for the inspection of oils, at such times as such auditor may direct. And it is the duty of the treasurer of state to collect such sums so charged in the manner prescribed in section 24-1 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2321.

JOINT COUNTY DITCH—WHERE IMPROVEMENT UNDERTAKEN IN YEAR 1917—CONTRACTOR DEFAULTED IN COMPLETING WORK—PARTICULAR CASE PASSED UPON.

Where in the year 1917, a joint county ditch improvement was undertaken, and the contractor defaulted in completing the work, HELD,

1. *That by virtue of section 26 G. C. the project is to be carried to completion under statutes in force at the time the project became a pending proceeding.*

2. *That the cost of completion over and above the original contract price, to the extent that it may not be recovered from the contractor and his surety, is to be assessed against benefited lands and not borne by the counties. (Former sections 6442 to 6517 G. C. referred to).*

3. *Former section 6489 G. C. authorizes the issue of bonds for the completion of the improvement.*

4. *The assessment against affected lands on account of the additional cost is to be made at the time and in the manner provided by former section 6489 G. C. and need not await the termination of efforts to recover from the defaulting contractor and his surety. In the event of such recovery, the amount collected will be transferred to the sinking fund to be used in redemption of additional bonds issued in completing the improvement.*

COLUMBUS, OHIO, August 12, 1921.

HON. J. E. WEST, *Prosecuting Attorney, Bellefontaine, Ohio.*
HON. GEORGE WAITE, *Prosecuting Attorney, Urbana, Ohio.*

GENTLEMEN:—Your offices have submitted to this department for consideration, the following statement of facts:

> "In 1917 the joint board of county commissioners of Logan and Champaign counties ordered the construction of the Hartzler joint ditch improvement and the contract for the same was let to a contractor who gave bond with his father as surety. Prices of labor and material increased rapidly, which, together with other reasons assigned by the contractor caused him to delay the completion of the construction until the time fixed in the bond expired, and 120 days were granted under section 6488 of the General Code, and this additional time was used up by the contractor without finishing the job. In the meantime the government commandeered his machinery for construction work in camps. Returning home from camp with his machinery, the contractor undertook to complete the ditch work undertaken, and finally quit work, leaving the job uncompleted. The county surveyor now in charge wishes either to re-sell the uncompleted portion of the improvement, or complete it at the expense of the original contractor, either course involving an expenditure of

money in excess of the original assessment for the uncompleted portion of the improvement.

In the meantime his father who was surety on his bond died, and the contractor was appointed administrator of his estate. The year from the time of his appointment as administrator will expire the latter part of December, 1920.

In the meantime also the legislature has recodified the drainage laws of Ohio, and apparently have omitted from the new ditch code section 6488, and have not embodied therein any other section granting the relief afforded by said section."

In response to requests for additional information, a copy of the contract in question has been submitted. It bears date February 5, 1917, and was entered into between the contractor and the "Joint Board of Commissioners of Champaign and Logan Counties." It provides for the payment of a lump sum in return for the furnishing of all labor and material necessary in the construction of the joint ditch in question. Such labor and material to be furnished in accordance with plans and specifications on file in the office of the auditor of Champaign county. It mentions six working sections and stipulates that the contractor will complete these sections at six several dates beginning June 1, 1917, and ending with April 1, 1918. It is accompanied by a bond in an amount in excess of the contract price, conditioned for the faithful performance of the contract.

A letter submitted by Mr. West states that

"The sections of the statutes followed were 6536 et seq., of the General Code in force the latter part of 1915. * * * Assessments were made following various meetings of the joint boards, and a considerable amount has been paid in."

Under these facts, you request answer to five inquiries, which will be discussed in the order submitted.

1. Will sections 26 and 6488 of the General Code of Ohio, as they existed prior to the adoption of the new ditch code, control in further proceedings in the matter of the above ditch improvement?

The answer is that in the absence of special relief through action of the general assembly, the project may, by reason of section 26, G. C., be carried to completion only in accordance with the pertinent statutes in force at the time the project became a pending proceeding. See Opinions of Attorney-General 1919, Vol. II, p. 1416; Opinions Attorney-General 1920, Vol. I, p. 211.

2. When will the estimated cost of finishing the improvement ripen into a claim against the original contractor and his bondsmen,—immediately upon the re-estimate or after the completion of the improvement?

This question is believed to be one for the courts and not for this department, since it involves the settlement of the estate of the deceased surety. However, immediately upon receipt of your original letter of inquiry, you were advised by this department of its views as to the proper steps to be taken in order to afford protection to the claim of the counties and property owners as against the estate of the deceased surety.

3. If the excess cost for the completion of the improvement, over the original estimate for the uncompleted portion of the same, cannot be recovered from the contractor and his bondsmen, shall the property owners benefited by the improvement, or the two counties involved, bear the excess cost?

