in their final order determining the apportionment, levying the assessments, and ordering the construction of the improvement."

(Section 6604, General Code.)

It is apparent therefrom that if a ditch is cleaned under the authority of Section 6603, et seq., General Code, in the event the property owner does not construct that portion of the ditch so apportioned to him, the cost of the same shall be assessed against the property benefited, and consequently such cost could not be paid from the public funds of the township.

Since this is true, the question of whether or not the ditch mentioned in your inquiry falls within the provisions of Section 6603, General Code, need not be discussed.

Under the conditions outlined in your communication, I do not believe that the cleaning of this ditch would be a proper charge against the general fund or any other fund of the township, such as the road or bridge fund.

In the instant situation, it would seem that the village in question could by proceeding under the provisions of Sections 6442 and 6446, General Code, file a petition with the county commissioners for such drainage improvement.

May I call your attention to Section 6691, General Code, which may be of assistance to you. Such section reads:

"In any township or townships in which a ditch, drain or watercourse or part thereof has been or may hereafter be located and constructed, the county commissioners for the purpose of keeping such ditches, drains or watercourses clean and in repair, may delegate such duty to the county surveyor who shall execute the necessary work and assess the cost thereof in accordance with the provisions of this chapter as they relate to the duties of a ditch supervisor, or employ a ditch supervisor for such township; the same person may be employed as a ditch supervisor for one or more townships in the county; no person shall be so employed unless he is a resident of the county in which he is employed; he may be removed by the county commissioners at any time for cause, and his duties may be delegated to another supervisor or the county surveyor, or another supervisor may be appointed in his place. * * *"

See also 14 Ohio Jur. 829.

In view of the foregoing and in specific answer to your inquiry, I am of the opinion that township public funds may not be expended for the payment of the cost of cleaning a ditch located within such towship.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4531.

COUNTY RECORDER—MUST RECORD DEED ALTHOUGH REVENUE STAMPS HAVE NOT BEEN ATTACHED—NO RESPONSIBILITY TO SEE STAMPS HAVE BEEN ATTACHED.

SYLLABUS:

Section 725, of "The Revenue Act of 1932," enacted by the recent Congress, places no duty upon the county recorder to determine whether revenue stamps in

the proper amount have been placed upon deeds submitted to him for record, and it is the duty of the county recorder to record a deed complete in form, when presented to him for that purpose, whether or not revenue stamps are affixed thereto.

COLUMBUS, OHIO, July 29, 1932.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I am in receipt of your recent request for opinion, which reads:

> "Permit me to advise with you relative to a question raised by the County Auditor relative to the application of the new federal stamp tax on conveyances and the like, the same being Section 725 of the federal laws.
>
> The County Auditor has been requiring of grantees of deeds presented to him at his office for the transfer of real estate purchased that said parties pay the stamp tax irrespective of the date of the execution and delivery of the conveyance of the deed in question. In other words, since the 21st day of June, he has been asking for these parties to have the tax stamp placed upon the instrument before he will make the transfer irrespective of the date of the execution and delivery of the deed to the grantees in question. To give you a typical case, one F. D. on July 5th, asked the Auditor to transfer property on his records presenting a deed made and executed and delivered on May 7, 1926, to. the said F. D. by the grantors named therein. I have advised the County Auditor that, in my opinion, the said stamp tax, by its terms, only applies to deeds made and executed and delivered subsequent to June 21, 1932. However, I would like to have your advice in the matter.
>
> Of course, the County Recorder's office is concerned with the same proposition. It is possible that you have already ruled on the matter or have an opinion already at hand upon the question. I would appreciate your early advices in the premises."

Your inquiry is as to the effect, if any, of Section 725, of "The Revenue Act of 1932." Such section reads:

> "Schedule A of Title VIII of the Revenue Act of 1926 is amended by adding at the end thereof a new subdivision to read as follows:
>
> '8. Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt.'"

This section is almost identical with that contained in the Revenue Acts of 1916 and 1918 and quite similar to that contained in the Act of 1866.

The question presented in your inquiry was raised in the case of *Stewart* vs. *Hopkins,* 30 O. S., 502, under the provisions of the Act of 1866, which act contained the provision that no instrument required by law to be stamped, which is not sufficiently stamped, "shall be recorded or admitted or used in evidence in any court" until stamped as required by law. The court, in rendering its opinion in that case, said:

> "Without denying that it is within the power of taxation conferred upon Congress, to levy taxes and collect them by means of stamps placed on written instruments, and to enforce the observance of the law by the imposition of penalties; yet the power of Congress to prescribe as a penalty that which invades the rules of evidence in the state courts, has been denied by the highest courts of many of the states, and in others so gravely doubted that at the present time it may be regarded as settled by the decided weight of authority that, whether the disputed power exists or not, since the act does not in express terms apply to the courts of the several states, and the provision excluding unstamped instruments from being given in evidence can have full application and effect by confining it to the federal courts, its application must be regarded as limited to the courts over which Congress has legislative control. *Carpenter* vs. *Snelling,* 97 Mass. 452; *Green* vs. *Holway,* 101 Mass. 243; *People* vs. *Gates,* 43 N. Y. 40; *Clements* vs. *Conrad,* 19 Mich. 170; *Craig* vs. *Dimock,* 47 Ill. 308; *Bunker* vs. *Green,* 48 Ill. 243; *Wallace* vs. *Cravens,* 34 Ind. 534; *Griffen* vs. *Ranney,* 35 Conn. 239; *Duffy* vs. *Hobson,* 40 Cal. 240; *Bumpass* vs. *Taggart,* 26 Ark. 398; *Davis* vs. *Richardson,* 45 Miss. 499; *Dailey* vs. *Cocker,* 33 Texas 815.
>
> The same sections of the act, which prohibit unstamped instruments and documents from being used in evidence, forbid the recording of such instruments. For the same reason, therefore, that the clauses prescribing a rule of evidence must be regarded as applicable to the federal courts only those relating to the recording of instruments not stamped as required by law, must be held to apply to such instruments as are required to be recorded by federal legislation and to officers under federal control." See also *Moore* vs. *Quirk,* 105 Mass. 49; *Moore* vs. *Moore,* 47 N. Y. 467.

The language of present section 725 does not purport to place a restriction upon the duties of the county recorder. The duties of the county recorder concerning the recording of deeds are set forth in Section 2758, General Code, which reads as follows:

> "Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date and the precise time of day of its presentation, and a file number. Such file numbering shall be consecutive and in the order in which the instrument of writing is received for record, except chattel mortgages which shall have a separate series of file numbers, and be filed separately, as provided by law. Until recorded each instrument shall be kept on file in the same numerical order for easy reference, and, if required, the recorder shall, without fee, give to the person presenting it a receipt therefor, naming the parties thereto, the date thereof, with a brief description of the premises. When a deed or other instrument is recorded, the recorder shall indorse thereon

the time when recorded, and the number or letter and page or pages of the book in which it is recorded."

The duties set forth in this section are restricted to a certain extent by Section 2768, General Code, which provides in substance that the county recorder shall not accept any deed for record until there has been endorsed thereon by the county recorder "transferred" or "transfer not necessary."

It has been repeatedly held that the innocent omission of revenue stamps from an instrument did not invalidate the instrument. *Harper* vs. *Clark,* 17 O. S. 190; *Gaylor* vs. *Hunt,* 23 O. S. 255; *Harris* vs. *Trimble,* 1 C. S. C. R. 108; *Stewart* vs. *Hopkins,* 30 O. S. 502.

In my opinion the language of Section 725, of "The Revenue Act of 1932" is insufficient to prevent a deed otherwise complete, to which no stamp has been affixed, from being a deed.

In the case of *State* vs. *Guilbert,* 56 O. S. 575, the court held that the county recorder was a ministerial officer, and as such, was incompetent to receive a grant of judicial power from the legislature and his attempt to exercise such power was a nullity. See also *Irvin* vs. *Smith,* 17 Ohio, 226.

I doubt whether any court would hold that any duty has been imposed upon the county recorder to determine the legal sufficiency of a deed as an instrument of transfer other than to determine that it was executed according to the provisions of the statute and that it bore the endorsement of the county auditor concerning transfers.

It is well to bear in mind that it is not the record of a deed which transfers the title to real property but rather the delivery of the instrument making such conveyance from the grantor to the grantee except under the provisions of the so-called Torrens Act. The date of delivery is the date of passing title and not the date of filing the deed for record. Such date is the date of the manual act of handing the deed to the grantee by the grantor.

When the date of delivery of the deed to the grantee is prior to the effective date of the act, there is no obligation to place revenue stamps on such instrument. The specific language of Section 725, of such act, is that the tax is imposed only on deeds "delivered on and after the 15th day after the date of the enactment." The county auditor and recorder could therefore have no legal reason for the refusal to transfer and record deeds delivered to the purchaser prior to June 21, 1932.

Specifically answering your inquiry it is my opinion that Section 725, of "The Revenue Act of 1932" enacted by the recent Congress, places no duty upon the county recorder to determine whether revenue stamps in the proper amount have been placed upon deeds submitted to him for record and that it is the duty of the county recorder to record a deed complete in form when presented to him for that purpose whether or not revenue stamps are affixed thereto.

Respectfully,

GILBERT BETTMAN,

Attorney General.