

territory to look after, his power would not be absolute; he would be under the general control of the entire board, just in the same manner as the board of trustees have control over the township highway superintendent."

In considering your fourth inquiry, it is assumed that in mentioning the sum of fifty dollars, you have reference to Section 3571-1, General Code, which provides:

"In the maintenance and repair of roads the township trustees and any township highway superintendent, appointed by them, shall be subject to the general supervision and direction of the county surveyor. They shall follow the direction of the county surveyor as to methods to be followed in making repairs and all expenditures made by them for maintenance and repair purposes shall where the amount involved exceeds fifty dollars receive the approval of the county surveyor before payment is made."

It is believed that the section last quoted would not affect your question. Section 3370, General Code, expressly authorizes the trustees to maintain or repair a county road or an intercounty highway with the approval of the county commissioners or State Highway Director. When such an approval is given, then it is believed that they may proceed in the same manner as they proceed in connection with township roads.

In specific answer to your inquiries, it is my opinion that:

First, under Section 3370, General Code, it is not mandatory that the trustees employ one of the methods of procedure in connection with roads set out in the section, but they may proceed to act as a board in such matters.

Second, when the trustees have actually divided the township into districts and failed to record such action upon their minutes, a nunc pro tunc entry may be made showing such action.

Third, in the event the trustees have divided the township into districts and a majority acts upon any proceeding instead of the individual member designated, such proceeding is not invalidated.

Fourth, in maintaining and repairing county roads, with the approval of the county commissioners, the trustees may proceed in the same manner as they proceed with township roads.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1102.

COMPLAINT—SWORN TO BY COMPLAINANT'S ATTORNEY—VERIFIED
WITHIN PURVIEW OF SECTION 6373-42, GENERAL CODE—EXCEP-
TION—JURISDICTION OF REAL ESTATE BOARD ACTING AFTER
IMPROPER COMPLAINT FILED, NOT QUESTIONABLE.

SYLLABUS:

1. *A complaint sworn to by a complainant before his attorney who is a notary public is a verified complaint within the meaning of Section 6373-42, General Code, unless such notary public is a party to a specific real estate transaction complained of, and, accordingly, financially interested in the matter of the complaint to an extent beyond the matter of attorney's fees for professional services.*

2. In the event an unverified complaint is filed with the state board of real estate examiners and such board sees fit, upon its own motion, to investigate the conduct of a licensee against whom such complaint is filed and as a result of such investigation serves notice upon such licensee in accordance with the provisions of Section 6373-43, General Code, the jurisdiction of such board may not be questioned at a hearing held pursuant to such notice.

COLUMBUS, OHIO, October 25, 1929.

HON. ED. D. SCHORR, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“A complaint was recently filed with the State Board of Real Estate Examiners under Section 6373-42, G. C., against a licensed broker. When the matter came on for hearing it developed that the attorney for the complainant acted as notary public and swore the complainant to the affidavit. Thereupon the attorney for the broker objected to the complaint on the ground that it had not been properly verified and cited Sections 11524 and 11532, G. C. and questioned the jurisdiction of the State Board of Real Estate Examiners to hear the complaint.

Will you please render an opinion on the following:

1. Does a complaint sworn to by complainant before his attorney comply with the provisions of Section 6373-42, G. C.?
2. Assuming that the verification was not properly made before the attorney for complainant, has the board authority under this same section to proceed with the hearing on this complaint?
3. In cases where the jurisdiction of the board is questioned, may the board proceed on its own motion to hear the complaint without giving further notice as provided by Section 6373-43 G. C.?”

Sections 6373-42 and 6373-43, General Code, are as follows:

Section 6373-42:

“The State Board of Real Estate Examiners may, upon its own motion, and shall, upon the verified complaint in writing of any person, investigate the conduct of any licensee under this act, within this state, and may suspend, or revoke or refuse to renew any license at any time where the licensee, in performing or attempting to perform any of the acts mentioned in Section 1 of this act, is guilty of:

- (1) Knowingly making any substantial misrepresentation, or
- (2) Making any false promises with intent to influence, persuade or induce, or
- (3) A continued and flagrant course of misrepresentation or the making of false promises through agents or salesmen, or advertising or otherwise, or
- (4) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto, or
- (5) Failure within a reasonable time to account for or to remit any moneys coming into his possession which belong to others, or
- (6) Any other conduct, whether of the same or a different character than hereinabove specified, which constitutes dishonest dealing.”

Section 6373-43:

“The State Board of Real Estate Examiners shall, before suspending, revoking or refusing to issue or renew any license, or before refusing to admit any applicant or person named in an application to the examination herein

provided for, notify in writing, the licensee or such applicant or person of the charges against him, and afford an opportunity to be heard in person or by counsel in reference thereto. Such notice may be served by mailing by registered mail to the address shown on the license or on the application, as the case may be. If the licensee be a real estate salesman, the board shall also notify the real estate broker employing him, in like manner."

