allowance, or one below the statutory limit, was made, but merely prevents an officer from being allowed more than $100.00 for services during any one year."

There is no statutory provision, other than section 3019, General Code, whereby a justice can collect lost fees in criminal cases instituted by a sheriff or county prosecutor.

Respectfully,
C. C. CRABBE,
Attorney General.

2431.

APPROVAL, BONDS OF LOGAN COUNTY, $15,000.00

COLUMBUS, OHIO, May 2, 1925.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2432.

APPROVAL, FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN RICHLAND, COLUMBIANA AND WASHINGTON COUNTIES.

COLUMBUS, OHIO, May 2, 1925.

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

2433.

GASOLINE TAX LAW CONSTRUED—STATE AND POLITICAL SUBDIVISIONS NOT EXEMPTED FROM PROVISIONS OF ACT.

SYLLABUS:

1. *In the event the state or its political subdivisions produces, refines, prepares, distills, manufactures or compounds motor vehicle fuel as defined in House Bill No. 44, or imports the same into the state for its own use, the state and such political subdivision is not required to pay the tax of two cents per gallon levied and imposed by section 2 of said act.*

2. *There is no provision in said act for reimbursement of the state or its political subdivisions for the amount of the tax assessed and paid by the dealer in the event the state or its political subdivisions purchase motor vehicle fuel from a dealer, unless such fuels are used for other purposes than the propulsion of motor*

vehicles operated or intended to be operated, in whole or in part, upon the highways of the state, as provided in section 9 of said act.

COLUMBUS, OHIO, May 4, 1925.

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

GENTLEMEN:—Your request of recent date is received, in which you propound the following question for opinion:

"Amended Substitute House Bill No. 44 provides for a tax upon gasoline, but makes no specific mention of exemption for the state and its political subdivisions.

"Question. Will the state and its political subdivisions be compelled to pay this tax?"

Section 1 of the act defines the word "dealer" as follows:

" 'Dealer' shall include any person, firm, association, partnership or corporation who imports or causes to be imported into the state of Ohio, any motor vehicle fuel or fuels as herein defined, for use, distribution or sale and delivery in Ohio, and after the same reaches the state of Ohio, also any person, firm, association, partnership or corporation who produces, refines, prepares, distills, manufactures or compounds such motor vehicle fuel as herein defined in the state of Ohio for use, distribution or sale and delivery in Ohio. Provided, however, that when any such person, firm, association, partnership or corporation so importing such motor vehicle fuel into this state, shall sell such motor vehicle fuel in tank car lots or in its original containers to any purchasers for use, distribution or sale and delivery in this state, then such purchasers and not the seller shall be deemed the dealer as to the motor vehicle fuels contained in such tank car lots or original containers."

Section 2 of the act provides in part as follows:

"For the purpose of providing revenue * * * there is hereby levied and imposed on the sale or use of each gallon of motor vehicle fuel sold or used *by any dealer, as herein* defined, within the state of Ohio, an excise tax of two cents; subject, however, to the following *specific exemptions.*

The sale of motor vehicle fuel shall not be subject to said tax

(a) if such motor vehicle fuel be sold in tank car lots to be used wholly for purposes other than propelling motor vehicles on the public highway;

(b) if such motor vehicle fuel be exported or sold for exportation from the state of Ohio to any other state, or to any foreign country;

(c) if such motor vehicle fuel be sold by a dealer, as herein defined, to the United States Government or any of its agencies;

(d) if such motor vehicle fuel be in process of transportation in international or interstate commerce, except in so far as the same may be permitted under the provisions of the constitution of the United States and acts of congress.

"After the excise tax herein provided for on the sale or use of any motor vehicle fuel has been paid by the dealer as herein defined, such motor

vehicle fuel may thereafter be used or sold or resold by any person, firm, association, partnership or corporation having lawful title to the same, without incurring any liability whatsoever for such tax."

Section 3 provides in part:

"Within thirty days after this act takes effect, each dealer, as herein defined, doing business within the state of Ohio, shall file with the tax commission of Ohio, a certificate stating," etc.

Section 4 provides that each dealer, as defined in this act, who engages in the sale or use of motor vehicle fuel, must make reports to the tax commission.

Section 5 provides that the tax commission, on the 20th day of each calendar month, shall transmit to the auditor of state a statement, upon receipt of which the auditor of state "shall compute the tax due from each such dealer at the rate of two cents per gallon." The auditor of state must then send to "each dealer" against whom findings have been made by the tax commission, a notice of the amounts due on such findings.

Section 6 provides for payment by "each dealer" to the treasurer of state, the excise tax due on the sale or use of motor vehicle fuel sold or used by such dealer in the preceding calendar month.

Section 9 provides for an application for reimbursement by the user of motor vehicle fuel on which the tax imposed by the act has been paid, when such fuel has not been used for the propelling of vehicles upon the roads, and it provides that reimbursement may be had to the extent of the amount of the tax so paid, prescribing the manner thereof. The provision for reimbursement does not include the state or any of its political subdivisions, except, of course, the motor vehicle fuel which has been used for the purposes therein specified, and not for the propelling of motor vehicles upon the roads of the state.

In answering your question, it of course is not necessary for us to notice the exemption provided for publicly owned and operated motor vehicles from the payment of the license fee, under the provisions of section 6295.

The intent of the act is to tax motor vehicle fuel at its source. The "dealer," as defined in section 1 of the act, against whom the tax is to be assessed, it will be noted, is any person, firm, association, partnership or corporation, who

(a) imports or causes to be imported into the state any motor vehicle fuel for use, distribution or sale and delivery in the state, and after the same reaches the state;

(b) produces, refines, prepares, distills, manufactures or compounds such motor vehicle fuel for use, distribution or sale and delivery in the state;

(c) In case motor vehicle fuel is imported into the state in tank car lots or in its original containers for use, distribution or sale and delivery in the state, the purchaser or user, and not the seller, is the dealer within the meaning of the act; that is, those who break the bulk in the case of motor vehicle fuel imported into the state, are the ones liable for the tax.

Unless, therefore, the state or any political subdivision comes within the foregoing definition of the word "dealer," it is not directly subject to the tax and is not assessed for the tax. The tax is assessed and paid before it is purchased or used by the state or the various political subdivisions thereof.

It will be noted, also, that unless the motor vehicle fuel is not used by the state or the political subdivision on the highways of the state, but is used for the purposes mentioned in section 9 of the act, the state or political subdivision is not entitled to apply for and receive a reimbursement of the amount assessed and paid by the dealer upon the fuel so used.

We will assume, in further answer to your inquiry, however, that the state or political subdivision is engaged in the production, refining, preparing, distilling, manufacturing or compounding of motor vehicle fuel or in the importing of such fuel into the state of Ohio for its own use, but not for distribution, sale or delivery to others. In such case I am of the opinion that no tax should be levied or imposed on such motor vehicle fuel so used by the state and its political subdivisions.

It is generally held that the state is not bound by the terms of a general statute. *State* vs. *Cappelear,* 39 O. S., 207; *Ohio* vs. *Board of Public Works,* 36 O. S., 409.

A political subdivision of the state is not a tax payer. *Board of Education* vs. *Guy, County Auditor,* 64 O. S., 434.

It has been generally held that in the imposition of a tax there is a presumption that the state and its political subdivisions are not subject to the tax. The rule is stated in Cooley on Taxation as follows:

> "Some things are always presumptively exempt from the operation of a general tax law because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax and thus the public would be taxing itself in order to raise money to pay over to itself and no one would be benefited. * * * It cannot be supposed that the legislature would ever purposely lay such a burden on public property and it is therefore a reasonable conclusion that, however, general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute. * * * To restate, the rule is that while a state 'may' tax its own property or the property of a political subdivision unless it is otherwise provided by the constitution * * * yet the general rule, independent of constitution or statute, is that property belonging to the state or a political division thereof is not taxable, on the theory that such taxation would merely be taking money out of one pocket and putting it in another, unless the constitution or statutes clearly show an intention to tax such property; and this implied exemption is generally reinforced by express provisions in the constitution or statutes exempting such property wholly or in part." (Sec. 621.)

In 37 Cyc., p. 874, the rule is stated as follows:

> "While in the absence of constitutional prohibition a state may tax the property of its municipal corporations, * * * an intention to tax such property of a municipality as is devoted to public or governmental purposes will not be implied, but on the contrary such property will be held to be exempt unless an intention to include it is clearly manifest. Lands, buildings and other property owned by municipal corporations and appropriated to public uses are but the means and instrumentalities used for governmental purposes and consequently they are exempt from taxation either by express constitutional or statutory provision or else by necessary implication. This rule applies not only to counties and incorporated cities, incorporated towns and incorporated villages, but also to such strict public and governmental bodies as sanitary or levee districts, directors of the poor and reclamation districts. * * *."

While these statements deal with general property taxes, nevertheless it would seem that the rule should be extended to a case such as we have at hand. The constitution of the state has expressly permitted the exemption of public property from general taxation (Article 2, section 2), and the legislature has granted the exemption (Section 5351 G. C.). It has also been held by the supreme court that public property is not subject to assessments for various improvements. See *City of Toledo* vs. *Board of Education,* 48 O. S., 83; *Board of Education* vs. *Volk,* 72 O. S., 469; *Trustees* vs. *Roth,* 2 Ohio Appeals, 196. In the latter case, Van Brocklin vs. State of Tennessee, 117 U. S., 151, is quoted from as follows:

> "General tax acts of a state are never, without the clearest words, held to include its own property or that of its municipal corporations, although not in terms exempted from taxation."

Further quoting in that opinion from the Court of Errors of New Jersey, it is said.

> "The immunity of the property of the state, and of its political subdivisions, from taxation, does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable, is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it (p. 198)."

I am therefore of the opinion that there was no intent of the legislature to subject motor vehicle fuel, either produced, refined, prepared, distilled, manufactured or compounded by the state or any of its political subdivisions, or imported into the state for its use; but the reason for the rule does not require its application in the event of a resale by the state or its political subdivisions to any corporation, firm or person otherwise subject to the tax. Whether the state or such political subdivisions would be authorized to sell such motor vehicle fuel to such other corporations, firms or persons not subject to the tax is a question which need not be discussed.

The conclusions of the Supreme Court of Oregon in *City of Portland* vs. *Kozer,* 217 Pac., 833, support the first branch of our discussion and we do not believe that the same are in conflict with the second branch of our discussion.

In that case suit was brought to enjoin the secretary of state from collecting a tax assessed against each gallon of motor vehicle fuel under a law almost identical with the Ohio act. The word "dealer," against whom the tax was assessed, is defined in the Oregon act substantially as in the Ohio act.

While it is not clear from the statement of facts, apparently the city of Portland was contending that the tax on motor vehicle fuel sold or distributed in the state of Oregon should not be assessed and paid by the city on fuels purchased from a dealer. The city lost in its contention. The court said:

> "Municipalities are in no way relieved from the burden of paying any addition that may be added to the price of motor fuels which may be occa-

sioned by the tax. There is no indication in the language of either the statutes in question that it was the intention of the law makers to relieve municipalities from the burden of paying any such enhanced price.

"The provision contained in section 11 of the act of 1921, for a refund of taxes paid on motor vehicle fuels used for other purposes than the operation of motor vehicles on the public highways, is in the nature of an exception, and, had it been the will of the law-makers to make an exception in favor of municipalities, no doubt the same would have been expressed in the act. * * *

"In the present case the question for determination is whether the city can be relieved from paying any addition to the price of gasoline caused by the exaction of the statutes."

The court then held that the provisions of the laws regulating the operation of motor vehicles and the vehicle fuel tax should be considered in *pari materia,* and said:

"The exemption in the auto license law of 1919 and 1921, the want of any exemption in favor of municipalities in the gasoline tax law of 1919, and the provision for a refund in the statute of 1921, taken altogether and carefully considered, plainly indicate that it was not the legislative intent to make any provision for relieving municipalities of the state from paying any addition that may be incidentally added to the price in the sale of motor fuels, on account of the tax thereon. The maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—applies.

"After a tax has been levied and assessed on all property in the state, the state, counties and municipalities might be required to purchase, and no doubt do purchase, large quantities of merchandise and personal property which has been subjected to taxation in the hands of the seller, and the price thereof raised on account of such taxes. Yet it would hardly be thought that under such circumstances a municipality would be entitled to a refund for any tax paid indirectly by the purchase of such property.

"To grant the prayer of the plaintiff city, and relieve the several municipalities of the state as desired by plaintiff, would leave the statutes in question like mere skeletons for all practical purposes; a condition that the lawmakers never intended. * * *

"We conclude that the statutes in question do not provide for levying the tax upon the municipalities of the state, but against the seller or dealer prior to the purchase of gasoline made by the city. Plaintiff is not entitled to the relief prayed for."

It is apparent from the last paragraph of the above quoted case that the city of Portland was purchasing from dealers motor vehicle fuels which had already been subjected to tax while in the possession of the dealer; and that it was not attempting to either manufacture or import motor vehicle fuel for its own use, in which event it would have been entitled to the status of a dealer under the act. The case, therefore, is not parallel in point of fact to the situation discussed in the second branch of this opinion.

There is an expression in the opinion which appears to be contrary to the conclusion we have here reached in the second branch of the discussion. It is as follows:

"Exemption from property tax does not include exemption from excise tax. * * * The rule that property of the state is exempt from taxation does not apply to privilege taxes."

Conceding this to be the rule as a general proposition of law, there is no intent found in the Ohio act, when the state or its political subdivisions have the status of a dealer, to assess the tax against the state or such political subdivision. While the act uses the word "corporation," we think it would be held that such word is used in the generally accepted sense of private corporation and as not referring to a political subdivision. See *Board of Education* vs. *Volk,* supra. Taking into consideration also the foregoing cited and other authorities to be found in this state, we believe that it can rightfully be said that there was no intent on the part of the legislature to assess the tax against the state or its political subdivisions when and if they have the status of a "dealer" within the meaning of the act.

I am therefore of the opinion:

First, in the event the state or its political subdivisions produces, refines, prepares, distills, manufactures or compounds motor vehicle fuel as defined in House Bill No. 44, or imports the same into the state for its own use, the state and such political subdivision is not required to pay the tax of two cents per gallon levied and imposed by section 2 of said act.

Second, there is no provision in said act for reimbursement of the state or its political subdivisions for the amount of the tax assessed and paid by the dealer in the event the state or its political subdivisions purchase motor vehicle fuel from a dealer, unless such fuels are used for other purposes than the propulsion of motor vehicles operated or intended to be operated, in whole or in part, upon the highways of the state, as provided in section 9 of said act.

Respectfully,
C. C. CRABBE,
Attorney General.

2434.

ELIMINATION OF GRADE CROSSINGS—AUTHORITY OF COUNTY COMMISSIONERS TO ISSUE BONDS TO PAY ITS SHARE OF COST OF SUCH IMPROVEMENT—SECTIONS 8863 ET SEQ. CONSTRUED.

SYLLABUS:

Section 8863, et seq., General Code of Ohio, is not repealed by implication by the enactment of section 6956-22, General Code, found in 110 Ohio Laws, 231, and the county commissioners may proceed to eliminate grade crossings under such section by agreement and may issue bonds and levy a tax to pay its share of the cost of such improvement.

COLUMBUS, OHIO, May 4, 1925.

HON. LISLE M. WEAVER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date in which, in substance, you submit the following statement of facts and questions:

> "The county commissioners propose to enter into a contract with the Wabash Railway Company providing for the construction of an overhead crossing over the tracks of said company at a point on Inter County Highway No. 107, Williams county, east of Montpelier.
>
> "The commissioners are unable to proceed under the provisions of the act providing for the separation of grades on inter-county highways and