As hereinafter pointed out in answer to your fourth question, the statutes chiefly concerned in the ditch project now in question are former sections 6442 to 6517. Under that series of sections, the only part of the cost which is authorized to be paid by the county is as provided by former section 6445, when benefit results to a public road; and by section 6463, which reads:

"When the allowance for compensation and damages is fixed and determined as provided in section sixty-four hundred and sixty-one, the county commisioners shall consider and determine, according to their best knowledge and judgment, the proportionate benefits to accrue from the construction of the proposed improvement. If they find that the public health, convenience or welfare will be promoted by the improvement, and that it is of sufficient importance to the public to cause the damages and compensation, which have been assessed, to be paid out of the county treasury, they shall order them to be so paid, or they may order a portion thereof to be paid by the county and the remainder by the benefited landowners, as they deem just and equitable."

The important point to be noted about this latter section is that it does *not authorize* any part of the cost *of construction* to be paid by the county, but confines the authority for payment to *compensation and damages*. Such compensation and damages, whether borne in whole or in part by the county, are to be paid before land has actually been taken (See former section 6507). It is therefore clear that except as to sums which may have been apportioned to the counties on account of benefits to a public road or roads, and except as to sums representing compensation and damages which may heretofore have been assumed by the counties and not yet paid over to the land-owners in whose favor a finding has been made for such compensation and damages, the cost of completion of the project must be borne by the benefited landowners and not by the counties. See Commissioners vs. Krauss, 53 O. S. 628; Commissioners vs. Gates, 83 O. S. 19; and Smith vs. Griffin, 6 O. C. D. 232, affirmed without report, 56 O. S. 775, and quoted from with approval in Commissioners vs. Gates.

4. What authority exists for the joint board of county commissioners to issue bonds to meet such excess cost?

Under the statutes in force at the time the project in question became a pending proceeding, joint county ditches were provided for by sections 6536, et seq., and also by another complete and independent group of sections enacted 102 Ohio Laws, 575, designated sections 6563-1 to 6563-48. From the data submitted with your inquiries, it appears that the set of sections first named was resorted to. Said sections 6536, et seq. do not purport to be complete in themselves, and do not in terms provide for a bond issue, but derive their vitality by making applicable to joint county projects the procedure described in the single county ditch statutes, sections 6442 to 6517. We

are thus reverted to former section 6489 of the single county ditch statutes for answer to your inquiry. That section as now in point, read:

> "When the working sections of the improvement are let, and the costs and expenses of location and construction, and all compensation and damages are ascertained, the county commissioners shall meet and determine at what time and in what number of assessments they will require them to be paid, and order that such assessments be placed on the duplicate, against the lots, lands, corporate roads or railroads assessed. They shall also determine whether they will issue the bonds of the county to raise the money necessary to pay such costs and expenses, and if they so determine, the bonds may be issued for a term of years, not exceeding twenty, at a rate of interest not exceeding six per cent per annum, payable semi-annually. They shall cause an entry to be made upon their journal, setting forth their finding and determination under this section."

This statute, it will be observed, is quite broad in character. It designates the bonds as "bonds of the county;" it does not in terms limit the amount to the estimated cost of the project, but makes the amount referable to "the money necessary to pay such costs and expenses." On the score of time, the only limitation is that the bonds are to be issued after the working sections are let, and the costs, expenses, compensation and damages are ascertained. Nor is there anything in the statute as a whole giving rise to the implication that once bonds are issued in a given amount, the authority of the county commissioners is at an end.

If objection be raised on the theory that there is an implication in the statute that the original estimated cost marks the limit of the amount of bonds, the point would seem to have been disposed of in principle in an opinion of this department of date October 2, 1918, Opinions Attorney-General 1918, Vol. II, p. 1253, of which the first headnote reads:

> "1. When the county commissioners have issued bonds to the amount equivalent to the estimated cost and expense of a road improvement, and it is afterwards ascertained that, owing to the fact of the failure of the original contractor to complete the improvement, it will cost more than the estimated cost and expense, the county commissioners are authorized to issue and sell additional bonds up to an amount which equals the increased cost as estimated by the county surveyor."

But as already intimated, section 6489 tends to make actual cost rather than estimated cost, the basis for amount of bonds, since, as already pointed out, the bonds are not to be issued until after the work is let, and costs, etc. *ascertained.* It is clearly to be concluded, therefore, and you are accordingly advised that under said former section 6489, the county commissioners of each of the two interested counties have ample authority to issue the bonds of their respective counties for the purpose of procuring funds with which to complete the project. Since by the terms of former sections 6536 to 6539, G. C., each of the counties will have apportioned to it an amount to be assessed against benefited lands within its borders, the amount of bonds issued by each county will have reference to the amount so apportioned to it. The proper time for the passage of legislation for the issuance of the bonds would be immediately following the letting of a contract for the uncompleted portion

of the work, and the ascertainment of costs, expenses, compensation and damages involved in completion, though it is to be supposed that, so far as compensation and damages are concerned, they were paid several years ago.

