3592.

APPROVAL, BONDS OF CAMBRIDGE CITY SCHOOL DISTRICT, GUERNSEY COUNTY, OHIO—$3,600.00.

COLUMBUS, OHIO, December 6, 1934.

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

3593.

APPROVAL, BONDS OF PARMA CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$1,000.00.

COLUMBUS, OHIO, December 6, 1934.

Industrial Commission of Ohio, Columbus, Ohio

3594.

APPROVAL, BONDS OF JEFFERSON COUNTY, OHIO—$25,000.00.

COLUMBUS, OHIO, December 6, 1934.

Industrial Commission of Ohio, Columbus, Ohio.

3595.

APPROVAL, BONDS OF ASHLAND CITY SCHOOL DISTRICT, ASHLAND COUNTY, OHIO—$27,445.87.

COLUMBUS, OHIO, December 7, 1934.

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

3596.

MOTOR VEHICLE—VIOLATION OF SECTION 12628-1, G. C.—INTOXICATED DRIVER STEERING AUTOMOBILE PUSHED OR PULLED BY ANOTHER AUTOMOBILE—"OPERATION" OF MOTOR VEHICLE DEFINED.

SYLLABUS:

Where A is intoxicated and is found steering his disabled automobile on a

public highway, which is being pushed or pulled by B's motor vehicle, the act of A in steering his car constitutes the "operation" of a motor vehicle and is a violation of Section 12628-1 *of the General Code of Ohio.*

COLUMBUS, OHIO, December 7, 1934.

HON. MARCUS MCCALLISTER, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

> "Your opinion is earnestly requested on the following hypothetical question:
>
> Suppose A, who is under the influence of alcohol, is found steering his disabled automobile on a state highway, which is being pushed or pulled by B's car. Would the act of A in steering his car constitute the *operation* of a motor vehicle in violation of section 12628-1 of the General Code of Ohio?"

Section 12628-1, General Code, provides in part:

> "Whoever *operates* a motor vehicle of any kind upon any public highway or street while in a state of intoxication, or under the influence of alcohol, narcotics or opiates, upon conviction thereof shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars or imprisonment in the county jail for not less than thirty days nor more than six months, or both, and shall be suspended from the right to operate a motor vehicle for not less than six months nor more than one year; and whoever operates a motor vehicle, upon any public highway or street, during the time he or she has been suspended from such operation, under the provisions of this section, shall be guilty of a misdemeanor and shall be imprisoned in the county jail for not less than six months nor more than one year. * * *" (Italics the writer's.)

It is first necessary to determine whether an automobile which could not be operated by its own power is a "motor vehicle" within the meaning of that term as defined by Section 6290, General Code, wherein the following definitions are given:

> "1. 'Vehicle' means everything on wheels or runners, except vehicles operated exclusively on rails or tracks, and vehicles belonging to any police department, municipal fire department, volunteer fire department or salvage company organized under the laws of Ohio or used by such department or company in the discharge of its functions.
>
> The provisions of this chapter shall apply to equestrians, horses hitched to vehicles and let horses in the same manner as to vehicles.
>
> 2. 'Motor vehicle' means any vehicle propelled or drawn by power other than muscular power, except road rollers, traction engines, power shovels and power cranes used in construction work and not designed for or employed in general highway transportation, well drilling machinery, ditch digging machinery and farm machinery."

It is apparent from a mere reading of these sections that the automobile in question even though at the time it could not be operated by its own power, was a "motor vehicle" within the legislative definition quoted supra. Under a similar statute it has been held that a "towed" automobile was a motor vehicle. See *State* vs. *Tacey,* 102 Vt. 439, 150 Atl. 68. And see *State* vs. *Storrs,* (Vt.) 163 Atl. 560.

The question now presented is when A is steering a disabled motor vehicle on the state highway, which motor vehicle is being pushed or pulled by B's motor vehicle, is A "operating" a motor vehicle within the meaning of Section 12628-1, General Code, quoted supra.

