

2141.

APPROVAL, BONDS OF LIBERTY TOWNSHIP SCHOOL DISTRICT,
BUTLER COUNTY—\$100,000.00.

COLUMBUS, OHIO, May 19, 1928.

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

2142.

APPROVAL, BONDS OF THE VILLAGE OF FAIRVIEW, CUYAHOGA
COUNTY—\$24,500.00.

COLUMBUS, OHIO, May 21, 1928.

Industrial Commission of Ohio, Columbus, Ohio.

2143.

TAX AND TAXATION—GASOLINE TAX AND MOTOR VEHICLE TAX—
AUTHORITY OF COMMISSIONERS TO EXPEND COUNTY'S SHARE—
SECTIONS 5537 AND 6309-2, GENERAL CODE, DISCUSSED.

SYLLABUS:

Those portions of the two cent gasoline tax and the motor vehicle license tax, apportioned to the counties of the state, in accordance with the provisions of Sections 5537 and 6309-2, General Code, may be expended by the county commissioners in the maintenance and repair of bridges on public roads and highways in the county system of highways.

COLUMBUS, OHIO, May 21, 1928.

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

GENTLEMEN:—Receipt is acknowledged of your communication of recent date requesting my opinion, which reads as follows:

“Under the law certain portions of the automobile license tax and gasoline tax are apportioned to counties and Section 6309-2 G. C., provides that in the treasuries of the counties such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways and for no

other purpose. This section then defines maintenance and repair. Section 5538 G. C., provides that the gasoline tax money shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways in such county.

Question: May any part of the automobile license tax or gasoline tax apportioned to the county be used in the maintenance and repair of bridges on public roads and highways of the county system of highways?"

Sections 5537 and 6309-2 of the General Code, which respectively provide for the distribution of the gasoline excise tax fund and the revenue derived from the motor vehicle license tax, read in part as follows:

Section 5537. "Upon receipt of taxes herein provided for the treasurer of state shall place the first \$50,000.00 collected in a special fund to be known as the gasoline tax rotary fund. Thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to \$50,000.00. The balance of taxes collected under the provisions of this act (G. C. Sections 5526 to 5540, 6292 and 6295), after the credits to said rotary fund, shall be credited to a fund to be known as the gasoline excise fund.

* * *

Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, *and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways* within such counties.

* * *'" (Italics the writer's.)

Section 6309-2. "The revenue collected under the provisions of this chapter shall be distributed as follows:

(1) Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district or (of) registration as provided in this chapter. The portion of such money due the municipal corporations shall be paid into the treasuries of such municipal corporations on the first business day of each month, and the remainder retained in the county treasury. *In the treasuries of such municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund.* 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundations thereof is (are) used as a subsurface of the improvement thereof, in whole or in substantial part.

* * *'" (Italics the writer's.)

The purpose of the gasoline tax law of 1925 (111 v. 294), is set forth in Section 2 of the act, which was codified as Section 5527, General Code, and which reads in part as follows:

"For the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon,

for resurfacing such highways where existing surfaces have become worn or rutted, *for enabling the several counties and municipal corporations of the state to properly maintain and repair their roads and streets, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same*, there is hereby levied and imposed on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the state of Ohio, an excise tax of two cents; * * *.

* * *” (Italics the writer’s.)

Section 6291, General Code, sets forth the purposes for which the motor vehicle license tax is levied in these words:

“An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways of this state, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles and of maintaining and repairing public roads, highways and streets. * * *” (Italics the writer’s.)

It is apparent from the provisions underscored in the above quoted sections that the counties’ portion of the two cent gasoline tax and the motor vehicle license tax moneys is to be used for the sole purpose of maintaining and repairing public roads and highways, the expenditure of the counties’ portion of the gasoline tax moneys being further limited to roads and highways in the county system. That the use of gasoline tax funds by the counties is so limited was held in Opinion No. 1674, rendered under date of February 4, 1928, to the Prosecuting Attorney at Georgetown, Ohio, the fourth paragraph of the syllabus of that opinion reading as follows:

“4. The county’s portion of gasoline tax funds (Section 5537 and related sections of the General Code) may be only used for the purpose of maintenance and repair of roads in the county highway system, including roads that are unimproved.”

The purpose for which the revenues derived from the two taxes may be expended by a county, being limited, as above pointed out, to the maintenance and repair of roads and highways, the question to be determined is whether or not a bridge is to be regarded as a part of the public road or highway, which passes over it. As to this question the law is that a bridge is a part of the highway which passes over it, except where the statutes clearly show that the term highways is not intended to include the bridges on such highways. See 9 C. J. 422.

As stated in an opinion of my predecessor in office, reported in Opinions, Attorney General, 1924, page 335:

“The decisions universally hold that a public bridge is a part of the highway which passes over it, *except where the language of some particular statute is such as to show plainly that the term is not intended to include bridges.*” (Italics the writer’s.)

When the several sections of the General Code, pertaining to the two cent gasoline tax and the motor vehicle license tax, are examined, not only does it appear that it was not intended by the Legislature that the terms “public roads” and “highways” as used in Sections 5537 and 6309-2, *supra*, should relate only to the roads and high-

ways proper and not include the bridges thereon, but the acts, imposing these two taxes and providing for the disposition of the revenue therefrom, seem rather clearly to show that the words "public roads" and "highways" were intended to include the bridges thereon.

You will observe that by the terms of Section 6291 above quoted in part, that the motor vehicle license tax is levied "upon the operation of motor vehicles on the public roads or highways of this state, for the purpose * * * of maintaining and repairing public roads, highways and streets." In so far as the counties' portion is concerned, the two cent gasoline tax is for the purpose of "enabling the several counties * * * to properly maintain and repair their roads * * *, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways * * * a fair share of the cost of maintaining and repairing the same." Obviously the same motor vehicles that are operated on the public roads and highways are driven over the bridges on such roads and highways, and the same vehicles damaging the roads also damage the bridges. The two cent gasoline tax is to enable the several counties properly to maintain their roads. Of what avail is a properly maintained road with an impassable bridge?

The same tax is to supplement revenue arising from direct taxation. In addition to the levy for road purposes authorized by Section 5627, General Code, Section 6926, General Code, authorizes a two mill tax levy by county commissioners to provide a fund for the payment of the county's proportion of the cost of constructing, maintaining and repairing roads under the county road laws. A direct levy by county commissioners for bridge purposes is also authorized. See Sections 5627, 2421, 7557 and related sections of the General Code. There is nothing in Section 5527, supra, to indicate that the Legislature intended that the direct levies for road purposes should be supplemented by gas tax moneys to the exclusion of a direct levy for bridge purposes. Moreover, the expressed object of the Legislature to distribute "equitably upon those persons using the privilege of driving * * * motor vehicles upon * * * (the) highways * * * a fair share of the cost of maintaining and repairing the same" will be best accomplished by using gas tax and motor vehicle license tax moneys on the bridges as well as on the roads, thus lessening the need for a direct levy for bridge purposes. For these reasons I reach the conclusion that the term "public roads" and the word "highways" as used in Section 5537 and Section 6309-2, and cognate sections of the General Code, include the bridges over which such roads and highways pass.

This conclusion is supported by the legislative construction of the sections under consideration, when appropriating the State's portion of the revenues derived from these two taxes and directing how such moneys shall be spent. In conformity with the provisions of the statutes imposing these taxes, the state's share of the moneys derived therefrom was appropriated by the 87th General Assembly to cover the cost of the maintenance and repair of roads and highways in the state system, one of the items reading "Bridge replacements (narrow and dangerous)....\$1,000,000.00." See page 47, House Bill No. 502. Not only does the state use the moneys in question for the purpose of maintaining and repairing bridges in the state system of highways but the Legislature has expressly authorized such an expenditure from the maintenance and repair fund; thus furnishing a legislative declaration that, in so far as the expenditure of motor vehicle license tax and two cent gas tax moneys by the state is concerned, bridges and culverts in the state highway system are a part of such roads and highways. By analogy it would seem to follow that bridges over which county roads and highways pass are a part of such roads and highways, for the repair and maintenance of which the counties' portion of the same two taxes may be expended.

Holding these views, in specific answer to your question, I am of the opinion that those portions of the two cent gasoline tax and the motor vehicle license tax, apportioned to the counties of the state, in accordance with the provisions of Sections 5537 and 6309-2, General Code, may be expended by the county commissioners in the maintenance and repair of bridges on public roads and highways in the county system of highways.

Respectfully,
EDWARD C. TURNER,
Attorney General.

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2144.

LEASE—STATE OF OHIO MAY CANCEL LEASE OF NIMISHILLING FEEDER
—NO WAIVER BY ACCEPTANCE OF RENT AFTER BREACH EXCEPT
WHERE LEASE PROVIDES OTHERWISE.

SYLLABUS:

Certain facts relating to a claimed violation by The Canal Fulton Lake and Improvement Company of the provisions of its lease of the Nimishilling Feeder executed to it by the State of Ohio through the Department of Public Works October 28, 1925, considered, and such violations held sufficient to justify the forfeiture and cancellation of such lease.

COLUMBUS, OHIO, May 21, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date in which you request my opinion with respect to the right of your department to declare a forfeiture of a certain written lease executed by the State of Ohio, through the Department of Public Works, to The Canal Fulton Lake and Improvement Company, and to cancel the same. This lease, which was executed October 28, 1925, released and demised to The Canal Fulton Lake and Improvement Company that portion of the Ohio canal property known as Nimishilling Feeder to the Ohio Canal located in Lawrence Township, Stark County, and Franklin Township, Summit County, Ohio, for a period of fifteen years for a consideration of an annual rental of \$100.00, to be paid by said lessee, in semi-annual installments of \$50.00 each on the first days of May and November of each and every year of the term of said lease. The lease here in question was granted subject to certain conditions and restrictions therein stated and such of said conditions as are pertinent to the consideration of the questions presented in your communication, with respect to the forfeiture and cancellation of said lease, are as follows:

“This lease is granted with the understanding that the grantee herein, its successors and assigns shall at all times, when required by the State of Ohio, maintain a free flow of water into the channel of the Ohio Canal at the present outlet of said feeder, and that all dams, flumes, wasteways, gates and other devices used in the maintenance and operation of the proposed lake, and the said Nimishilling Feeder shall be constructed under plans which shall be approved by the Superintendent of Public Works of Ohio, and that the State of Ohio may, through its properly authorized employes, have the right of control over all dams, flumes, wasteways, gates and other devices, should any be built by the grantee, its successors and assigns, across said