"Nothing in this act shall affect the right of the prosecuting attorney to institute and complete proceedings to foreclose the lien of the state under sections 5718-3 and 5719 of the General Code of Ohio, nor the jurisdiction and power of the common pleas court under said sections of the General Code unless prior to the date of sale, the costs incurred in foreclosure proceedings shall have been paid and an undertaking shall have been entered into pursuant to this act, covering the payment of such delinquent taxes and assessments."

The addition of this section, as I have pointed out in my opinion, No. 896, issued under date of July 18, 1939, extends the operation of the Act. If, after delinquent lands have gone on the foreclosure list and it is desired to take advantage of the provisions of the Act, in addition to the other requirements the costs incurred in the foreclosure proceedings must then be paid. But even this privilege expired unless exercised "prior to the date of sale."

In the situation you suggest, the sale has been held and it is desired to take advantage of the Act either at or after the time of confirmation. Since there is no provision in the Act for compliance with its terms at this stage of the proceedings, it seems evident that after the date of sale the provisions of Amended Senate Bill No. 3 are no longer applicable.

It is therefore my opinion that the benefits of Amended Senate Bill No. 3 of the 93rd General Assembly, known as the Whittemore Act, are not available when the lands were sold in a foreclosure proceeding before the effective date of the Act, even though the confirmation be filed after the effective date, section 5692, General Code, requiring the payment of all taxes, assessments, penalties and interest due thereon at the time of sale.

Respectfully,

THOMAS J. HERBERT,

Attorney General.

903.

PUBLIC HIGHWAY — WHETHER "IMPROVED" OR "UNIMPROVED" — QUESTION OF FACT — DETERMINED FROM EXAMINATION FACTS AND CIRCUMSTANCES IN PARTICULAR SITUATION.

SYLLABUS:

The question as to whether a particular public highway is "improved" or "unimproved" is a question of fact that can only be determined from an examination of the facts and circumstances in the particular situation.

COLUMBUS, OHIO, July 20, 1939.

HON. CYLON W. WALLACE, *Registrar, Bureau of Motor Vehicles, Columbus, Ohio.*

DEAR SIR: Your request for my opinion reads as follows:

> "This bureau is in receipt of a communication from Mr. R. M. Snetzer, District Director of the Interstate Commerce Commission, Bureau of Motor Carriers, reading as follows:
>
> 'An analysis of the statutes of the various states reveals that the size and weight restrictions specified in the laws of the State of Ohio are predicated on the operation of vehicles upon "the improved public highways and streets."
>
> Definition of terms included in the laws of Ohio specifies "public roads and highways" to mean all public thoroughfares, bridges and culverts.
>
> A request has been received in this office from the Bureau at Washington for information which might authoritatively set forth the distinction between the terms "public roads and highways" and "the improved public highways and streets."
>
> It will be appreciated if you will furnish us with references to any court decisions or legal opinions which have been rendered on this question.
>
> I thank you for your cooperation.'
>
> Will you give us your opinion as to whether or not under our motor vehicle laws there is any distinction between the terms 'public roads and highways' and 'the improved public highways and streets'?"

As stated in your communication, the size and weight restrictions set out in the laws of Ohio, Sections 7246 to 7251-1, inclusive, of the General Code, refer specifically to the improved public highways, etc. Your letter in effect asks for a definition of an "improved public highway."

An examination of the court decisions of this state reveals that the term has never been judicially defined. The question presented herein was considered by the then Attorney General in the year 1929 (O. A. G. 1929, page 1691). One of the questions discussed in that opinion was whether a dirt road on which cinders had been used would still be regarded as an "unimproved dirt road." It was stated in the second branch of the syllabus:

> "It is a question of fact whether or not a road upon which cinders have been used should be regarded as an unimproved dirt road. The determination of the question depends upon the

extent of the improvement by the use of cinders and this question must be determined by the township trustees, whose judgment would not, in the absence of its abuse, be disturbed."

On page 1693 of the 1929 Opinions, supra, the Attorney General used the following language:

"* * * an unimproved dirt road and by this I mean a road which has no bearing surface of materials other than the native soil itself."

On pages 1693 and 1694, it is stated:

"In your inquiry you ask whether a road which has been cindered should be regarded as an unimproved dirt road within the meaning of this section. The Legislature has not given us any definition of what an unimproved dirt road is, and, in the absence thereof, recourse must be had to the common, ordinary interpretation of the term. In my opinion it would be a question of fact to be determined in each instance whether or not a particular road was improved or unimproved. Ordinarily, the use of cinders is regarded as a more or less temporary expedient and the whole surface of the road is not so treated but occasional spots are cindered where, were it not for their use, the road would be impassable. Such use of cinders would scarcely result in the road being classified as improved, for it would still remain substantially a dirt road. On the other hand there are roads which throughout a substantial portion of their length have a complete surfacing of cinders, and in an instance of that kind, the cinders being materials foreign to the natural soil and constituting a traffic bearing surface in themselves, I believe that the road should be regarded as improved. As I have heretofore stated, this would be a question of fact to be determined in the first instance by the township trustees, whose judgment would not, in the absence of its abuse, be disturbed."

An examination of the instant question reveals that no definition of an "improved highway" can be given which would apply to every situation. As stated in the 1929 Opinions of the Attorney General, supra, it must necessarily be a question of fact to be determined by an examination of the particular situation at hand. It is elementary in interpreting a statute which is ambiguous that the purpose of the Legislature in enacting the measure may be properly considered. In determining whether a particular highway is "improved," it should be borne in mind that statutory

weight restrictions were established in order to prevent damage to the highways.

In conclusion, and in specific answer to your inquiry, I am of the opinion that the question as to whether a particular public highway is "improved" or "unimproved" is a question of fact that can only be determined from an examination of the facts and circumstances in the particular situation.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

904.

DIRECTOR OF AGRICULTURE—MAY ADOPT REGULATION TO PERMIT NON-RESIDENT NURSERY MAN, DEALERS AND AGENTS TO SHIP NURSERY STOCK INTO OHIO—PROCEDURE—FILE CERTIFIED COPY ORIGINAL STATE CERTIFICATE AND OBTAIN REQUIRED OHIO CERTIFICATE—HOUSE BILL 444, 93RD GENERAL ASSEMBLY.

SYLLABUS:

Under the provisions of House Bill No. 444, passed by the 93rd General Assembly, the Director of Agriculture may adopt a regulation permitting non-resident nurserymen, dealers and agents, desiring to ship or transport nursery stock into the State, to file a certified copy of their original state certificate with the Director of Agriculture, and thereby obtain a certificate permitting such person to ship or transport nursery stock into this State.

COLUMBUS, OHIO, July 20, 1939.

HON. JOHN T. BROWN, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR: Receipt is acknowledged of a letter from the Chief of the Division of Plant Industry, Department of Agriculture, requesting my opinion as follows:

> "The General Assembly of Ohio at the last session passed House Bill 444 on May 23, 1939. This law will go into effect August 27, 1939, and will take the place of the old Plant Pest Law of Ohio.
>
> The new Act leaves out the old Section 1136 G. C., Section 15.
>
> The Department of Agriculture and the Division of Plant Industry feel this has been a serious oversight. Since there has