

confinement and to pay the costs of this prosecution in the amount of \$-----, for which execution is awarded.”

fixes no minimum period of duration of sentence. A prisoner so sentenced is eligible for parole at any time after his commitment to the Ohio Penitentiary provided such prisoner is recommended as worthy of such consideration by the warden and chaplain of the penitentiary and notice thereof published in accordance with Section 2171, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1078.

APPROPRIATION FOR HIGHWAY DEPARTMENT—HOUSE BILL NO. 206,
87TH GENERAL ASSEMBLY, DISCUSSED—MONEY FOR ABOLISHING
GRADE CROSSINGS—PAYMENT OF SALARY OF OFFICER OR EM-
PLOYE OF DEPARTMENT OF HIGHWAYS.

SYLLABUS:

1. *The funds to be raised under House Bill No. 206, 87th General Assembly, during the fiscal period ending December 31, 1927, were legally appropriated to the Department of Highways and Public Works, Division of Highways, by House Bill No. 502, 87th General Assembly, and may be expended by that department in accordance with the provisions of and for the purposes specified in House Bill No. 206.*

2. *By the terms of Section 5541-8, General Code, all revenue derived under House Bill No. 206, 87th General Assembly, after the establishment and maintenance of the rotary fund of \$25,000.00 provided for in Section 5541-7, General Code, including the monies, not exceeding one million dollars, determined by the State Highway Director to be used for the purpose of abolishing grade crossings, must be apportioned and used in the several counties of the state in accordance with the provisions of said Section 5541-8, supra, viz., forty per cent must be used in the various counties of the state in proportion to the number of motor vehicles registered in such counties, the remaining sixty per cent to be apportioned and used in the several counties of the state according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the Director of Highways and Public Works.*

3. *Section 22, Article II, of the Constitution of Ohio, applies to appropriations made by the General Assembly of funds derived under House Bill No. 206, passed by the 87th General Assembly.*

4. *Except where it is specifically directed by statute that the salary of any officer or employe of the Department of Highways and Public Works, or that any other expense, be paid from a fund other than the state highway construction fund, any legitimate expenditure incident to paying the state's share of constructing or reconstructing of state highways or abolishing railway grade crossings is a proper charge against the state highway construction fund to the extent that monies to the credit of such fund are sufficient.*

COLUMBUS, OHIO, September 29, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows:

"I am hereby addressing you for opinion in answer to the following questions:

Question 1. Is there any constitutional limitation which would preclude the general statute making an appropriation for the two year period? The question in point being: Is there sufficient provision in the appropriation of the one-cent gas tax as set forth on page 49 of H. B. 502 whereby said Highway Construction Fund is appropriated to the Highway Improvement Fund, to enable its expenditure by the Highway Department in accordance with the stipulations set forth in Section 9 of H. B. 206?

Question 2. Is the provision of \$1,000,000 for grade crossing,—as set forth in Section 9, H. B. 206, chargeable against the county's portion of 40 per cent, or should it be considered as a first lien against the total collection under the provision of said bill?

Question 3. Is an allotment of the county's share on the 40 per cent basis by the Director of Highways subject to the constitutional two-year limitation? If not, does the unencumbered or unexpended balance revert to the State Highway Improvement Fund, or remain as accumulation to the county's credit?

Question 4. Is the administrative cost of the Highway Department chargeable against the Highway Improvement Fund, or should same be charged against the General Revenue Fund?"

House Bill No. 502, referred to in your letter, is the act passed by the 87th General Assembly, "To make general appropriations." Section 1 thereof reads in part as follows:

"The sums set forth herein designated 'Total Personal Service,' 'Total Maintenance' and 'Total Additions and Betterments,' for the purposes therein specified, are hereby appropriated out of any monies in the state treasury not otherwise appropriated. Appropriations for departments, commissions, bureaus, institutions and offices, for the uses and purposes of which, or of any activity or function thereof, specific funds in the state treasury are provided by law, are hereby made from such specific funds, insofar as such funds are subject by law to appropriation and expenditure for the purposes herein mentioned, and to the extent that the monies to the credit of such specific funds on July 1, 1927, or which may be credited thereto prior to December 31, 1928, shall be sufficient to satisfy such appropriations. Any sums necessary to supply the balance of such appropriations are hereby appropriated out of any monies in the state treasury to the credit of the general revenue fund, but no monies shall be taken from the general revenue fund to support the activities of the Fish and Game Division of the Department of Agriculture."

