

Crabbe Act may, by virtue of Sections 4133, et seq., General Code, be released or paroled by the officer authorized by statute to manage such workhouse.

In view of the foregoing discussion, I am of the opinion that:

1. County commissioners of a county, not having a county workhouse, may, by virtue of Section 12382 of the General Code, and in accordance with its provisions, release on parole indigent prisoners confined in the county jail for fine and costs alone, imposed for violation of the Crabbe Act.

2. County commissioners have no authority, under Section 12382 of the General Code, to release prisoners confined in a municipal workhouse where such persons are being maintained under a contract between the county commissioners and the Director of Public Safety of such municipality. Under Sections 4133, et seq., General Code, such prisoners may be released or paroled by the officer authorized by statute to manage such workhouse.

Respectfully,
GILBERT BETTMAN,
Attorney General.

494.

TAX AND TAXATION—MOTOR VEHICLE LICENSE AND GASOLINE TAXES—MUNICIPALITY MAY CONSTRUCT STORM WATER DRAINS FROM SHARE OF PROCEEDS.

SYLLABUS:

A city may expend funds which it receives under the provisions of Sections 5537 and 6309-2 of the General Code, as amended by the 88th General Assembly, in House Bill No. 104, for the purpose of constructing local storm water drains which are installed as a part of the street construction for the purpose of draining such street.

COLUMBUS, OHIO, June 8, 1929.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

“House Bill No. 104, Mr. Anderson, was passed by the 88th General Assembly and will become effective during the coming summer, unless a referendum petition be filed.

This bill in part provides that the city's portion of the motor vehicle license tax and gasoline tax may be used to construct, maintain and repair their streets and roadways.

QUESTION: May the city's portion of these funds be used for the purpose of constructing storm water sewers which are installed as a part of the street construction and for the purpose of draining such street?”

At the outset, it may be noted that your communication is premised by the statement that House Bill No. 104 will become effective during the coming summer unless a referendum petition be filed. In this connection, it should be mentioned that Section 2 of said act, which amends Section 5527, General Code, expressly levies a tax of two cents on each gallon of motor vehicle fuel sold or used by any dealer within the State of Ohio, and it appears to be clear that this particular section, under the

provision of Section 1d of Article II of the Constitution of Ohio, went into immediate effect. Moreover, the original act of which this section was a part, as well as Section 5537 of the General Code, which is now amended in Section 2 of said House Bill No. 104, was held to be a law providing for a tax levy and not subject to the referendum, in the case of *State, ex rel. vs. Brown*, 112 O. S. 590. However, in an opinion, No. 327, issued under date of April 20, 1929, to Hon. Myers Y. Cooper, Governor of Ohio, which considered the question as to whether House Bill No. 17, which provided for the erection of a State office building and levied a tax for such purpose, was subject to a referendum, it was held that Section 9 of the act, which related to the levying of the tax, went into immediate effect, whereas the remainder of the bill was subject to the provisions of the referendum.

In view of the foregoing, it will be observed that a question of some difficulty may arise as to what parts of said House Bill No. 104 are subject to the referendum. Inasmuch as you do not specifically present this question, it is believed expedient for this department to reserve an opinion thereon unless and until such question is specifically presented. The act was passed April 3, 1929, approved by the Governor April 19th, and filed in the office of the Secretary of State, April 22, 1929, and, of course, there cannot be any doubt but that the same will be in full force and effect ninety days after it is filed in the office of the Secretary of State. However, as above stated, the question is reserved as to what parts of said act go into immediate effect.

Section 5537, as amended by said House Bill 104, in part, provides :

“Thirty per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporations for the sole purpose of maintaining, * * * repairing, constructing and repaving the public streets and roads within such corporation, provided however that not more than fifty per cent of the total funds available during any year from such source, including the unexpended balance of such funds from any previous year, shall be used by any such municipal corporation in such construction and repaving, which shall be done by contract let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation.”

Section 6309-2, as amended in said House Bill 104, in part, provides :

“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 * * * of registration as provided in this chapter. The portion of such money due the municipal corporation 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 * * * 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, 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 * * * in which the existing foundations thereof * * * are used as a sub-surface of the improvement thereof, in whole or in substantial part; and in the treasuries of such municipal corporations, such moneys shall constitute a fund which shall be used for the

maintenance, repair, construction and repaving of public streets, and for no other purpose and shall not be subject to transfer to any other fund, provided however that as to such municipal corporations, not more than fifty per cent of the total funds available during any year from such source including the unexpended balance of such funds from any previous year, shall be used in such construction and repaving which shall be done by contract let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation."

