On similar grounds, a former Attorney General in an opinion, which may be found in the published Opinions of the Attorney General for 1929, at Page 1646, held:

> "Where municipal bonds are made payable at a specific bank, the Board of Sinking Fund Trustees of the municipality lawfully may enter into an agreement with the bank to pay for its services, made necessary for the redemption of the bonds or interest coupons thereon, whether the said bank is located in the municipality or outside the municipality and whether the said bank is the regularly designated depository of the municipality or not."

I am, therefore, of the opinion that a Board of Education may lawfully pay a bank with which it does not have a depository contract, or a bank with which it has a depository contract after the limitation of its deposit under said contract is reached, for the cashing of checks and warrants, if it is unable to have them cashed without charge.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3034.

GRAVEL—AS USED IN HIGHWAY CONSTRUCTION AND MAINTENANCE NOT MINERAL—COUNTY AUDITOR UNAUTHORIZED TO INCREASE TAXABLE VALUE OF LAND BECAUSE OF GRAVEL DEPOSIT.

SYLLABUS:

Ordinary commercial gravel such as is used in grading township and county roads, is not a mineral within the meaning of section 5562, *General Code. And the county auditor is not authorized by the provisions of this section to make and enter an increase in the taxable value of a tract of farm land by reason of the fact that such land contains a deposit of such gravel.*

The county auditor is not authorized to make and enter an increase in the taxable value of a tract of land in the county under the provisions of section 5562, *General Code, or of section* 5548-1, *General Code, after he has made up the tax list and duplicate of the taxable real property in the county and in the taxing district in which such tract of land is located, and after he has delivered such duplicate to the county treasurer and the owner of the land has paid taxes thereon for the first half of the current year on the original tax valuation of such land.*

COLUMBUS, OHIO, August 14, 1934.

HON. CHARLES D. HAYDEN, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication in which you advise me that in December, 1933, apparently after a certain taxpayer in Knox County had paid the taxes for the first half of the year 1933 on a farm owned by him, the Auditor of Knox County made and extended on the

tax list for that year an increase of ten thousand dollars on the taxable valuation of this farm property for the year; and that since the taxpayer had paid the taxes on this property for the first half of the year on the original valuation of said property, the increased amount of taxes for the year 1933, due to the increase made by the county auditor in the taxable valuation of the farm, was extended for collection at the regular period for the payment of the last half of 1933 taxes on real property in said county.

You state in your communication that this increase in the taxable valuation of this farm and property was made by reason of his finding that there was and is a deposit of gravel in this land which as material is being used for township and county road purposes.

It further appears from your communication, in this connection, that the county auditor made this increase in the taxable valuation of the lands above referred to under the assumed authority of section 5562, General Code.

Upon the facts above indicated, you request my opinion on the question of the county auditor's authority to make this increase in the taxable valuation of the property here in question in the manner and at the time stated. In consideration of the question here presented, it is to be noted that although section 5671, General Code, which is referred to in your communication, provides that the lien of the state for taxes levied for all purposes in a particular current year shall attach to all real property subject to such taxes on the day preceding the second Monday of April of such current year, the amount of taxes that may be payable for that year on any particular parcel or tract of real property is not fixed on the lien date of the taxes for the year; but the amount of taxes on such parcel or tract of land is determined by the aggregate amount of taxes that may be thereafter levied during the year for all purposes, and by the taxable valuation of the property which may be thereafter increased or decreased. As before noted, the question here presented arises out of an increase in the taxable valuation of this property made by the county auditor under the provisions of section 5562, General Code, for the reason that he found that there was a valuable deposit of commercial gravel in these lands. Section 5562, General Code, provides that on or before the thirty-first day of March, annually, the county auditor shall make a list of petroleum, oil and natural gas wells, coal and ore mines, limestone quarries, fireclay pits, or works of any kind designed for the production of minerals of any kind, which have been begun or constructed since the last preceding appraisement. This section further provides, among other things, that if, by reason of the discovery of "such minerals," the construction of such works, the commencement of such operations, or the development of such minerals within the year, the value of the lands containing or producing "such minerals," or any of them, shall increase in value to the amount of one hundred dollars or more, the county auditor shall increase the assessment of such land to its true value in money in the name of the owner thereof.

