

properly executed by you in your official capacity and by the lessees above named.

Upon examination of the provisions of this lease, and of the conditions and restrictions therein contained, I find that the same are in conformity with the provisions of Sections 13965 et seq. of the General Code relating to the execution of canal land leases generally, and with those of House Bill No. 417 enacted by the Eighty-eighth General Assembly, 113 O. L. 521, relating to the abandonment of the Hocking Canal in Fairfield, Hocking and Athens Counties.

The lease here under consideration is accordingly approved by me as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith inclosed.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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758.

EMERGENCY REPAIRS—COUNTY COMMISSIONERS REQUIRED TO  
APPROPRIATE THEREFOR — PURCHASE OF MATERIALS AND  
EMPLOYMENT OF LABOR EXERCISED BY COUNTY SURVEYOR.

*SYLLABUS:*

*The provision of section 2792-1, General Code, authorizing the county commissioners to make an appropriation each year to carry out the purposes of said section, is mandatory in so far as there are available funds therefor.*

COLUMBUS, OHIO, May 3, 1933.

HON. C. DONALD DILATUSH, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you ask my opinion as to whether or not it is the mandatory duty of the Board of County Commissioners to appropriate funds for emergency repairs, as the same are defined in section 2792-1 of the General Code. This opinion is predicated upon the assumption that there are available funds for such purpose since no facts are submitted to indicate otherwise.

In my Opinion No. 368, dated March 24, 1933, addressed to the prosecuting attorney of Hamilton County, I held that before a county surveyor can make purchases of road materials for emergency repairs, which he is authorized by section 2792-1, General Code, to make, the money required therefor must first be appropriated by the county commissioners. Said section reads in part as follows:

“The county commissioners are hereby authorized to appropriate a sum of money each year sufficient to enable the county surveyor to carry out the purposes of this section. Such sum shall constitute the ‘county surveyor’s emergency repair fund’. All expenses incurred in employing extra help or in purchasing materials used in such repairs shall be paid from such fund on vouchers signed by the county surveyor.”

Your inquiry raises the question as to whether the provision authorizing

such appropriation is mandatory or merely directory. The general rule in the construction of statutes conferring powers upon public officers to perform a public act is stated in section 125 of Black on Interpretation of Laws as follows:

“Where a statute provides for the doing of some act which is required by justice or public duty, or where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interests or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty.”

In the case of *Supervisors vs. U. S.*, *ex rel.*, 71 U. S. 435, the following was held:

“Where power is given to public officers, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory.”

See also *State, ex rel.*, vs. *Board of Education*, 95 O. S. 367.

In the case of *Railroad Company vs. Mowatt*, 35 O. S. 284, it is held:

“Where authority is conferred to perform an act which the public interest demands, ‘may’ is generally regarded as imperative.”

In the case of *State, ex rel.*, vs. *County Commissioners*, 35 O. S. 458, the fourth branch of the syllabus reads as follows:

“An act providing ‘that the commissioners of Franklin county be, and they are hereby, authorized and directed to levy a special tax not to exceed,’ etc., to improve a county road, is a mandatory statute, and the commissioners may be compelled by mandamus to obey its provisions.”

See also *State, ex rel.*, vs. *County Commissioners*, 2 Bull. 155; *Stanton vs. Realty Company*, 117 O. S. 345; *State, ex rel.*, vs. *Evans, et al.*, 30 O. App. 419.

I do not believe that the legislature intended that the exercise of the power given by this statute to the county surveyor to make emergency repairs, as they are defined therein, should be dependent upon the discretion of the county commissioners. The legislature intended that the purchase of materials and the employment of labor for such purpose should be exercised by the county surveyor, rather than by the county commissioners, and to hold this provision of the statute in question as directory would tend to thwart this legislative intent. Consequently, I am of the view that the rule of construction set forth in the foregoing authorities is applicable to this statute.

I am of the opinion therefore that the provision of section 2792-1, General Code, authorizing the county commissioners to make an appropriation each year to carry out the purposes of said section, is mandatory in so far as there are available funds therefor.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*