again filing an application for a license to engage in such business and paying an additional license fee therefor. The law will look to the identity of the individual who is transacting such business rather than to the style of the name adopted and assumed.

I suggest that you amend your ruling in accordance with the views herein expressed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

164.

DIRECTOR OF HIGHWAYS—CONSTRUCTION OF CERTAIN CONTRACTS —BOUND BY KNOWLEDGE OF AUTHORIZED AGENT.

SYLLABUS:

1. *Where the owner of lands desired by the state for highway purposes delivered a deed therefor to a duly authorized and acting agent of the state empowered to negotiate for the purchase of the required right of way, with the express stipulation that such deed should remain in the personal possession of such agent, until the Department of Highways and Public Works should execute and deliver an unconditional agreement to build a retaining wall, knowledge by the agent of the terms and conditions of such stipulation is knowledge by the state, and upon the state's taking possession of said lands and constructing a highway thereon, it is legally bound to build the retaining wall as stipulated by the owner.*

COLUMBUS, OHIO, March 10, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

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

"Re: Property damage and retaining wall, C. B. W. property, I. C. H. No. 47, Granville township, Licking county, Ohio.

Submitted herewith for your advice is a copy of a letter to the Director of Highways from Mr. W. and a copy of the agreement upon the part of the Department relative to the above. The facts so far as the Department is concerned are briefly as follows:

In August, 1926, Mr. T., county surveyor of Licking county, acting in the capacity of resident engineer for the state, negotiated with Mr. W. of Granville for 0.14 acres of land needed to widen a curve on inter-county highway No. 47 at the east edge of Granville.

The sum of $150.00 was agreed upon for compensation and damages for the land. Mr. W. states that Mr. T. agreed to build a retaining wall in front of his property as part of the agreement. Mr. T. states 'that he agreed to the $150.00 compensation and damages and promised to hold in his personal possession, the signed deed to 0.14 acres until such a time as the state gave Mr. W. an agreement in connection with the wall.' Mr. T. does not say whether he promised the wall or not. His statement is as quoted above.

When it came time to make payment for the right of way, Mr. T. requested an agreement on the wall. Upon receiving the agreement, he gave us the deed. Payment was made for the $150.00 but Mr. W. refused to cash the check until the state actually agreed to build the wall without any qualification as to necessity.

There is absolutely no reason for a retaining wall at the point in question, from an engineering standpoint, and the director does not wish to build it if we can in any way avoid doing so both from a matter of cost and of policy.

Will you, therefore, kindly advise us if there is any method by which we can legally avoid building this wall? As a suggestion, would it be possible to withdraw the check for $150.00 covering compensation and damages and start condemnation proceedings in order to settle the matter?"

The copy of Mr. W.'s letter which is dated December 7, 1926, reads in part as follows:

"Let me state the facts of the case, as I have them of record, as briefly as possible: On August 18th, 1926, there appeared at my log cabin in Mackinac county, Michigan, Mr. T. of Newark, Ohio, a personal friend of mine, and the highly efficient county surveyor of Licking county. He stated, and his credentials corroborated his statement, that he came as your authorized envoy, to secure the signatures of my wife and myself to a deed conveying to the State of Ohio a portion of our land for additional right of way on the Columbus-Newark inter-county highway in Granville township, Licking county, Ohio. There was urgent need, he said, of securing this deed at once, so that work on the road might be begun without delay.

The negotiations did not consume much time, a happy circumstance, since Mr. T. was in a hurry to get home. We met him with the utmost frankness, and assured him of our willingness to promote public improvements. We insisted upon one thing only, i. e., that he agree to protect our land with a retaining wall; for the top of the hill whose north slope was to be shorn away contains building lots, now very scarce in our little village which is hemmed in by hills and Raccoon Creek. Mr. T. agreed that our request was reasonable and promised that it would be granted. He left the same afternoon, bearing our promise to remit the deed and leaving with us his promise to keep the deed in his personal possession until our stipulation for a retaining wall should be endorsed by the State Department of Highways.

On August 30th, 1926, we mailed the deed, duly executed, to Mr. T. We returned to our home in Granville, Ohio, on September 8th, 1926, to find the excavating almost completed. Naturally therefore, we assumed that the State Highway Department had agreed to make the retaining wall; consequently we were surprised when, later on, Mr. T. appeared with a document, dated September 3rd, 1926, containing the agreement of the Ohio Department of Highways to 'construct if necessary a retaining wall adequate to control bank.' We object to that conditioning phrase 'if necessary' and appeal to you to eliminate it. No such condition was discussed in our negotiations with Mr. T., who consented to our stipulation for a retaining wall unconditionally.

The latest development in the case is the receipt by us on December 6th, 1926, of your order for $150.00, the sum of which you adjudged proper for our portion of land. We have no complaint to make as to this compensation. We agreed to it freely in our talk with Mr. T. on August 18th, 1926. We have not cashed that order and shall not do so until we hear from you.

I have written this appeal to you without consulting our attorney. It is

my belief, that, once you are in possession of the facts in the case, you will be glad to redeem Mr. T.'s promise to us regarding the retaining wall, by striking out that phrase 'if necessary,' which really nullifies the document. We have acted throughout with the greatest fairness and good faith, accepting Mr. T.'s verbal promise as sufficient."

