

amount that has been otherwise provided. The contracts usually expressly provide that in no event is the State to expend more than a certain amount and that the contractor is to look to the subscription fund for the remainder of the contract price. Under such circumstances the State takes the initiative and all formalities of law insofar as the State's share is concerned are complied with.

In the case you have under consideration the municipal authorities proceed to purchase a certain fire apparatus. In pursuance of the advertisement for bids, the owner of said apparatus submits a bid. According to your statement, he reduces such bid to an amount which represents the market price less the amount subscribed. It is believed that this procedure in no wise violates the provisions of the statute. In such case the owner who is to receive the subscribers' money undoubtedly will be the low bidder. However, it is conceivable that some competitor could have the same arrangement with another group of citizens of the same municipality and by reason of such arrangement would be able to submit a bid lower than his competitor. While, of course, this is not probable it must be conceded that it is possible.

It is believed that there is no basis for the municipal authorities to question the motive which actuates a low bidder in making the low bid under such circumstances. Such officers are concerned with reference to the quality of the equipment to be furnished and the price to be paid.

Many reasons may account for a bidder desiring to submit a low figure but, as above stated, such motives are immaterial and need not be considered by the awarding authorities, in the absence of fraud or collusion.

In view of the foregoing and in specific answer to your inquiries you are advised that

1. There is no authority whereby municipalities may contribute to a fund to be expended by others than the city authorities for the purchase of fire apparatus. The purchase of such equipment by the municipal authorities must be in pursuance of advertisement and competitive bidding.

2. There is no inhibition against the municipal authorities accepting the lowest bid for such equipment notwithstanding such bid is made by reason of an arrangement whereby citizens have agreed to make a contribution to such bidder in the event his bid is accepted.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

182.

RESIDENT DISTRICT DEPUTY DIRECTOR—NECESSITY FOR REAPPOINTMENT WHEN CHANGE IN HIGHWAY DIRECTORS OCCURS.

*SYLLABUS:*

*Where it is desired by the Director of Highways now in office to continue in office or position resident district deputy directors appointed by his predecessor, under the provisions of Section 1183, General Code, such persons should be appointed to their respective positions by such highway director and they should qualify pursuant to their respective appointments.*

COLUMBUS, OHIO, March 11, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, which reads as follows:

"Sections 1178-1182-2 provide for the appointment of various employees of the Department of Highways. In connection with such appointments I desire your advice on the following question:

Is it necessary that the Resident District Deputy Directors provided for in Section 1183 be reappointed in order to continue to serve in their official capacity?

In general the county surveyor or some other engineer in the county has held the appointment of Resident District Deputy Director for each county in the state. We have proceeded on the assumption that such appointee held office until a successor was duly appointed and qualified. Kindly advise if this procedure is in accordance with law or if it is necessary for me to make re-appointments where it is intended to continue said deputies as our official representatives."

Section 154-3, General Code, provides, among other things, for the creation of the Department of Highways, administered by the Director of Highways. Under the provisions of Section 154-4, General Code, the Director of Highways is appointed by the Governor with the advice and consent of the Senate, holding his office during the term of the Governor.

Section 1183, General Code, referred to in your communication, was enacted as a part of the Norton-Edwards Act to revise the laws relating to the Department of Highways and the state highway system, passed April 21, 1927 (112 O. L. 430, 433). This section provides in part as follows:

"The state is hereby divided into eighty-eight districts. The boundaries of such resident districts shall be concurrent with the boundaries of the eighty-eight counties of the state; provided, that when the director is of the opinion that the efficiency of the department will be adequately maintained by so doing, he may combine two or more counties into one resident district. The director may give to each such resident district an appropriate number or name.

The director may appoint and assign a resident district deputy director to each resident district. A county surveyor may be appointed and serve as such resident district deputy director of the district made up in whole or in part of the county in which he is surveyor. Any compensation paid to a county surveyor, as a resident district deputy director by the director shall, by such county surveyor, be paid into the county treasury.

Such resident district deputy directors shall be competent civil engineers. They shall be appointed to serve during the pleasure of the state director, and receive a salary of not to exceed three thousand dollars per annum, and give bond in the sum of five thousand dollars. Such resident district deputy directors shall perform such duties as may be prescribed by the director."

Section 1183-2, General Code, is likewise applicable in the consideration of the question presented in your communication. This section provides as follows:

"No appointee of the director, other than hereinbefore provided in connection with the first assistant director, shall be authorized to bind the director in a contract, except when given general or special authority thereto on the improvement or improvements to which such appointee may be assigned."

From the provisions of Sections 1183 and 1183-2, General Code, above quoted, it appears that no powers or duties are conferred or imposed upon the resident dis-

strict deputy directors provided for by Section 1183, General Code, independent of those which pertain to the Director of Highways, and that such resident district deputy directors are but deputies of the Director of Highways in fact as well as in name.

Coming to the question presented in your communication, it is noted as a general rule that "a deputy's commission, in the absence of any statutory provision to the contrary, runs only while the principal's term runs; if the principal is re-elected or re-appointed, the deputy must be appointed anew." Throop on Public Officers, Sec. 582.

