

2489.

ROADS AND HIGHWAYS—ADVERTISEMENT OF PROPOSED LETTING—HOW TO CALCULATE TWO WEEKS' PERIOD PROVIDED BY SECTION 1206 G. C.—DAY OF FIRST INSERTION OF ADVERTISEMENT IS TO BE INCLUDED IN CALCULATION.

In calculating the two weeks' period provided by section 1206 G. C. for notice of the letting of state highway contracts, the day of the first insertion of the advertisement is to be included. Accordingly an advertisement inserted on September 30th and October 7th containing notice of a proposed letting on October 14th, is sufficient as to time.

COLUMBUS, OHIO, October 18, 1921.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

GENTLEMEN:—Your department has made request, in a letter of recent date, for an opinion as to the following:

“At a letting advertised by this department for October 14, 1921, bids were received on a project, among others, initiated upon the application of the county for state aid; and in advertising the letting of the project in question, notice was published in the county where the improvement is to be made, in two newspapers of the dominant political parties therein and of general circulation in said county.

In one of the newspapers, the advertisement was inserted in its issue of September 28 and October 5; and in the other newspaper in its issues of September 30 and October 7.

The question is whether the publication mentioned is sufficient to permit this department to proceed to award the work under bids received on October 14.”

Your inquiry has reference to section 1206, G. C., which, so far as pertinent, reads (108 O. L. 486):

“Upon the receipt of a certified copy of the resolution of the county commissioners or township trustees that such improvement be constructed under the provisions of this chapter, the state highway commissioner shall advertise for bids for two consecutive weeks in two newspapers of general circulation and of the two dominant political parties published in the county or counties in which the improvement, or some part thereof is located, if there be any such papers published in said counties, but if there be no such papers published in said counties then in two newspapers having general circulation in said counties, and such commissioner shall also have authority to advertise for bids in such other publications as he may deem advisable. Such notices shall state that plans and specifications for the improvement are on file in the offices of the state highway commissioner and the county surveyor, and the time within which bids therefor will be received.”

The language thus employed as to the time for the advertisement is somewhat indefinite, in that there is no provision in terms that the insertion shall be for two consecutive weeks *before* the day of the letting. However, for present purposes, the statute will be taken as implying that two full

weeks must have elapsed between the day of the first insertion of the advertisement and the ultimate day fixed for the receipt of bids. It cannot be urged with any show of reason that any longer time of notice is required by the statute than is imposed by the assumption just made.

The sole question, therefore, raised by your inquiry is whether in calculating the two weeks' time, the day of the first insertion of the advertisement is to be included. It is plain, of course, that if this day is included, then, to put the matter in concrete form, if the first insertion is made on Friday, one full week will have elapsed at midnight of the following Thursday and two full weeks will have elapsed at midnight of the next following Thursday, thus permitting the letting to be held on the second Friday after the first publication.

The question whether under the circumstances stated the day of the first insertion is to be included in calculating time has been the subject of a wide divergence of opinion in the courts of various states. However, in the opinion of this department, the question has been clearly and definitely disposed of in a unanimous opinion by the supreme court of this state in the case of Hagerman vs. Building Association, 25 O. S. 186. In that case the court had under consideration section 436 of the code of civil procedure (now section 11681 G. C.) which provided in part that:

"Lands and tenements taken in execution shall not be sold until the officer cause public notice of the time and place of sale to be given *for at least thirty days before* the day of sale by advertisement in some newspaper printed and of general circulation in the county. * * *

At the same time there was in force section 597 of the code of civil procedure (present section 10216, G. C.) providing that:

"The time *within which* an act is to be done, as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday it shall be excluded."

In the light of these two statutes the conclusion reached by the court as embodied in the eighth paragraph of the syllabus is:

"In computing the time for which notice of a sale on execution should be advertised before the day of sale, as prescribed in section 436 of the code, the day on which the notice was first published may be included, and the day of sale must be excluded. Section 597 does not apply in such case. When the notice is published in a daily paper, as authorized by section 436, it is sufficient if the first publication be thirty days before the day of sale."

The court say in the course of the opinion at page 207:

"It is sufficient to advertise notice of the time and place of a sale on execution for thirty days before the day of sale. In computing the time, the day of sale is excluded, but the day upon which advertisement was first made, may be included.

Section 597 of the code does not apply in such case. This is not a case where an act is to be done *within* a certain time; the sale takes place after the time for advertising has expired. The time for advertising such sale is determined by the special provisions contained in

section 436; and the time therein prescribed may be computed by counting the day on which the notice was first given."

The rule thus laid down clearly applies in principle to section 1206 G. C. with the result that the day on which the advertisement first appears is to be included in calculating the two weeks' time.

In line with the Hagerman case, *supra*, is that of Voorhees vs. Minor, 19 O. C. C., 560; 10 O. C. D., 681, wherein the circuit court cites and follows the Hagerman case and makes note of additional authorities, including that of Barto vs. Abbe, 16 Ohio, 409, in which latter case the supreme court held as to a required three days' notice of a trial to be held before a magistrate, that the day of service of the notice was to be included in calculating the three days' time, and that accordingly a notice served on the 6th day of the month was good as to a trial set for the 9th day of the month. In the Voorhees case, the court made use of the following expression, which is particularly apt as to your inquiry:

"But we are of the opinion that the claim of the counsel for the plaintiff, that there is a wide difference between a contract or a law providing a period *within which* a thing must be done, and a contract or law providing a period *beyond which* a thing may be done, is well founded, and that while in the first case supposed there is a great conflict of authorities as to whether the first day shall be included and the last day excluded, or the converse, in the second case the great weight of authority is that the first day is included."

In the Hagerman case, the supreme court contented itself with a statement of the rule and did not advance any reason for the rule. But if reason be sought, it will be found first, in the theory that fractions of a day are not ordinarily taken into account in calculating time for the doing of an act provided for by law or contract, and second, in the fact that newspapers, practically without exception, get into circulation on the day of their date; so that it is to be presumed that notice of an intended action will reach interested persons on the day of the publication. It is of further interest to note with reference to the Hagerman case that the statutory language therein construed not only involved private property rights, but was much more specific in its requirements of the full period of time before the doing of an act than is section 1206 G. C. Upon the whole, then, it is to be said that the case is of unusual import as authority for the answer to your inquiry.

It may be added that in the recent case of State ex rel. Boyd vs. McMaster, 29 O. C. A. 382, the court in dealing with the provisions of section 1206 G. C., seems to have been clearly of the opinion that the day of the first insertion is to be included in calculating the two weeks' period, though it is to be said that no question was raised in the case that such is the correct rule.

You are accordingly advised, in specific answer to your inquiry, that the publication you describe constitutes a compliance with the provisions of section 1206 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.