It thus appears that one of the questions presented for consideration on the facts stated in your communication is whether gravel is a mineral within the purview of section 5562, General Code, above noted. One of the standard definitions of the term "mineral" is that stated in the case of *Hendler* vs. *Lehigh Valley Railroad Company*, 209 Pa. St. 256, where it is said:

> "In the commercial sense a mineral may be defined as any inorganic substance found in nature, having sufficient value separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake, or its own specific uses."

Applying this definition to the facts presented in the case above cited, the court in that case held that while a vein of pure white quartz sand, valuable for making glass or other special use, would be within a reservation of "coal and other minerals" in a deed, a common mixed sand merely worth digging, and removing as material for grading, would not be a mineral within the meaning of a reservation of this kind. The court in its opinion in this case, after referring to the broader meaning of the term "mineral" as comprising one of the three great divisions of matter, said:

> "But there is another, and what may be called the commercial sense in which the word mineral is used, and in which having reference to its supposed etymology of anything mined, it may be defined as any inorganic substance found in nature, having sufficient value separated from its situs as part of the earth to be mined, quarried or dug for its own sake or its own specific uses. That is the sense in which it is most commonly used in conveyances and leases of land, and in which it must be presumed that it was used by these parties in the deed in question. 'Coal and other minerals,' the expression used, indicate substances which, like coal, have a value of their own, apart from the rest of the land, sufficient to induce the expense and labor of severance for their own sakes. These the grantor intended and expressed the intention to except from his grant and reserve to himself. While coal was the principal and perhaps the only thing clearly in view, yet the reservation was not meant to be limited to that, for then the addition 'and other minerals' would be superfluous and misleading. A vein of fine marble would clearly be reserved, and so probably if near enough a market to have a value, would be granite, or limestone or other building material, potter's or porcelaine clay and the like."

In the case of *United States of America* vs. *Aitken, et al.*, 25 Philippine Rep. 7, the court, in holding that commercial gravel is not a mineral such as is subject to location as such under the United States mining laws and regulations, considered this question quite comprehensibly in its opinion, speaking through Trent, Associate Justice of the Supreme Court of the Philippine Islands. The court in its opinion in this case said:

> "It is true that commercial gravel belongs to the mineral kingdom in that it is inorganic and that it is formed by nature alone. But there is an important distinction between it and any of the so-called minerals as recognized by the authorities. Practically speaking, all the definitions of the word 'mineral' agree that such a substance must always have a definite chemical composition by which it can be easily recognized, in whatever part of the earth it may be found. There can be no such uniformity in the chemical content of gravel deposits, for the reason that this depends entirely upon the character of the mineral deposits which have contributed to their formation. And upon the character, quantity, and proximity of the minerals to the gravel deposit, their susceptibility to erosion, the violence with which the erosion is accompanied, the duration of the eroding process, as well as various other facts, depends the size of the pebbles and the quality of the deposit as commercial gravel. There is nothing constant in the character of commercial gravel by which

to identify it as a mineral, except that it consists of broken fragments of rock mingled with finer material, such as sand and clay. Nothing definite can be said of its chemical composition as can be said of the minerals. Commercial gravel is simply a jumbled mass of fragments of various minerals (rocks). Science, at least, cannot accept as a distinct subdivision of the mineral kingdom any substance whose character and attributes are so composite and fluctuating. It is true that beds of sandstone and limestone may possib'y owe their origin in some instances to deposits of ordinary gravel. (Barringer and Adams on The Law of Mines and Mining in the United States; Enc. Brit., 11th ed., Title 'Gravel.') But commercial gravel has not yet reached that stage. So far as scientific classification goes, then, commercial gravel cannot be considered as a mineral.