As suggested in your communication, both of the sections hereinbefore quoted from, within the limitations therein prescribed, authorize municipalities to use the funds therein provided for in repairing, constructing and repaving public streets and roads within such corporation. Since it is clear that such funds may be used in constructing streets and repairing streets, the question your communication presents is whether or not a storm sewer which is installed in a part of the street construction is to be regarded as a part of said street construction. Attention is directed to Section 3812, General Code, which, among other things, authorizes each municipal corporation to levy and collect assessments for the purpose of improving any street or public road by grading, draining, curbing, paving, repaving, repairing, et cetera. It would seem improper to conclude that a municipality, in the construction of a street, could not take into consideration the necessary drainage in order to provide for the utilization and preservation of such street. In the case of *Roebeling vs. Cincinnati*, 102 O. S. 461, consideration was given to the provisions of Section 3812, General Code. The question arose by reason of the fact that the council, in its legislation, referred to the draining of a street in connection with its improvement. In pursuance of such legislation, the authorities attempted to assess property owners for the construction of a sanitary sewer. The court rightfully held that the term "drain," as used in connection with such a proceeding, did not include a sanitary sewer. However, upon the question of what constitutes a "drain," Judge Hough makes the following pertinent comment:

"A drain is an incident to street building. No engineer would think of constructing a street without providing for the drainage of that street. It is an essential element of good workmanship and substantial construction, and it is highly important that drains be provided to prevent the accumulation of water upon the surface of the street and adjacent territory, for the purpose of preventing early decay and deterioration of the street. By reason of its construction a street may receive surface water, and frequently does, from territory outside of its own compass, from the terraces of abutting property and from the roofs of houses thereon."

As suggested in the opinion of the court above referred to, no street improvement would be complete without proper arrangements being taken to secure the necessary drainage, and so long as funds are used for such purpose in an amount reasonably necessary for such purpose, it is believed that no valid objection could be made to such a procedure. I am not clear just what meaning you give to the term "storm water sewers." For the purposes of this opinion, however, I have assumed that you mean the usual local storm water drains installed as an incident to every modern street improvement and not the trunk sewers which often serve as an outlet for these local drains. So restricted, the answer to your inquiry presents little difficulty in the light of the foregoing discussion.

It is accordingly my opinion that a city may expend funds which it receives under the provisions of Section 5537 and 6309-2 of the General Code, as amended by the

88th General Assembly in House Bill No. 104, for the purpose of constructing local storm water drains which are installed as a part of the street construction for the purpose of draining such street.

Respectfully,
GILBERT BETTMAN,
Attorney General.

495.

SINKING FUND TRUSTEES—MUNICIPAL—DEPOSITS SECURED BY
REALTY MORTGAGES OR BONDS UNAUTHORIZED.

SYLLABUS:

The trustees of a municipal sinking fund are not authorized to accept real estate mortgages or bonds secured by real estate mortgages, as security for deposits made in the public depository which may be selected by them.

COLUMBUS, OHIO, June 8, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your communication in which you request my opinion in answer to the following question:

“May the trustees of the sinking fund in a municipality accept first mortgages or bonds secured by first mortgages upon unencumbered real estate located in Ohio as security for the deposit of the moneys in their hands held in reserve and deposited in a public depository by authority of Section 4515, General Code.”

Section 4515, General Code, reads as follows:

“At least once every three years the trustees of the sinking fund shall advertise for proposals for the deposit of all sums held in reserve and shall deposit such reserve in the bank or banks, incorporated under the laws of this state or of the United States, situated within the county, which offer, at competitive bidding, the highest rate of interest and best security and accommodation and give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety in a sum not less than twenty per cent in excess of the maximum amount at any time to be deposited. There shall not be deposited in any one bank an amount in excess of the paid-in capital stock and surplus of such bank, or to exceed in amount four hundred thousand dollars except when such moneys are deposited for the purpose of meeting the payment of some obligation.”

A depository of public funds has been defined as a person designated by law, to whom public officials may or should confide the custody of public funds. The safeguarding and preservation of the public funds of the several subdivisions of the State has been the subject of especial care in Ohio, and legislation has been enacted providing for public depositories for the public funds of the State, the several counties, townships, municipal corporations and school districts. The method of selecting these depositories of the several classes of funds above named, the limitation thereon, and