

report for the year 1926 and to pay a franchise tax for that year on the same basis as an Ohio corporation. The Tax Commission should accept this report when tendered and such acceptance of the report and the payment of the franchise tax will exempt the person owning such stock from listing the same for taxation.

3. (a) The exemption from listing stock under the provisions of section 192 G. C. attaches when the report is filed and the election is made to pay as a domestic corporation.

(b) The list when certified by the Tax Commission, as containing the names of all foreign corporations whose stock is exempt from listing for taxation on April 11, 1926, should contain those who have regularly filed their reports for 1926 prior to April 11, 1926, and have elected to pay on the basis of Ohio corporations.

4. If a corporation fails for any reason to pay the franchise tax so assessed, the stock of such stockholder may be listed by the auditor as omitted property under section 5399, General Code.

Respectfully,
C. C. CRABBE,
Attorney General.

3264.

APPROVAL, BONDS OF BRISTOL TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, \$50,000.00.

COLUMBUS, OHIO, April 12, 1926.

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

3265.

ROADS AND HIGHWAYS—DISCUSSION OF THE AUTHORITY OF COUNTY COMMISSIONERS AND THE DIRECTOR OF HIGHWAYS IN THE CONSTRUCTION, MAINTENANCE AND REPAIR OF ROADS IN THE STATE SYSTEM.

SYLLABUS:

1. *County commissioners are without authority to acquire property for the sole purpose of widening a road which is a part of the state system.*

2. *In the maintenance, repair or reconstruction of an inter-county highway or main market road, by the director of highways and public works, under the provisions of section 1224, General Code, either with or without the cooperation of county commissioners or township trustees, the director of highways and public works is authorized to acquire property for the sole purpose of widening such highway or road to such width as he, in his discretion, may deem necessary.*

3. *To lay out a county road sixty feet wide, immediately adjacent to and paralleling an inter-county highway or main market road, would, in effect, be a widening of such inter-county highway or main market road, and county commissioners are without authority to so widen such highways or roads.*

4. *The word "repair," as used in section 1224 of the General Code, means to mend, add to or make over the original improvement to such an extent as may be necessary to restore the original improvement to the required standards.*

5. *Whatever widening of the pavement is reasonably necessary and essential and in the nature of being incidental in the repairing of an inter-county highway or main market road constructed by the state, by the aid of state money, or taken over by the state after being constructed, to the required standard, for the preservation, protection or reconstruction of the original pavement, is within the contemplation and meaning of the word "repair" as the same is used in section 1224 of the General Code.*

6. *Widening of an original pavement on an inter-county highway or main market road, constructed by the state, by the aid of state money, or taken over by the state after being constructed, such as would amount to the construction of a new or additional pavement, and which was more than reasonably necessary and essential in the preservation, protection or reconstruction, to the required standard of the original pavement, and not incidental thereto, is not within the contemplation and meaning of the word "repair" as the same is used in section 1224 of the General Code.*

7. *In projects involving the resurfacing and widening of inter-county highways and main market roads constructed by the state, by the aid of state money, or taken over by the state after being constructed, under the provisions of section 1224 of the General Code, not more than ten per cent of the cost and expense of such repair may be assessed against the property abutting on such road, or within one-half mile on either side thereof, or within one mile on either side thereof.*

8. *In projects involving the widening, as distinguished from the repair, of inter-county highways and main market roads constructed by the state, by the aid of state money, or taken over by the state after being constructed, by the director of highways and public works, under the provisions of section 1224 of the General Code, ten per cent of the cost and expense of such widening may be assessed against the property abutting on such road, or within one-half mile on either side thereof, or within one mile on either side thereof; however, such widening constitutes a construction project such as the director of highways and public works has ample statutory authority to construct, and of which a part of the cost and expense may be assessed against the property within the assessing zone.*

9. *The director of highways and public works is without authority to construct a road project into or through a city, or an improvement constituting an extension of an improved inter-county highway or main market road within a city.*

