1018.

APPROVAL, BONDS OF LAKEWOOD CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$99,808.60.

COLUMBUS, OHIO, September 19, 1927.

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

1019.

APPROVAL, BONDS OF JEFFERSON TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO—$100,000.00.

COLUMBUS, OHIO, September 19, 1927.

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

1020.

APPROPRIATION OF LAND—STATE MUST PAY INTEREST ON AWARD OF JURY IF VOUCHER IS NOT ISSUED WITHIN REASONABLE TIME.

SYLLABUS:

When the requisition for the amount awarded by a jury in an appropriation case by the state is not issued by the Superintendent of Public Works, under the provisions of Section 450, *General Code, within a reasonable time thereafter, interest should be paid by the state thereon at the rate of six per cent from the date the state took possession of the property, pursuant to the award by the jury, to the date of the issuance of the warrant of the auditor upon the requisition.*

COLUMBUS, OHIO, September 19, 1927.

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

DEAR SIR:—You direct my attention to a paragraph contained in a letter addressed to you by Daniel C. Funk, Wooster, Ohio, under date of August 30, 1927:

"I have heard nothing from you with reference to the progress being made with reference to the payment into court of the amount of the verdict of the Naftzger farm. With reference to the matter of interest, would advise you that Judge Weiser, who is one of the attorneys for the Naftzgers, stated to me several days ago that if interest were not included that they intended to start an action to recover possession of the farm. This is a question which I think you should submit to the Attorney General."

The verdict referred to is the amount allowed by a jury in the Probate Court of Wayne County, Ohio, in an appropriation case brought by the State of Ohio, as authorized in Sections 442 to 454, inclusive, of the General Code. The verdict was returned on April 21, 1927, for $20,846.00, a motion for a new trial was filed by the defendants and that motion came on to be heard on the 25th day of April, 1927, was overruled and the court accordingly entered a judgment for the amount of the verdict, to which ruling and judgment the property owners duly excepted. Under the provisions of Section 449, General Code, the owners of the property had thirty days from the rendition of the verdict to prosecute error to the court of appeals, but they did not elect so to do. I am informed that the state took immediate possession of the property.

The Superintendent of Public Works issued a requisition for the costs in the case on July 28, 1927, to the state auditor and the latter officer issued a warrant on the treasurer for the amount of the costs on August 15, 1927. On August 31, 1927, the Superintendent of Public Works issued a requisition for the amount of the verdict upon the auditor of state and the auditor drew his warrant on the treasurer for the amount thereof on September 1, 1927.

You say that the property owners are now contending that they are entitled to interest on the amount of the judgment from the date of the rendition thereof.

The appropriation by the state of the private property of the owners was the exercise of a sovereign constitutional right recognized and limited primarily by Article I, Section, 19, of the Constitution of Ohio, which reads:

"Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner."

Section 450 of the General Code, which has to do directly with the appropriation of the property in question, reads:

"Upon completion of appropriation proceedings the probate judge shall make a bill of taxable costs therein, and forward it to the Superintendent of Public Works.

The Superintendent of Public Works shall issue a requisition upon the Auditor of State for the payment of the costs and the compensation awarded each property owner, and the Auditor of State shall draw his warrant on the Treasurer of State for the payment thereof. Thereupon the amount named in the warrant shall be deemed deposited in the treasury for the use and benefit of the person entitled thereto and no interest thereon shall there-

after be paid. The Superintendent of Public Works may decline to make the appropriation in any case, if in his judgment the compensation awarded is excessive, but the costs in such case shall be paid by the state."

It will be noted that provision is made in Section 450, supra, that upon the completion of the appropriation proceedings, the probate court shall make a bill of taxable costs therein and forward it to the Superintendent of Public Works, who shall issue a requisition upon the Auditor of State for the payment of the costs and compensation awarded to the property owners and the Auditor of State shall thereupon draw his warrant upon the Treasurer of State for the payment thereof. When that is done the statute provides that the amount claimed in the warrant shall be deemed deposited in the treasury for the use and benefit of the person entitled thereto, and *no interest thereon shall thereafter be paid.*

While I have no difficulty in concluding that the provision of Section 450, General Code, with reference to interest, precludes the recovery of interest by the owners, after the warrant therefor was drawn on the treasurer, on which date it is deemed to be deposited in the treasury for the use and benefit of the persons entitled thereto, I do not feel there is any necessary implication from that provision that interest should not be paid prior to that date when it appears that the state duly appropriated the property and took possession of it substantially four months previous to the date of issuing the warrant. The above provision as to interest, to say the least, cannot supersede or annul the provision in the constitution requiring that compensation for the lands taken "shall first be made in money, or first secured by a deposit of money."

Nichols on Eminent Domain, Section 216, says:

"The theory of law is that, when land is taken by eminent domain * * * , payment for the land thus effected should be coincident with the taking or injury, and, if for any reason payment is postponed, the right to interest from the time that payment ought to have been until it is actually made follows as a matter of strict constitutional right."

The author, supra, cites many cases on the proposition, including the case of *Atlantic and Great Western Ry. Co.* vs. *Koblentz,* 21 O. S. 334, the syllabus of which reads:

"Where a railroad company, in proceedings under the statute for condemnation of private property, pays into court the damages assessed, and takes possession of the property, and upon petition in error the assessment is set aside, and a new assessment awarded, it is competent for the jury in making the latter assessment, to allow and include in their verdict, interest from and after the time when possession was taken, and while the money was retained by the court."

