

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3574.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN
 MARION AND LAKE COUNTIES.

COLUMBUS, OHIO, September 1, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

GENTLEMEN:—With further reference to your letter of August 30, 1922, enclosing for my examination, among others, certified copies of the two following final resolutions:

Marion county, I. C. H. 114, section H,
 Marion-Galion road.
 Lake county, I. C. H. 2, section B,
 Cleveland-Buffalo road.

As to the Marion county resolution, I have noted your letter of explanation of this date regarding the provision for funds on this project.

As to the Lake county resolution, I have noted the correction which has been made in accordance with my letter of this date, namely, the insertion of the volume and page of record.

Finding as I do in the light of the foregoing that said two resolutions are correct in form and legal, I am returning them to you with my approval endorsed thereon in accordance with section 1218 G. C.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3575.

COAL—AUTHORITY OF STATE TO REGULATE PRICES—EXISTING AND
 PROPOSED LEGISLATION DEALING WITH POWERS OF STATE CON-
 sidered.

COLUMBUS, OHIO, September 2, 1922.

HON. HARRY L. DAVIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have requested the opinion of this department as follows:

"In order effectively to maintain a reasonable price for coal mined and used in Ohio, it is urgently desirable that the state exercise every lawful power that will prevent the charging of exorbitant prices in the present emergency. With that end in view, I request your official opinion of the state's authority, if any, to fix prices and prevent profiteering, or to enact legislation that will enable the state to protect the public adequately against attempted gouging.

Specifically, I would like to know what, if any, powers the state has

- (1) under the constitution to establish or regulate prices of necessities of life under what constitutes a public emergency;
- (2) what existing legislation there is, dealing with such a situation;
- (3) what new legislation would be possible under the constitution, to make such inherent authority as the state has, effective."

Referring to your second question, you are advised that there is no existing legislation dealing with the situation that you describe; so that no state officer or department is at present authorized to act in the premises. The only state agency having powers even remotely analogous to those that would have to be invoked is the Bureau of Markets in the Department of Agriculture; but its functions relate solely to food products.

Referring to your first question, you are advised that in the opinion of this department the police power of the state, properly exercised, is entirely adequate to deal with the situation. It is quite possible that certain express provisions of the constitution have the effect of strengthening the arm of the state in this behalf, namely, section 36 of Article II authorizing the passage of laws "to provide for the regulation of methods of mining, weighing, measuring and marketing coal" and Article XIII, section 2, which empowers the legislature to pass laws "regulating the sale and conveyance of * * * personal property." The exact effect of these provisions has never been passed upon by the courts and they may be regarded as open to some conjecture. The advice of this department is based more particularly upon the general power of police which resides in all governments. It is curbed only by the provisions of the bill of rights guaranteeing to all individuals the right among others of "acquiring, possessing and protecting property" (Art. I, sec. 1) and the equal protection and benefit of government (Art. I, sec. 2); and by the provisions of the Fourteenth Amendment to the Federal Constitution prohibiting any state from depriving persons within its jurisdiction of life, liberty or property without due process of law or of the equal protection of the laws. These provisions have been held in numerous cases not to deprive the state of the power to regulate the making of contracts in the public interest; but they so operate as to require such state action to be reasonable and to be justified by actual public necessity.

Brief reference may also be made to the declaration of Article I, section 19 of our Bill of Rights to the effect that "private property shall ever be held inviolate *but subservient to the public welfare.*" This provision, and particularly the remainder of it not herein quoted, will be referred to in another connection. On the broad question submitted this department can advise only that, when the occasion exists the power to regulate the price of necessities of life in civilization as it exists is present and not restrained to the point of extinction by the constitutional limitations referred to; but that it must be so exercised as that the action of the state shall not be arbitrary or unreasonable and that the machinery thereof shall afford to those affected thereby the requisite measure of due process of law.

This department understands by your third question that advice is requested as to the form of legislation that would be possible and valid in the exercise of the police power. Of course the possibilities are very numerous, but certain suggestions

based upon the recent experience of the federal government during the war emergency may serve the purpose.

The federal government sought to prevent profiteering in the necessities of life during the period of the war by enacting what was known as the "Lever Act." Certain portions of this legislation were held to be unconstitutional for the following reasons: These portions of the act prohibited dealers in certain necessities of life from making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities" but failed to set up any administrative machinery for the determination of the question as to what might constitute just and reasonable rates and charges. The courts uniformly held that these portions of the law were invalid because it would be impossible for one accused of a violation thereof to know the nature and cause of the accusation against him.