This principle of law is stated in 9 Am. & Eng. Ency. of Law (2nd Ed.), page 382, as follows :

"A deputation of necessity expires with the office upon which it depends; if the principal be re-elected, a new appointment is required to continue in office his former deputy."

In 46 C. J., at page 1062, it is said :

"Deputies, whether common law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and their deputation expires with the office on which it depends. Deputies must, from this point of view, be distinguished from assistants to whom a fixed term has been given by law."

In the case of *Hord vs. State*, 167 Ind., 622, 640, the court in its opinion says :

"The general and well affirmed rule is that in the absence of some statutory provision to the contrary, the commission or appointment of a deputy officer runs and continues only during the term of the officer making the appointment. Of course, in the absence of a statute to the contrary, the principal has a right, at his pleasure, to remove his deputies. If the principal officer is re-elected or reappointed for another term, his deputies must also be reappointed in order to continue them in office."

By way of specific application of the general rule and principle above noted, it was held in the case of *Greenwood vs. State*, 17 Ark. 332, that the appointment of a deputy sheriff does not continue any longer than the term for which his principal was elected; and that upon re-election of the sheriff, it requires a new appointment and qualification to continue such deputy in office.

In the case of *Smith vs. Canstler*, 83 Ky. 367, it was held that where one who had been a deputy county clerk during the first term of the clerk continued to act as such deputy without reappointment after the clerk had entered upon his second term, such deputy was not a *de facto* officer.

Among other authorities supporting this rule of law, the following cases in point are noted: *Hubert vs. Mendheim*, 64 Cal. 213; *State vs. Barrows*, 71 Minn. 178; *Banner vs. McMurray*, 12 N. C. 218; *Thomas vs. Summey*, 46 N. C. 554; *Boardman vs. Halliday*, 10 Paige (N. Y.) 223; *Brady vs. French*, 6 O. N. P. 122; *State ex rel. vs. Cooper*, 12 O. N. P. (n. s.) 659.

Consistent with said rule and in the application thereof, it has been held that since the act of a deputy acquires validity because it is the act of the principal, the authority of the deputy ceases upon the death, resignation or removal of the principal. *Anderson vs. Brown*, 9 Ohio 151; *Brady vs. French*, *supra*; *Boardman vs. Halliday*,

*supra*. In the case of *State vs. Townley*, 67 O. S. 21, the question was raised with respect to the status of a deputy clerk holding over without reappointment during the second term of the county clerk. The Supreme Court did not find it necessary to decide this question but contented itself with the observation that such acting deputy was not a deputy clerk *de jure* and that whether he was a deputy clerk *de facto* was a debatable question.

Upon the authorities above mentioned, however, I am inclined to the view that if it is your desire that resident district deputy directors appointed by your predecessor under the provisions of Section 1183, General Code, be continued in their respective offices or positions, they should be appointed by you and they should qualify under such appointment. This holding applies to county surveyors holding the position of resident district deputy directors in their several districts, as well as to other persons. This follows from the fact that a county surveyor holding the position of resident district deputy director does not hold his position by virtue of his office as county surveyor but by virtue of his appointment by the Director of Highways.

The question presented in your communication is one of considerable importance by reason of the fact that under the provisions of Section 1183, General Code, above quoted, resident district deputy directors appointed under the provisions of said section are required to give bond. In this connection a further question might arise with respect to the liability of the sureties upon the bond of a resident district deputy director for unlawful acts or default of such resident district deputy director while he is holding over without appointment by the Director of Highways in office at the time of such unlawful act or default. The case of *Banner vs. McMurray*, *supra*, was an action on the bond of a deputy sheriff. In this case it appeared that the term of the sheriff was one year and that he was reappointed and continued to serve several successive years and retained the same deputy. At the commencement of the first term of such sheriff the deputy gave bond for his faithful conduct as said deputy sheriff during his continuance in office. The Supreme Court of North Carolina in this case said that "the deputation of necessity expires with the office upon which it depends," and that the words "during his continuance in office" should be restricted to the first term of the sheriff's tenure in office. Following the case of *Banner vs. McMurray*, the Supreme Court of North Carolina, in the case of *Thomas vs. Summey*, *supra*, held that where a sheriff takes a bond from his deputy to indemnify him against the wrongful acts and defaults of such deputy "during his continuance in office," such bond is operative only during the sheriff's then current term, and that such bond cannot be held to cover defaults which occur during the succeeding term of the sheriff while the deputy sheriff is holding over and acting as such deputy without appointment. The cases above noted on this point were later followed in the case of *Hubert vs. Mendheim*, *supra*.

Your communication does not present any question with respect to the bond of a resident district deputy director appointed under the provisions of Section 1183, General Code, and for this reason no opinion is here expressed as to the question above suggested, which I have noted for the purpose of showing its relation to the question presented in your communication, and the importance of the question thus presented.

By way of specific answer to the question presented in your communication, I am of the opinion that where it is intended to continue in office or position the resident district deputy directors now acting as such under appointment of your predecessor, they should be appointed by you to such positions.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*