But it is urged, and rightly, that the *legal* definition of 'mineral' is not in accord with the strict scientific definition of the term, and that it includes substances such as coal, asphalt, phosphate rock, etc., which, strictly speaking, probably owe their origin to vegetable or animal life of past ages. As commercial gravel cannot be classified as a mineral, strictly speaking, it remains to be seen whether it may be so classified under the broader legal signification which the term 'mineral' has acquired.

The leading English case of *Hext* vs. *Gill* (L. R., 7 Ch., 699, 712, 17 Eng. Rul. Cas., 429, 441) has often been quoted with approval:

'A reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.'

The United States Land Department, whose decisions on the subject are recognized as of quasi judicial authority, announced the rule many years ago as follows:

'Whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the mining act of May 10, 1872.' (Circular of Instructions, July 15, 1873.)

The Department has relied upon this definition many times in the course of its administration of the mining laws. During this time the definition has met with neither legislative nor judicial disapproval, and it consequently is deserving of great weight as an interpretation of the law by the executive department of the Government. Indeed, of all the definitions to be found, it is probably the least misleading, for the reason that 'mineral' in a legal sense is no longer bound up in the etymology of the word, and the only method of determining its scope is to ascertain what is included within it by legal authorities.

Assuming that the gravel deposits which the appellees seek to locate could be worked at a profit, it might appear that commercial gravel would fall within the scope of the above definitions. If, however, an examination be made of the individual adjudicated cases and the decisions of the United States Land Department, upon which these general definitions of the term 'mineral' are based, it will be found that commercial gravel was not a factor in forming them, and that it has never been considered

as a mineral. It is as completely excluded from the legal definition of the term by the silence of the books on the subject as it is eliminated from any technical discussion of the subject by the failure to consider it at all. Nor can such exclusion be attributed to ignorance of its existence as has been the case with certain minerals which scientific investigation has but recently discovered, and whose discovery has necessitated widening the meaning of the term 'mineral' so as to include them. Commercial gravel and its uses, at least for road making and the like, have been known from time immemorial."

In the case of *Waring* vs. *Foden,* 1 Ch. 276, decided by the English Court of Appeals, November 13, 1931, and also reported in 86 A. L. R. 969, the plaintiff by his action sought to obtain a finding that all sand and gravel located within and under certain lands conveyed by him by deed to the defendant were the property of the plaintiff by reason of a reservation or exception in the conveyance of all mines, minerals and mineral substances. The court held that sand and gravel were not "minerals" or "mineral substances" as those terms are used and understood in the mining world, the commercial world or among land owners, and that, as sand and gravel constituted a part of the ordinary soil of the district in which the property in question was located, it would be a negation of the substance of the transaction between the parties to hold that all sand and gravel, which were very generally a part of the soil and subsoil of the tract of land conveyed and which were worked and gotten up through the surface of the land, were excepted from the conveyance and remained the property of the plaintiff. This question was considered in the case of *Zimmerman* vs. *Brunson,* 39 L. D. 310, decided by the United States Land Department in 1911. In this case the United States Land Department was called upon to decide whether commercial gravel could be located as a placer mineral claim under the mining laws and regulations of the United States government. In the consideration of the case presented, it was said:

"Conceding that the twenty acres are chiefly valuable for their deposit of gravel and sand, which can be used in connection with cement forming concrete used in the construction of buildings, does such a deposit confer upon them a mineral character so as to except them from homestead entry?"

After quoting the definition of a mineral as formulated by the Department in its Circular of Instructions issued in 1873, quoted in the opinion of the court in the case of *United States of America* vs. *Aitken, supra,* it was further said:

"A search of the standard American authorities has failed to disclose a single one which classifies a deposit such as claimed in this case as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them special value, were not to be regarded as mineral.

