

the director of highways shall be the defendant. Summons shall be served and the rule days and the rights of the defendants to plead shall be the same as in civil actions in such court."

The succeeding sections prescribe the details incident to the procedure. While the language of Section 8898 is not entirely clear on the point, in my opinion, it necessitates securing the authority of the Common Pleas Court where a change is made in the location of a state road which necessitates the making of a new crossing at grade with the railroad. The Legislature has established a general policy that all crossings constructed in the future shall be at other than grade and that no more grade crossings shall be permitted except where the Common Pleas Court is convinced that the public safety will not be prejudiced thereby. Since I am informed that the approval of the Common Pleas Court has not been secured in this instance, I do not feel that I should approve the agreement at this time. When such approval is secured I shall be glad to pass upon the agreement if you again present it.

With respect to the agreement itself, I will point out that it is not clear to me what the exact situation is, and I am therefore unable to determine what authority or authorities would have jurisdiction to vacate the old right of way across the railroad. Under Section 1202 of the General Code the Director of Highways apparently has sole jurisdiction to vacate portions of the state road which may properly be abandoned by reason of relocation or realignment. I observe, however, that there are apparently two county roads which join with the state road at the crossing and I will therefore appreciate it if, in resubmitting the agreement, you give me more in detail the status of the various roads affected by the crossing.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2879.

GASOLINE TAX—PART PAYMENT BY CORPORATION—WHEN STATE
TREASURER MAY ACCEPT.

SYLLABUS:

Where payment of a portion of the tax due for gasoline sold is offered without prejudice to the right of the State to collect the balance, the Treasurer of State is authorized to accept the same.

COLUMBUS, OHIO, November 14, 1928.

HON. BERT B. BUCKLEY, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

"Attached herewith is a carbon copy of a letter received from C., M. & F., Attorneys, Guardian Building, Cleveland, Ohio, in the matter of the gasoline tax of the A. Oil Company of Wooster, Ohio.

The Treasurer has received from these attorneys the check of the A. Oil Company, payable to the order of the Treasurer of State, in the amount of \$4,801.99, the company of its own accord having made a deduction of \$3,204.32 by reason of the tax improperly paid on non-taxable benzol at two cents a gallon.

The Attorney General is requested to advise the Treasurer of State whether to accept this check in the sum made out and turn the same into the treasury."

It appears from the letter accompanying your communication that the oil company during the years 1925 and 1926 paid to the State \$3,204.32, representing a tax at the rate of two cents per gallon upon their sales of benzol during that period. The subsequent decision of the Supreme Court of Ohio in December, 1926, held that the sale of benzol was not taxable under the original gasoline tax law. The oil company now claims that it is entitled to receive reimbursement from the State for the amount so paid.

After setting forth in detail the controversy, the letter of the attorneys states that the company was liable to the State in the sum of \$8,006.31 for the month of July, 1928, representing a tax of three cents per gallon on the amount sold. A deduction of the amount claimed to be due from the State has been made for the month of July, 1928, and a check for the balance of \$4,801.99 has been transmitted by the attorneys to you, their letter stating:

"We assume that you will of course accept this check and we desire to advise you that your acceptance thereof will not be regarded as a waiver of any claim which your office may wish to assert for the amount deducted."

Your question is as to your authority to accept the check representing, as it does, an amount less than the tax upon gasoline sold during the month of July, 1928.

The deduction in question simply means that the company is refusing to pay the sum of \$3,204.32 which it owes for tax due upon gasoline sold during July, 1928. The letter of the attorneys is clear to the effect that the acceptance of this check is without prejudice to the right of the State to collect the balance. This being so, I see no reason why the check cannot be accepted by you.

Your duties with respect to the collection of the gasoline tax are defined by Sections 5530 and 5531 of the General Code. Section 5530 requires the Tax Commission to transmit a statement to the Auditor of State of the number of gallons of motor vehicle fuel sold by each dealer, as shown by reports to the Tax Commission and from other information which the Commission has. The Auditor then computes the tax due from each dealer and is required to transmit a copy of the statement showing the amounts due from all dealers.

Section 5531 of the Code is as follows:

"On or before the last day of each calendar month each dealer shall pay to the treasurer of state the excise tax due on the sale or use of motor vehicle fuel sold or used by him in the preceding calendar month, together with any tax penalty on omitted amounts as certified to him during such calendar month. Such payment shall be accompanied by a copy of the statement filed with the tax commission of Ohio."

This section requires each dealer to pay the tax due to the Treasurer on or before the last day of each calendar month covering the motor vehicle fuel sold or used during the preceding calendar month. While, of course, this section requires the dealer to pay to you the entire amount of the tax, I do not believe that it precludes the acceptance by you of an amount less than the full amount of the tax, especially when the payment is made upon the express condition that it shall not prejudice the right of the State to collect the balance due. It is doubtless true that there would be no authority in you to accept a less amount in full satisfaction of the tax, but that is not the situation under consideration. The acceptance in this instance merely removes the necessity

of proceeding to enforce collection as to that part of the tax which the company is willing to pay. Since the company refuses to pay the amount deducted, it is undoubtedly your duty to place the claim for this amount in course of collection in the ordinary manner of claims of this character.

The situation which you present is similar to that before me in Opinion No. 2315, dated July 3, 1928, and addressed to the Honorable Herman R. Witter, Director of Industrial Relations. In that opinion I held that the Industrial Commission could properly accept a check in payment of the undisputed portion of a claim upon a bond of a former employe, although the check recited that it was in full payment of all claims, where an accompanying letter, signed by the same official who signed the check, expressly stated that the acceptance of the check would be without prejudice to the rights of either party with reference to other alleged losses. I enclose herewith a copy of my former opinion for your information.

Accordingly, by way of specific answer to your inquiry, I am of the opinion that you have the authority to accept the payment of a lesser amount than that due from a dealer in motor vehicle fuel for the tax upon such fuel sold during the preceding calendar month where such payment is without prejudice to the right of the State to proceed to collect the balance due.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2880.

TRANSPORTATION OF PUPILS TO HIGH SCHOOL—AUTHORITY OF COUNTY BOARD OF EDUCATION DISCUSSED.

SYLLABUS:

A county board of education cannot lawfully pay parents, from the general fund of the county, for transporting their children to a high school, and have the same charged to the local district by authority of Section 7610-1, General Code, unless the county board had, prior to the furnishing of said transportation, deemed and declared the transportation to be advisable and practicable, or unless the local board desires to pay for such transportation and is unable on account of lack of funds to do so.

COLUMBUS, OHIO, November 14, 1928.

HON FRANK F. COPE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, which reads as follows:

“No provision having been made by the Board of Education of Rose Township, Carroll County, for maintaining a high school within four miles of the residence of J. W. S., or providing room and board or transportation of the children of J. W. S. to any legally constituted high school, the pupils were transported by parents during the years of 1926-27 and 1927-28.

Mr. S. now seeks to collect from the Rose Township Board of Education \$178.25 for such services. The board has refused and failed to pay the amount above demanded and Mr. S. has now made demand upon the County Board of Education for this amount.