

3821.

APPROVAL, BONDS OF VILLAGE OF MAUMEE, LUCAS COUNTY,
OHIO—\$7,500.00.

COLUMBUS, OHIO, December 7, 1931.

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

3822.

MECHANICS LIEN LAW—CREDITORS OF BANKRUPT CONTRACTOR
HAVE NO LIEN ON FUNDS IN HANDS OF DIRECTOR OF HIGH-
WAYS—TRUSTEE IN BANKRUPTCY ENTITLED TO SUCH FUNDS
IN PREFERENCE TO CREDITORS.

SYLLABUS:

1. *Creditors of a bankrupt contractor have no claims against the funds in the hands of the Director of Highways by reason of the provisions of Sections 8324 et seq. of the General Code.*

2. *The trustees in bankruptcy, upon completing a contract of the bankrupt with the Director of Highways, is entitled to the funds in the hands of the Director of Highways in preference to the creditors of the bankrupt.*

COLUMBUS, OHIO, December 8, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion which reads as follows:

“A contract was awarded for the construction of a section of highway. The contractor became bankrupt and the surety company which furnished the bond is being liquidated by the insurance department of the State of New York. The trustee in bankruptcy is completing the contract through a sub-contractor.

A number of creditors have claims which would have been valid against the surety, and are attempting to press these claims against the state. There is still a balance due on the contract. Should this balance be held for the creditors or should it be paid to the trustees in bankruptcy?”

I assume, from a reading of your letter, that the bond issued by the surety company was executed and received by you in a legal manner. The creditors who are pressing a claim against the unpaid funds in your hands, are evidently asserting this claim under the provisions of Sections 8324 et seq., of the General Code. This office has consistently held that the provisions of said sections are not applicable to state work or improvements.

Under date of September 5, 1929, I rendered to your predecessor, Hon. Robert N. Waid, an opinion which is found in Opinions of the Attorney General for 1929, volume II, page 1417, the syllabus of which reads as follows:

"The provisions of Sections 8324, et seq., General Code, are not applicable to state works or improvements, and the Director of Highways is without authority to withhold funds due to a contractor under a contract entered into with the state for the construction of works or improvements of the state under the direction of the Director of Highways, on the ground that a person or corporation has filed with such Director a sworn itemized statement of material furnished to such contractor and used in the construction of such works or improvement for the purpose of seeking a lien upon such funds."

Upon re-examining the statutes, and decisions of the courts, I am of the opinion that the above ruling was correct, and I hereby affirm the same.

With respect to your specific question as to whether this balance should be held for the creditors, or should it be paid to the trustee in bankruptcy, the trustee in bankruptcy is not obligated to assume and perform the liabilities under an executory contract, however, when he does elect to accept and perform such executory contract, he accepts the contract, subject to exactly the same liabilities, and is entitled to the same benefits as the bankrupt.

In Collier on Bankruptcy, Thirteenth Edition, Vol. 2, p. 1739, the law is summarized as follows:

"Trustees in bankruptcy may either assume or renounce executory contracts of the bankrupt as they deem best for the interests of the estate, and they are entitled to a reasonable time to elect whether to accept such contracts or to repudiate them. * * If they elect to assume such a contract, they are required to take it cum onere, as the bankrupt enjoyed it, subject to all its provisions and conditions, in the same plight and condition that the bankrupt held it."

In view of the foregoing, I am of the opinion that you owe no debt to the creditors whose claims would have been valid against the surety and that these creditors have no authority to press a claim against the funds in your hands, and that therefore the balance of the funds should be paid to the trustee in bankruptcy when, and as he becomes entitled to the same, under the contract of the bankrupt.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3823.

CHURCH PROPERTY—USED EXCLUSIVELY FOR PUBLIC WORSHIP
—SUBJECT TO ASSESSMENTS FOR STREET IMPROVEMENTS.

SYLLABUS:

Under section 3812 of the General Code, a municipality has the authority to levy assessments for street improvements upon church property used exclusively for public worship, where such church property lies within the municipality.