10. *County commissioners may, with the consent of the council of a city, construct a proposed road improvement into, within or through a city, when the finished improvement will form a continuous road improvement over a state or county road, or roads, or part thereof, or a state or county road or roads and a city street, or streets, or any part thereof, which form a continuous road improvement.*

11. *The original construction of an improvement on an inter-county highway or main market road constructed by the state, by the aid of state money, or taken over by the state after being constructed, is a separate, distinct and complete project, part of the cost of which may be assessed against the property within the assessing zone as provided by law.*

12. *A project involving the maintenance, repair or reconstruction of an inter-county highway or main market road constructed by the state, by the aid of state money, or taken over by the state after being constructed, is a separate, distinct and complete project and has no reference to or connection with the original construction project of such highway or road, and in the repair thereof by the director of highways and public works under the provisions of section 1224 of the General Code, not to exceed ten per cent of the cost and expense of such repair may be assessed against the property within the assessing zone, subject to the general assessment limitation, that the assessment against any property may not exceed the benefits accruing to*

such property; and this without reference to whether or not the same property has been assessed for a part of the cost and expense of the original construction of such highway or road and without reference to whether or not the assessments against the same property to pay a part of the cost and expense of the original construction of such highway or road have been paid.

13. Subject to the prior granting of an order of transfer by the common pleas court in accordance with section 2296, and related sections, of the General Code, county commissioners may devote to state aid road improvement projects funds not otherwise appropriated, derived and to be derived from levies under section 6926 of the General Code, in so far, and only in so far, as the proceeds of such levies are either in the county treasury or are to accrue to the treasury from levies which have been placed on the duplicate and are in process of collection; provided that the use stated may not be made of any part of such funds as may have been (a) anticipated by bond issues, (b) directed by popular vote under section 6926-1 of the General Code to be put in certain uses, or (c) found necessary for the maintenance and repair fund purposes mentioned in section 6956-1 of the General Code.

14. Funds raised by the two mill levy exempted from all tax limitations under the provisions of section 6926-1 of the General Code, may be used by the county commissioners in the payment of that portion of the costs and expenses to be paid by the county of a project on an inter-county and main market road, by the county commissioners and without cooperating with the department of highways and public works.

15. The proceeds arising from a two mill levy which has been exempted from all tax limitations under the provisions of section 6926-1 of the General Code, are available for the purpose of paying the county's proportion of the costs and expenses of a project on an inter-county highway or main market road by the county commissioners and without co-operation with the department of highways and public works, but such proceeds may not be used for the payment of the township's proportion of such costs and expenses, or the part thereof which, under the law, is to be assessed against the property within the assessing zone.

16. County commissioners are authorized to widen the pavement of an inter-county highway or main market road which has been constructed by the state, by the aid of state money, or taken over by the state after being constructed, without cooperating with the department of highways and public works. The exercise of this authority, however, is subject to first obtaining the approval of the plans and specifications for such a project by the director of highways and public works under the provisions of section 1203 of the General Code.

17. Under the provisions of section 1222 of the General Code, in the event less than one and one-half mill is levied, county commissioners are authorized to determine what part of the levy made, not exceeding one mill, shall not be subject to the tax limitation.

18. Under the provisions of section 1222 of the General Code, in the event less than one and one-half mill is levied, county commissioners are authorized to determine what part of the levy made, not exceeding one-half mill, shall be subject to the tax limitation.

19. That part of the levy which shall be subject to the tax limitations, under the provisions of section 1222 of the General Code, may not be removed from the tax limitations by a vote of the people.

COLUMBUS, OHIO, April 14, 1926.

HON. G. WALTER BOOTH, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Under recent date I am in receipt of a communication from Mr. Harold W. Slabaugh, Assistant Prosecuting Attorney of Summit County, enclosing

a letter from Mr. H. G. Souers, Resident Engineer for that county, in which the Resident Engineer requests my opinion on questions submitted by him to Mr. Slabaugh, and Mr. Slabaugh joins in requesting an opinion on the questions submitted by Mr. Souers.

The questions submitted are, in substance, as follows:

1. Wherein is authority imposed to acquire additional right of way for the purpose of widening an inter-county highway or main market road which has heretofore been constructed by the state, by the aid of state money, or taken over by the state after being constructed?

