

2. The same answer may be made to the second question raised in the opinion of the attorney general. The condition relative to buildings fronting on the public road do not apply to the land described in the deed but to another portion of the farm of which this is a part.

3. The exception relative to taxes is well understood by the parties acquiring the land. The work of the county auditor is not complete. The taxes will be paid as soon as he can determine the amount."

While without a plat it is impossible to determine the exact location of the tract of land which the state proposes to purchase with reference to the building restriction contained in the deed from Francis M. Wills and wife to John McDivitt under date of March 28, 1907, I am informed by the county auditor of Tuscarawas county that this tract is located about 400 or 500 feet from the public road and that the building restriction contained in said deed does not apply to said tract.

In view of the information contained in the letter from Rev. Weinland and that obtained from the county auditor, I am of the opinion that the objections enumerated in the second paragraph, with the exception of the taxes for 1926 and 1927, may be disregarded.

Having heretofore, in Opinion No. 162, supra, found that the abstract showed a good and merchantable title to the premises in H. P. Copeland, Martha McDivitt and James McDivitt, trustees of the estate of John McDivitt, deceased, subject to exceptions enumerated in said opinion, and being of the opinion that the objections as to the right of way granted to The Central District & Printing Telegraph Company and as to the building restrictions in the deed from Francis M. Wills to John McDivitt as shown by Sections 26 and 28 respectively of the abstract, may be disregarded, I see no reason why the state should not complete the proposed purchase upon payment or other disposition of the 1926 and 1927 taxes.

I am returning herewith abstract of title, deed, encumbrance estimate and other papers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

660.

TOWNSHIP TRUSTEES—PURCHASE OF TRACTOR—MUST BE ADVERTISED IF OVER \$500.00.

SYLLABUS:

1. *Under the provisions of Section 7201, General Code, township trustees may purchase a tractor or other equipment for use in constructing, maintaining and repairing roads upon the terms prescribed in such section, namely, not less than one-third of the purchase price in cash, not more than one-third at any time within one year and not more than one-third at any time within two years from the date of purchase.*

2. *By the express terms of Section 3373, General Code, all purchases of machinery by township trustees for use in constructing, maintaining, and repairing roads must, where the amount involves five hundred dollars, be made from the lowest responsible bidder after advertisement, as prescribed by such section.*

3. *By the express terms of Section 7201, General Code, the provisions of Section 5660, General Code, apply only to such portion of the purchase price of machinery, tools, trucks or equipment, purchased by township trustees for use in constructing, maintaining and repairing roads, as is to be paid in cash.*

COLUMBUS, OHIO, June 24, 1927.

HON. F. E. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Receipt is acknowledged of your request for my opinion as follows:

"The trustees of Walnut Township, this county, want to purchase a tractor for use in grading their roads, in connection with a grader they now have, at a cost of approximately \$600.00, paying half this year and the other half in 1928. I have been unable to locate the proper section of the Code which will allow them to make such purchase inasmuch as they have not sufficient money on hands or in process of collection with which to purchase, nor any authority for the deferred payment.

The tractor is very much needed by them, and if there is any way by which such purchase and arrangement can be made, I shall be glad of your advice at an early date."

Section 7201 of the General Code provides:

"County commissioners and township trustees, in the purchase of machinery, tools, trucks and other equipment for use in constructing, maintaining and repairing roads, shall be authorized to purchase such machinery, tools, trucks and equipment upon the following terms, to wit; not less than one-third of the purchase price thereof shall be paid in cash, and of the remainder not more than one-third may be paid at any time within one year from the date of purchase and not more than one-third at any time within two years from the date of purchase. Such commissioners or trustees shall be authorized to issue to the purchaser the notes of the county or township, as the case may be, signed by the commissioners or trustees and attested by the signature of the county auditor or township clerk, and covering such deferred payments and payable at the times above provided, which notes may bear interest at not to exceed six per cent per annum. In the legislation under which such notes are authorized, the county commissioners or township trustees shall make provision for levying and collecting annually by taxation an amount sufficient to pay the interest, if any, thereon and to provide a sinking fund for the final redemption of such notes at maturity. *The provisions of Section 5660 of the General Code, shall apply only to such portion of the purchase price of such machinery, tools, trucks or equipment as is to be paid in cash.*

The power herein conferred on township trustees shall be exercised by them only with the consent to and approval of such purchase and the terms thereof by the county commissioners of the county." (Italics the writer's)

It will be observed that this section confers upon township trustees specific authority to purchase machinery for road purposes *upon the terms* specified in said section, provided the consent and approval of the county commissioners for such purchase is obtained.

In connection with Section 7201, *supra*, your attention is directed to Section 3373, General Code, reading in part as follows:

“* * * * *

Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. The township trustees shall provide suitable places for housing and storing machinery and tools owned by the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for carrying into effect the provisions of this section, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. All payments on account of machinery, tools, material, labor and teams shall be made from the township road fund as provided by law. All purchases of materials, machinery, and tools, shall where the amount involved exceeds five hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner hereinbefore provided. All force account work shall be done under the direction of a member of the board of township trustees or of the township highway superintendent.”

