3112.

APPROVAL, NOTES OF GREEN RURAL SCHOOL DISTRICT, GALLIA COUNTY, OHIO—$4,800.00.

COLUMBUS, OHIO, August 29, 1934.

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

3113.

APPROVAL, NOTES OF MIAMI TOWNSHIP RURAL SCHOOL DISTRICT, CLERMONT COUNTY, OHIO—$4,435.00.

COLUMBUS, OHIO, August 29, 1934.

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

3114.

APPROVAL, BONDS OF RUSSELL TOWNSHIP RURAL SCHOOL DISTRICT, GEAUGA COUNTY, OHIO—$4,500.00.

COLUMBUS, OHIO, August 29, 1934.

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

3115.

BOARD OF EDUCATION—MANDATORY DUTY TO SUBMIT ITEMIZED STATEMENT OF OUTSTANDING DEBTS TO STATE AUDITOR—TO ISSUE BONDS IN PAYMENT THEREOF.

SYLLABUS:

Under the provisions of House Bill No. 11 *of the third special session of the* 90th *General Assembly, it is the mandatory duty of a board of education to submit to the auditor of state an itemized statement of all the outstanding debts of the school district due and unpaid on July* 1, 1934, *and, upon receipt of the certificate of net floating indebtedness from such auditor, to proceed to issue the bonds of the school district in the total sum thereof less the amount of bonds which prior to the passage of this act may have been issued under the provisions of any act theretofore passed by the* 90th *General Assembly, which bonds are in excess of the debt limitations which may be incurred, and less the amount of current debts which may be funded by loans made under section* 11 *of the Act of Congress passed May*

10, 1934, *entitled "An act relating to direct loans for industrial purposes by federal reserve banks, and for other purposes."*

COLUMBUS, OHIO, August 30, 1934.

HON. GEORGE N. GRAHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads in part as follows:

> "House Bill No. 11 passed by the 90th General Assembly, Third Special Session, provides in substance, that each school district shall, on or before the 15th day of July, 1934, or at such other time as the State Auditor may determine, file with the State Auditor an itemized statement of all the net floating indebtedness of the school district and thereafter, after the same has been approved by the State Auditor, the school district shall issue bonds in such sum as its net indebtedness may be.
>
> The only question we present to you, for your opinion is as follows: It is mandatory upon a school district to certify such indebtedness and issue such bonds or is it within the discretion of the school district so to do?"

Section 2 of said House Bill 11, which is entitled "An Act to limit the borrowing of money by boards of education; to provide for the funding of existing indebtedness; and to declare an emergency," provides in part that:

> "On or before July 15, 1934, or at such time or times thereafter as the auditor of state may determine, each board of education in the state of Ohio shall submit to the auditor of state an itemized statement of all outstanding indebtedness of the school district due and unpaid on July 1, 1934."

Said section further provides as follows:

> " * * In case any board of education fails to furnish such statement prior to January 1, 1935, or in case its statement is ambiguous or incomplete, the auditor of state shall cause an audit to be made for the purpose of obtaining the information required for a correct statement of the indebtedness and the cost of making this audit shall be a charge against the district as a penalty for failure to report."

Section 5 of said House Bill 11 reads as follows:

> "The auditor of state shall examine and compile said statements and shall certify to each board of education the amount of its net floating indebtedness on July 1, 1934. The floating indebtedness shall be determined to include all legally incurred indebtedness of the school district except bonds or notes issued under any

act heretofore passed authorizing the issuance of any evidences of debt in excess of the limitations fixed by law. The floating indebtedness shall also include any amounts due prior to January 1, 1935, on notes issued in anticipation of the collection of taxes under section 2293-4 of the General Code. The net floating indebtedness shall be the total floating indebtedness less, (1) all sums due and owing to the school district on July 1, 1934, other than delinquent taxes, or taxes collected but not paid into the school district treasury by the county auditor because such collected taxes were in a depository in the process of liquidation or operating on a restricted withdrawal basis under authority of the state superintendent of banks, including amounts due the general fund from the state educational equalization fund; (2) and general fund cash balance on July 1, 1934, other than funds on deposit in banks in the process of liquidation or operating on a restricted withdrawal basis under authority of the state superintendent of banks."

Section 4 reads as follows:

"Upon receipt of the certificate of net floating indebtedness from the auditor of state each board of education having any such indebtedness shall proceed to issue the bonds of the school district in the total sum of said indebtedness less the amount of bonds which may have been heretofore issued under the provisions of any act heretofore passed by the ninetieth general assembly authorizing the issuance of bonds and which bonds are already in excess of the debt limitations which may be incurred. Such bonds shall be full general obligations of the school district and shall mature in not more than ten substantially equal semi-annual installments, the first maturity of which shall be one year from the date of issuance. Such bonds shall bear interest at a rate not to exceed 6 per cent per annum, and shall be issued or sold in the manner prescribed by law. The proceeds thereof shall be applied immediately to the payment of existing indebtedness or shall be held for the retirement of notes issued in anticipation of the collection of taxes."