* * * * * * * * *

The Department, in the absence of special legislation by Congress,

> will refuse to classify as mineral, land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain."

However, giving due weight to the views expressed in and by the authorities above noted on the general question as to whether gravel is included within the meaning of the term "minerals," the particular question here presented with respect to the meaning of this term in the consideration of the ultimate question as to whether gravel deposits in land are included within the meaning of the term, is one arising under the terms and provisions of section 5562, General Code. In the consideration of this question on the construction of the provisions of section 5562, General Code, it is to be noted that this section further provides for an increase in proper cases of the taxable value of minerals in lands when the same are separately owned and listed for taxation. And in this connection section 5562, General Code, is to be considered as in *pari materia* with sections 5560 and 5563, General Code, which make special provision for the valuation and assessment for taxation of minerals when the same are owned and held separate and apart from the fee in the land in which the same are found. And in this view, the provisions of section 5562, General Code, should, in my opinion, be construed to apply only to such substances, in addition to those specifically named in the statute, as are recognized as minerals that may be separately owned and held in the land in which they are found. As noted in some of the authorities above cited, sand and gravel usually constitute such a part of the soil and subsoil of the land in which they are found that it is quite impossible in most cases to take such sand and gravel without a destruction or taking of the surface of the land.

Upon these considerations which support to some extent the conclusions reached by the authorities which have considered this question, that gravel is not a mineral, I am inclined to the view that it is not a mineral within the meaning of section 5562, General Code, and this leads to the further view here expressed as an opinion that the county auditor was without authority in increasing the value of the land here in question on the tax list and duplicate under the assumed authority of section 5562, General Code.

As above indicated, there is nothing in your communication to suggest that the increase made and entered by the county auditor in the taxable valuation of the farm land here in question was made by the county auditor otherwise than under the assumed authority of section 5562, General Code, which as above noted, authorizes the county auditor in proper cases to make and enter an increase in the valuation of land upon the discovery of minerals therein. However, your communication suggests the further question whether such increase in the taxable valuation of real property can be made by the county auditor either under the provisions of section 5562, General Code, or under the more general provisions of section 5548-1, General Code, after the tax list and duplicate of all the taxable real property in the county and in the particular taxing district wherein the property in question is located, have been completed and the completed tax duplicate has been delivered to the county treasurer, upon which the taxpayer who owns the land in question has made a payment of taxes for the first half of the current year on the property valuation as it stood before the county auditor made the increase here in question. As to this, it is to be observed that neither section 5562, General Code, nor section 5548-1, General Code, contains any pro-

vision which in express terms limits or otherwise fixes the time during the year on or before which the county auditor is required to make the increases in valuation therein provided for, if such increases are determined upon and made by the county auditor. In this connection, it is to be noted, however, that taxes on real property can be paid only upon a completed tax list and duplicate made by the county auditor pursuant to responsible action by him, by the county board of revision and, in some cases, by the Tax Commission of Ohio, fixing and determining the valuation of the different lots, parcels and tracts of land entered upon such tax list and duplicate.

Consistent with recognized rules of statutory construction, the provisions of section 5562, General Code, and those of section 5548-1, General Code, should be construed so as to bring the provisions of these sections in harmony with the general statutory scheme relating to the preparation and completion of the tax list and duplicate upon which real property taxes are paid from year to year.

The provisions of section 5562, General Code, have, perhaps, been sufficiently noted with respect to the question here under consideration. Section 5548-1, General Code, provides that in any year after the year in which an assessment has been made by the county auditor of all the real estate in any subdivision of the county, it shall be the duty of such county auditor at any time to revalue and assess any part of the real estate contained in such subdivision where he finds that the same has changed in value, or is not on the duplicate at its true value in money, and in such case he shall determine the true value thereof in money. This section further provides that when any such change is made in the valuation of any particular parcel or tract of land, such change shall only be made upon notification of the owner of such real estate or of the person in whose name the property stands on the duplicate of the intention of the county auditor to reassess such real estate and of the change in valuation thereof in such reassessment. And as to this, the statute further provides that in case the owner of such real estate is not satisfied with such reassessment, "the same shall be heard at the next ensuing session of the county board of revision, and such owner shall have the right to appeal therefrom to the Tax Commission of Ohio as provided in other cases."