And to Section 3371, General Code, which provides:

“When the trustees of any township determine to proceed in the third method hereinbefore provided and appoint a township highway superintendent such superintendent shall before entering upon the discharge of his duty give bond to the state of Ohio for the use of the township in the sum of two hundred dollars, conditioned upon the faithful performance of his duty. Such bond shall be approved by the trustees of the township and filed with the clerk thereof. The township trustees shall fix the compensation of the township highway superintendent for time actually employed in the discharge of his duties, which compensation shall be paid from the township road fund. The compensation and all proper and necessary expenses, when approved by the trustees, shall be paid by the township treasurer upon warrant of the township clerk.”

These two sections relate to the same subject matter as Section 7201, *supra*, therefore are *in pari materia*, and must be so construed.

In an opinion of this department reported in Opinions, Attorney General, 1921, p. 506, it was held as follows:

“1. By reason of the provisions of Section 3371-1, G. C., (108 O. L. 499), township trustees are not authorized to purchase machinery for use in the maintenance and repair of roads unless they first secure the approval of the county surveyor to the expenditure; and this is true even though the trustees have resort to competitive bids in accordance with Section 3373, G. C.

2. The consent and approval by county commissioners to the purchase of machinery by township trustees for use in the maintenance and repair of roads, is requisite only in case the township trustees have recourse to the installment plan described in Section 7201, G. C., (108 O. L.

505), and is not required in case the township trustees are making the purchase on a cash basis."

In the opinion it was said as follows:

"Your inquiries are based on the assumption that a tractor for road work comes within the purview of Section 3373. Your assumption is clearly correct, since the object of the statute is to authorize the purchase of machinery for road maintenance and repair work.

Section 3371-1 is inclusive in form in its employment of the words: 'and all expenditures made by them for maintenance and repair purposes shall where the amount involved exceeds fifty dollars receive the approval of the county surveyor before payment is made.' No exception is made for cases where under the statutes the trustees are commanded to resort to competitive bids. Moreover, the limited exception as to amounts under fifty dollars shows that the legislature had in mind the approval by the surveyor of large expenditures rather than small ones. Any claim that the statutory language last quoted is intended to apply only to current expense items, such as the purchase of supplies, tools and material, and the employment of labor, as distinguished from occasional special expenditures such as for the purchase of machinery, is clearly without merit, since the approval of the surveyor is required as to 'all expenditures * * * for maintenance and repair purposes,' and the very authority of the trustees to purchase machinery rests upon the basis that the machinery will be used for maintenance and repair purposes.

* * * * *

Coming to your question regarding Section 7201: As already noted, that section appears as an original enactment in the act in 108 Ohio Laws, making changes in the highway code. Prior to the time of the enactment of said section, county commissioners had authority to purchase road machinery (Section 7200, G. C., 107 O. L. 115), as did township trustees (Section 3373, G. C., 107 O. L. 93). The existence of such authority is recognized in the opening lines of Section 7201. This latter section, therefore, is to be looked upon as a grant of additional power, and not as a limitation upon powers previously existing. The conclusion thus becomes clear that the limitation contained in the last sentence of Section 7201 applies only to the additional power granted by the section itself—a conclusion which is fortified by reference to the fact that the 'term' of the purchase by the trustees, as well as the purchase itself, are to be subject to the consent and approval of the county commissioners. Specific answer to your second question is therefore made by the statement that the consent and approval by county commissioners to the purchase of road machinery by township trustees is requisite only in case the township trustees have recourse to the installment plan described in Section 7201, G. C., and is not required in case the township trustees proceed to make the purchase on a cash basis."

Inasmuch as, according to your letter, the expenditure contemplated by the township trustees for the purchase of a tractor involves more than five hundred dollars, it will be necessary to advertise for bids and let the contract for such purchase to the lowest responsible bidder as provided in Section 3373 of the General Code.

Section 5660, General Code, provides, *inter alia*:

"No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed.

No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employee of any such subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation, or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation or certification, which certificate shall be filed with such authority, officer, employee, commissioners, council, body or board, or the chief clerk thereof. The sum so certified shall not thereafter be considered unencumbered until the county, subdivision or district is discharged from the contract, agreement, or obligation or so long as the order is in force. Taxes and other revenues in process of collection or the proceeds to be derived from lawfully authorized bonds, notes, or certificates of indebtedness sold or in process of delivery shall, for the purposes of this section, be deemed in the treasury or in process of collection and in the appropriate fund.

* * * * *

That contracts for the purchase of machinery for road purposes by township trustees upon an instalment basis are exempt from the provisions of the above quoted section is seen from the language of Section 7201, above quoted, to the effect that "the provisions of Section 5660 of the General Code shall apply only to such portion of the purchase price of such machinery, tools, trucks or equipment as is to be paid in cash."

It is, therefore, necessary that the proper fiscal officer certify that money for the first instalment only is in the treasury, appropriated for the purpose of purchasing the tractor, which it is intended to purchase, and that the same is free from any previous obligation.

It is noted that in your letter you state that the township trustees desire to pay one-half of the purchase price for the tractor this year and the remaining one-half in 1928.