In an opinion of my predecessor, found in the Opinions of the Attorney General for 1916, Vol. II, p. 1239, and also in an opinion found in Opinions of the Attorney General for 1921, Vol. I, p. 187, it was held that the county commissioners are without authority to acquire property for the sole purpose of widening a road which is a part of the state system of highways. There has been no statute enacted since the date of the opinions referred to, conferring such authority upon county commissioners. The opinions referred to are approved and followed.

Section 1202 of the General Code, as the same is found in Enacted Amended Senate Bill No. 174 of the Eighty-sixth Session of the General Assembly (Mr. Hopley), 111 Ohio Laws, 80, reads:

"If the director of highways and public works proposes to improve an inter-county highway or main market road without the cooperation of the county commissioners or township trustees, and it is necessary as a part of the proposed improvement of the said highway, bridge or culvert, to acquire or appropriate lands or property, and such director is unable to agree with the owner or owners of such land or property as to the value thereof, he may proceed to condemn such land or property in the manner hereinbefore fixed for county commissioners and township trustees. Such director may condemn materials for road purposes in like manner.

"The director of highways and public works, in the maintenance, repair or reconstruction of inter-county highways and main market roads, shall be authorized to change the line of the improvement from that followed by the existing highway or road whenever such change is necessary, in his judgment, to eliminate dangerous curves, sharp angles or steep grades. He shall also be authorized to widen the right of way occupied by such road or highway whenever in his judgment a wider right of way is needed. For the purpose of acquiring any real estate that may be needed for any of such purposes, such director is authorized to pay to the owner or owners thereof, such reasonable sum as may be agreed upon between him and such owner or owners. If such director is unable to agree with the owner or owners of such real estate as to the value thereof, he may proceed to condemn such real estate in the manner provided in section 1201 of the General Code with respect to the condemnation by county commissioners or township trustees of right of way for state highway improvements.

"The director of highways shall be authorized to purchase or lease land along or in the vicinity of state highways, which in his judgment may be required in order to furnish storage facilities for materials or equipment employed in the maintenance and repair of such state highways, and to pay from the state maintenance and repair fund such reasonable price for such real estate as may be agreed upon between him and the owner or owners thereof. He shall be authorized to erect on such lands such sheds or other structures as in his judgment may be required."

It will be noted that this section is divided into three paragraphs and deals with three things, namely:

(1) The improvement of inter-county highways or main market roads by the director of highways and public works, without the cooperation of county commissioners or township trustees;

(2) The maintenance, repair or reconstruction of inter-county highways; and

(3) The purchasing or leasing of land along or in the vicinity of state highways, for storage and other purposes.

The first paragraph, dealing with the improvement of inter-county highways or main market roads, pertains to improvement projects without the cooperation of county commissioners or township trustees, the pertinent language of the section in that respect reading:

“If the director of highways and public works proposes to improve an inter-county highway or main market road without the cooperation of county commissioners or township trustees, etc.”

Then follow provisions giving the director of highways and public works authority to do the things provided for in the paragraph.

In contrast to the provisions of the first paragraph, it will be noted that the second paragraph, dealing with the maintenance, repair or reconstruction of inter-county highways or main market roads, contains no provision limiting the authority therein granted to maintenance, repair or reconstruction projects without the cooperation of county commissioners or township trustees. The language of this paragraph is broad and general, including projects in which there is cooperation on the part of the county commissioners or township trustees as well as projects where there is no such cooperation.

It will be further noted that the provisions specifically provide for the widening of the right of way, the pertinent language of the paragraph in that respect reading:

“He shall also be authorized to widen the right of way occupied by such road or highway whenever in his judgment a wider right of way is needed.”

The width to which the right of way may be widened is not limited by the provisions of the section and, therefore, the width to which the right of way shall be widened is within the discretion of the director of highways and public works.