Section 5592, General Code, provides that the county board of revision shall organize annually on the second Monday in June, and by section 5605, General Code, it is provided that at this time the county auditor shall lay before the county board of revision the returns of his assessment of real property for the current year, and such board shall forthwith proceed to revise the assessment and returns of such real property. This section further provides that the county auditor shall not make up his tax list and duplicate, nor advertise as provided in section 5606 of the General Code, until the board of revision has completed its work under section 5605, General Code, and has returned to the auditor all the returns laid before it with the revisions and corrections thereof, as made by the county board of revision. By section 5606, General Code, it is provided that when the county board of revision has completed its work of equalization and has transmitted the returns to him, the county auditor shall give notice by advertisement in the manner therein provided, that the tax returns for the current year have been revised and the valuations completed and are open for public inspection in his office, and that complaints against any valuation or assessment, except as to those made by the Tax Commission of Ohio, will be heard by the county board of revision, at a time and place to be stated in such notice. Section 2583, General Code, provides that on or before the first Monday of September in each year, the county auditor shall correct his real property tax list in accordance with

the additions and deductions ordered by the Tax Commission of Ohio, and by the county board of revision, and on the first day of October deliver one copy thereof to the county treasurer. And as to this, it is therein further provided that the copies prepared by the county auditor shall constitute the auditor's general tax list and treasurer's general duplicate of real and public utility property for the current year.

The fact that the tax list and duplicate of taxable real property in any particular county and in the taxing districts thereof have been made up by the county auditor under the provisions of section 2583, General Code, and the duplicate has been delivered to the county treasurer, does not prevent the county board of revision from hearing complaints with respect to the valuation of particular parcels or tracts of land on such tax list and duplicate; for, by the provisions of section 5609, General Code, complaint against any valuation or assessment of any particular parcel or tract of land as the same appears upon the tax duplicate of the current year, may be filed on or before the time limit for the payment of taxes for the first half year, which, under the provisions of section 2653, General Code, and other related sections of the General Code, is the twentieth day of December of the current year, or such later date to which the payment of such taxes has been legally extended. And section 5602, General Code, provides in this connection that when corrections are made by the county board of revision with respect to property standing on the tax list and duplicate, after the tax duplicate has been delivered to the county treasurer, the county auditor shall certify such corrections to the county treasurer and he shall enter such corrections on his tax duplicate.

Although, as here noted, the county board of revision has express statutory authority to make an order increasing or decreasing the valuation of particular parcels or tracts of real estate on the tax list and duplicate, after such tax list and duplicate have been made up and the duplicate has been delivered to the county treasurer, there is no suggestion in any of the statutory provisions that the county auditor has any authority to make any change in the valuation of a particular parcel or tract of land after the tax list and duplicate have been completed and the duplicate is in the hands of the treasurer.

I am inclined to the view, therefore, that for this additional reason the increase in the taxable valuation of the property here in question made by the County Auditor of Knox County, was and is unauthorized and invalid.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3035.

COUNTY COMMISSIONERS—MAY USE PART OF ALLOWANCE TO INDIGENT FAMILY BY PAYING EXPENSE OF CHILD THEREOF AT SUMMER HEALTH CAMP TO ARREST DEVELOPMENT OF TUBERCULOSIS.

SYLLABUS:

A board of county commissioners may, with the approval of the state relief commission, use a part of the allowance which they make to a family from the proceeds of bonds issued by it in anticipation of the county's share of taxes