officer in fixing the compensation to be paid to his deputies, assistants, clerks, bookkeepers and other employes is limited to the amount of the appropriation.

2. An appropriation measure governing money for deputy hire in county offices when once passed by county commissioners, may be amended by either increasing or reducing the amount appropriated for such purpose, and the county officer appointing such deputies, assistants, clerks, bookkeepers and other employes, cannot expend in any fiscal year a greater sum for the salary of such deputies and other assistants than is fixed in the appropriation measure as amended."

In addition, your attention is invited to the fact that mandamus will lie to compel an officer to perform specific acts especially enjoined by law to be performed. And your attention is further invited to Section 10-1 et seq., of the General Code, providing *inter alia* that a county officer, who refuses or willfully neglects to perform any official duty imposed by law or is guilty of gross neglect of duty or non-feasance, may be removed from office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1224.

DIRECTOR OF HIGHWAYS—DUTY, IF NECESSARY, TO MAKE PLANS AND MAPS FOR HIGHWAY IMPROVEMENT—BRIDGE ON OHIO RIVER, INTER-COUNTY HIGHWAY NO. 7—VALIDITY OF BOND OF BRIDGE COMPANY.

SYLLABUS:

1. *By the terms of Section* 1196, *General Code, upon the approval by the Director of Highways and Public Works of an application for state aid, filed by a board of county commissioners, it is the duty of such Director, if necessary, to cause a map of the highway in outline and profile to be made, indicating thereon any change of existing lines if the Director deems it of advantage to make such change. It is further the duty of the Director to cause to be made plans, specifications, profiles, and estimates for such improvement, and as an incident thereto and to the making of the improvement, such Director is vested with the discretion to determine at what grade the highway shall be made.*

2. *Where a part of inter-county highway No. 7 along the Ohio River is being improved, whether or not a proposed bridge over the Ohio River will be built, is a vital factor to be taken into consideration in determining whether or not a change shall be made in the existing lines of such highway and in fixing the grade at which such highway is to be constructed.*

3. *An agreement entered into by the Director of Highways and Public Works with the County of Meigs, the Village of Pomeroy, and a private corporation, which proposes to construct a bridge over the Ohio River connecting inter-county highway No. 7 with a highway in West Virginia, in which agreement, in consideration of the determination by the Director to change the existing lines of the highway and fix the grade thereof so that suitable approaches to the proposed bridge can be built and of the State's proceeding without delay to construct said road improvement, the county commissioners agree to pay a*

portion of the cost of the improvement and provide the necessary right of way, the Bridge Company and the Village agreeing to contribute to the county a portion of the cost of the improvement and the necessary right of way to be borne by the county, the Bridge Company further agreeing to give a bond conditioned upon its building the bridge within a specified time or upon its failure so to do to pay the State of Ohio a certain sum of money, sufficient in amount to cover the cost of rebuilding the road along a route and at a grade which would be suitable and proper if the bridge be not built, plus a sufficient sum to cover the extra cost entailed in locating the highway and building the same at the higher grade necessary to accommodate the approaches to the bridge would, after performance by the State, be enforcible against such Bridge Company, notwithstanding the fact that such contract would not be enforcible against the State while an executory contract. A bond given in accordance with the terms of such a contract would, after performance by the State, be a valid obligation enforcible against the Bridge Company.

COLUMBUS, OHIO, October 31, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date reading as follows:

> "This Department has agreed to construct a relocation of State Route No. 7 in the vicinity of Pomeroy, Meigs County, at the Ohio approach to the proposed new bridge over the Ohio River. Meigs County will participate in the cost. The bridge construction has not yet been started by the Dravo Contracting Company of Pittsburgh who are financing and will construct this bridge. In order to make the relocation in question serviceable, it will have to connect with the approach to the proposed bridge. We desire to proceed with this project and wish to have the State protected in case the bridge project should not go ahead. The grading of the relocation at this time is desirable in order that we may at the same time remove and dispose of the excavation for a serious landslide adjoining this project which threatens to completely block the highway. At the present time we are detouring the traffic over a portion of the Hocking Valley right of way but have been notified to vacate.
>
> Please advise if this Department would be authorized to accept a bond in an amount sufficient to save the State of Ohio harmless, with good and sufficient sureties thereon, conditioned upon the construction and completion of the bridge within the time specified or the restoration of the highway in as good condition as it now is. If this Department is without authority to accept such bond can you suggest any other procedure whereby the State may be protected in proceeding with the necessary fill? In case the Department of Highways and Public Works is authorized to accept such bond would the same be enforceable?"