It would follow, and you are advised, that in no event are county commissioners authorized to acquire property for the sole purpose of widening the right of way of an inter-county highway or main market road; that in the maintenance, repair or reconstruction of an inter-county highway or main market road, the director of highways and public works, when proceeding either with or without the cooperation of county commissioners or township trustees, whenever in his judgment a wider right of way is needed, is authorized to acquire property for the purpose of widening the right of way of such inter-county highway or main market road to such width as he may deem necessary.

2. May county commissioners establish a new county road, sixty feet wide, immediately adjacent to and parallel to an inter-county highway which has been constructed by the state, by the aid of state money, or taken over by the state after being constructed, thereby making such inter-county highway one hundred and twenty feet in width?

To institute and prosecute proceedings before a board of county commissioners to lay out a new county road sixty feet in width, adjacent to and paralleling an inter-county highway constructed by the state, by the aid of state money, or taken over by the state after being constructed, for the purpose of widening such inter-county highway, would, in effect, be a widening of such inter-county highway and, as hereinbefore advised, the county commissioners would be without authority, by such a method or otherwise, to widen such inter-county highway.

3. In projects involving the resurfacing and widening of inter-county highways under the provisions of section 1224 of the General Code;

First, May ten per cent of the cost and expense of resurfacing be assessed against the property abutting on said road, or within one-half mile on either side thereof, or within one mile on either side thereof; and

Second, May ten per cent of the cost and expense of widening be assessed against the property abutting on said road, or within one-half mile on either side thereof, or within one mile on either side thereof?

The pertinent parts of section 1224 of the General Code, as amended in Enacted Substitute House Bill No. 339 of the Eighty-sixth Session of the General Assembly (111 Ohio Laws, 102), read:

"The director of highways and public works shall maintain and repair to the required standard, and when in his judgment necessary, shall resurface, reconstruct or widen all inter-county highways, main market roads and bridges and culverts constructed by the state, by the aid of state money or taken over by the state after being constructed. In repairing inter-county highways and main market roads the director shall not be limited to the use of the material with which such inter-county highways or main market roads were originally constructed, but may repair such inter-county highways or main market roads by the use of any material which he deems proper. When in the repair of an inter-county highway or main market road the director changes the type of such road and uses, as the principal material in making such repair, a material different from that which the road was originally constructed, not more than ten per cent of the cost and expense of such repair may be assessed against the property abutting on said road, or within one-half mile on either side thereof or within one mile on either side thereof, in the manner hereinbefore provided in the cause of the construction of a road under the supervision of the department of highways and public works."

This section, among other things, requires the director of highways and public works to maintain and repair, to the required standard, inter-county highways, main market roads, bridges and culverts constructed by the state, by the aid of state money, or taken over by the state after being constructed. It authorizes the director of highways and public works, when in his judgment he deems it necessary, to resurface, reconstruct or widen such highways, bridges and culverts.

In repairing such highways, the director of highways and public works is not limited to the use of the material with which such highways were originally constructed, but he may use any material which he deems proper.

The section further provides that when in repairing inter-county highways and main market roads the type of the road is changed and a material different from that of which the road was originally constructed is the principal material used,

not more than ten per cent of the cost and expense of such repair may be assessed against the property abutting on said road, or within one-half mile on either side thereof.

It will be noted that the provision providing for the assessing of the property within the assessing zone appears to relate only to repairing such highways as distinguished from widening of such highways. It is clear, however, that in the repair of such highways the legislature, to a degree at least, contemplated a reconstruction thereof, for it is provided, as hereinbefore pointed out, that the director of highways and public works, in repairing, is authorized to change the type of road and use such different material as he may deem proper. By the clear reading of the statute, the director of highways and public works may, in the repair of such highways, assess not more than ten per cent of the cost and expense of such repair against the property within the assessing zone, even though such repair involves a reconstruction of such highways to the extent of changing the type of road and using as the principal material a different material than that used in the original construction of such highway.

