mains in the bond retirement fund until such time as there are obligations to be met by the fund, or until some provision is made by law for its transfer to some other fund. In the present state of the law, there is no provision whereby it may be transferred from the bond retirement fund.

Second, when transfers are made by virtue of Section 5625–13, General Code, it is not necessary to make application to a court for permission to make such transfer, nor does the court have any authority to order a transfer of funds of a subdivision from one fund to another, in any case.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1507.

APPROVAL, BONDS OF THE VILLAGE OF WILLOWICK, LAKE COUNTY, OHIO—$43,000.00.

COLUMBUS, OHIO, December 31, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

1508.

DAMS—LIABILITY FOR DAMAGE CAUSED BY BREAKAGE CONSIDERED.

SYLLABUS:

Liability of one who negligently constructs or maintains a dam to respond in damages to county commissioners for injuries to and destruction of county bridges and retaining walls, caused by escape of impounded waters, considered.

COLUMBUS, OHIO, December 31, 1927.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

> "An individual dammed a creek which runs through this county for the purpose of making a private lake with the intention of forming a park on his place for the purpose of deriving revenue therefrom for himself. Last night the dam broke and the water rushed down the creek destroying one or two county bridges, which cross the creek and are a part of the property of the county. It also tore out some retaining walls erected by the county.
>
> Please advise me whether or not the individual constructing the dam is liable to the county for the loss of the bridges and retaining walls?"

It may be stated at the outset that it is impossible to reach a definite conclusion upon the meager facts presented in your letter and, as will be seen when this opinion is read, without all the facts surrounding the occurrence to which you refer, a specific answer to your question can not be given. I shall therefore confine my opinion to a discussion of authorities which may be helpful in the premises.

I direct your attention to two Ohio cases in which our Supreme Court has definitely laid down certain principles of law, which are applicable to cases of the nature concerning which you inquire. In the case of *City of Piqua* vs. *Morris, et al.*, 98 O. S. 42, the first, second and third branches of the syllabus read:

> "1. The proximate cause of a result is that which in a natural and continued sequence contributes to produce the result, without which it would not have happened. The fact that some other cause concurred with the negligence of a defendant in producing an injury, does not relieve him from liability unless it is shown such other cause would have produced the injury independently of defendant's negligence.
>
> 2. In the construction and maintenance of a hydraulic, or similar work, a municipality, or other owner, is required to use ordinary skill and foresight to prevent injury to others in times of floods to be reasonably anticipated; and if injury is caused by the negligence of such owner, he is liable in damages, provided his negligence is one of the proximate causes of the injury, although it concurred with other causes, including the act of God.
>
> 3. In order to fix liability on an owner in such case, it must be shown that his negligence concurred with the act of God in causing the injury; but if the act of God, such as an extraordinary flood, was so overwhelming and destructive as to produce the injury, whether the defendant had been negligent or not, his negligence cannot be held to be the proximate cause of the injury."

In the case of *The East Liverpool City Ice Co.* vs. *Mattern*, 101 O. S. 62, it was stated by the court on page 64 of the opinion, in discussing the liability of the ice company for damages caused a lower riparian property owner, by reason of the breaking of a dam which had been constructed on a natural watercourse by said company, that:

> "The situation at the time of the breaking of the dam was such that ordinary prudence would have guarded against it, under the finding of the court of appeals, and the breaking of the dam in such a situation would call for the application of the doctrine of *res ipsa loquitur*."

On page 63 of the opinion, the court quotes from and adopts as its language, a part of the statement of the Court of Appeals, as follows:

> " 'It, the dam, should have been constructed with reference to what ordinary prudence would require in its construction at that place with reference to ordinary affairs. Of course, if an extraordinary convulsion of nature, an extraordinary flood would come down, one which ordinary prudence would not have foreseen, it would not be expected, and the defendant company would not be required to construct a dam with reference to such a flood. But it would be required and was required to construct its dam with reference to the ordinary conditions of nature, at least. And we do not find that at this time there was any extraordinary flood. It was a greater flood than they had during ordinary rains, undoubtedly, but not more than they could have anticipated. And it appears from the testimony of Mr. Gaston that there was no more water in the dam at the time it broke than they had

carried when they were cutting ice. So that the dam fell. We do not think it makes a particle of difference whether it was negligently constructed or not. It fell, and by its falling, and by the fact that it had gathered the waters there, and by its falling the waters were allowed to escape and injure the plaintiff, rendering the defendant *prima facie* liable.' "

It may be stated that under the Ohio rule, as set forth in the above cases, in order to hold a person liable for damages caused by the release of water upon the breaking of a dam, it is necessary to show some one or more acts of negligence on the part of such owner. These acts of negligence may consist either in improperly constructing such a dam or in failing properly to maintain the same, after it is once constructed. If the breaking of such dam is caused by an extraordinary convulsion of nature and the water held under control by such dam is thereby released, through no fault or act of negligence on the part of such owner, it is clear that no cause of action exists against said owner.

