

knot on one end of the series to the knot on the other end." This language cannot be construed to mean that the size of the mesh is to be determined by measuring three separate meshes and taking the average length of the meshes so measured.

In specific answer to your inquiry, I am of the opinion that the size of the mesh of a gill net should be determined by exerting a one pound strain on the third mesh of three consecutive collapsed meshes parallel with the selvage, and measuring the total length of these three meshes from the knot on one end of the series to the knot on the other, and by taking the average length of these three meshes so measured, and not by exerting the one pound weight on three separate collapsed meshes and taking the average length of the separate meshes so measured.

Respectfully,

GILBERT BETTMAN,
Attorney General.

983.

APPROVAL, BONDS OF NAPOLEON VILLAGE SCHOOL DISTRICT,
HENRY COUNTY—\$50,000.00.

COLUMBUS, OHIO, October 4, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

984.

ROAD MACHINERY—PURCHASED WITHOUT COMPETITIVE BIDDING
—SELLER'S RIGHT TO SET-OFF COST OF REPAIRS TO SUCH MA-
CHINERY WHEN FINDING MADE FOR MONEY ILLEGALLY PAID
BY TOWNSHIP TRUSTEES.

SYLLABUS:

Where township trustees purchase road machinery without complying with the provisions of Section 3373, General Code, and the property is returned to the seller and a finding made against the seller, the seller is entitled to plead as a setoff the cost of repairs made on said property during possession by the township if such repairs were ordered by the township in a separate contract which complied with the statutes.

COLUMBUS, OHIO, October 4, 1929.

HON. GEO. E. SCHROTH, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication of recent date which is as follows:

"The trustees of _____ Township, Seneca County, Ohio, in which township Tiffin is located, some time ago entered into a contract with the _____ Machinery Co., for the purchase for \$4275.00 of a shovel to be used in township work. No advertisement for competitive bidding was

held by the trustees, and consequently the contract was not lawful. The trustees paid \$1,500.00 to the ----- Machinery Co., and the trustees have been advised by the Attorney General's department, or perhaps by the department of the Auditor of State, I am not sure which, to proceed to recover the \$1500.00.

It develops, however, that the ----- Machinery Co. has done various jobs of repair on the steam shovel, for which the township trustees have not paid. I advised the township trustees that it struck me at first blush, at least, that even though the trustees should sue the ----- Machinery Co. for the \$1500.00, and would show an absolute right to recover, the ----- Machinery Co. in such case could plead counter claims for the various items of repairs that have been charged against the township trustees. No one of these individual repair bills amounted to as much as \$500.00 and, consequently, would not have required competitive bidding in any event.

I would be glad to have your opinion on this question of the competency of a defense of counter claim for repairs, should an action be brought for the \$1500.00.

P. S.—I am now able to state definitely that H. W. R., state examiner, working under the Bureau of Inspection and Supervision of Public Offices, made the finding on November 9, 1928, that there was due to ----- Township from the ----- Machinery Co. the sum of \$1500.00."

From the statements in your communication, it seems clear that the trustees, in the purchasing of the machinery referred to, did not comply with the provisions of Section 3373, General Code, which require an advertisement for bids. There seems to be no doubt as to the validity of the finding of the Bureau of Inspection and Supervision of Public Offices in view of the numerous decisions upon the question.

The contract between the trustees of ----- Township and the ----- Machinery Company was a nullity and had no legal effect whatsoever, inasmuch as Section 3373, General Code was violated.

The contracts for the repair of said illegally purchased machinery, however, appear to have been separately executed and to have been valid.

A somewhat analogous situation was considered by my immediate predecessor, see Opinions of the Attorney General for 1928, Volume 4, page 2856. In this case a road grader to cost \$2,500.00 was purchased without advertising for bids, in violation of Section 3373, General Code. The road grader after use by the township was returned to the seller, subsequent to a finding that it had been illegally purchased.

The specific question propounded to my predecessor was whether in arriving at a compromise of the finding a reasonable amount might be allowed for use of the machinery. The answer was in the affirmative.

Since the contract in the instant case was not *malum in se* but rather *malum prohibitum*, it seems to me that the doctrine applies which is laid down in the case of *Hill County vs. Shaw & Borden Company*, (C. C. A.) 225 Fed., 475. This case extensively discussed the authorities upon this point and holds that if a political subdivision obtains the money or property of others without authority, the law will compel restitution or compensation.

In *Hommel & Company vs. Village of Woodfield*, 115 O. S., 683, the above subject was discussed, and it was strongly intimated that the seller would be entitled to have his property restored to its original condition at the time it was delivered, which probably implies his right to damages for the use of the same.

In connection with the facts here presented, your attention is directed to Section 286, General Code, which relates to the certification and collection of findings of the Bureau:

" * * * No claim for money or property found in any such report to be due to any public treasury or custodian thereof in any such report shall be abated or compromised either before or after the filing of civil actions, by any board or officer or by order of any court unless the Attorney General shall first give his written approval thereof. * * *

No judgment or final order shall be entered in any civil action commenced under the authority or direction of this section until such entry shall have been submitted to the Attorney General, and the Attorney General is hereby constituted an attorney of record in each such action."

From the provisions of the statute last mentioned, it will be noted that a finding may be compromised in the manner therein provided.

Although there is no specific authority for anyone to compromise or abate a claim, when reduced to a finding by the Bureau, such as the one in the instant case, similar to authority with reference to claims due the State of Ohio, it would seem that the Legislature contemplated the abatement or compromise of these claims under certain circumstances, by providing that such abatement or compromise should not be done except with the written approval of the Attorney General.

In answer to your specific inquiry, you are advised that in my judgment, the ----- Machinery Company would be entitled to plead as a set-off the cost of repairs in a defense to an action to enforce the finding of the Bureau.

Respectfully,

GILBERT BETTMAN,
Attorney General.

985.

ANNEXATION—TOWNSHIP TERRITORY JOINED WITH MUNICIPALITY
HAVING ANOTHER TOWNSHIP COTERMINOUS THEREWITH—EFFECT
ON JUSTICES OF PEACE OF TRANSFERRED TOWNSHIP—RESULT
WHEN ATTACHMENT PROCEEDINGS IMPROPER.

SYLLABUS:

1. *Where territory of a township is, by proper proceedings, annexed to, and made a part of a municipal corporation and of another township coterminous with such municipal corporation, justices of the peace of the first mentioned township residing in such transferred territory do not become justices of the peace of the township to which such territory was transferred, with the right to hold court therein, if there is in such township a court other than a mayor's court, having jurisdiction of all cases of which justices of the peace have, or may have jurisdiction. And in such case, such justices of the peace and other township officers living in such transferred territory will be required to remove their residences into the remaining territory of the township for which they were elected, as a condition of their right to exercise the functions of their respective offices.*

2. *The annexation of a part of the territory of the township to a municipal corporation does not in and of itself, effect an attachment of such territory to another township included within the limits of such municipal corporation, and where such territory has not been attached to such other township, by proper proceedings to that end, justices of the peace and other officers of the township first above mentioned, who reside in the transfer of territory may continue to exercise the duties of their respective*