In connection with the above request the County Commissioners of Meigs County have submitted to this department copies of certain letters, including a letter from The Dravo Contracting Company of Pittsburgh, Pennsylvania, to the President of the Board of County Commissioners of Meigs County, dated September 6, 1927, in which, among other things, it is said as follows:

> "Even suppose we were ready with all our designs, it would not be wise for us to undertake an expense at Pomeroy unless we knew absolutely that the revised route would be proceeded with. We have told you before this that we were willing to put up a bond to cover this work; but it is just as

sensible for us to say that we will not proceed with the bridge until the road is under way, as it is for the State Highway Department of Columbus to say that they will not proceed with the road until we build the bridge. We would be in a terrible mess if we were to start the bridge and have the State, due to some political upheaval, decline to build the road. It seems to us that it is simply a matter which requires adjustment; and we are, as we have told you before, willing to put up a bond to proceed with the building of the bridge."

The Commissioners have also submitted an agreement duly executed on August 2, 1927, by The Pomeroy-Mason Bridge Company, a West Virginia corporation, and the Commissioners of Meigs County, which, after reciting that The Pomeroy-Mason Bridge Company proposes to construct, maintain and operate an interstate bridge across the Ohio River at Pomeroy, Ohio; that Intercounty Highway No. 7, through the village of Pomeroy, should be relocated wherever and whenever practicable so as to improve its grade and alignment at an elevation above high water, which should be accomplished in such a manner as to permit a connection with the proposed bridge; and that both parties have agreed upon the proportionate part of the expense to be borne by them in connection with the relocation and construction of said intercounty highway; provides, that The Pomeroy-Mason Bridge Company will construct, or cause to be constructed across the Ohio River at the location specified, an interstate bridge in accordance with the plans and specifications filed by it with the United States War Department; that it will enter upon such construction within six months and carry the same to completion as fast as reasonably practicable; and that such company will pay to Meigs County a sum equal to one-fourth of the total cost of securing the necessary rights of way and the grading and surfacing necessary and incident to the change in the location of Intercounty Highway No. 7, provided, that such sum shall not in any event exceed the total sum of $18,000.00; in consideration of which, the county commissioners agree immediately to proceed with the securing of the necessary rights of way and the grading and surfacing of said highway, and to carry the same to completion as fast as reasonable and practicable, in any event completing said grading on or before January 1, 1928, unless prevented by causes beyond their control; the commissioners further agreeing to surface such highway with concrete at or before the completion of the bridge.

It appears that a short distance above the site chosen for the proposed bridge an unusually large landslide has occurred, which threatens completely to block intercounty highway No. 7, and that to remedy this situation it is necessary to remove and dispose of a considerable amount of earth and rock. I am informed that in order to build approaches to the proposed bridge from the highway in question and to permit traffic to pass and repass between the proposed bridge and the highway it will be necessary to establish the highway at a grade higher than the one now existent and to make considerable change in the line of such highway, and that this improvement will require a large fill to be made. I am further informed that the change in the highway will eliminate certain curves and that a higher grade is desirable at this point, because as it now exists the highway is subject to be flooded at times by the Ohio river; although a much lower grade would be established if the bridge were not to be built, the construction of the bridge necessitating a higher grade so that the traveling public may be properly accommodated.

Under ordinary circumstances the questions presented by you would not arise because the improvement of the highway and the construction of the bridge could, and probably would, be done contemporaneously. In this instance, however, it is extremely desirable at once to proceed with the necessary fill so that an economic disposition of the earth and rock at the nearby landslide can be made, such a plan not only permitting the debris at the landslide to be disposed of with very little haulage

but also rendering unnecessary the purchase and transportation of earth for the contemplated fill.

From the statement in your letter, that "Meigs County will participate in the cost", I assume that the proposed improvement will be made upon the application of and in cooperation with the county commissioners, under the "state aid plan." And while you speak of "a relocation of State Route No. 7", from the information at hand, it appears that the highway in question is not to be relocated in the technical sense of that word (see Section 1189, General Code) but only that a change is to be made of the existing lines of the highway.