Section 7201, supra, prescribes the terms upon which such machinery may be purchased on the instalment plan, namely, not less than one-third of the purchase price, cash "and of the remainder not more than one-third may be paid at any time within one year from the date of purchase and not more than one-third at any time within two years from the date of purchase." And since a board of township trustees is a creature of statute, possessing only such powers as are expressly granted by statute and those necessarily implied to carry the powers expressly granted into effect, such a board would be without authority to purchase a tractor or other road machinery upon terms other than those fixed by the legislature.

It is apparent, however, that if the language of this statute were to be strictly followed it would be impossible ever to pay for any machinery purchased

under the authority contained in such section. The section prescribes that not less than one-third of the purchase price shall be paid in cash and that "*of the remainder*" not more than one-third at any time within one year and not more than one-third at any time within two years from the date of purchase. For example, if as in the instant case the purchase price be six hundred dollars and one-half or three hundred dollars is paid in cash at the time of purchase, a remainder of three hundred dollars is left. If not more than one-third of this remainder, or one hundred dollars, be paid within one year and not more than one-third, or one hundred dollars, be paid within two years from date of purchase, there would still be a balance of one hundred dollars not provided for. It is of course apparent that the legislature intended no such situation, and that that body did intend the section to have some force and effect.

With reference to the part of the section under consideration, the language of Judge Price in the case of *Beverstock, a Taxpayer, vs. The Board of Education et al.*, 75 O. S. 144, 149, is pertinent:

"* * * It is true that the provision is imperfectly, and even bunglingly drawn, and exhibits negligence and perhaps ignorance in its phraseology, but these marks should not defeat the operation of the statute, if we can, by the fair use of its language, arrive at the true legislative purpose. * * * It is the duty of the court when called upon to deal with the legislation of a co-ordinate department of our government, to so construe a statute, if possible, as to give it a sensible effect and make it of binding force. A statute can not 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 give full force and effect to every enactment of the General Assembly not obnoxious to constitutional prohibition."

Undoubtedly, when the legislature used the language "of the remainder not more than one-third" it intended to say "of the remainder not more than one-third of the purchase price." That is to say, it seems apparent that the statute should read:

"* * * not less than one-third of the purchase price thereof shall be paid in cash, and of the remainder, not more than one-third of the purchase price may be paid at any time within one year from the date of purchase and not more than one-third of the purchase price within two years from the date of purchase * * * ."

For example, if it be desired to pay one-half of the purchase price of six hundred dollars in cash, this may be done, since it is not *less* than one-third thus leaving a balance or remainder of three hundred dollars to be paid. Of this remainder, not more than one-third of the purchase price or two hundred dollars may be paid at any time within one year from the date of purchase and not more than one-third of the purchase price or one hundred dollars may be paid within two years. This balance of three hundred dollars may of course be divided into such instalments as the township trustees and the seller may agree upon, that is, three hundred dollars may be paid in cash, one hundred and fifty within one year and one hundred and fifty within two years; or three hundred in cash and two

hundred within one year and one hundred within two years; or three hundred in cash, and one hundred within one year and two hundred within two years, or any other terms may be agreed upon so long as the requirements of the statute are complied with, namely, not *less* than one-third must be paid in cash, while neither of the two remaining instalments, to be respectively paid within one and two years, may be *more* than one-third of the purchase price.

For the reasons above stated it is my opinion that:

1. Under the provisions of Section 7201, General Code, township trustees may purchase a tractor or other equipment for use in constructing, maintaining and repairing roads upon the terms prescribed in such section, namely, not *less* than one-third of the purchase price in cash, not *more* than one-third at any time within one year and not *more* than one-third at any time within two years from the date of purchase.

2. By the express terms of Section 3373, General Code, all purchases of machinery by township trustees for use in constructing, maintaining and repairing roads must, where the amount involves five hundred dollars, be made from the lowest responsible bidder after advertisement, as prescribed by such section.

3. By the express terms of Section 7201, General Code, the provisions of Section 4660, General Code, apply only to such portion of the purchase price of machinery, tools, trucks or equipment, maintaining and repairing roads, as is to be paid in cash.

Respectfully,
EDWARD C. TURNER,
Attorney General.

661.

CORPORATION—REINSTATEMENT OF FOREIGN CORPORATION—
PENALTY.

SYLLABUS:

The additional penalty provided by Section 5511, General Code, to be paid for the privilege of reinstatement by a foreign corporation whose certificate of authority to do business in this state has been canceled by the secretary of state, is ten cents for each share of its authorized capital stock, such penalty not to exceed one hundred dollars nor to be less than ten dollars in any case.

COLUMBUS, OHIO, June 24, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication as follows:

“The J. L. Company qualified January 12, 1923, under Sections 178 and 183 G. C., for the purpose of doing business in Ohio. The filing shows a total capital stock of \$500,000 divided into 5,000 shares of \$100.00 each. The proportion in Ohio as shown by the filing is \$25,870.00, or five percent.

The qualifying certificates were canceled upon certificate of the Tax Commission under date of February 15, 1927.

The department is now in receipt of a communication that the company desired to reinstate the certificate of authority to do business and desires to be advised as to fees.