The specific appropriation with which we are concerned, set forth on page 49 of the appropriation act, reads:

"G Additions and Betterments—

There is hereby appropriated to the State Highway Improvement Fund the state's portion of revenues derived under H. B. No. 206, 87th General Assembly of Ohio."

House Bill No. 206, passed by the 87th General Assembly, on May 11, 1927, is entitled:

"An Act—To impose an additional excise tax on the sale and use of motor vehicle fuel, and to provide revenue for supplying the state's share of the cost of constructing and reconstructing highways and abolishing railway grade crossings thereon."

Sections 2, 8 and 9 of this act, respectively numbered Sections 5541-1, 5541-7 and 5541-8 of the General Code, provide *inter alia*, as follows:

Section 5541-1. "For the purpose of providing revenue for supplying the state's share of the cost of constructing and reconstructing the main market roads and inter-county highways of this state, or any other state highway system that may be created by law, and also for supplying the state's share of the cost of abolishing railway grade crossings upon such roads and highways, there is hereby levied and imposed on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the state of Ohio, an excise tax of one cent, which tax shall be in addition to the tax imposed by Section 5527 of the General Code; subject, however, to the specific exemptions set forth in said Section 5527 of the General Code.
* * * "

Section 5541-7. "Upon receipts of taxes herein provided for, the treasurer of state shall place the first twenty-five thousand dollars collected in a special fund, which shall constitute a rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to twenty-five thousand dollars. The refunds provided for by this act shall be paid from such rotary fund. The balance of taxes collected under the provisions of this act, after the credits to said rotary fund, shall be credited to a fund to be known as the state highway construction fund and shall be used solely for the purposes enumerated in Section 2 of this act. No disbursements shall, however, be made from said state highway construction fund except in pursuance of specific appropriations made therefrom from time to time by the General Assembly of Ohio."

Section 5541-8. "When appropriated by the General Assembly such state highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

Forty per cent thereof shall be appropriated for use in and shall be used in the several counties of the state in proportion to the number of motor vehicles registered from each of said counties during the calendar year preceding the making of such appropriation.

Sixty per cent thereof shall be appropriated for use in and shall be used in the several counties of the state according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the Director of Highways and Public Works or such other state official as may from time to time be the chief officer of any department of the state having charge of the main market roads and inter-county highways of the state or other state highway system.

Provided, however, that not more than one million dollars of said state highway construction fund may be appropriated for use in or used in any one calendar year for the purpose of paying the state's share of the cost of abolishing railway grade crossings.

The Director of Highways and Public Works, or such other state official as may from time to time be the chief officer of any department of state having charge of the main market roads and inter-county highways of the state, or

other state highway system, shall have the same authority to expend portions of the proceeds of the tax herein imposed upon the extensions of such main market roads and inter-county highways, or other state highways, within cities, as is conferred upon him by law with respect to such extensions within villages, and the procedure with respect to such expenditure within cities shall be the same as is provided by law with respect to such expenditures within villages."

1. While you ask in your first question if there be any constitutional limitation, which would preclude a "general statute making an appropriation for the two year period," in view of the express provisions of Section 8 of House Bill No. 206, supra, to the effect that no disbursements shall "be made from said state highway construction fund except in pursuance of specific appropriations made therefrom from time to time by the General Assembly of Ohio," the real question to be determined is, whether or not the language of the appropriation item above set forth reading, "there is hereby appropriated to the State Highway Improvement Fund the state's portion of revenues derived under H. B. No. 206, 87th General Assembly of Ohio" is so free from ambiguity as to be effective.

It as a well settled rule of statutory construction that a statute will not be held void because of uncertainty or indefiniteness unless it be clearly necessary so to do. That is, the imperfection of a law will not render it void, unless it be so imperfect as to be incapable of being understood or impossible of execution.

As stated in Lewis, Sutherland Statutory Construction, Second Edition, Vol. I, page 140:

"It is inevitable that some statutes should come from the hands of the legislature with imperfections of various sorts. These imperfections may relate to minor matters, such as grammar, punctuation or rhetoric, or they may relate to substantial matters in the form of omissions, ambiguities and contradictions. It is undoubtedly the duty of a court to so construe a statute as to give it a sensible effect and make it of binding force. *A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language. Mere difficulty in ascertaining its meaning or the fact that it is susceptible of different interpretations will not render it nugatory.* Doubts as to its proper construction will not justify us in disregarding it. *It is the bounden duty of courts to endeavor by every rule of construction to ascertain the meaning of, and to give full force and effect to, every enactment of the General Assembly not obnoxious to constitutional prohibitions.*" (Italics the writer's.)

