

141.

APPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF THEIR DUTIES—EARLE STEWART—T. DAVID BLACK.

COLUMBUS, OHIO, March 4, 1929.

HON. C. S. YOUNGER, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval two bonds. The first of said bonds is to cover the faithful performance of the duties of Earle Stewart appointed Deputy Superintendent of Insurance as of February 11, 1929, and is for the penal sum of \$10,000, upon which the Royal Indemnity Company appears as surety. The other of said bonds is to cover the faithful performance of the duties of T. David Black appointed Financial Officer in the office of Superintendent of Insurance as of February 8, 1929, and is for the penal sum of \$25,000, upon which the Royal Indemnity Company appears as surety.

I find no special provisions in the statutes requiring bonds in either of the cases above mentioned. It follows, therefore, that said bonds must have been executed in pursuance to the provisions of Section 154-14, General Code, which among other things, authorizes the Director of each department, with the approval of the Governor, to require any officer or employe to give bond in such amount as the Governor may prescribe.

In view of the provisions of the section of the Code, above mentioned, the signature of the Governor should be noted upon said bonds, indicating his approval, before the same are filed.

It appearing that the bonds are properly executed and the sureties appearing thereon are in good standing under the insurance laws of Ohio, I have approved said bonds as to form, and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

142.

APPROVAL, BONDS OF CITY OF YOUNGSTOWN, MAHONING COUNTY
—\$50,000.00.

COLUMBUS, OHIO, March 4, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

143.

COUNTY SURVEYOR—REPORT OF PUBLIC ROAD MILEAGE TO STATE HIGHWAY COMMISSIONER CONCLUSIVE—EXCEPTION—DETERMINATION OF SALARY BY COUNTY AUDITOR—PROCEDURE WHERE REPORT ERRONEOUS.

SYLLABUS:

Where a county surveyor, pursuant to the provisions of Section 7181-1, General Code, makes a report to the State Highway Commissioner, setting forth the number of miles of public roads in his county, and such report upon examination thereof is approved by the State Highway Commissioner and certified by him to the county auditor

of such county for the purpose of determining that part of the annual salary of the county surveyor that is based on the public road mileage in the county, such report is conclusive in the absence of conduct amounting to fraud in the matter on the part of the county surveyor or the State Highway Commissioner; and payments of salary to the county surveyor on the basis of such report are legal although the same may be in excess of that represented by the actual mileage of public roads in the county.

Where it is ascertained that such report so approved by the State Highway Commissioner is incorrect and that the actual number of miles of public roads in the county is less than that indicated in such report, such report should no longer be continued in the files of the county auditor as the basis for the determination of the annual salary of the county surveyor, but the county surveyor should make a new report as to the public road mileage and forward the same to the Director of Highways for approval and certification in the manner provided in Section 7181-1, General Code.

COLUMBUS, OHIO, March 4, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your communication of recent date, which reads as follows:

“You are respectfully requested to render this department your written opinion upon the following:

Under the provisions of Section 7181, General Code, the salary of the county surveyor is in part based upon the number of miles of road in the county. Section 7181-1, General Code, provides how the mileage of roads is to be determined. In a certain county in Ohio the number of miles of road certified to the Director of Highways and approved by him was stated to be 802 miles. This certification being made and filed in the county auditor's office February 24, 1920, the surveyor's compensation was based in part upon this mileage.

Question 1: In the event that it is determined at this time by the county surveyor that such mileage was in excess of the actual mileage of roads in the county, may the excess salary paid to the surveyor on such erroneous mileage be recovered upon findings made by this department?

Question 2: Should the present county surveyor submit his computation of the number of miles of roads to the Director of Highways for his approval and the salary in the future be based upon such mileage?”

In the consideration of the question here presented, I do not deem it necessary to quote at length the provisions of Section 7181, General Code, referred to in your communication. This section makes provision for the salaries of the county surveyors in the several counties of the state, the same being based in part upon the number of miles of public roads in the county, in part upon the population of the county, and in some of the counties in part upon the tax duplicate valuation of taxable real and personal property therein.

Relating to that part of the annual salary of the county surveyor that is based upon the mileage of public roads, said Section 7181, General Code, provides that the county surveyor shall receive an annual salary to be computed as follows: “One dollar per mile for each full mile of the first thousand miles of the public roads of the county.” Section 7181-1, General Code, provides as follows:

“In determining the number of miles of the public roads of the counties of the state the mileage of county line roads shall be reckoned one-half in each

county. The number of miles of public roads in each county shall be determined in the first instance by the county surveyor, who shall make a report to the State Highway Commissioner setting forth the mileage of public roads within his county.

The State Highway Commissioner shall examine such reports and after correcting the same, if necessary, shall approve the reports; and the mileage of public roads in each county, as set forth in such reports as corrected and approved by the State Highway Commissioner, shall govern in determining the annual salary of the county surveyor under the provisions of Section 7181 of the General Code of Ohio. The county surveyor of each county shall promptly report to the State Highway Commissioner from time to time any additions to or deductions from the public road mileage of his county by reason of the establishment of any new roads or the vacation of any existing roads. After the State Highway Commissioner has examined and approved the report of the county surveyor as to the road mileage of his county, it shall be the duty of the State Highway Commissioner to certify to the county auditor of said county a copy of such report as approved."

Aside from the provisions of Section 7181-1, General Code, above quoted, the salary of the county surveyor in any county, with respect to the question here presented, would be based upon the actual number of miles of public roads in the county at the time the salary of the county surveyor is paid to him out of the county treasury, and any payment of such salary in excess of that represented by the actual mileage of public roads in the county would, as to such excess, be illegal. However, as may be noted from the terms of Section 7181-1, General Code, above quoted, provision is thereby made for the determination of the number of miles of public roads in a county for the purpose of determining that part of the salary of the county surveyor which is based on public road mileage in the county. As to this, said section of the General Code provides that the number of miles of public roads in the county shall be determined in the first instance by the county surveyor, who shall make a report to the State Highway Commissioner, setting forth the mileage of public roads within the county. The State Highway Commissioner is then required to examine such report and after correcting the same, when such correction is necessary, he is required to approve the report of the county surveyor with respect to such mileage. Said section further provides as follows:

" * * * * and the mileage of public roads in each county, as set forth in such reports as corrected and approved by the State Highway Commissioner, shall govern in determining the annual salary of the county surveyor under the provisions of Section 7181 of the General Code of Ohio.
* * * "

It is a rule of general application that where by statutory provision the determination of the facts in regard to the particular matter is imposed as a duty upon a public officer, the determination of such officer with respect to such facts is conclusive in the absence of fraud or of such gross abuse of discretion as is tantamount to fraud. In 46 *Corpus Juris*, at pages 103 and 1034, it is said:

"Where the decision of a question of fact has been committed to a particular officer, his determination will not ordinarily be reviewed by the courts, except as may be provided for by statute, although they may interfere in the case of an abuse of discretion or fraud upon his part or on the part of the person claiming rights under his act."

In support of the text above quoted a large number of cases are cited, of which the following cases in point are noted: *Bates and Gould Company vs. Payne*, 194 U. S. 106; *State ex rel. vs. Keefer, et al.* 3 O. A. 426, 431; *U. S. vs. Fletcher, etc., Trust Company*, 197 Ind. 527, 535; *Belknap vs. Benton Township*, 169 Mich., 59, 64.

The principle of law noted by the authorities above cited is clearly applicable in the consideration of the question presented in your communication, and I am of the opinion that in the case here presented the determination of the State Highway Commissioner, as to the number of miles of public roads in the county here in question, is conclusive with respect to the annual salary paid to the county surveyor on such determination by the State Highway Commissioner, and no recovery can be had against such county surveyor for annual salary paid to him upon such determination in excess of that represented by the actual mileage of public roads in the county, unless fraudulent conduct upon the part of the State Highway Commissioner or the county surveyor can be shown. As the first question is stated in your communication, therefore, the same is answered in the negative.

In the consideration of your second question, it is to be observed that the conclusion reached in this opinion with respect to your first question is predicated on the assumption that the computation made by the county surveyor, and the finding made by the State Highway Commissioner as to the miles of public roads in the county here in question, were made in good faith by said officials and in the honest belief that the figures arrived at represented the public road mileage in said county as nearly as the same could be ascertained. A determination of such mileage by the State Highway Commissioner, under the provisions of Section 7181-1, General Code, that was not in accord with the known facts as to the number of miles of public roads in the county, would have been fraudulent and the same would not have afforded any legal basis for the payment of salary to the county surveyor in excess of that payable on the actual mileage of public roads in the county. Inasmuch as it is now known that the computation made by the county surveyor and the finding of fact made by the State Highway Commissioner, with respect to the number of miles of public roads in the county, was incorrect, such determination so made by the State Highway Commissioner should no longer continue in the files of the county auditor as the basis for the salary of the county surveyor. Although the finding made by the State Highway Commissioner, under authority of said section of the General Code, had the effect of legalizing salary payments made to the county surveyor, pursuant to such finding, the same would afford no justification for the payment of salary in excess of that now known to be due and payable on the basis of the actual mileage of public roads in the county. I am of the opinion, therefore, that your second question should be answered in the affirmative.

Respectfully,

GILBERT BETTMAN,

Attorney General.

144.

PROSECUTING ATTORNEY—DUTY TO CONDUCT ACTION TO QUIET
TITLE FOR RURAL BOARD OF EDUCATION—WHEN NECESSARY.

SYLLABUS:

It is the duty of a prosecuting attorney, in his official capacity, to institute and conduct actions to quiet title to school property for a rural board of education within his country, when it becomes necessary to do so in order to render said property marketable.