Despite the general rule that criminal statutes are to be strictly construed, Section 12628-1, quoted in part supra, prohibiting the operation of a motor vehicle while intoxicated was designed to protect the public from the menace of automobiles operated upon the public highways with inadequate and inefficient control, and such statute should be reasonably construed. Even though a motor vehicle is not being operated by its own power, still it is obvious that the steering of a motor vehicle by an intoxicated person when the automobile is being towed or pushed by another motor vehicle, is hazardous to pedestrians and the general traveling public, and consequently the statute should be construed so as to accomplish the purpose for which it was intended. I am unable to find any Ohio authorities interpreting the act on the precise point in question, but decisions from other states indicate that A, under the conditions described in your request, is "operating" such motor vehicle.

It has been held that one who gets into a car and starts the engine, although he does not attempt to move the car, is operating it; *State* vs. *Ray,* 4 N. J. Misc. Rep. 433, 33 Atl. 486; that one who gets into an automobile and merely idles the engine is operating such car; *State* vs. *Webb,* 202 Iowa, 633, 210 N. W. 751; it has also been held that one who gets into a car, starts the engine, and attempts to move the car, but is unable to do so because of lack of power, or for other reasons, is operating such car. *State* vs. *Overbay,* 210 Iowa, 758, 206 N. W. 624; *People* vs. *Domagala,* 123 Misc. Rep. 757, 206 N. Y. S. 288; see also *Commission* vs. *Clark* 254 Mass. 566, 150 N. E. 892; *State* vs. *Storr,* (Vt.) 163 Atl. 560. See also L. R. A. notes, 42 A. L. R. 1498, 49 A. L. R. 1329 and 68 A. L. R. 1356.

In the case of *State* vs. *Tacey,* 102 Vt. 439, 150 Atl. 68, it was held as disclosed by the third branch of the syllabus:

> "3. Where defendant, while under the influence of intoxicating liquor, steered or attempted to steer his automobile while it was being towed, held that he 'operated' such an automobile within the meaning of Laws 1925, No. 70, Section 87, prohibiting operation of motor vehicles by one under influence of intoxicating liquor."

The statute under consideration in that case provided in section 3 paragraph 2 that " 'operate', 'operating', 'operated' as applied to motor vehicles shall include an attempt to operate and shall be construed to cover all matters and things connected with the presence and use of motor vehicles on the highways, whether they be in motion or at rest."

At page 442, it is stated:

> "* * * we entertain no doubt but that in prosecutions of this character our statute was intended to, and does, cover, such acts as the

respondent is shown to have committed. The primary object of the particular provision on which this prosecution is based is the protection of the public from injury to person or property by drunken operators on our streets and highways, and, if it can fairly be done, the statute must be so construed as to accomplish the purpose for which it was intended. * * *"

In my opinion the statutes thereunder consideration and the Ohio Statutes are not so dissimilar as to destroy the force of the reasoning and conclusion of that opinion. Consequently, specifically answering your inquiry, it is my opinion that where A is intoxicated and is found steering his disabled automobile on a public highway, which is being pushed or pulled by B's motor vehicle, the act of A in steering his car constitutes the "operation" of a motor vehicle and is a violation of Section 12628-1, of the General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3597.

HORSE RACING ACT—CONSIDERATION BY RACING COMMISSION OF DATES ASSIGNED TO COUNTY AGRICULTURAL SOCIETY.

SYLLABUS:

The State Racing Commission, in assigning dates for a horse racing meeting at which the pari-mutuel or certificate system of wagering is to be allowed, must take into consideration the dates assigned for the same track by the Racing Commission to a county agricultural society to conduct a horse racing meeting at which the pari-mutuel or certificate system of wagering was allowed.

COLUMBUS, OHIO, December 8, 1934.

Ohio State Racing Commission, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your letter requesting my opinion as to whether the dates assigned by the Racing Commission to a county agricultural society to conduct a horse racing meeting at which pari-mutuel betting is permitted, should be taken into consideration by the Commission in awarding dates for other horse racing meetings to be held at the same track, at which meetings the pari-mutuel or certificate form of wagering or betting is to be allowed.

Section 1079-7, General Code, reads:

"No permit shall be issued under this act authorizing horse racing at any place, track or enclosure except on successive week days, excluding Sundays, and except between the hours of 12:00 o'clock noon and 7:00 o'clock in the afternoon, for running horse racing meetings, and between the hours of 12:00 o'clock noon and 12:00 o'clock midnight for light harness horse racing meetings, nor shall any permit be granted for the holding or conducting of a horse racing meeting at any place in this