The difficulty arises in determining whether or not, within the meaning of the legislation, no widening of a pavement, however slight, may be said to be repair of the highway. It is made the duty of the director of highways and public works to maintain and repair such highways to the required standard. The legislation involved uses the word "repair." According to Webster, to repair is "to mend, add to or make over; to restore to a sound state." The provision itself clearly shows that by the use of the word "repair" the legislature contemplated a making over; but it is just as clear that the legislature did not contemplate a substantial widening of the pavement, in the use of the word "repair." This is clear from the fact that under the general authority extended by the section, the director of highways and public works is authorized to repair, reconstruct or widen, while he is only authorized to assess not to exceed ten per cent of the cost and expense of repairing against the property within the assessing zone.

It cannot be said, however, that all widening, however slight, is not contemplated by and included within the meaning of the word "repair." As hereinbefore noted, to repair is to mend, add to or make over; and whatever widening is reasonably necessary and essential in the preservation or reconstruction of the original pavement is clearly within the contemplation and meaning of the word "repair," because that is the very purpose of the repair.

Under such an interpretation, the placing of a curb reasonably necessary and essential for maintaining, preserving and protecting and bringing to the required standard the original pavement or the reconstructed pavement, is clearly within the contemplation and meaning of the word "repair" as it is used; and not more than ten per cent of the cost and expense thereof may be assessed against the property within the assessing zone.

On the other hand, as hereinbefore suggested, such widening as would amount to what might be said to be the construction of a new or additional pavement, or which could not be said to be incidental to the original or reconstructed pavement, or being more than would be reasonably necessary to maintain or protect the original or reconstructed pavement, is clearly without the contemplation and meaning of the word "repair" as used; and the difficulty arises in determining whether or not a part of the costs and expense of widening, as distinguished from repair, may be assessed against the property within the assessing zone.

A study of said section 1224 of the General Code discloses that the widening therein provided for is only such widening as may be necessary in and incidental to repair, a part of the costs and expense of which, as hereinbefore pointed out, may

be assessed against the property within the assessing zone.

On the other hand, widening, as distinguished from repair, not being contemplated by the provisions of this section, may not be assessed under the provisions of this section.

It should be noted, in passing, that widening, as distinguished from repair, constitutes a project such as the director of highways and public works has ample statutory authority to construct, of which a part of the costs and expenses may be assessed against the property within the assessing zone, the same as any other construction project.

4. Is the director of highways and public works authorized to construct a road project into or through a city, or an improvement constituting an extension of an improved inter-county highway or main market road within a city?

While under the provisions of section 1193-1 of the General Code, upon the application of county commissioners or township trustees, the director of highways and public works is authorized to extend the improvement or an inter-county highway or main market road into or through a village, or construct an improvement constituting an extension of an improved inter-county highway or main market road within a village, there is no authority for so doing within the limits of a city.

5. Are the county commissioners authorized to construct a road project into or through a city, or an improvement constituting an extension of an improved inter-county highway or main market road, within a city?

Section 6906 of the General Code reads:

"The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by otherwise improving the same. The county commissioners shall have power to alter, widen, straighten, vacate or change the direction of any part of such road in connection with the proceedings for such improvement."

Section 6949 of the General Code reads:

"The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other proceedings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality."

It will be seen, from the provisions of the foregoing sections, that county commissioners may, with the consent of the council of a city, construct a proposed road improvement into, within or through a city.

In passing, attention should be directed to an opinion of my predecessor, found in Opinions of the Attorney General for 1919, Vol. 1, page 661, wherein it was held, as shown by the syllabus of the opinion, that

“Section 6949 G. C. does not authorize county commissioners to undertake the improvement, or to join with a municipality in undertaking the improvement of a municipal street forming no part of a state or county highway.”

Also, as shown by the opinion on page 662, as follows:

“It is therefore quite evident that the legislative intent in amending section 6949 was not to confer general power on the commissioners, to improve any street within a municipality, but merely to give them power to enter a municipality with the consent of the council thereof for the purpose of such road improvement as might be necessary to connect or complete county or state road improvements. In section 6949 the terms ‘into, within or through’ are used conjunctively, and in that sense are certainly plainly to the effect that the proposed road improvement must be such an improvement as the commissioners are authorized generally to construct, special power being conferred in certain necessary instances to conduct the improvement into, within or through the municipality. Further support for this construction, if any is needed, may be found in the last sentence of section 6952, reading as follows:

“The word “road” as used in sections 6906 to 6953 inclusive of the General Code, shall be construed to include any state or county road or roads, or any part thereof, or any state or county road or roads, and any city or village street or streets, or any part thereof, which form a continuous road improvement’.”