The opinion of Judge Welch in this case reads as follows:

"We see no error in these proceedings. Where private property is taken by the public for its use, the constitution guarantees to the owner a full compensation. To take the property, and deposit the compensation in the hands of a public officer, where the owner cannot reach it, is to deprive the owner of the use of his property, without giving him the use of the compensation. It is, to take from him the *use* of his property without *any* compensation. In the light of this constitutional provision, the real parties to the

transaction are the public on the one hand, and the owner of the property on the other. By its laws the public has authorized the corporation, as its agent, to take the property, and has provided that the compensation shall be withheld, in the hands of one of its own officers, after the property is taken. This, of course, necessitates a loss to some one, of the interest on that compensation. It is not just that the loss should be cast upon the owner. The law by which the loss is occasioned is no act of his, but an act of the public, and he has no power to repeal or modify it, so as to avoid the loss. He is compelled to be passive, and can only insist, as he does in this case, that compensation for his property taken by the public, shall either be paid at the time it is taken or paid with interest, or with a fair allowance for the use of the property during the time it is withheld."

While the above case was an appropriation proceeding by a railroad company, it is my opinion that the same principle of law applies where the state itself is the party appropriating private property. Railroad corporations have their existence in this state only by virtue of an act of the legislature by which special powers and privileges are granted to them as a portion of state sovereignty, such as the exercise of the right of eminent domain. Performing as they do a public service, they are entrusted with the exercise of certain sovereign powers and the rules and obligations imposed upon them in the exercise of those powers, on principle, would apply to the state when it seeks to exercise the right of eminent domain.

I am not unmindful of the fact that the Supreme Court, in the case of *State ex rel.* vs. *Board of Public Works of the State of Ohio,* 36 O. S. 409, held:

"In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the state for delay in the payment of money."

The rule announced in the above case casually considered would seem to prevent the recovery of interest from the state in all cases unless statutory authority, express or implied, is found authorizing its recovery. The above case must be read and interpreted in connection with the facts appearing in the report, which facts disclose that it was a case for the recovery of money from the state board of public works on a claim under a contract for the purchase by the board of public works of dredging machinery and materials. The rule of law as to the recovery of interest from the state, based on a claim, or for unpaid accounts, is different from the rule with reference to the payment of interest by the state when it has taken possession of property by appropriation proceedings.

The United States Court of Appeals, in the case of *United States* vs. *Sargent,* 162 Fed. 81, at page 83, points out the difference between such cases, as follows:

"It is well settled that, in the absence of a stipulation to pay interest or a statute allowing interest, none can be recovered against the United States upon unpaid accounts or claims. Section 1091, Rev. St. U. S. (U. S. Comp. St. 1901 p. 747); Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. Stat. 1901, p. 752); Tillson vs. United States, 100 U. S. 43, 25 L. Ed. 543; Angarioa vs. Bayard, 127 U. S. 251, 260, 8 Sup. Ct. 1156, 32 L. Ed. 159; Baxter vs. United States, 2 C. C. A. 411, 51 Fed. 671. It is upon or in analogy with this principle that the United States contends that interest upon the amount of the award in this case should not have been allowed. We are unable to agree with this contention. There is a great difference between the assertion of a claim or account against the United States by a person who possesses it and a proceeding of this kind instituted by the United States. This proceeding,

instead of one to collect an account or claim against the United States, is an adversary proceeding instituted by the United States against owners of land to take it from them. The landowners are not plaintiffs prosecuting claims but defendants resisting a proceeding to deprive them of what is theirs until a condition precedent is fulfilled. Mason City R. R. Co. vs. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629. The exercise of the right of eminent domain is a prerogative of sovereignty in this country, but it is subject to the condition imposed by the Constitution of paying 'just compensation therefor.'"

Section 742, Lewis' Eminent Domain (3rd Ed.), discussing the question of the payment of interest, says:

"In the absence of any statutory provision controlling the subject, the rules in respect to interest must be derived from the constitutional provision requiring just compensation to be made for property taken."

The Auditor of State could not draw his warrant on the treasurer for the amount of the compensation awarded by the jury until he duly received a requisition therefor from the Superintendent of Public Works, and, it appearing that the requisition was not issued until more than four months after the verdict of the jury was confirmed by the court, the state having taken possession of the property, I am of the opinion that the property owners will not receive the compensation guaranteed by the constitution unless interest is paid on the compensation awarded from April 25, 1927, to September 1, 1927, at the legal rate of six per cent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1021.

DISAPPROVAL, BONDS OF THE VILLAGE OF NEW PARIS—$37,000.00

COLUMBUS, OHIO, September 20, 1927.

In re: Bonds of the Village of New Paris—$37,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The transcript pertaining to the above issue of bonds discloses that at a special meeting of council held on the 31st day of August, 1926, a resolution declaring the necessity of constructing a water works system in said village and providing for the submission of the question of issuing bonds to provide the funds necessary to pay the cost of such improvement, and the levying of a tax outside of existing limitations for the retirement of said bonds and interest was adopted. The minutes of said meeting do not show that said resolution was read on three different occasions or that said rule was dispensed with by a vote of three-fourths of all members elected thereto. Section 4224, General Code, provides in part as follows:

"No by-law, ordinance or resolution of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale, or transfer