It will be observed that while Section 8 of House Bill No. 206, supra, is to the effect that "the balance of taxes collected under the provisions of this act, after the credits to said rotary fund, shall be credited to a fund known as the state highway construction fund," the appropriation item under consideration provides that "the state's portion of revenues derived under H. B. No. 206, 87th General Assembly," is thereby appropriated to the State Highway *Improvement Fund*.

The language "there is hereby appropriated to the State Highway Improvement Fund" must be read in connection with the operative words in the first sentence of the appropriation act above set forth, namely, "The sums set forth herein designated * * * 'Total Additions and Betterments,' for the purposes therein specified, are hereby appropriated out of any monies out of the state treasury not otherwise appropriated." The item under consideration is included among the other items appropriated to the Department of Highways and Public Works, Division of Highways,

and it seems clear that, notwithstanding the language of the item, it was the intention of the legislature to appropriate the revenues to be derived under the provisions of House Bill No. 206, during the eighteen months' period ending December 31, 1928, to the Highway Division of the Department of Highways and Public Works and not merely to provide that the funds, which Section 7 of House Bill No. 206, supra, provides shall be credited to the "state highway construction fund," shall be transferred therefrom to the fund known as the "state highway improvement fund." That is, the appropriation was made to the Highway Division of the Department of Highways and Public Works, to be expended in accordance with the provisions of and for the purposes specified in Sections 5541-1, 5541-7 and 5541-8, supra, and the words "state highways improvement fund" as used in the appropriation act are synonymous with and refer to the "state highway construction fund" for which provision is made in Section 5541-8, supra.

An additional reason for this conclusion is suggested by the fact that the 87th General Assembly, in House Bill No. 80, passed April 13, 1927, effective August 10, 1927, expressly repealed Section 6859-1 of the General Code, which provided for the state highway improvement fund in the following language:

"There shall be levied annually a tax of three-tenths of one mill on all the taxable property within the state to be collected as are other taxes due the state and the proceeds of which shall constitute the state highway improvement fund."

This section was theretofore repealed, though not in express terms, by Amended Senate Bill No. 125, passed by the 80th General Assembly, on June 2, 1915 (106 v. 574, 666).

In answer to your first question, it is therefore my opinion that the funds to be raised under House Bill No. 206, 87th General Assembly, during the fiscal period ending December 31, 1927, were legally appropriated to the Department of Highways and Public Works, Division of Highways, by House Bill No. 502, 87th General Assembly, and may be expended by that department in accordance with the provisions of and for the purposes specified in House Bill No. 206.

2. Your second question requires a construction of Section 5541-9, supra.

This section provides that forty per cent of the funds raised under the provisions of House Bill No. 206, supra, "shall be used in the several counties of the state in proportion to the number of motor vehicles registered from each of said counties during the calendar year preceding" the appropriation and that the remaining sixty per cent "shall be used in the several counties * * * according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the Director of Highways and Public Works" or his successor; provided, however, "that *not more than one million dollars* of said * * * fund may be * * * used in any one calendar year for the purpose of paying the state's share of the cost of abolishing railway grade crossings."

It seems clear from a reading of this entire section that the proviso with reference to the expenditure of funds for grade crossing eliminations, relates not to the division or apportionment of the funds, but is a limitation upon the amount that may be expended by the Director of Highways to abolish grade crossings.

It will be observed that by the terms of Sections 5541-1 and 5541-7, supra, all revenues raised under House Bill No. 206, after the establishment and maintenance of the rotary fund of \$25,000.00, is to be "credited to a fund to be known as the state highway construction fund" and used solely for "the purpose of providing revenue for supplying the state's share of the cost of constructing and reconstructing the main market roads and inter-county highways of this state, or any other state highway

system that may be created by law, and also for supplying the state's share of the cost for abolishing railway grade crossings upon such roads and highways." None of these funds are paid to the counties or municipalities to be expended by them as was provided in the old gasoline tax law (Section 5537, General Code), but are to be expended by the Department of Highways and Public Works of the State.

Two limitations are, however, placed upon the discretion to be exercised by the Director of Highways as to how these funds shall be spent. First, forty per cent of the funds must be used in the various counties of the state according to the number of motor vehicles registered in the various counties, and the remaining sixty per cent is to be used in the various counties according to such "equitable plan or method of apportionment" as may be adopted or prescribed by the Director of Highways. The second limitation as above pointed out relates solely to the purpose for which such funds shall be expended, the Director of Highways being forbidden to expend more than one million dollars for grade crossing elimination.