Section 11524, to which reference has been made, appears in Title IV, Division III, Chapter 3, General Code. This chapter contains provisions relative to the subject of evidence. Section 11521 provides that testimony may be taken by affidavit, by deposition or by oral examination. Section 11522 defines affidavit as "a written declaration under oath made without notice to the adverse party." Deposition is defined in this section as "a written declaration under oath, made upon notice to the adverse party." Section 11524 provides that an affidavit may be made before any person authorized to take depositions and that unless it is a verification of a pleading, it must be authenticated in the same way as a deposition. The reference here is clearly to an affidavit as defined in Section 11522. It is provided in Section 11532 that the officer before whom depositions are taken must not be an attorney for either party or otherwise interested in the event of the action or proceeding. It is noted that there is no express inhibition with relation to the attorney of either party to an action, acting as a notary in connection with the taking of an affidavit as defined in that chapter. I am accordingly of the view that Section 11532 contains no inhibition with reference to the attorney for a complainant verifying such complaint as is contemplated in the provisions of Section 6373-42, General Code.

In the absence of a statute prohibiting an attorney from taking such a verification of his client as is here in question, it would appear that such verification is valid unless against public policy. Acknowledgments have been held to be invalid on this ground when the party taking the acknowledgment is directly and primarily interested in the transaction as in the case of an instrument conveying title to real estate. *Amick vs. Woodworth et al.*, 58 O. S., 87.

Upon the facts here presented, there is nothing to indicate that the attorney was acting in other than a ministerial capacity.

A situation may arise whereby the attorney for a complainant who acted as notary public in the verification of a complaint filed under Section 6373-42, General Code, may be financially interested in a particular real estate transaction complained of or have a personal interest in such real estate. Under such circumstances, of course, such verification might possibly be invalid on the grounds of public policy. A situation of this kind, however, is not before me.

Specifically answering your first question, I am of the opinion that a complaint sworn to by a complainant before his attorney who is a notary public is a verified complaint within the meaning of Section 6373-42, General Code, unless such notary public is a party to a specific real estate transaction complained of and, accordingly, financially interested in the matter of the complaint to an extent beyond the matter of attorney's fees for professional services.

Your second and third questions will be considered together. Under the provisions of Section 6373-43, *supra*, certain rights are guaranteed to a licensee, *viz.*, before the State Board of Real Estate Examiners may revoke any license, the licensee shall be granted a hearing pursuant to notice as therein provided. It is observed that there is no provision in this section to the effect that such notice served upon a licensee, shall contain any reference to what motivated the board in making the investigation which resulted in the board determining that a hearing should be held. Under the provisions of Section 6373-42, wherein the board is authorized upon its own motion to investigate the conduct of any licensee, it is stipulated that in the event a verified complaint in

writing is filed with the board, it then becomes the mandatory duty of the board to investigate the conduct of such licensee against whom the complaint is filed. It is manifest, accordingly, that in the event an instrument purporting to be a verified complaint were filed with such board and the board should not be satisfied as to the validity of the verification and refused to make an investigation, the complainant would clearly have the right to raise the question of the authority of such action of the board in so refusing to investigate. I am clearly of the view that whether a verified complaint is filed or not, if the board does in fact investigate the conduct of any licensee which it is clearly authorized to do under this section, the question of the validity or invalidity of a verification may not be raised by the licensee notified to appear for a hearing under the provisions of Section 6373-43, *supra*. Manifestly, a complaint unverified may cause a board, upon its own motion, to make an investigation and such act would be clearly in accordance with the provisions of Section 6373-42, *supra*.

It must be borne in mind that the filing of a verified complaint imposes no duty upon the board to hold a hearing upon a matter of revocation. The only duty which such instrument imposes upon the board is to make an investigation. After having made such investigation the board must then, upon a consideration of the facts disclosed by its own investigation, determine whether or not the conduct of the party investigated is such as to warrant a hearing. A more difficult question would be presented if this verified complaint imposed a mandatory duty upon the board to hold a hearing, but such is not here the case.

Specifically answering your second and third questions, therefore, I am of the opinion that in the event an unverified complaint is filed with the State Board of Real Estate Examiners and such board sees fit, upon its own motion, to investigate the conduct of a licensee against whom such complaint is filed and as a result of such investigation, serves notice upon such licensee in accordance with the provisions of Section 6373-43, the jurisdiction of such board may not be questioned at a hearing held pursuant to such notice.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1103.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND GEORGE W. TIMMONS, COLUMBUS, OHIO, FOR CONSTRUCTION OF UNDERGROUND STORAGE ROOMS FOR CHEMISTRY BUILDING, OHIO STATE UNIVERSITY, COLUMBUS, OHIO, AT AN EXPENDITURE OF \$6,350.00.

COLUMBUS, OHIO, October 25, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Board of Trustees of the Ohio State University, and George W. Timmons of Columbus, Ohio. This contract covers the construction and completion of general contract for "Underground Storage Rooms for Chemistry Building," Ohio State University, Columbus, Ohio, and calls for an expenditure of six thousand three hundred and fifty dollars (\$6,350.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted evidence that the consent of