This authority extends to a designated extension of an inter-county highway or main market road where such extension, when improved, will form a continuous road improvement over a state or county road, or roads, or part thereof, or a state or county road, or roads, and a city street, or streets, or any part thereof, which from a continuous road improvement.

This authority granted may be exercised without cooperating with the department of highways and public works.

6. If the assessments on the original construction of a project on an inter-county highway or main market road constructed by the state, by the aid of state money, or taken over by the state after being constructed, are not paid, at the time such highway or road is repaired or reconstructed, may not more than ten per cent of the cost and expense of repairing such original improvement, by changing the type thereof and using as a principal material in making such repair a material different from that of which the road was originally constructed, be assessed against the property within the assessing zone so that the assessments run concurrently?

The highways which the resident engineer has in mind are no doubt highways, a part of the cost and expense of construction of which were originally assessed

either under the provisions of section 1224, and related sections, of the General Code, and limited in amount to thirty-three per cent of the value of the property within the assessing zone for the purposes of taxation and to the general rule that assessments may not exceed the benefits accruing to such property, or under the provisions of section 6922, and related sections, of the General Code, limited in amount by the general rule above referred to, or under the provisions of section 3928-15a, and related sections, of the General Code, and limited in amount by the general rule above referred to.

It will be noted that there is no statutory limitation in section 1224 of the General Code on the total amount which may be assessed, other than the percentage limitation of ten per cent of the cost and expense of the project. The only other limitation on such amount is the limitation under the rule that assessments may not exceed the benefits.

Each improvement, that is the original improvement and the repair project, is a separate and distinct project, each without relation to the other, and the only limitation upon assessments in connection with the repair project are those hereinbefore set out, and such assessments may be made without reference to the former assessments and without reference to whether or not the former assessments have or have not been paid.

7. May funds raised by the two mill levy exempted from all other tax limitations under the provisions of section 6926-1 of the General Code, be used to pay the portion to be paid by the county in the construction of a state aid project?

An affirmative answer, subject to certain limitations, may be found to this question in an opinion of my predecessor, found in the Opinions of the Attorney General for 1920, Vol. I, page 112, which opinion is approved and followed and to which your attention is directed.

8. May funds raised by the two mill levy exempted from all tax limitations under the provisions of Section 6926-1 of the General Code be used by the county commissioners in the payment of the cost and expense of a project on an inter-county highway or main market road by the county commissioners and without cooperation with the department of highways and public works?

Section 6926 of the General Code reads:

"The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the county shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force."

Section 6926-1 of the General Code reads:

"The county commissioners of any county may, and upon petition of the qualified electors of the county in a number equal to at least five per cent

of the number of votes cast therein at the last preceding election of state and county officers, shall by resolution submit to the electors of such county at the first ensuing November election that occurs more than forty days after the adoption of such resolution, the question of exempting from all tax limitations the levy of two mills provided by section 6926 of the General Code, for the purpose of paying the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, maintaining and repairing county roads, or the question of so exempting a part of such levy, such exemption to continue for a definite term of years not exceeding ten. When such question is submitted upon the petition of electors, such petition shall state the portion of the levy to be so exempted and the number of years during which such exemption shall continue, and these matters set forth in the petition shall also be set forth in like manner in the resolution adopted by the county commissioners pursuant thereto.

"Where such question is submitted by the commissioners without the filing of a petition by electors, such resolution shall state the portion, of the levy to be so exempted and the number of years during which such exemption shall continue. The petition and resolution, or the resolution where the commissioners act without a petition being presented, may also state the part of such levy so as to be exempted to be used for constructing and improving county roads and the part of such levy so to be exempted to be used for maintaining and repairing county roads, in which event the proceeds of any such levy exempted by vote of the electors of the county shall be expended in accordance with such division. The board of county commissioners, upon the adoption of such resolution by a majority vote of all the members elected or appointed thereto, shall cause a copy of such resolution to be certified to the deputy state supervisors and inspectors or the deputy state supervisors of elections of the proper county."