5. When should the excess cost be assessed against the property, if at all,—immediately upon the completion of the improvement, or only after remedies are exhausted against the original contractor?

There are practical considerations involved in this question, as well as legal ones. It is possible that if the project could be left in its present unfinished state for a sufficient length of time, there would be no occasion for an assessment; that is to say, if the estimated cost of finishing the work could be recovered from the original contractor and the estate of his deceased surety, the amount so recovered could be used in completing the project. From a practical standpoint, however, it is to be observed that in view of the long delay which has already occurred, the most important thing about the matter is to get the ditch finished as soon as practicable; and to this may be added the observation that it is among the possibilities that efforts to collect damages on account of the contractor's default may not be successful.

With these practical matters in mind, what is to be said from a legal standpoint?

Former section 6489 has already been quoted. Former section 6488 read:

"A job, not completed within the time fixed in the contract and bond, may be re-estimated by the county surveyor, and resold by him to the lowest bidder, or he may complete it at the expense of the contractor and bondsmen, but such jobs shall not be resold for a sum greater than such estimate or re-estimate, nor a second time to the same person or corporation. The county commissioners, for good cause, may give further time, not exceeding one hundred and twenty days, to a contractor. The county surveyor shall fix a time for the completion of the work resold not exceeding one hundred and twenty days from the date of the bond. A person or corporation who has sustained damages in consequence of the non-performance of such work may bring suit for damages against a contractor failing to perform his contract, or upon the bond of such contractor, and recover damages, as provided by law in other cases. No contractor shall be prosecuted on his bond until the section below the one named in his contract has been completed."

When said sections 6488 and 6489 are taken together, the result is that the cost of the unfinished part of the work is to be re-estimated, bids asked, and a contract entered into; then, as provided by section 6489, the county commissioners are to proceed with the assessment and the issue of bonds. The amount of this new assessment will necessarily have to be not less than the sum needed to complete the work; for while an assessment has already been made and a considerable part paid, yet the returns from that assessment must go into a sinking fund to be used in discharging the original issue of bonds. While steps, such as re-estimate of cost, assessment, and issue of bonds, are being carried out for the completion of the improvement, there need be no cessation of efforts to collect damages for the default of the original contractor; and in the event of recovery, the amount collected will be transferred to the sinking fund for the redemption of the additional bonds

issued to complete the improvement. The effect of such transfer will be, that to the extent of the damages recovered, the assessments made against affected lands for the purpose of completing the improvement will be reduced.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2322.

MUNICIPAL CORPORATIONS—SINKING FUND TRUSTEES—SALE OF SECURITIES BY SAID TRUSTEES IN ORDER TO PURCHASE OTHER MUNICIPAL BONDS UNAUTHORIZED—LIABILITY FOR LOSS WHERE TRUSTEES PERFORM UNAUTHORIZED ACT.

The sale of securities in the hands of the sinking fund trustees, for the purpose of raising funds to purchase municipal bonds offered for sale by the municipality, is unauthorized by law and illegal, and such an act is a breach of official duty, rendering such trustees liable to the municipality for any loss or damage occasioned by reason of such illegal transaction.

COLUMBUS, OHIO, August 12, 1921.

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

GENTLEMEN:—Receipt is acknowledged of your letter of recent date reading as follows:

> "We are respectfully requesting your written opinion upon the following matter:
>
> We are calling your attention to an opinion of December 7, 1912, which may be found in the Annual Reports of the Attorney-General for 1913, page 1456, and we would say that we are finding instances in which the sinking fund trustees of municipalities at times when they have no funds whatsoever for investment and the municipality has bonds which they wish to sell, that the sinking fund trustees either by selling certain investments, which they have on hand, below par to secure the funds necessary, or by taking the bonds offered for sale and selling them below par, paying for such bonds after they have them sold, in order to help out the city:
>
> Question: Can the trustees of the sinking fund, who have acted as stated above, be held liable for the difference between the amount received for the bonds sold to complete such a transaction and the par value thereof; in other words, can the bureau make a finding for recovery?"

The question presented by your inquiry relative to the sale of municipal bonds by the trustees of the sinking fund under the conditions stated in your communication, would seemingly be best answered by an analysis of the statutes authorizing the sale of such bonds, as well as defining the powers and duties of the various officials participating therein.

Section 3922 G. C. provides as follows:

> "When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees,