In conformity with the general rule above indicated, and with the Oregon case cited, you are advised that said section 6926-2 G. C. does not require fourteen insertions in each newspaper, but requires only an insertion once a week for two weeks in two newspapers.

The construction given is in line with the general tenor of the statutes of Ohio as to newspaper publication, namely, that publication is to be made on a weekly rather than on a daily basis. The statement just made is particularly true with reference to the road laws. See sections 1206; 1214; 6912; 6922; 3298-7; 3298-15a; 3298-32 and 3298-41.

It is quite true that the several statutes just named are more definite in their terms as to number of insertions than is the section about which you inquire; but it is believed that the reasons herein given are sufficient to show that the intent of the legislature as to the latter section is that the standard to be applied is the week rather than the day.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1144.

ROADS AND HIGHWAYS—WHEN COUNTY NOT LIABLE FOR ITEMS REPRESENTING BALANCE OF CONTRACT PRICE AND VALUE OF "EXTRA WORK"—NO AUTHORITY TO ISSUE BONDS TO REIMBURSE CONTRACTORS FOR LOSSES DUE TO INCREASE OF FREIGHT RATES BY GOVERNMENTAL ACTION.

1. *Under facts as stated in opinion, county not liable for items representing balance of contract price, and value of "extra work." If the commissioners pay such items, however, there can be no recovery back by the county.*

2. *Bonds may not be issued for the purpose of providing funds for reimbursement of contractors as authorized by act* 108 *O. L.* 548, *on account of losses due to increase of freight rates by governmental action.*

COLUMBUS, OHIO, April 9, 1920.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—You have submitted for the opinion of this department the following:

> "On August 29th, 1917, the board of county commissioners of Williams county, Ohio, entered into a contract for the construction of the Marks Road, so-called, at the contract price of $72,269.00.
>
> To finance this road the county commissioners sold $70,000.00 of bonds at a premium of $627.00 and transferred to the Marks Road fund $2,100.00 from inter-county highway No. 306 fund of Jefferson township.
>
> I. C. H. No. 306 of Jefferson township was a road, at that time, completed. There was more than $6,000.00 at the time in the I. C. H. No. 306 fund unexpended and not required to meet any outstanding obligations or contracts in respect to I. C. H. No. 306. Thirty-five per cent of the cost of constructing I. C. H. No. 306 was paid by Williams county.
>
> The cost of constructing the Marks road was divided as follows: Twenty-five per cent to Williams county, thirty-five per cent to Madison township and forty per cent to the land owners.

The resolution of the commissioners, directing the transfer of $2,100.00 from I. C. H. No. 306 to the Marks road was entered September 11, 1917, after the contract for the construction of the Marks road had been entered, but before the work was begun.

Shortly following this there was a change in the board of county commissioners, * * * and * * * an action was begun to mandamus the county auditor to re-transfer $2,100.00 back to the I. C. H. No. 306. This action was not resisted and the 2,100.00 was returned to I. C. H. No. 306, which left the Marks road fund short.

The road has now been completed. There are unpaid bills as follows: $1,152.42 freight refunder, a balance of $880.95 on last estimate on extra work and substantially $1,600.00 on the original contract, leaving between $2,600 and $2,700 unprovided for.

I have examined the opinion of the attorney-general of October 2, 1918, at page 1253 of his report, but it seems to me the opinion does not quite meet the present situation. Will you kindly advise the correct procedure to help us out of this predicament?

In refunding freight charges paid by road contractors, pursuant to the recent act of legislature, would the commissioners be authorized to make such payment out of the general fund, or to issue bonds for that purpose?"

In response to a request for additional information in connection with the above you have advised this department under date March 27, 1920, as follows:

"The original estimated cost of this road was $72,713.66.

The county has in its treasury the sum of $2,700.00 and more unappropriated to any specific purpose as proceeds of a levy under section 6926.

The Burns law certificate mentioned in section 5660 was not made by the county auditor at any time nor in any amount.

The provisions of section 6948 were not taken into account during the progress of the work, and in fact nothing of record can be found in respect to the extra work."

Your inquiry relates to the legality of payment of the three separate items of freight refunder; estimate on extra work; and balance on original contract. These items will be discussed in reverse order.

It appears that the issue of bonds for the road improvement in question brought into the county treasury a total of $70,627.00, including premium. This total was overrun both by the estimated cost of the work and the ultimate contract price. It appears that to make up the deficiency, a transfer was made from the balance in a fund which had originally been created for the improvement of another road. However, this transfer was afterwards vacated. There was therefore finally a deficiency in the fund created for the road improvement now in question of more than $1,600.00 as compared with the contract price; and you say that there is about $1,600.00 now due on the original contract price.

So far as concerns the $70,627.00 above mentioned, it would appear that the auditor's certificate described in section 5660 G. C. was not necessary. (See opinion of this department dated June 2, 1917—Opinions of Attorney-General 1917, Volume I, page 885). There may be some doubt as to whether the certificate was necessary as to the amount representing the difference between the contract price and said sum of $70,627.00. However, it is believed that within the fair intendment of sections 5660 and 5661 the auditor's certificate should have been made covering the

difference last mentioned; so that it would follow as a legal proposition that the county is not now liable for the difference in question because of the lack of auditor's certificate. (See section 5661).

Referring next to the matter of the $880.95 which you speak of as representing estimate on extra work: Your letter does not make plain the nature of these extras. However, it may be said that the subject of extra work on county road contracts is covered by section 6948 G. C., reading as follows:

> "In case of an unforseen contingency not contemplated by the contract, allowances for extra work may be made by the county commissioners, but they must first enter into a new contract in writing for such extra work. In all cases where the amount of the original contract price is less than ten thousand dollars, and the amount of the estimate for such extra work exceeds five hundred dollars, the preceding sections relating to advertising for bids shall apply to the letting of contracts for such extra work. If the amount of the original contract price is ten thousand dollars or more, the preceding sections relating to advertising for bids shall apply to all cases where the estimate for such extra work exceeds five per cent of the original contract price for such work. If the estimate for such extra work is less than five hundred dollars, in all cases where the amount of the original contract price is less than ten thousand dollars, or if the estimate for such extra work is less than five per cent of the original contract price in all cases where the original contract price is ten thousand dollars or more, the contract for such extra work may be let by the county commissioners at private contract without publication or notice, but no contract shall be awarded for such extra work at any price in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with such contract. In case of any new class or kind of work the county commissioners and contractor shall agree as to the price to be paid. The contractor shall submit his bid in writing, and if accepted by the commissioners they shall immediately enter their acceptance on the journal. The costs and expenses of such extra work shall be paid by the county commissioners out of any funds available therefor, and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement."

This section was in force at all times during the pendency of the contract in question.

It seems from your letter that the provisions of said section 6948 were not observed, in that no written contract for the extras was entered into. The extras do not amount to five per cent of the original contract price; but you will note that by the first sentence of section 6948 a written contract must be entered into if extra work is to be done.

It therefore appears that, speaking from a legal standpoint, the county is not liable for the payment of said $880.95, first, because there was no written contract as the basis for the accrual of such a charge, and second, because the auditor's certificate was not made as contemplated by sections 5660 and 5661.

However, your letter indicates that the whole transaction has taken place in perfect good faith and that the present situation has arisen chiefly through the depletion of the improvement fund by the re-transfer of the $2,100.00 above mentioned. Under these circumstances, it is suggested that if the county commissioners see fit to pay the two items in question, namely, the balance on original contract and the bill for extra work, there would be no ground of recovery against either the commissioners or the contractor. The fact remains that the county has

received the benefit of the work and is under a moral obligation to pay for it. (See the case of State ex rel. Hunt vs. Fronizer, 77 O. S., 7).

As to the source of funds with which to make payment, your letters indicate that the county has on hand as the accruals of a levy under section 6926 G. C. more than enough to pay both of the items mentioned. No reason appears why payment should not be made by the county, in the first instance, out of the accruals of said levy under section 6926. Of course, distribution as between county, township and property owners will finally be made in accordance with the proportions mentioned in your letters. As a condition precedent, however, to the payment of the two items in question, the county auditor should first make his certificate to the commissioners of the fact that the funds are on hand, which certificate should be filed with the commissioners and recorded as provided in section 5660; and thereupon the commissioners should pass a resolution appropriating the specific sum which is to be applied in payment of the two items in question.

By freight refunder, you doubtless mean reimbursement of contractor for "excess freight charges" as provided for by Act 108 O. L. (Pt. I) p. 548. By the terms of section 5 of that act, counties, townships and municipalities are authorized under certain conditions to reimburse contractors for additional freight charges paid out as the result of freight rate increases ordered by the United States government. Among other things, said section provides:

> "Payments *shall be made* from any fund available for the construction, improvement, maintenance or repair of roads, highways, streets or bridges *created by general taxation and against which no contractural obligations exist.*"

This language taken in connection with the general tenor of said section 5, indicates plainly that the reimbursement, if made, is to be at the expense of the subdivision as a whole, and is not to be treated as an expense item of a particular improvement. No authority is found in the act in question for the issuing of bonds for the purpose of providing funds; and indeed the quotation just above made negatives the idea of any such authority.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1145.

STATE TEACHERS' RETIREMENT SYSTEM—TEACHERS ELIGIBLE.

1. *A teacher who had not taught for one or more years prior to September* 1, 1920, *would not be eligible to membership in the state teachers' retirement system and have the status of "present teacher," even though teaching during the school year of* 1920-21, *unless such teacher was teaching at the beginning of the school term starting in the school year beginning on September* 1, 1920.

2. *The state teachers' retirement system is for the benefit of teachers regularly employed as such and under the provisions of section* 7896-50 *G. C. each employer shall certify to the state retirement board the names of all teachers to whom the act applies and at such times as the state retirement board may require.*

3. *Where a substitute teacher is regularly employed and carried on the payroll as one of the teaching force, such substitute teacher is entitled to the provisions of the teachers' retirement system law.*

4. *Under authority of section* 7896-3 *G. C. the retirement board can and should*