The copy of the so-called agreement upon the part of the highway department, dated September 3rd, 1926, is in this language:

"This is to certify that the Department of Highways and Public Works, Bureau of Maintenance, will in the consideration of the granting of a warranty deed for highway right of way by yourself in favor of the Department of Highways and Public Works agree to construct if necessary a retaining wall adequate to control bank opposite your property, over a length of 141 feet immediately east of the east corporation line of Granville on intercounty highway No. 47 in the county of Licking."

In your communication you ask (1) Is there any method by which the Department of Highways and Public Works can legally avoid building the retaining wall described in the above letters; and (2) would it be possible to withdraw the check covering compensation and damages for the right of way taken from Mr. W. and appropriate the property needed therefor?

Your letter as well as the letter of Mr. W. shows that certain facts relating to the controversy here involved are indisputable. These are, that Mr. T. was the duly authorized and acting agent for the Department of Highways and Public Works in the negotiations with Mr. W.; that Mr. W. agreed to sell the required right of way, and the state, through Mr. T., agreed to pay as compensation therefor and for damages, the sum of $150.00; that the deed for the land needed for the right of way was to be delivered to Mr. T. who, as agent for the seller for this purpose, was to hold the deed in escrow, until the state duly executed and delivered some agreement with reference to a retaining wall; that upon this state of facts the state took possession of the necessary land, under date of September 3rd, 1926, sent the letter above set forth agreeing "to construct *if necessary* a retaining wall adequate to control bank opposite" Mr. W.'s property, and on December 6th, 1926, gave Mr. W. a check for $150.00, which he refuses to cash.

Mr. T.'s statement as contained in your letter in no way contradicts or denies the truth of the facts set forth in the letter of Mr. W. He states that he "promised to hold in his personal possession, the signed deed to 0.14 acres of land until such a time as the state gave Mr. W. an agreement in connection with the wall." He fails to state what that agreement was to be, that is, whether it was to be an unconditional agreement that the state would build the retaining wall or whether it was to be a promise on the part of the state to build the wall *"if necessary."* Just what Mr. W.'s stipulation with reference to the building of the wall was is a question of fact, and in this connection it is suggested that the statements contained in his letter are definite and positive, and that they are, as above pointed out, in nowise contradicted by the statement of Mr. T. Furthermore, the course of conduct of Mr. W. as shown by the correspondence submitted, is entirely consistent with his contention.

As a matter of law, since Mr. T. was the agent of the state, knowledge on the part of Mr. T. of the terms and conditions of the agreement *demanded* by Mr. W. with reference to the building of the retaining wall by the state, was knowledge by the state. If, therefore, it was in fact stipulated by Mr. W. that as part of the consideration for the conveyance of the necessary right of way, the state should agree to and build a retaining wall, Mr. T. agreeing to hold the deed for the right of way

until an agreement to that effect was executed by your department, knowledge on the part of Mr. T. of that stipulation and its terms and conditions was knowledge by the state, and when the state took possession of Mr. W.'s land and constructed a highway thereon, it accepted his terms and conditions and became legally bound to comply therewith.

For the reasons given, therefore, I am of the opinion that, keeping the above suggestions in mind, you should make such investigation as may be necessary and determine definitely just what the terms and conditions fixed by Mr. W. were; and if you should find that Mr. W. did in fact definitely stipulate with Mr. T. that the deed for the right of way should be personally held by him and not delivered to the state until your department executed and delivered an unqualified agreement to build a retaining wall, then, and in that event, since the state took possession of and used the land in question with knowledge of Mr. W.'s conditions, these conditions should be complied with.

If after this investigation you desire further advice from this department, I stand ready to assist.

In so far as your second question is concerned, your attention is directed to Section 1202, General Code, which reads in part as follows:

> "If the Director of Highways and Public Works proposes to improve an inter-county highway or main market road without the co-operation of the county commissioners or township trustees, and it is necessary as a part of the proposed improvement of the said highway, bridge or culvert, to acquire or appropriate lands or property, and such director is unable to agree with the owner or owners of such land or property as to the value thereof, he may proceed to condemn such land or property in the manner hereinbefore fixed for county commissioners and township trustees. (Sec. 1201)
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> He shall also be authorized to widen the right of way occupied by such road or highway whenever in his judgment a wider right of way is needed. For the purpose of acquiring any real estate that may be needed for any of such purposes, such director is authorized to pay to the owner or owners thereof, such reasonable sum as may be agreed upon between him and such owner or owners. If such director is unable to agree with the owner or owners of such real estate as to the value thereof, he may proceed to condemn such real estate in the manner provided in Section 1201 of the General Code with respect to the condemnation by county commissioners or township trustees of right of way for state highway improvements."

In view of the conclusion reached with reference to your first inquiry, however, I am of the opinion that the legality and propriety of resorting to appropriation proceedings to condemn the land in question should not be passed upon by this office until your department shall have made the investigation hereinbefore recommended.

Respectfully,
EDWARD C. TURNER,
Attorney General.