To like effect are the decisions of courts in other states. In *Consolidated Coal Company* vs. *Turner*, 145 Ala., 639, it was held in substance that a riparian proprietor who constructed dams in the usual manner, and such as to be able to resist water coming from usual freshets, was not liable to a lower riparian owner for damages from the breaking of dams on account of an extraordinary flood.

In the case of *Charles A. Anderson, Appellant* vs. *Rucker Brothers, Respondent*, decided by the Supreme Court of the State of Washington on July 21, 1919, and reported in 183 Pac. p. 70, it was held, in part, as follows:

"4. One who impounds the water of a stream by means of a dam is required to exercise such reasonable care and caution in its construction, maintenance and operation as a reasonably careful and prudent man, who was acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rainfall, and other conditions likely to cause freshets, would exercise under like circumstances.

5. One constructing and maintaining a dam across a stream must take into consideration such freshets as from climatic and geographical conditions may reasonably be expected, whether of frequent or infrequent occurrence.

* * * * * * * * *

9. One building and maintaining a dam does not do so at his absolute peril and is not an insurer, but will be excused from liability for injuries caused by acts of God, or flood, which he could not have anticipated."

There are so many cases which lay down practically the same rules of law relative to a recovery in cases of the nature which you present that it is unnecessary to quote therefrom in detail. In this connection your attention is directed to the following cases: *Barnum* vs. *Handschiegel*, (Neb. 1919) 173 N. W. 593; *Sutliff* vs. *Sweetwater Co.* (Wash. 1920) 186 Pac. 766; *Trump* vs. *Bluefield Waterworks & Improvement Co.* (W. Va. 1926) 129 S. E. 309; *Sloss-Sheffield Steel & Iron Co.* vs. *Webb*, (Ala. 1913) 63 So. 518; *Bridgeport* vs. *Bridgeport Hydraulic Co.* (Conn. 1908) 70 Atl. 650; *City Water Power Co.* vs. *City of Fergus Falls*, (Minn. 1910) 128 N. W. 817, 32 L. R. A. (N. S.) 59; *Frederick* vs. *Hale*, (Mont. 1910) 112 Pac. 70.

It is, of course, unnecessary to state that if property of a county, such as bridges and retaining walls, is destroyed because of the breaking of a dam, due to the failure of the owner of such dam properly to construct or maintain it, so that the water would be retained by it during periods of rains or floods, county commissioners may bring an action to recover damages the same as any individual or concern might bring such action.

In this connection your attention is directed to Sections 2424 and 2425, General Code, reading as follows:

> Sec. 2424. "If a bridge or any state or county road, or any public building, the property of or under the control or supervision of a county, is injured or destroyed, or when any state or county road or public highway has been injured or impaired by placing or continuing therein, without lawful authority, any obstruction, or by the changing of the line, filling up or digging out of the bed thereof, or in any manner rendering it less convenient or useful than it had been previously, by a person or corporation, such person or corporation shall be subject to an action for damages. The board of commissioners of the proper county may sue for and recover of such person or corporation the damages which have accrued by reason thereof, or such as are necessary to remove the obstruction or repair the injury."
>
> Sec. 2425. "If the county commissioners fail or refuse to bring such action for ten days after petition so to do by at least ten owners of property adjoining such county road or living within one mile of such bridge or public building, any one or more of such owners of property may bring suit in the name of the prosecuting attorney of the county in which the property is situated, and recover the damages which have accrued by reason thereof, or which are necessary to remove the obstruction or repair the injury."

A reading of the cases cited herein will reveal that a person who has constructed a dam over a natural watercourse is not liable for damages to property injured by the breaking of such dam during an extraordinary flood, unless his negligence, in constructing or maintaining such dam, proximately contributed to the breaking of such dam, thereby injuring the property of others.

From the discussion thus far it is quite apparent that each individual case must be determined upon all the facts and circumstances surrounding the happening of the event which caused the injury.

In the present instance, if suit is instituted it will be necessary to show that the defendant was negligent, either in the construction or maintenance of such dam, or both, and that his negligence in the particular relied upon was the proximate cause of the injury to the bridges and retaining walls in question.

If you find, after an investigation of the facts, that the rainfall merely contributed to the breaking of the dam, that it was not an extraordinary flood or convulsion of nature, but was a freshet or flood to be reasonably anticipated by ordinary prudence, and if you further find that the defendant was negligent in either constructing the dam or in maintaining it so that such damage would not have been caused without his negligence, which was the proximate cause of the injuries, then you have such a set of facts which would warrant the bringing of an action, and upon which a recovery would probably be had.

Respectfully,
EDWARD C. TURNER,
Attorney General.