From these provisions it seems clear that the monies to be expended for the purpose of abolishing grade crossings are subject to the same provisions with reference to the division or apportionment as are monies to be spent for the purpose of constructing or reconstructing state highways. In other words, the amount determined by the Director of Highways to be spent for railway grade crossing eliminations, which sum cannot exceed one million dollars, is not as you express it a "first lien" against the revenues derived under the act in question but is subject to the same directions of the statute with reference to the counties in which it shall be spent as any other monies in the state highway construction fund.

Answering your second question specifically it is my opinion that by the terms of Section 5541-8, General Code, all revenue derived under House Bill No. 206, 87th General Assembly, after the establishment and maintenance of the rotary fund of \$25,000.00 provided for in Section 5541-7, General Code, including the monies, not exceeding one million dollars, determined by the State Highway Director to be used for the purpose of abolishing grade crossings, must be apportioned and used in the several counties of the state in accordance with the provisions of said Section 5541-8, supra, viz., forty per cent must be used in the various counties of the state in proportion to the number of motor vehicles registered in such counties, the remaining sixty per cent to be apportioned and used in the several counties of the state according to such equitable plan or method of apportionment as shall be from time to time adopted and prescribed by the Director of Highways and Public Works.

3. In your third question you ask :

"Is an allotment of the county's share on the 40 per cent basis of the Director of Highways subject to the constitutional two-year limitation? If not, does the unencumbered or unexpended balance revert to the State Highway Improvement Fund, or remain as accumulation to the county's credit?"

Section 22 of Article II of the Constitution, which reads :

"No monies shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law ; and no appropriation shall be made for a longer period than two years."

applies to all appropriations from the state treasury made by the General Assembly, including, of course, funds raised under House Bill No. 206, supra.

It is not entirely clear what you mean by your query as to whether or not any unexpended balance will "revert to the State Highway Improvement Fund, or re-

main an accumulation to the county's credit." As I read the sections above set forth no particular funds are placed to the credit of any county. As above stated Section 5541-8, supra, contains limitations upon the discretion of the Director of Highways and Public Works in the expenditure of the funds in question, and requires him to apportion and use the money as therein provided. The provisions of this section are mandatory and will undoubtedly be followed by the Director. Should there be any failure to apportion the funds in question as required by law mandamus would undoubtedly lie.

Specifically answering your question it is my opinion that Section 22, Article II, of the Constitution of Ohio, applies to appropriations made by the General Assembly of funds derived under House Bill No. 206, passed by the 87th General Assembly.

4. The answer to your fourth question is found in Section 1 of the act making general appropriations, House Bill No. 502, commencing with the second sentence, which provides *inter alia*:

" * * * Appropriations for departments, * * * for the uses and purpose of which, or of any activity or function thereof, specific funds in the state treasury are provided by law, are hereby made from such specific funds, in so far as such funds are subject by law to appropriation and expenditure for the purposes herein mentioned, and to the extent that the monies to the credit of such specific funds on July 1, 1927, or which may be credited thereto prior to December 28, 1928, shall be sufficient to satisfy such appropriations. Any sums necessary to supply the balance of such appropriations are hereby appropriated out of any monies in the state treasury to the credit of the general revenue fund, * * * "

The state highway construction fund provided for in Section 5541-7, supra, is as heretofore set forth, to be used for "purpose of * * * supplying the state's share of the cost of constructing and reconstructing" state highways "and also for supplying the state's share of the cost of abolishing railway grade crossings" thereon.

With reference to the fourth question, considering the above provisions together, it is my opinion that, except where it is *specifically* directed by statute that the salary of any officer or employe of the Department of Highways and Public Works, or that any other expense, be paid from a fund other than the state highway construction fund, any legitimate expenditure incident to paying the state's share of constructing or reconstructing of state highways or abolishing railway grade crossings is a proper charge against the state highway construction fund to the extent that monies to the credit of such fund are sufficient.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1079.

INSPECTORS OF ROADS OR BRIDGES—EMPLOYED BY COUNTY SURVEYOR— COMPENSATION FROM COUNTY ROAD AND BRIDGE FUND.

SYLLABUS:

Inspectors employed by a county surveyor, for the purpose of inspecting roads or bridges constructed under authority of the county commissioners, may be com-