The word "shall" is used consistently throughout this act. This word, when used in its ordinary sense, is mandatory. *State, ex rel. Jackson* vs. *County Commissioners,* 122 O. S. 456. As stated in *State, ex rel. Mitman, et al.,* vs. *County Commissioners,* 94 O. S. 296:

"Courts should be slow to impart any other than the natural and commonly understood meaning to terms employed in the framing of our statutes.

You shall and you shall not should be construed as imposing imperative duties or prohibitions, unless the manifest intention of the legislature suggests a weakened sense of meaning."

Amended Substitute Senate Bill No. 175 of the 90th General Assembly was a somewhat similar act which was likewise entitled "An Act to limit

the borrowing of money by boards of education; to provide for the funding of existing indebtedness; and to declare an emergency." This act provided for the funding of floating indebtedness, as therein defined, due from school districts on July 1, 1933. Section 3 of this act provided in part as follows:

> "Upon receiving the certificate of net floating indebtedness from the auditor of state each board of education having any such indebtedness in excess of four hundred dollars may proceed to issue the bonds of the school district in the total sum of said indebtedness, which bonds shall be outside of all limitations as to the amount of net indebtedness which may be incurred."

This act expired on January 1, 1934. Said Amended Sub. Senate Bill No. 175 was amended by House Bill No. 17 of the First Special Session of the 90th General Assembly, but the amendments are not pertinent.

In the case of *State, ex rel.,* vs. *Board of Education,* 127 O. S. 336, it was sought to compel the board of education to proceed to issue bonds under the provisions of Amended Substitute Senate Bill No. 175, and the court held:

> "The exercise of the authority conferred upon boards of education by Section 3 of Amended Substitute Senate Bill 175, passed March 30, 1933, (115 Ohio Laws, 196), to issue bonds in payment of net floating indebtedness in excess of four hundred dollars is not mandatory but rests in the sound discretion of each such board."

And the court said in its opinion:

> "It is the contention of the respondents that the authority conferred by this section is discretionary and directory. The relators, on the other hand, insist that the word 'may' in the first sentence is required to be construed as 'must' or 'shall.' Under this latter construction the sentence would read: 'Upon receiving the certificate of net floating indebtedness from the auditor of state each board of education having any such indebtedness in excess of four hundred dollars *must* (or shall) proceed to issue the bonds * * *.'"

The court further said:

> "It is, of course, true that in Section 3 the word 'shall' appears in nine places while the word 'may' is used but once. However, there seems to be nothing in the context to indicate that the Legislature did not have in mind the generally accepted sense in which the two words are ordinarily employed."

This case was decided approximately six months prior to the passage of said House Hill No. 11, and it must be presumed that the legislature, when it passed a similar act to said Amended Substitute Senate Bill No. 175 dealing with the same subject matter, had in mind the interpretation of the former statute by the Supreme Court which held the provision for the issuance of bonds as it was then worded discretionary and not mandatory, and that when the legislature used the word "shall" in the later act instead of the word "may," it intended to make this provision in the new act mandatory. Where the language used in the later act is the same, the rule is laid down in the case of *Spitzer, et al.,* vs. *Stillings, et al.,* 109 O. S. 297, as follows:

> "Where a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as a part of the law, unless express provision is made for a different construction."

However, in the statute in question here, the very language which was construed by the court has been changed. In the case of *Haviland, et al.,* vs. *City of Columbus,* et al., 50 O. S. 471, the statute which provided for assessing the cost of street improvements "by the foot front of the property bounding and abutting upon the improvement," held as follows:

> "If a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more."

This statute was later changed by using the words "foot frontage," and the court in the case of *Oakwood* vs. *Stoecklein,* 81 O. S. 332, said in referring to the Haviland case and the later change in the statute:

> "Whatever may have been thought of the decision in that case as an interpretation of the statute, and however general may have been the belief that it imposed upon interior lots burdens which in justice should be borne by corner lots, the case was reconsidered and adhered to in the *City of Toledo* vs. *Sheill,* 53 Ohio St., 447. In one of the opinions in that case it was suggested that the rule should be regarded as established so far as judicial decisions were concerned, and that if it was thought to operate unjustly it should be changed by the general assembly by an act operating prospectively. Accordingly by the uniform municipal code enacted October 22, 1902 (96 Ohio Laws, 20), Section 2264, Revised Statutes, was repealed and by Section 50 of that act, the third mode of assessing the costs and expenses of street improvements was defined as follows: 'By the foot frontage of the property bounding and abutting upon the improvement.' Since the general assembly under the circumstances changed the phraseology of the clause and employed language in making the change which indicates very clearly the purpose of the legislature to act upon the suggestion referred to and to change the rule established in the case which appears to have controlled the judgments under review, the judgment must be regarded as erroneous. The entire frontage abutting on the improvement is now, by the clear terms of the statute, the subject of assessment."

After the decision in the Stoecklein case, the statute was again changed so that the words "foot frontage" were replaced by the former term "foot

front," and the court in the case of *Henry* vs. *Barberton,* 12 N. P. (N. S.) 364, applied the same rule of construction. The court said:

> "By the same rule of construction applied in *Village of Oakland* vs. *Stoecklein,* this court, if it follows the Supreme Court, as it is bound to do, must hold that the Legislature by changing the wording of 'foot frontage' back to 'foot front' meant to repeal its abrogation of the rule in the Haviland case and return to the old rule with the interpretation of and construction placed upon it by the Supreme Court."

However, the Supreme Court, in the case of *Youngstown* vs. *Fishel,* 89 O. S. 247, while it recognized this general rule of statutory construction, adhered to the law laid down in the Stoecklein case. Because of the fact that no property rights were affected and because the rule of the Haviland case was against the weight of authority, the majority of the court, as it stated in the opinion, was "influenced to indulge in freedom to deal with the question anew." The court, however, did not attempt to change the rule of statutory construction but simply refused to follow it in this case.

While said House Bill No. 11 is not an amendment of said Amended Substitute Senate Bill No. 175, since the latter had expired and it was not therefore necessary to amend it, I believe the same rule would apply as in the case of a change in the language of an amendment. The rule in the case of an amendment is stated in the case of *Board of Education* vs. *Boehm,* 102 O. S. 292, as follows:

> "When an existing statute is repealed and a new and different statute upon the same subject is enacted, it is presumed that the legislature intended to change the effect and operation of the law to the extent of the change in the language thereof."

See also *Board of Education* vs. *Board of Education,* 112 O. S. 108. And in the case of *State, ex rel.,* vs. *County Commissioners,* 94 O. S. 296, the following was held:

> "When a section of an existing law is amended by the general assembly by striking out therefrom 'may' and inserting in lieu thereof 'shall,' a clear intent is manifested to thereby alter the directory nature of the law and render it mandatory."

The mandatory character of the provision of said House Bill No. 11 with reference to the issuing of bonds is further shown by section 10 of the act. This section reads as follows:

> "Each board of education is hereby authorized to negotiate loans for such unfunded current debts of the district, due and unpaid on July 1, 1934, as may be included within the meaning of section 11 of an act passed by the seventy-third congress of the United States, second session, on May 10 (calendar day, May 14th), 1934, being an act entitled 'an act relating to direct loans for industrial purposes by

federal reserve banks, and for other purposes.' The fiscal officer together with the board of education in each school district is hereby required to provide such information upon request as may be required by the reconstruction finance corporation in conformity with the rules and regulations established for the administration and extension of loans as provided in section 11 of the act of congress hereinbefore specified. But any unfunded current operating indebtedness due and unpaid on July 1, 1934, and not included within the meaning of section 11 of the act of congress entitled 'an act relating to direct loans for industrial purposes by federal reserve banks, and for other purposes,' shall be funded in the manner provided by the separate sections of this act."

In other words, the current debts due and unpaid July 1, 1934, may be funded under the provisions of section 11 of said Act of Congress by a school district, but the balance of the indebtedness must be funded under the provisions of said House Bill No. 11, and if any of the current operating indebtedness due and unpaid July 1, 1934, is not included within the meaning of section 11 of said Act of Congress, then such indebtedness must likewise be funded under the provisions of said House Bill No. 11.

Therefore, I am of the opinion that, under the provisions of House Bill No. 11 of the third special session of the 90th General Assembly, it is the mandatory duty of a board of education to submit to the auditor of state an itemized statement of all the outstanding debts of the school district due and unpaid on July 1, 1934, and, upon receipt of the certificate of net floating indebtedness from such auditor, to proceed to issue the bonds of the school district in the total sum thereof less the amount of bonds which prior to the passage of this act may have been issued under the provisions of any act theretofore passed by the 90th General Assembly, which bonds are in excess of the debt limitations which may be incurred, and less the amount of current debts which may be funded by loans made under section 11 of the Act of Congress passed May 10, 1934, entitled "An act relating to direct loans for industrial purposes by federal reserve banks, and for other purposes."

Respectfully,
JOHN W. BRICKER,
Attorney General.

3116.

LIBRARY—DISTRIBUTION OF CLASSIFIED PERSONAL PROPERTY TAX RECEIPTS.

SYLLABUS:

When prior to the May settlement of the county treasurer of taxes received from classified personal property taxes, the county treasurer has received from such source an amount greater than one half of the taxes levied on such class of property, the county treasurer is required by the provisions of Section 5639, General Code, to make distribution of such taxes to public libraries within the county in