By necessary inference at least, however, those provisions of this act which related to the fixing of the price of coal and coke were held valid—or would have been had it been possible to separate them from the remaining provisions of the act. These provisions regarding coal and coke authorized and directed the President to conduct tests and inquiries into the cost of production, the expense of operation and maintenance, depreciation and depletion and to fix, with an allowance for a just and reasonable profit, the price of coal and coke to be charged by the miners or producers thereof. This portion of the statute, as has been stated, was not open to the constitutional objections which were fatal to the remaining provisions thereof.

The lessons drawn from this experience seem obvious. If the General Assembly of Ohio is to enact a law to prevent the charging of exorbitant prices for coal in the present emergency, it must so frame its legislation as to avoid the possibility of arbitrary action constituting a denial of due process of law and at the same time secure a definite standard whereby proceedings for the effective enforcement of the law can be successfully instituted and carried out. In order to accomplish this dual purpose it would be advisable in the opinion of this department to erect some administrative tribunal charged with the duty of making inquiry into the conditions and circumstances of business, the charges of which are proposed to be made subject to regulation and with the further duty of fixing and determining (subject to revision from time to time in manner somewhat similar to that which characterizes the action of the Public Utilities Commission with respect to public utility charges) some definite standard of maximum prices and charges which can successfully be made the basis of civil or criminal proceedings in the enforcement of such regulations. In other words, whatever be the exact form of the legislation, the danger of arbitrary action and of uncertain and vague standards must be carefully avoided.

In the abstract sense, the General Assembly probably possesses the power under emergency conditions of fixing the price of necessities of life itself, but for reasons which perhaps sufficiently appear it is felt that this course would be inadvisable.

In the event of the practical failure of measures of the type just indicated to secure an adequate supply of coal for the necessities of the people of the state at fair and reasonable prices, other and more extreme expedients might have to be resorted to. While time has not been afforded for the consideration of the question with that degree of care which its importance would justify, attention is called to the fact that Article I, section 19 of the Ohio constitution by necessary implication declares the power of the state to take private property for the public welfare in cases of public exigency other than war, if only the exigency be such as imperatively to require the immediate seizure of the property. In such event compensation for property so seized need not be made prior to the seizure. The question arising here would be as to whether the taking over of coal mines and other supplies of coal (subject to subsequent compensation) with a view of selling or otherwise distributing coal among the private citizens of the state to relieve or prevent suffering attendant upon a coal famine among the people of the state

would be a taking of such property for "public use." This is the question upon which this department would have desired further time for consideration. As at present advised, however, it is the opinion of this department that if the exigency were imperative enough and a condition of actual suffering were definitely threatened or present, such use of the property so appropriated would be "public" in the sense in which that term is used in the constitution. As to the right of a state to exercise the power of taxation in support of this kind of an enterprise, it is believed that recent decisions of the Supreme Court of the United States support the view that under the circumstances imagined it would constitute such a "public purpose" as is requisite for the proper exercise of the power of taxation, should that be required.

As previously intimated the seizure of mines and stocks of coal is a course to be pursued only as a last resort, after all other expedients shall have failed to accomplish the purpose. Only under such circumstances could it be confidently asserted that a "public exigency," within the meaning of the constitutional provision above referred to, existed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3576.

APPROVAL, CONTRACT OF STATE OF OHIO WITH THE F. D. SULLIVAN COMPANY, COLUMBUS, FOR CONSTRUCTION AND COMPLETION OF 6-INCH CAST IRON WATER MAIN TO BE LAID FROM DEFIANCE MUNICIPAL WATER WORKS INTO PROPOSED FISH HATCHERY, DEFIANCE COUNTY, AT A COST OF \$5,950.00—SURETY BOND EXECUTED BY SOUTHERN SURETY COMPANY.

COLUMBUS, OHIO, September 5, 1922.

HON. LEON C. HERRICK, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted to me for approval a contract (three copies) between the State of Ohio, acting by the Department of Highways and Public Works, and F. D. Sullivan, an individual, doing business as F. D. Sullivan Company, of Columbus, Ohio. This contract is for the construction and completion of a 6-inch cast iron water main to be laid from Defiance Municipal Water Works into the proposed fish hatchery, Defiance county, Ohio, and calls for an expenditure of five thousand nine hundred and fifty dollars (\$5,950.00).

Accompanying said contract is a bond to insure faithful performance, executed by Southern Surety Company.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.