Where an improvement such as here contemplated is being made, upon the approval by the Director of Highways and Public Works of the application for state aid filed by the county commissioners, by the terms of Section 1196, General Code, the Director is required, if necessary, "to cause a map of the highway in outline and profile to be made and indicate thereon any change of existing lines if he deems it of advantage to make such change." He is further directed to "cause to be made plans, specifications, profiles, and estimates for said improvement."

This section was enacted as Section 189, of the Cass Highway Law, (106 v. 574, 629). Concerning the provisions of this section, in connection with the provisions of Section 1189, General Code, which was enacted as Section 182 of the Cass Highway Law, this department in an opinion, rendered under date of October 19, 1915, reported in Opinions, Attorney General, 1915, Vol. III, p. 2042, 2053, said as follows:

> "It is my opinion that the 'change of existing lines' authorized by Section 189 of the act, is not the 'change in existing inter-county or main market road' referred to in Section 182 of the act, but it is impossible, nevertheless, to answer your question by laying down any general rule by which it would be possible to determine in all cases whether a proposed change constituted a 'change of existing lines' within the meaning of Section 189 or a change in existing inter-county or main market roads' within the meaning of Section 182. Such a question can be answered only by reference to the particular facts of each case, and it is only possible to observe at the present time that if the change is a slight one and not such as to affect the termini or general course and direction of a road, then it is a 'change of existing lines' within the meaning of Section 189 of the act. If the change is substantial, however, or such as to affect the termini or general course and direction of the highway, then the change is to be regarded as a 'change in existing inter-county or main market roads' within the meaning of Section 182 of the act."

From the facts at hand in the instant case, it seems clear that the "relocation" contemplated is simply a "change of existing lines" of the highway in question, as those words are used in Section 1196, supra. By the terms of this section, the Director of Highways and Public Works without question has the power and authority to make the proposed change of the existing lines of this highway and the establishment of a proper grade for the improvement so as best to accommodate the traveling public is a necessary incident to the construction of the new roadway after the changes of the existing lines are made.

It is manifest that in making any change of the existing lines of the highway and in establishing the grade of the improvement, the existence or non-existence of a bridge over the Ohio river for vehicular and other traffic at or near the proposed improvement is a vital element to be taken into consideration. Such a bridge would undoubtedly accommodate no small amount of traffic; and, since roads are built to provide for the traveling public, what would be a suitable route and grade if the bridge be built, would be different in this particular case from the route and grade to be established if the bridge be not constructed.

From what has been said it is clear that the Director of Highways and Public Works is vested with a broad discretion to determine what, if any, changes shall be made in the existing lines of the highway to be improved and at what grade the new highway shall be built. The question to be decided is, would an agreement entered into by the Director of Highways with the Bridge Company, or with Meigs County, the Village of Pomeroy and the Bridge Company be valid and enforcible, in which agreement, in consideration of his determining to change the existing lines of the highway in question and fix the grade thereof so that a suitable approach to the proposed bridge could be built, and of the state's proceeding without delay to construct the improvement, Meigs County agrees to pay a portion of the cost of such improvement and provide the necessary right of way, the Bridge Company and the village agreeing to contribute to the county and to help to pay a portion of the cost to be borne by the county, the Bridge Company further giving a bond, conditioned upon its building the bridge within the time to be specified or upon its failure so to do to pay to the State of Ohio a certain sum of money, which shall be sufficient in amount to cover the cost of rebuilding the road along a route and at a grade, which would be suitable and proper if the bridge be not built, plus a sufficient sum to cover the extra cost entailed in locating the highway and building the same at the higher grade necessary to accommodate the approaches to the bridge.

At the outset it may be stated that there is no express statutory authority for the Director of Highways to enter into a contract and take a bond such as here contemplated.

