

action of the water thereon, so as to become unsafe to travelers on such highway.

2. The county commissioners are not required under Section 7563, General Code, to protect by guard rails banks immediately connected with or adjacent to a public highway unless they have a perpendicular drop of more than eight feet from the surface of the highway and are composed of such substance that they may be washed away by the action of water thereon so as to be unsafe for travel on such highway.' "

A copy of Opinion No. 461 is herewith enclosed for your information.

It will be noted from the foregoing discussion contained in my former opinion that the Supreme Court of Ohio has not passed upon the question which you raise, and inasmuch as the Court of Appeals in the Harrigan case, *supra*, has directly passed upon the question of the liability of a board of county commissioners to respond in damages for the failure to erect guard rails, as required by the provisions of Section 7563, *supra*, in specific answer to your question, it is my opinion that it is the duty of the county commissioners to erect guard rails at all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with the public highway, or are adjacent thereto, in an unprotected condition, and that such duty extends to roads in the state highway system. Upon failure to so do county commissioners may be subjected to a suit in damages, in case injuries are sustained which directly grow out of such failure.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2156.

MORTGAGE—MAY BE EXECUTED BY CHURCH OR RELIGIOUS SOCIETY INCORPORATED UNDER SECTION 8623-98, ET SEQ., GENERAL CODE—MUST OBTAIN COURT AUTHORITY UNDER SECTION 10051, GENERAL CODE—EXCEPTIONS NOTED.

SYLLABUS:

A church or religious society or association incorporated under the provisions of Sections 8623-98 et seq., General Code, (the new general corporation act) is required to obtain court authority in order to mortgage its property in the manner provided by Section 10051, General Code.

COLUMBUS, OHIO, May 24, 1928.

HON. J. W. TANNEHILL, *Superintendent of Building and Loan Associations,*
Columbus, Ohio.

DEAR SIR:—This will acknowledge receipt of your recent communication which reads as follows:

"Will you please advise whether or not a church or religious society or association incorporated under the provisions of Sections 8623-98 et seq. of the General Code of Ohio is required to obtain authorization of Court in the manner contemplated by Section 10051 of the General Code in connection with the mortgaging of property, the title to which is held in the name of such incorporated body?"

The provisions of the new corporation act relative to corporations not for profit make it clear that such corporations may purchase, hold and dispose of real estate and, as an incident to that right, such corporations have the right to mortgage such property.

Section 10051, General Code, however, provides as follows:

“When a charitable or religious society or association desires to sell, lease, exchange or incumber by mortgage or otherwise any real estate owned by it, or held in trust by it for a specified religious or charitable purpose, or held for its use or benefits by trustees either chosen by it or otherwise constituted, for any such purpose, except grounds used or occupied as burial places for the dead, the trustees, wardens and vestry, or other officers intrusted with the management of the affairs of such society or association or holding the title to such property, *or such society or association itself, if it be incorporated under any law of this state, in the common pleas court of the county in which the real estate is situated may file a petition stating how and by whom the title thereto is held, that such society or association desires to make the sale, lease, exchange or incumbrance and setting forth the object thereof. If upon the hearing of the case it appears that such sale, exchange, lease or incumbrance is desired by the members of the society or association and that it is right and proper that authority be given to accomplish it, the court may authorize the trustees or other officers of the society or association, or if incorporated the society or association itself, to sell, lease, exchange or incumber such real estate in accordance with the prayer of the petition and upon such terms as the court deems reasonable.*” (Italics the writer’s.)

It accordingly remains to be seen whether or not the provisions of this section are applicable to a church or religious society incorporated under the provisions of the new corporation act.

The ordinary rule is, that, in the absence of express provisions to the contrary, where a general codification of laws is made and a complete method of procedure prescribed, such as is provided by the new general corporation act, earlier inconsistent statutes are impliedly repealed. In this instance, however, as a part of the general corporation act the Legislature adopted Section 8623-132, General Code, which is as follows:

“When special provision is made in the General Code for the incorporation, organization, conduct or government of corporations formed for any specified purpose, this act shall not apply, but the special provision shall govern unless it clearly appears that the special provision is cumulative.”

This section has clear reference to any specific statute then in force with relation to corporations formed for any specified purpose. In my opinion Section 10051, supra, and the succeeding sections relating to the procedure prescribed, are clearly special provisions in that they are applicable only to charitable or religious societies or associations. These provisions likewise are specifically directed toward the conduct of these special forms of corporations. Such being the case, by the express language of Section 8623-132, the general corporation act does not apply. Consequently, I have no hesitancy in saying that Section 10051, General Code, is still in force and effect as to charitable or religious societies or associations.

In this connection, however, the provisions of Section 10054, General Code, should not be overlooked. This section, as amended by the last Legislature, reads as follows:

"The trustees of a church organization, religious or charitable society or association, or such organization, religious or charitable society or association itself, if incorporated, and all persons holding title to property in trust therefor, may upon a two-thirds vote of the members of the organization connected therewith present and voting at a meeting duly called and held for that purpose, lease, transfer, convey or incumber it to other trustees of the same denomination or to the trustees of such organization, society or association itself of the same denomination if incorporated under the law of this state. But the lease, transfer, conveyance or incumbrance shall be made only when the property so transferred, leased or incumbered, or the proceeds thereof, or the revenue arising from the use thereof, is still to be used for the religious, missionary or church purposes of said denominations, or, if a charitable organization, for the specified charitable purpose."

This section authorizes the encumbrance of the property of an incorporated church by a two-thirds vote of the members, without court order, where the encumbrance is made to an organized society or association of the same denomination and the proceeds of the encumbrance are to be used for the same character or purpose.

Specifically answering your inquiry I am of the opinion that a church or religious society or association incorporated under the provisions of Sections 8623-98 et seq., General Code (the new general corporation act) is required to obtain court authority in order to mortgage its property in the manner provided by Section 10051, General Code.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2157.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO EXPEND
PUBLIC MONEY TO DREDGE A RIVER IN AID OF NAVIGATION.

SYLLABUS:

A board of county commissioners is without authority to expend public moneys to dredge a river in aid of navigation.

COLUMBUS, OHIO, May 24, 1928.

HON. D. A. BAIRD, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—This will acknowledge your letter dated May 18, 1928, which reads:

"Black River is a navigable stream flowing through the City of Lorain and emptying into Lake Erie. Boats on the Great Lakes navigate this stream for a distance of about four or five miles, within the limits of the city. Each year silt deposits form in the channel of the river, making it impossible for the boats to navigate the stream unless it is dredged or cleaned out, and the City of Lorain has been doing this in the past and it is more or less expensive.

The City of Lorain has asked the County Commissioners to contribute to the expense of dredging the river. The Commissioners are willing to cooperate with the city and pay part of the expense, if it can be legally done and we would like to inquire whether or not they have any authority to appropriate money for this purpose."