By the express provision of the first quoted section, county commissioners are authorized "for the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of the constructing, reconstructing, improving, maintaining and repairing roads *under the provisions of this chapter*, to levy annually a tax not exceeding two mills."

Under the provisions of section 6906 of the General Code, which section is a part of the same chapter, the county commissioners are authorized, among other things, to improve, reconstruct or repair any existing public road or part thereof. Under this provision the authority extends to inter-county highways and main market roads as well as any other public road; and it would follow that funds arising from the two mill levy may be used to pay the county's proportion of the costs and expenses of a project on an inter-county highway or main market road constructed under the jurisdiction of the county commissioners and without cooperating with the department of highways and public works.

In passing, it is deemed pertinent to call attention to the provisions of section 1203 of the General Code, which reads:

"Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from constructing, improving, maintaining or repairing any part of the inter-county highways within such county or township; provided, however, that the plans and specifications for the proposed improvement shall first be submitted to the state highway commissioner and shall receive his approval."

9. May funds raised by the two mill levy exempted from all other tax limitations under the provisions of section 6926-1 of the General Code, be used in the payment of that part of the costs and expenses of a project on an inter-county highway or main market road by the county commissioners and without co-operating with the department of highways and public works, which is to be paid by the township and which is to be specially assessed against the property within the assessing zone?

By the provisions of section 6926 of the General Code, as well as by the provisions of section 6926-1 of the General Code, the proceeds arising from the levy are available only for use in the payment of the county's proportion of the costs and expenses of the project, and are not available for use in the payment of the proportion of the costs and expenses to be paid by the township, or for the payment of that proportion to be specially assessed.

10. May county commissioners widen the pavement on an inter-county highway or main market road constructed by the state, by the aid of state money, or taken over by the state after being constructed?

As hereinbefore pointed out, under the provisions of section 6906 of the General Code, the county commissioners, among other things, are authorized to improve, reconstruct or repair *any* existing public road or part thereof, by grading, paving, * * * or by otherwise improving the same.

Under the broad powers granted in this section, the county commissioners are authorized to widen the pavement on an inter-county highway or main market road constructed by the state, by the aid of state money, or taken over by the state after being constructed, without co-operating with the department of highways and public works.

The exercise of this authority, however, is subject to the provisions of sections 1203 of the General Code, hereinbefore quoted.

11. Under the provisions of section 1222 of the General Code, may any part of the one mill provided for therein, and which is outside of all tax limitations, be levied before the one-half mill provided for therein, and which is subject to the limitation on the combined maximum rate for all taxes, has been levied?

In answering this question, I am, at the outset, confronted with the opinion of my predecessor, found in Opinions of the Attorney General for the year 1921, Vol. I, page 362, wherein it is held, as shown by the syllabus:

"A levy for the 'county's proportion' under section 1222 G. C. as amended 108 O. L., 494, of less than the full one and one-half mills as well as a levy of the full one and one-half mills, is subject, to the extent of one-half mill thereof, to the limitation upon the combined maximum tax rate."

The amendment of the section (110 Ohio Laws, 453) does not materially change the language of the section in the particulars involved in your question and the proposition in the opinion referred to.

The section in its present form reads:

"For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, main-

tenance and repair of highways and of bridges in municipalities under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax, not exceeding one and one-half mills, upon all the taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes but subject, however, to the extent of one-half mill thereof, to the limitation upon the combined maximum rate for all taxes now in force. The remaining one mill of said levy so authorized shall be in addition to all other levies made for any purpose or purposes, and the same shall not be construed as limited, restricted or decreased in amount or otherwise by any existing law or laws. The proceeds of such levy shall be used solely for the purpose of paying the county's proportion of the cost and expense of constructing, improving, maintaining and repairing inter-county highways and main market roads or parts thereof in co-operation with the state highway department or the federal government or both; and the funds produced by such levy shall not be subject to transfer to any other fund, either by order of court or otherwise.