A similar question was considered by the Circuit Court of Lucas County in the case of *Hassenzahl et al* vs. *Bevins*, 2 O. C. C. (N. S.) 496, the headnotes reading:

> 1. "The necessity and utility of a road improvement depend in a measure upon its cost, and if the county commissioners can reduce the cost by accepting subscriptions from property owners beyond their jurisdiction, whose lands will be benefited by the improvement, they are justified in taking such subscriptions into consideration in deciding the question of utility.
>
> 2. The promise of such a subscriber to pay does not lack mutuality after the commissioners have made the improvement.
>
> 3. When, therefore, a road built under the two-mile assessment law is carried to the state line in consideration of property owners over the line whose property is benefited, subscribing a specified amount toward the cost of the improvement, such subscriptions are collectible at law, in a suit by the commissioners after the work has been completed."

The facts in that case as stated in the opinion were as follows:

> "The suit is upon an alleged undertaking by the defendant, William Bevins, to contribute toward the expenses of constructing a certain macadamized road, or the macadamizing or improving of a certain road under the two mile assessment law (Section 4831, Revised Statutes, et seq.). It appears from the averments of the petition that in the improvement of a certain public road called Lewis Avenue, extending from the city limits at a certain point to the state line between the states of Ohio and Michigan, a distance of perhaps two miles and a half from West Toledo, northeasterly to the state line between the State of Ohio and Michigan, was petitioned for under this statute; that the viewers, who were required under the statute to report whether in their opinion the improvement was a necessity, reported to the commissioners that it was not enough of a necessity to justify extending it to the Michigan line at the expense of landowners in Ohio or in Lucas County: but that if the owners of lands in Michigan whose lands would be especially

benefited by the improvement would contribute $1,500 toward the expense, then the improvement might be deemed of sufficient necessity to justify the expense falling upon the property owners of this county. * * *

* * * in pursuance of this recommendation of the viewers, the commissioners and all persons interested in the improvement got together and it was arranged and agreed between them that if the property owners in Michigan would pay $1,500 toward the improvement, it would be carried forward; otherwise, it would not. * * * When these promised contributions amounted to $1,500, the viewers reported that they found that the improvement was a necessity, and the commissioners then found that public utility required the improvement, and they proceeded to follow the directions of the statute and to make the improvement.

Now this suit is against Mr. Bevins upon his promise to pay $100 toward this improvement. His promise was not made directly to the commissioners; but it is conceded on all hands that the arrangement amounted practically to an agreement that Bevins should pay the commissioners of Lucas County $100 toward this improvement."

In the opinion the court said:

"Counsel for defendant in error urges, and his contention was sustained by the court of common pleas, that this agreement can not be enforced for several reasons: (1) He says it is without consideration; (2) That it lacks mutuality, that is to say, it was not enforceable against the commissioners, therefore, it can not be enforced against him, which is only another phase or branch of the question of consideration; and, (3) He urges with great earnestness as his chief ground of defense that the commissioners being unauthorized, either expressly or by necessary implication, to enter into a contract of this kind, and it being against public policy, that, therefore, it can not be enforced.

We find no express authority in the statute for the commissioners to enter into a contract or arrangement of this character. Neither do we find that it is given by clear implication of law, that is to say, that it is such an act as may be necessary to carry out the powers expressly conferred upon the commissioners or to enable the commissioners to perform the duties expressly enjoined upon them.

But if it be conceded that the commissioners had none of these powers, still we think it does not follow that the board can not enforce this contract. We think that there are other principles that have application and influence in a case where a contract has been fully performed upon the one side and the party resisting performance upon his part has received and is enjoying the fruits of the performance of the other party.

Before going to that I will say briefly that it is not apparent to us that this contract is without consideration. It seems to us very clear that it is supported by a good and valuable consideration; * * *

As to the contention that there is a want of mutuality, because the contract, while executory, could not be found against the commissioners because they could not be compelled by Mr. Bevins or others in Michigan to build the road, we are of the opinion that that defense or objection can not be interposed by Mr. Bevins after performance by the commissioners.

* * * * * * * *

Now we come to the consideration of the question which has been most argued by counsel, and to which the most attention has been given in their

respective briefs; and that is, whether, admitting that the commissioners are without express authority to enter into this contract; admitting that they may not have sufficient authority, express or implied, so that they could enforce the contract, if entirely executory, and that it can not be enforced against them, the promise of the persons who agreed to contribute to this improvement may be enforced, since the commissioners have performed and since the parties promising enjoy the benefits which they sought, and on account of which they made the promise.

We can not find that there is anything immoral in the promise on the part of the commissioners to carry forward this improvement, if certain contributions are made by others than those who can be required to contribute. Neither can we find that entering into an arrangement of this character is expressly prohibited; and these facts should be borne in mind in considering the authorities bearing upon the right of public officers to enforce contracts that they are not in the first instance authorized to enter into. There are certain contracts, which are expressly prohibited, or which are immoral, and clearly against public policy, that are therefore absolutely void. This we do not think was a contract of that character.

* * * * * * * *

But we think * * * that some discretion is vested in the commissioners to say whether or not it will be of public utility, that these terms are somewhat flexible, and are not to be regarded with the strictness contended for by counsel for defendant in error. The public necessity or public utility may depend somewhat upon the cost of the thing, and the real question is whether the improvement is of sufficient use and benefit to the parties who will be called upon to pay for it to justify its being constructed; whether it is of sufficient public necessity to justify laying the cost of it upon the property within two miles of the improvement; *and if this cost or expenses can be reduced by other contributions, we think that is a fair and proper matter for the commissioners to take into consideration in passing upon the question of the public utility; and that these contributions are not such as may be said to influence the officers improperly in the discharge of their official duty. We think it is a proper influence, and proper to be considered by the commissioners.*

There is one case in point, and but one, so far as we can find, in support of the contention of counsel for defendant in error, and that he has cited, to-wit, the case of Commissioners vs. Jones, Breese (Ill.), 237. The gist of it is given in the syllabus:

'An agreement to pay the County Commissioners of Randolph County a certain sum of money provided they will build a court house on a particular lot, is not binding for want of mutuality, although they do build the court house on the lot designated, the obligation to pay and to build not being reciprocal.

A promise to pay the county commissioners to do an act which they are required to do by law is against public policy, and, therefore, void.

The county commissioners of a county have no power to contract only as a court.'

* * * * * * * *

Counsel for plaintiff in error did not seem to get hold of the line of decisions on this question which sustain his contention; but we have discovered a number. Some of them are mentioned in 1 Dillon Municipal Corporations (4th Ed.), 458.

* * * * * * * *

A number of authorities are cited, some of which I desire to refer to briefly, the first being the case of Townsend vs. Hoyle, 20 Conn., 1.

* * * * * * * *

To the same effect is a case in Springfield vs. Harris, 107 Mass., 532; another in Stilson vs. Lawrence County Commissioners, 52 Ind., 213; another State vs. Johnson, 52 Ind., 197. The case at page 197 contains a very full discussion of the question, and cites a great many authorities. It will not be profitable to read these now, but we call especial attention to it as being a satisfactory case."

In the case of *Commissioners of the Canal Fund* vs. *Perry*, 5 Ohio, 6, the Supreme Court of Ohio held as follows:

"Undertakings by written subscription to contribute the money or other property, in aid of public works, are valid contracts, that may be enforced in courts of justice."

The contract involved in that case was one in which certain subscribers promised to pay to the Commissioners of the Canal Fund of the State of Ohio for the use of such fund the amounts of money specified in such contract. In the opinion by Judge Wright it was said as follows:

"The first question claiming our attention in this case is, whether the subscription paper, upon which the suit is founded, affords a legal foundation for the action. It has been repeatedly decided in this state and elsewhere, that promises to pay money for the erection of school and court houses, churches and bridges, would, the work being undertaken or done, sustain the action of assumpsit. A moral obligation is sufficient to support an action on an express promise. 6 Mass. 40; 3 Mass. 483. The subscription we are now called to examine does not rest alone upon the general principle, but may invoke to its aid a positive enactment of the legislature.

* * * * * * * *

The contract here is not against good policy or good morals, nor against law, but in conformity with its express provisions. * * * Various routes for canals were contemplated; and in determining the choice, much depended upon the amount of contributions. Individual contributors would give more or less, according as the route adopted, or other circumstances, might be supposed to enhance the value of their property. Provisions looking to such a state of things were inserted in the law, subjecting the donations to the direction and conditions of the donor."

Section 792, page 1182, Vol. II, Fifth Edition, Dillon on Municipal Corporations (Section 458 of the Fourth Edition, cited in the above opinion) reads as follows:

"Agreeably to the foregoing principles, a corporation cannot maintain an action on a bond or a contract which is invalid, as where a city, without authority, loaned its bonds to a private company, and took from it a penal bond, conditioned for the faithful application of the city bonds to payment for works which the city had no power to construct or assist in constructing. The remedy in such case must be in some other form than in an action to en-

force the contract. So, a contract by a city to waive its right to go on with the laying out of a street or not, as it might choose, is, it seems, against public policy, and it is void if it amounts to a surrender of its legislative discretion. So, a promise to pay a public corporation, or its agents, a premium for doing their duty is illegal and void; and a contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. *But a promise by individuals to pay a portion of the expenses of public improvements does not necessarily fall within this principle, and such a promise is not void as being against public policy; and if the promisors have a peculiar and local interest in the improvement, their promise is not void for want of consideration, and may be enforced* against them. * * *" (Italics the writer's.)

In Page on the Law of Contracts, Vol. 2, Section 907, the author says as follows:

"If a contract is entered into between the government or a public corporation, on the one hand, and individuals, on the other, by which such individuals agree to donate a site for a public building or to pay for a part or all of the construction of a public building, in consideration of its location and construction at a specified place, such contract is free from the collateral objections which frequently appear in the case of contracts for the location or construction of public improvements. The consideration moves from the promisor to the public; and all private gain is excluded, except the private gain of the promisor, which is frankly avowed and for which he offers the amount stipulated in the contract. Accordingly, if such a contract is invalid at all, it is invalid because the location and construction of public improvements can not be made the subject-matter of any contract, no matter how fair or reasonable it otherwise may be. *The great weight of authority is that contracts of this sort are valid. If a property owner will receive a special benefit for an improvement, his promise to pay to the government something of value, to induce the construction of such improvement, is valid.* Promises to pay part of the expense of opening a street, or to donate a site for a court house, if accepted for such purpose, or to pay a part of the cost of the site of a public building, in consideration of its being located on that site, or to pay a part of the cost of a public building, in consideration of its being located at a specified point, or to pay money for park purposes, if the park is located at a certain place, or to pay money for library purposes, if a school district will vote a bond issue therefor, are all valid. * * *" (Italics the writer's.)

In the case of *Townsend* vs. *Hoyle, et al.*, 20 Conn. 1, in passing upon a question similar to the one here presented, Ellsworth Judge, speaking for the Supreme Court of Errors of Connecticut, said as follows:

"It was said, on the trial, the contract was void, for want of consideration; and furthermore, that it was against the policy of the law, as being an engagement to pay money to the City of New Haven, for performing its duty.

We agree with the defendants' counsel, that a promise to pay public agents for doing their duty, is illegal and void; nor would we sustain a contract tending to such a consequence, or as being a restraint on the exercise of unbiased judgment. But this is not of that character. For many years, St. John Street had been dedicated to the public use, and the only thing to be done, was to define it, and have it recorded. It is true, one Gaston, who had united in the act of dedication, claimed, that a narrow strip of a few feet near the middle of the road, had not been given up by him to the public,

for which he asked to be indemnified. The defendants, wishing to have this impediment removed, if indeed it existed, and the road accepted and recorded, applied, in form, to the city, to have St. John Street laid out and defined—i. e. to be made entirely explicit—and then accepted and recorded. None of the parties expected a new highway to be laid out through private or enclosed land. This strip was to be taken, of course, and to be appraised, if need be; and these defendants, having a special interest here, undertook to pay the damages. In this, we perceive nothing exceptionable, or of dangerous tendency. We see no temporizing with public agents, and no restraint upon a free and unbiased judgment.

Then, as to consideration. The defendants are not only benefited in common with other citizens, but, obviously they had a peculiar and local interest, and well might obligate themselves to indemnify the city for assuming the burthens and responsibilities of a new public highway.

This is all the determination the case calls for; *but we must not be considered as assenting to the proposition, that a promise by individuals to pay a part of the expenses of public improvements, ordered by public authority, is of course illegal and void. We think the amount of a public burthen, or the cost to the public of an improvement, may properly enough enter into the question of expediency or necessity. A canal, a railroad, a bridge, a new street, a public square, or a sewer, is called for. If made in one way, or in one place, it will be much better for the public, though more expensive; but individuals, especially benefited, stand ready, by giving their land, their money or their labour, to meet the extra expense. Will these promises be void, as being without consideration, or against public policy? We think not.*" (Italics the writer's.)

I am not unmindful of the case of *Commissioners of Delaware County* vs. *Hiram G. Andrews*, 18 O. S. 50, the first syllabus of which reads as follows:

"A board of county commissioners, at the solicitation of the directors of a railroad company, without being authorized by law, issued to the company orders on the county treasury to the amount of $15,000, payable at a future day, for the purpose of aiding the company to build its road, and for the orders received $20,000 of the income bonds of the company. The orders were not applied to the purpose for which they were issued; but, before they were paid, the commissioners took the personal bond of the directors in the penal sum of $20,000, conditioned that, whereas the orders had been issued to enable the company to complete its road, and they had been otherwise used, without so doing, the bond should be void, if the road was finished in a specified time, and then paid the orders as they afterward became due. Held, the orders having been issued without authority, and in violation of the constitution and laws of the state, were illegal and void; and the bond of the directors to the commissioners, having been taken in furtherance of the illegal purpose for which the orders were made and paid, was taken in violation of the public policy of the state, and is, therefore, void; and, though the condition of the bond be broken, no recovery can be had thereon, for either the penal sum named therein, or the amount paid on the illegal orders."

However, this case is plainly distinguishable from the facts in the case of *Hassenzahl* vs. *Bevins*, supra, and from the facts in the case under consideration. In the Andrews case, the commissioners were utterly without power or authority to use the funds of the county as they did and every act done by them in connection with the

misuse of the county funds was absolutely void. This is repeatedly pointed out by Chief Justice Day in the opinion.

> "We do not find among the powers conferred or duties imposed upon the commissioners, anything that would authorize them to purchase railroad bonds with the county funds, or to loan the credit or money of the county to aid railroad corporations to build their roads, however desirable it may be to do so.
>
> But the commissioners in undertaking to draw from the county treasury to pay for railroad bonds, or to enable a railroad company to build its road, without authority conferred upon them so to do, not only transcended their powers, but were acting in violation of the fundamental law of the state. It is a provision of the constitution that 'No money shall be drawn from any county or township treasury, except by authority of law.' Art. 10, Sec. 5.
>
> Now, indeed, could the legislature authorize county commissioners to issue orders, or dispose of county funds as a loan of county credit or money for the purpose stated in the bond. The 6th section of the 8th article of the constitution prohibits it, as follows:
>
> 'Sec. 6. The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association.'
>
> * * * * * * * *
>
> It follows that the county orders mentioned in the bond, issued without legal authority, and in violation of the public policy of the state, were void. They imposed no legal obligation on the county in favor of the company to which they were delivered; nor is anything shown in the petition—if indeed it were legally possible—to render them of any more value in the hands of a third party.
>
> * * * * * * * *
>
> * * * The bond thus entered into and became a part of the transactions of the board of commissioners in the unauthorized and illegal disposition of the county credit and county money in aid of the railroad corporation. *The whole transaction was clearly against the spirit and policy of the constitution and laws of the state. To sustain transactions like these would nullify the salutary prohibitions of the constitution, and open wide the door to the very evils thereby sought to be obviated.*
>
> The majority of the court, therefore, hold that the bond, as well as the orders, were illegal and void; and that an action can not be maintained thereon to recover either the 'penal sum of twenty thousand dollars,' or the amount paid on the illegal orders."

In the instant case, as above set forth, the Director of Highways and Public Works is authorized by law to co-operate with the county commissioners in financing an improvement like the one in question, and when an application for state aid for such an improvement is approved by him, it becomes his duty to make such changes in the existing lines of the highway as he deems proper and to fix the grade at which the highway is to be built. He occupies a much different position from that of the county commissioners in the Andrews case, who acted without any warrant of law whatsoever and contrary to express constitutional provisions.

With reference to the power of county commissioners to accept contributions covering a portion of the cost of constructing, maintaining or repairing state highways, your attention is directed to Sections 18 and 1224 of the General Code, providing in part as follows:

> Sec. 18. "* * * a county, * * * the commissioners thereof, may receive by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest. Such gifts or devises of real estate may be in fee simple or of any lesser estate, and may be subject to any reasonable reservation. * * *"
>
> Sec. 1224. * * *
>
> "Nothing in this chapter shall be construed so as to prohibit a county, township or municipality or the federal government, or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of said state highways. * * *"

Your attention is further directed to the following excerpt from an opinion of this department, rendered under date of January 7, 1916, and reported in Opinions, Attorney General, 1915, Vol. III, p. 2503.

> "I deem it proper in this connection to call your attention to the fact that individuals, firms and corporations may make their contributions toward the construction, improvement, maintenance and repair of state highways to the county in which the improvement is to be constructed instead of making the same to the state highway department provided the co-operation of county officials may be had in the matter. Under authority of the case of State ex rel. vs. County Auditor, 86 O. S., 244, the contributors may secure the placing of their contributions in a specific road fund in the county treasury by indicating their desire in the premises at the time payment is made. Their contributions being placed in the county treasury to the credit of a road fund available for a specific improvement, it would be within the power of the county commissioners to make an application for state aid upon the road in question and to use the contributed funds for the purpose of meeting the county's proportion of the cost and expense of the improvement."

Upon the authorities and for the reasons above set forth, it is my opinion that:

1. By the terms of Section 1196, General Code, upon the approval of the Director of Highways and Public Works of an application for state aid, filed by a board of county commissioners, it is the duty of such Director, if necessary, to cause a map of the highway in outline and profile to be made, indicating thereon any change of existing lines if the Director deems it of advantage to make such change. It is further the duty of the Director to cause to be made plans, specifications, profiles, and estimates for such improvement, and as an incident thereto and to the making of the improvement, such Director is vested with the discretion to determine at what grade the highway shall be made.

2. Where a part of inter-county highway No. 7 along the Ohio River is being improved, whether or not a proposed bridge over the Ohio River will be built, is a vital factor to be taken into consideration in determining whether or not a change shall be made in the existing lines of such highway and in fixing the grade at which such highway is to be constructed.

3. An agreement entered into by the Director of Highways and Public Works with the County of Meigs, the Village of Pomeroy, and a private corporation, which proposes to construct a bridge over the Ohio River connecting inter-county highway

No. 7 with a highway in West Virginia, in which agreement, in consideration of the determination by the Director to change the existing lines of the highway and fix the grade thereof so that suitable approaches to the proposed bridge can be built and of the State's proceeding without delay to construct said road improvement, the county commissioners agree to pay a portion of the cost of the improvement and provide the necessary right of way, the Bridge Company and the Village agreeing to contribute to the county a portion of the cost of the improvement and the necessary right of way to be borne by the county, the Bridge Company further agreeing to give a bond conditioned upon its building the bridge within a specified time or upon its failure so to do to pay the State of Ohio a certain sum of money, sufficient in amount to cover the cost of rebuilding the road along a route and at a grade which would be suitable and proper if the bridge be not built, plus a sufficient sum to cover the extra cost entailed in locating the highway and building the same at the higher grade necessary to accommodate the approaches to the bridge would, after performance by the State, be enforcible against such Bridge Company, notwithstanding the fact that such contract would not be enforcible against the State while an executory contract. A bond given in accordance with the terms of such a contract would, after performance by the State, be a valid obligation enforcible against the Bridge Company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1225.

DOG—TRANSFER OF OWNERSHIP CERTIFICATE SHOULD BE FILED WITH AUDITOR OF COUNTY WHERE DOG IS REGISTERED.

SYLLABUS:

A transfer of ownership certificate as provided for in House Bill No. 164, passed by the 87th General Assembly, (112 O. L. 347) should be recorded with the auditor of the county in which such dog is duly registered, even though the buyer thereof may reside in a different county.

COLUMBUS, OHIO, October 31, 1927.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated October 17, 1927, which reads as follows:

> "Our county auditor desires a ruling construing Section 5652-7c of the new dog warden law appearing at page 349 of 112 Ohio Laws, on this proposition, viz.:
>
> 'A' registered a dog in Brown County. He recently sold the dog to a resident of Fayette County and gave the buyer a transfer of ownership certificate. In which county should the transfer of ownership certificate be recorded—in Brown County or Fayette County?"

Your attention is directed to Section 5652-7c, General Code, which relates to transfer of ownership of dogs and reads as follows:

> "Upon the transfer of ownership of a dog the person selling such dog shall give the buyer a transfer of ownership certificate which shall be signed by the seller, such certificates shall contain the licensed number of such