

In this connection, it will be noted that Section 12194, General Code, provides in part:

"When the surety in a judgment, who is certified therein to be such, or his personal representatives, pays the judgment, or part thereof, to the extent of such payment he shall have all the rights and remedies against the principal debtor that the plaintiff had at the time of such payment."

It will further be observed that Section 11713 of the General Code provides that when judgment is rendered upon an instrument of writing in which two or more persons are jointly or severally bound and it is made to appear to the court, by parole or other evidence, that one or more of the persons against whom the judgment is rendered is a surety or bail for the co-defendant, the clerk must certify which of the defendants is the principal debtor and which is surety.

It, therefore, is clear that in the event the sureties are required to pay the funds which they have secured, such sureties will be entitled to the right of subrogation.

Based upon the foregoing, you are specifically advised that it is my opinion that:

Where a board of education has duly designated a bank as a school depository under Section 7605 of the General Code, and a surety bond has been executed conditioned to secure that said depository shall faithfully and truly, according to law, perform its duties as the custodian of such school funds, such surety is liable to the board of education for the full amount of the fund deposited therein to the extent of the maximum amount named in said bond, as soon as such depository fails to deliver said fund on demand being made therefor, notwithstanding said bank may be in the process of liquidation.

Respectfully,

GILBERT BETTMAN,
Attorney General.

396.

PUBLIC WORK—EMPLOYES OF SANITARY DISTRICT—HOURS OF
LABOR—WHAT CONSTITUTES EXTRAORDINARY EMERGENCY.

SYLLABUS:

Where the only emergency in any sense presented with respect to the construction of the works of a sanitary district, created and organized to furnish a supply of pure water to cities in a sanitary district, is the great and pressing need for such water supply, which need has existed since the inception of said project and which will continue until all of the works of the sanitary district are completed, such emergency, if such it be, is not an extraordinary emergency within the meaning of the term as used in Section 17-1, General Code, and neither said sanitary district nor contractors constructing the works of said district have any right to require or permit workmen employed in the construction of said works to labor more than eight hours a day or forty-eight hours a week.

COLUMBUS, OHIO, May 11, 1929.

HON. WILLIAM T. BLAKE, *Director Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication, which is as follows:

"I am herewith submitting correspondence between The Mahoning Valley Sanitary District and this department pertaining to a request by the former that they be authorized and permitted to engage workmen on 'Public Work,' viz., construction work involved in the development of a water supply for the cities of Youngstown and Niles.

Not satisfied with our answer, Mr. Perry, attorney representing the board of directors of said The Mahoning Valley Sanitary District, has called in person and requested a written statement specifically granting them the permit to work employes more than eight (8) hours daily and more than forty-eight (48) hours per week.

This we declined, agreeing, however, with Mr. Perry to submit the matter to the Attorney General for an opinion."

In the correspondence referred to in your communication is a communication directed to the Industrial Commission of Ohio by The Mahoning Valley Sanitary District. This communication reads in part as follows:

"The board of directors of the Mahoning Valley Sanitary District herewith respectfully submits to the Industrial Commission of Ohio request for action by the Commission to authorize and permit daily working hours in excess of 8 hours per day and weekly hours in excess of 48 hours per week on the various contracts awarded by this district for the construction work involved in the development of a water supply for the cities of Youngstown and Niles.

Following is a general statement of the nature of the work, the contracts which have been awarded and are to be awarded, and the conditions which create an extraordinary emergency.

The cities of Youngstown and Niles now obtain their respective water supplies from the Mahoning river. This stream receives sewage and industrial wastes of all of the cities in the Mahoning valley and the water supplies obtained from it are to be classed with the most heavily polluted water supplies of the entire country. In each city water supply after filtration is still unsatisfactory for general use. Due to these conditions protection of the public health and welfare demands immediate action to obtain a safe and satisfactory water supply for these cities at the earliest possible date.

By action of the two cities the Mahoning Valley Sanitary District was organized in 1926 and the district is now engaged in the construction work involved in developing a new water supply for Youngstown and Niles. This development will include a dam on Meander Creek, a storage reservoir formed by the dam in the creek valley, two viaducts to provide highway crossings of the reservoir, new border roads along the reservoir, the clearing and grubbing of the reservoir area, a filtration plant and pumping station near the dam site, pipe line to deliver the supply to Youngstown and to Niles, a distributing reservoir and a standpipe in Niles. The entire improvement will involve an investment from \$8,000,000 to \$9,000,000."

In this communication of The Mahoning Valley Sanitary District, it is stated that construction contracts have been awarded for certain parts of the public improvements contemplated by the district and that said district has in preparation and intends to award during the present year contracts for other parts of such work. In said communication it is further said:

"The conditions giving rise to the emergency involve not only the neces-

sity of completion of the entire project at the earliest possible date for the protection of the public health and welfare, but also the physical necessities involved in dam construction and all other construction work incident to the development of the supply. To avoid serious loss and damage it is necessary that construction work at the dam be carried forward with avoidance of all delays so as to avert possible washouts and the losses thereby incurred. It is likewise necessary that all reservoir construction work including bridges, clearing and grubbing roads, etc., be completed with the completion of the dam as filling of the reservoir must immediately ensue.

This board is of opinion that the conditions involved necessitate working hours in excess of the limitations of 8 hours per day and 48 hours per week to insure the successful completion of the work in hand and to provide proper protection of the public health and welfare, and respectfully requests that action be taken by the commission so as to permit such limitations to be exceeded."

Attached to your communication and as a part of the correspondence therein referred to is a communication directed to you by the Director of Health, which is as follows:

"The attention of this department has been directed to a request by the board of directors of the Mahoning Valley Sanitary District for the permission of your department to extend the working hours of the men employed in the development of the water supply system for the cities of Youngstown and Niles.

For your information I will say that the water supply of the city of Niles has been condemned, and that of the city of Youngstown is wholly inadequate. It is essential that this work be completed on schedule time in order that the necessary water be collected. You can readily understand that should this work be not completed during the rainy season that it would mean practically a year's extension before their water supply would function.

The State Department of Health would greatly appreciate any action upon your part which would further the completion of this project, as the health of the citizens of these two cities is jeopardized by present conditions."

Waiving aside, without discussion, the question suggested by your communication and by that of The Mahoning Valley Sanitary District, whether your department, or any division thereof, has any power or authority to fix the hours of labor on public works of the kind here in question, as to which my opinion is not requested, I assume that the question that you desire and intend to submit for my opinion is whether, on the facts here presented, persons employed on the works of The Mahoning Valley Sanitary District, under contracts entered into by it for said purpose, may be required or permitted to labor on said works for more than the eight hours a day and forty-eight hours a week prescribed by Section 17-1, General Code. Said Section 17-1, General Code, provides as follows:

"Except in case of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public works carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen, to require or permit any of them to labor more than eight

hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall be construed not to include policemen or firemen."

Section 17-2, General Code, provides the sanction of a penalty for the violation of the provisions of Section 17-1, General Code. Both of these sections of the General Code were enacted pursuant to Section 37 of Article II of the Ohio Constitution as amended in 1912. This constitutional provision is as follows:

"Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise."

It is of interest to note in this connection that the constitutional provision above quoted was adopted after a decision of the Supreme Court holding that an act quite similar in its provisions to those of Section 17-1, General Code, was unconstitutional. *City of Cleveland vs. Construction Company*, 67 O. S. 197.

The Mahoning Valley Sanitary District is a sanitary district created and organized under an act of June 7, 1919 (108 O. L. Pt. 1, p. 634, §§6602-34 to 6602-106 of the General Code), to provide a water supply for domestic, municipal and public use in the cities of Youngstown and Niles in said district. The question here presented does not require any consideration of the provisions of the sanitary district act other than to note that by the provisions of Section 6 thereof, Section 6602-39, General Code, the sanitary district created under said act "shall be a political subdivision of the State of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities and obligations; to exercise the right of eminent domain and of taxation and assessment as herein provided; to issue bonds and to do and perform all acts herein expressly authorized and all acts necessary and proper for the carrying out of the purposes for which the district was created, and for executing the powers with which it is invested." It follows from the provisions of the sanitary district act above quoted that The Mahoning Valley Sanitary District is a political subdivision of the state and, as such, is amenable to the provisions of Section 17-1, General Code. There can be no question but that the public improvements and works, the construction of which is contemplated by The Mahoning Valley Sanitary District, are "public work" as that term is used in Section 17-1, General Code. *Strange vs. Cleveland*, 94 O. S. 377; *State vs. Peters*, 112 O. S. 249.

The further question is here presented whether or not, under the facts stated in the correspondence submitted with your communication, a situation or condition of "extraordinary emergency" is presented such as under the provisions of Section 17-1, General Code, will allow The Mahoning Valley Sanitary District, or contractors constructing the several work of the sanitary district, to require or permit workmen employed in the construction of such works to labor more than eight hours a day or more than forty-eight hours a week. Inasmuch as the term "extraordinary emergency", as used in Section 17-1, General Code, is identical with the term adopted by the people as a part of the constitutional provision above quoted, these words are to be taken in their natural, plain and ordinary signification as the people must have understood them in the adoption of said constitutional amendment. As noted by the court in the case of *State ex rel. vs. Zangerle*, 95 O. S. 1, 8, the term "emergency" in itself has been defined in the Century Dictionary as "(1) a sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication

of circumstances. (2) A sudden or unexpected occasion for action; exigency; pressing necessity." As the word "emergency" has been used in various statutory provisions, it has been held to be a sudden or unexpected occurrence or condition calling for immediate action. *Seaboard Air Line Ry. vs. McMichael*, 143 Ga. 689; *City of Atlanta vs. Scott*, 153 Ga. 1; *People ex rel Rayland Realty Co. vs. Fagin*, 194 App. Div. (N. Y.) 185; *Colfax County vs. Butler County*, 83 Neb. 803.

Touching the meaning of the term "extraordinary emergency", as used in Section 17-1, General Code, it obviously refers to some condition other than that merely calling for great haste in the construction of works that will necessarily extend over a considerable period of time. In other words, the extraordinary emergency which relieves the political subdivision or its contractors from the provisions of this act is not one that is contemplated and necessarily inheres in the work to be done. *United States vs. Sheridan-Kirk Contract Co.*, 149 Fed. Rep. 809; *United States vs. Garbish*, 222 U. S. 257, 261.

In the case of *United States vs. Sheridan-Kirk Contract Co.*, *supra.*, it was held by the District Court for the Southern District of Ohio, in a case involving the consideration of the act of Congress of August 1, 1892, 27 Stat. 340, relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States, that the term "extraordinary emergency", as used in said act, cannot be construed to mean a continuing emergency which would suspend the eight-hour law during the entire life of the contract, but that "it is such an unforeseen, sudden or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases."

In the case of *Penn Bridge Company vs. United States*, 29 App. D. C. 452, it was held by the court, as stated in the syllabus of the report of the case and likewise in the opinion of the court, that:

"The term 'extraordinary emergency,' within the meaning of Sec. 892 D. C. Code, limiting to eight hours the daily labor on public works, except in case of such emergency, imports a sudden and unexpected happening; an unforeseen occurrence or condition calling for immediate action to avert imminent danger to health, or life, or property; an unusual peril, actual, and not imaginary, suddenly creating a situation so different from the usual or ordinary course in the prosecution of the public work that the court may and must conclude that Congress contemplated excepting from the operation of the law such an occurrence, so sudden, rare, and unforeseen."

In the case of *Ellis vs. United States*, 206 U. S. 246, it was held that the disappointment of a contractor with regard to obtaining some of the materials needed in the construction of the work contracted for and the delay in the work resulting from his failure to obtain such material, did not present a case of extraordinary emergency within the meaning of the act of August 1, 1892, 27 Stat. 340, or justify him in having workmen labor more than eight hours a day.

In the case of *United States vs. Garbish*, *supra.*, the court having under consideration said act of Congress restricting service of laborers employed on public works of the United States to eight hours a day, except in cases of extraordinary emergency, held that "the exception does not relate to contemplated emergencies necessarily inhering in the work, or to mere requirements of business convenience or pecuniary advantage, but only to those exceeding the common degree." The court, in its opinion in this case, said:

"The extraordinary emergency which relieves from the act is not one that is contemplated and inheres necessarily in the work. *United States vs.*

Sheridan-Kirk Contract Co., 149 Fed. Rep. 809. It is a special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden and unexpected, but an extraordinary one, one exceeding the common degree. We must assume that the phrase was used with a consciousness of its meaning and with the intention of conveying such meaning. As said by the Solicitor General, 'the phrase "continuing extraordinary emergency" is self-contradictory.'

In the case of *State vs. Walters*, 60 W. L. B. 481, it was held by the court on a consideration of the provisions of Section 17-1, General Code, as noted in the head-notes of the report of the case, that "extraordinary emergency is a sudden, unexpected occurrence or condition, calling for immediate action beyond and out of the common order, a singular, unexpected occurrence or condition. Under the law in question, the employment of workmen on public work in Ohio, for more than eight hours in any calendar day, is prohibited in all but unexpected situations, arising in an extraordinary, unforeseen manner." This decision is one by a court of inferior jurisdiction but its holding seems to be clearly supported by the higher courts in the construction of similar statutory provisions.

The facts set out in the communication of The Mahoning Valley Sanitary District and the Director of Health show that there is a pressing need for the water supply that said sanitary district was designed to furnish, and that to this end there is a need of the greatest possible expedition in the construction of the different works of said district that are required to secure and furnish such water supply. This urgent and pressing need for expedition in the construction of the works of said district has existed in a measure from the inception of the project and will continue until such works are completed. If it can be said in any sense that the situation disclosed by the facts before us presents a case of emergency, it is clear that such an emergency is one that will continue during the life of each and every contract under which the works of such sanitary district are to be constructed. This situation in itself is effective to exclude the emergency here presented, if such it can be said to be, from the definition of the term "extraordinary emergency", as used in the statute here under consideration, for, as noted in cases above cited, the term "extraordinary emergency" cannot be construed to mean a continuing emergency which would suspend the eight hour law during the entire lives of said contracts.

I am constrained to the view, therefore, that there is nothing in the situation here presented with respect to the construction of the various works of The Mahoning Valley Sanitary District which presents a case of extraordinary emergency within the meaning of that term as employed in Section 17-1, General Code, and, by way of specific answer to the question here presented, I am of the opinion that neither The Mahoning Valley Sanitary District, nor contractors constructing the works of said district, have any right to require or permit workmen employed in the construction of said works to labor more than eight hours a day or forty-eight hours a week.

Respectfully,

GILBERT BETTMAN,

Attorney General.