"The county commissioners of any county in which less than one and one-half mills is levied in any year under the provisions of this section shall within the above limitations determine what part of such levy shall be subject to the limitations upon the combined maximum rate for all taxes now in force and what part of such levy shall be outside such limitation and unrestricted by any existing law or laws.

"For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the interested township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the county commissioners or the township trustees are authorized to levy a tax not exceeding two mills upon all taxable property of the township in which such road improvement or some part thereof is situated. Such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside the limitation of two mills for general township purposes, and subject only to the limitation upon the combined maximum rate for all taxes now in force. Where the improvement is made upon the application of the county commissioners said county commissioners shall levy the tax, and where the improvement is made upon the application of the township trustees said township trustees shall levy the tax. A county or township may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section."

For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of a state aid project, the county commissioners are authorized to levy not exceeding one and one-half mills.

Under the provisions of the first paragraph of the section, it is provided that one-half mill of the levy is subject to the limitations upon the combined maximum rate for all taxes. The remaining one mill of the levy shall be outside of the tax limitations. In other words, the effect of the provisions of this paragraph is that when all of the one and one-half mill levy is made, the one-half mill thereof is subject to the tax limitations and one mill thereof is not subject to the tax limitations.

In the event that less than one and one-half mills are levied, the county commissioners shall determine what part of such levy shall be subject to the tax limitations and what part thereof shall not be subject to the tax limitations. Their determination, however, as provided in the section, is subject to the limitations (a) that not more than one-half mill of whatever levy less than one and one-half mills is made

shall be subject to the tax limitations; and (b) that not more than one mill of whatever levy less than one and one-half mills is made shall not be subject to the tax limitations.

The purpose and intent of the legislation is to authorize county commissioners to provide a fund for use in connection with state aid projects; authorizing a levy of one-half mill subject to the tax limitations and a levy of one mill outside of the tax limitations.

To give strict application to the rule as laid down in the former opinion would in counties where the tax levying situation was such as not to permit the levying of one-half mill within the tax limitations, deprive such counties of all authority to make any levy whatever outside of the tax limitations. It seems clear that such was not the intention of the legislature, but, on the other hand, by the plain language of the statute the county commissioners are, under the second paragraph thereof, authorized to determine, in cases in which less than one and one-half mills are levied, what part of the levy made shall be and what part thereof shall not be subject to the tax limitations; their determination being subject to the limitations hereinbefore pointed out.

The former opinion, referred to, is not followed.

It would follow, and you are advised, that in cases where a levy of less than one and one-half mills is made, any part or all of one mill may be levied outside the tax limitations even though one-half mill is not levied subject to the tax limitations.

12. Under the provisions of section 1222 of the General Code, may the one-half mill referred to be placed outside of all tax limitations by a vote of the people?

There is no statute authorizing the submission of the proposition to remove the part of the levy referred to from the tax limitations. By the provisions of the statute, this part of the levy is subject to the tax limitations.

Respectfully,

C. C. CRABBE,

Attorney General.

3266.

ENDOWMENT CERTIFICATES ISSUED BY BOND INVESTMENT COMPANIES DO NOT COME WITHIN THE CLASSIFICATION OF SECURITIES AS DEFINED IN SECTIONS 6373-1 AND 6373-2 OF THE GENERAL CODE OF OHIO—SPECIFIC TYPE OF CERTIFICATES CONSIDERED.

SYLLABUS:

1. *Companies which place or sell endowment certificates on the partial payment or installment plan are subject to the provisions of the bond investment statutes and such certificates are not to be treated as securities as contemplated by sections 6373-1 and 6373-2, General Code.*

2. *The classification of agents and the requirements to be met by bond investment companies are controlled by the provisions of section 697 to 709, inclusive, of the General Code.*

COLUMBUS, OHIO, April 14, 1926.

HON. CYRUS LOCHER, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your communication has been received, which is as follows:

“The Capital Endowment Company of Cleveland has been insistent that we get an opinion from the Attorney General with reference to the following: