high school, and the question of the liability of the board of education of the district of his residence for tuition in the high school which he elects to attend, and transportation to said high school, will be governed by the provisions of Sections 7764 and 7750 of the General Code of Ohio.

4. When a pupil residing in a school district which does not maintain a high school has been assigned to a high school outside the district, which is more than four miles from his residence, and transportation is furnished thereto and he elects to attend a high school other than the one to which he has been assigned, the board of education of the district of his residence is liable for so much of the cost of his tuition in the school which he chooses to attend, and of his transportation thereto as the said board would be required to pay for his tuition in the school to which he had been assigned and of his transportation thereto."

I am therefore of the opinion, in specific answer to your question, that the board of education of the "S" township rural school district is liable to the "M" board of education for the tuition of the pupil in question to the extent that it would have been required to pay tuition to the board of education maintaining the "B" high school, if the pupil had attended that school.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2257.

ESCHEAT—PERSONAL PROPERTY UNDER SECTION 8579, GENERAL CODE, SINCE REPEALED, DID NOT ESCHEAT TO STATE IF HEIR LIVING—HEIR RECEIVES MONEY HOW—COUNTY TREASURER MAY NOT PAY INTEREST THEREON.

SYLLABUS:

1. *The provisions of former Section* 8579, *General Code, since repealed, did not cause the title to a decedent's personal property to escheat to the state, when there was a living heir at the time of the demise even though he may be unknown to the administrator at the time of the closing of the administration proceedings.*

2. *When an administrator has filed his final account and has made a final distribution of the assets of a decedent's estate, by paying the residue of the funds in his hands to the prosecuting attorney as escheated to the state, pursuant to the provisions of former Section* 8579, *General Code, (since repealed) which funds have been paid into the general fund of the county where they still remain, if it be made to appear to the satisfaction of the probate court that there is a living heir of the decedent, the court may, pursuant to the authority of Sections* 11634 *et seq., General Code, vacate the former order of the court and order the funds paid to the heir.*

3. *There is no provision of law authorizing the payment of interest by the county treasurer on funds paid to him as escheated but subsequently claimed by an heir.*

COLUMBUS, OHIO, February 5, 1934.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion concerning the following queries:

> "1. Does personal property escheat to the state under Section 8579 when the decedent died prior to January 1, 1932, if there be a living heir at the time of the decease of the intestate, even though said heir be unknown to the administrator at that time?
>
> 2. When an administrator closes an estate prior to January 1, 1932, by filing a final account showing a distribution to the Prosecuting Attorney of an unexpended balance in the estate, under the belief and designation that said balance had escheated to the State of Ohio, and said money is paid into the general fund of the County Treasury, where it still remains, what is the procedure to recover said money from the County Treasury, when an heir at law of the decedent appears and proves his claim to the satisfaction of the Probate Court?
>
> 3. Should it be determined that the said money so paid to the County Treasurer can be recovered by the heir at law, then and in that event, should said recovery be under the "unclaimed' statute No. 10846 G. C., without interest, as provided in Section 10844 G. C., or should interest be allowed the heir at law under Section 1094 G. C.?"

Section 8579, General Code, as it existed prior to the enactment of the present Probate Code, with reference to the escheat of personal property, read:

> "If there be no person living to inherit it by the provisions of this chapter, such personal property shall pass to and be vested in the state. The prosecuting attorney of the county in which letters of administration are granted upon such estate, shall collect and pay it over to the treasurer of such county; to be applied exclusively to the support of the common schools of the county in which collected, in such manner as is prescribed by law."

The statute uses the language: "If there be no person living to inherit" not "if there be no person living who is known to have a right to inherit." In Section 1094, General Code, there is a clear recognition of the fact that if the lands are erroneously considered as escheated to the state, they may be recovered by the heir. Such language is:

> "When escheated property is legally reclaimed by an heir, the state agricultural fund shall be held subject to the payment to the purchaser from the state of so much of the original purchase money as it receives with legal interest to the time of reclamation."

It should be borne in mind that a judgment of a court affects only the rights of the parties to such suit. A judgment of escheat in such action could be res adjudicata only as to the rights of the parties having notice, actual or constructive, of such proceedings. *Hamilton* vs. *Brown*, 161 U. S. 256.

There are a number of decisions to the effect that a judgment of escheat must be rendered by a court before the state can get title to property by escheat. *Louisville School Board* vs. *King,* 127 Ky. 824; *Kershaw* vs. *Kelsey,* 100 Mass. 561; *Manuel* vs. *Wulff,* 152 U. S. 505, and cases cited in note in 15 L. R. A. (N. S.) 379. Many of these cases proceed on the theory that to hold otherwise, the act of escheat would amount to taking the property without due process of law.

However, it might be forcibly argued that under the statutes of descent and distribution as they existed prior to the enactment of the present "Probate Code" title vested automatically in the state in the event the owner died leaving no heirs surviving him. Many cases could be cited in support of such general argument. In re. Melrose Ave., 234 N. Y. 48; *Christianson* vs. *King Co.,* 239 U. S. 359; *Crane* vs. *Reeder,* 21 Mich. 24, and cases cited in note in 23 A. L. R. 1237. If such conclusion is sound no proceedings would be necessary to vest the title to the property in the state. The language of Section 8579, General Code, seems to indicate that such was not the intent of the legislature, for it makes no provision for the receipt of, or collection of such property until letters of administration have been granted for the decedent's estate.

For the purposes of this opinion, however, I do not deem it necessary to hold that either of such is or is not the rule in Ohio; for the statute only provided that the property should escheat to the state when there are no heirs. Thus, if it were to be established that an heir did exist then the property never could have automatically escheated to the state; on the other hand, by reason of the provisions of the statutes as they then existed, if an heir was alive at the time of the decedent's demise such heir would by that fact acquire title to the property of which he could not be divested without due process of law. Either of such premises would lead to the same conclusion, if we assume that the missing heir had no notice actual or constructive, i. e., that the state had no title by escheat.

Even though the unknown heir had constructive notice, as by service by publication, of the pendency of the proceedings to declare such lands escheated to the state by reason of the provisions of Section 11632, General Code, such judgment could be vacated and set aside. Since you do not give the date of the proceedings, if any, to declare the property escheated to the state, nor do you set forth whether he had notice of such proceedings, if any, I can not render an opinion as to whether the heir's rights were barred by judicial decree or are res adjudicata. It is, however, my opinion that the state obtains no title to property of a decedent by escheat, if there is a living heir of the decedent, even though he may be unknown by the administrator at the time of the administration of the estate.

In 10 R. C. L., 617, it is stated:

> "There is no question but that an heir who is competent to hold title has the right to recover from the state property which has escheated. Obviously, if there is an heir, there can be no legal escheat and the state in such case acquires no title."

See *Northwestern Clearance Co.* vs. *Jennings,* 106 Oreg. 291; *Donovan* vs. *Pitcher,* 53 L. R. A. 533; *Young* vs. *Oregon,* 47 L. R. A. 548.

Your second inquiry is concerning the nature of the proceedings to recover moneys paid into the county treasury as escheated, when it is determined that such moneys have been wrongfully so paid.

Section 1094, General Code, referred to in your inquiry, has reference to the return of that portion of the escheated property which has been received by the state agricultural fund. Your inquiry states that the escheated money was "paid into the general fund of the county treasury, where it still remains." I can not see where Section 1094, General Code, can have any bearing on the question presented by your inquiry.

Sections 10843 to 10848, General Code, have reference to the deposit, investment and repayment of funds which some court has theretofore decreed to belong to a particular creditor, in the event that they have not been paid to the creditor for a period of six months after such funds are paid into court, or to an administrator, executor, trustee, master, etc.

It should be borne in mind that the county treasurer or county has no authority to lend funds coming into the treasury except as given him by statute. Section 5679, General Code, since repealed, provided that when the funds were collected by the prosecuting attorney they shall be paid over to the county treasurer to be applied to the support of the common schools of the county in such manner as is provided by law.

In an opinion of one of my predecessors in office, 1928 Opinions of the Attorney General, page 980, it is stated:

> "Moneys paid into the county treasury representing the proceeds of personal property escheated to the state by virtue of Section 8579, General Code, should be apportioned and distributed to the various school districts and parts of districts in the county at the times and in the manner provided for the apportionment and distribution of the levy of two and sixty-five hundredths mills, as provided in Section 7575 of the General Code."

You state that the funds in question are still in the general funds of the county treasury; I therefore assume that no use has been made of them except that of deposit in the county depositary. Section 2737, General Code, provides that all interest earned thereon shall be credited to the general fund.

From the facts deduced from your inquiry, it is evident that the probate court made an erroneous entry or judgment in its order of final distribution, that is, in the order of distribution to the county treasurer rather than to the heir, who under the provisions of statute was entitled thereto.

Section 11631, General Code, sets forth the grounds upon which Courts of Common Pleas or Courts of Appeals may modify their own judgments or orders after term. Such provisions or grounds, in my opinion, would be broad enough to allow the correction of the error by the Common Pleas or Court of Appeals. Section 11643, General Code, extends the powers conferred by Section 11631, General Code, to the Probate Court. Sections 11634, 11635, 11636, 11637 and 11638, General Code, are subject to the statute of limitations contained in Section 11640, General Code. I am not quoting such sections for the probate judge is undoubtedly fully familiar with their provisions.

I am of the opinion that the erroneous entry closing the estate should be vacated pursuant to the authority of Sections 11631 et seq. General Code, and the estate thereupon administered as though the erroneous entry had not been made. Thereafter the refunder could be made by the county auditor and treasurer in

like manner as refunders of other erroneous payments to the county treasurer are made.

Your third inquiry is as to whether the county treasurer should pay interest to the heir by reason of his retention of the funds. Keeping in mind that interest is of two kinds: first, that which is given by reason of the contract providing for the same; this is usually referred to as "contract interest"; second, that which is given by way of damages by reason of delay in the payment of an obligation; this is usually referred to as "damage interest." It is evident that no contract interest could be due from the county to the heir, unless the statute requires it to be paid, for the county treasurer has no authority to enter into a contract to pay such interest. I have not found any statute in Ohio which expressly requires or authorizes the county treasurer to pay interest on funds wrongfully paid into the county treasury.

There is a general rule of law that funds in the custody of the court whether paid into court for the purpose of litigating the ownership or otherwise, do not bear interest. *Franklin Bank* vs. *Burns*, 84 O. S. 12; *Lentz* vs. *Fritter*, 92 O. S. 186.

It could hardly be said that there was any wrongful detention of the funds in question when they were held by order of the court and payment had not yet been demanded by the heir.

Specifically answering your inquiry it is my opinion that:

1. The provisions of former Section 8579, General Code, since repealed, did not cause the title to a decedent's personal property to escheat to the state, when there was a living heir at the time of the demise even though he may be unknown to the administrator at the time of the closing of the administration proceedings.

2. When an administrator has filed his final account and has made a final distribution of the assets of a decedent's estate, by paying the residue of the funds in his hands to the prosecuting attorney as escheated to the state, pursuant to the provisions of former Section 8579, General Code, (since repealed) which funds have been paid into the general fund of the county where they still remain, if it be made to appear to the satisfaction of the probate court that there is a living heir of the decedent, the court may, pursuant to the authority of Section 11634 et seq., General Code, vacate the former order of the court and order the funds paid to the heir.

3. There is no provision of law authorizing the payment of interest by the county treasurer on funds paid to him as escheated but subsequently claimed by an heir.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2258.

APPROVAL, CONTRACT BETWEEN THE DIRECTOR OF HIGHWAYS AND THE COUNTY OF SUMMIT FOR THE IMPROVEMENT OF A PORTION OF STATE HIGHWAY NO. 16 IN THE CITY OF AKRON.

COLUMBUS, OHIO, February 5, 1934.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a contract between the Director of Highways