

cancelled in February, 1926, prior to the time when the annual report for 1926 would otherwise have been filed, which, under Section 5495, is during the month of April, it is evident that no franchise tax was assessed after the year 1925. No such tax having been assessed after the year 1925, it follows that the only franchise taxes which have "accrued" within the meaning of Section 8623-80, supra, are franchise taxes for the year or years preceding the year 1926.

Specifically answering your question, therefore, I am of the opinion that under the provisions of Sections 8623-79 and 8623-80, General Code, as amended by the 88th General Assembly, when the articles of a corporation were cancelled February 15, 1926, for failure to file annual franchise tax returns or excise tax returns, or failure to pay franchise or excise taxes, and such corporation has not been reinstated, such corporation may voluntarily dissolve upon the filing of a certificate as therein provided to which is attached a receipt, certificate or other evidence showing the payment of all franchise taxes to January 1, 1926, and the receipt, certificate or other evidence showing the payment of personal property taxes accrued up to the date of filing such certificate of dissolution.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1181.

APPROVAL, BONDS OF GEAUGA COUNTY—\$39,346.81.

COLUMBUS, OHIO, November 12, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1182.

APPROPRIATION PROCEEDINGS—NORTON-EDWARDS ACT—PROPERTY OWNER REFUSING MONEY AND PERFECTING APPEAL—DUTY OF HIGHWAY DIRECTOR TO WITHDRAW MONEY DEPOSITED.

SYLLABUS:

When the owner of property appropriated under the provisions of the Norton-Edwards Act (112 O. L., 430), after having been notified as to the amount of compensation and damages, if any, on deposit in the Probate Court, declines to accept the money and elects to, and does perfect an appeal as to the amount of compensation and damages, if any, the Director of Highways should at that time withdraw the amount of money on deposit.

COLUMBUS, OHIO, November 13, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"In connection with the construction of Section 'Vermilion Bridge and the approaches thereto', on SH (ICH) No. 3, Erie County, inability to negotiate with certain property owners for rights of way needed therewith necessitated the initiating of appropriation proceedings upon the part of the Director of Highways in the Probate Court of Erie County, the particular case in question being the *Director of Highways vs. Clifford Parsons*.

A resolution was entered upon the official Journal of the Department under date of July 20, 1928, in Volume 13, Page 17, declaring it necessary for the public convenience and welfare to appropriate certain property of said Clifford Parsons. Notice was duly served by the Sheriff of Erie County on July 24, 1928, and on July 30, 1928, an appeal was entered, based upon necessity of the improvement and the amount of compensation and damages tendered. Bond was provided, preliminary hearing held, and the case set for trial September 18, 1928.

The amount tendered by the Department as compensation and damage was Thirty One Hundred Dollars (\$3100.00). The verdict brought in by the jury was Two Thousand Dollars (\$2000.00). On October 24, 1928, the court, upon the motion of the appellant, set aside the verdict of the jury upon the grounds of the amount not being in accordance with the evidence presented.

The department desires to have the property reappraised preliminary to the redepositing in Probate Court. In view of such an action, it would seem logical to withdraw the original tender of Thirty One Hundred Dollars.

It is therefore requested that the Department be advised as to the proper manner in which to secure the withdrawal of this warrant and the procedure to be followed in the re-entering of the case in the Probate Court of Erie County."

I assume the appropriation of the property of the owner named, and the deposit of the money mentioned, in the Probate Court, was pursuant to the pertinent provisions of the Norton-Edwards Act (112 O. L., 430). I observe that Section 20 of the Act (Sec. 1202, General Code), among other things, provides as follows:

"The director shall have power and is hereby authorized to alter, widen, straighten, re-align or relocate any road or highway on the state highway system, and when in altering, straightening, re-aligning or relocating any such road or highway there is any portion of the existing road or highway which he deems not needed for highway purposes he may vacate and abandon such portion. The director is hereby authorized to purchase or appropriate property for the necessary right of way for such purposes, and also such property as may be necessary in the location or construction of any bridge, culvert, grade separation project, or other highway improvement, which he, by law, is or may be authorized to locate or construct.
* * * "

Likewise, provision is made in Section 21 of the act (Sec. 1201, General Code), as follows:

"If the director is unable, for any reason to purchase the property for such purposes, or any of them, mentioned in the preceding sections, he may proceed to condemn such land or property, whether the property of an individual or corporation, in the manner following:

The director shall first enter on the journal of the department of highways a finding that it is necessary for the public convenience and welfare to appropriate such property as he may deem needed for the purposes, or any of them, hereinbefore mentioned. Such finding shall contain a definite, accurate and detailed description of such property deemed needed and the name and place of residence, if known or with reasonable diligence ascertainable, of each person or corporation the owner or owners of the property sought to be appropriated.

The director shall in such finding also fix what he may deem to be the value of such property sought to be appropriated, together with the damage to the residue, if any, and deposit the value thereof, together with such damages, if any, with the probate court of the county within which such property, or a part thereof, is situated, for the use and benefit of such owner or owners; and thereupon the director shall be authorized to take possession of and enter upon said property for any and all the purposes hereinbefore mentioned. * * * "

It seems manifest, from the provisions of the statutes, supra, that the Director of Highways is given the power to purchase or appropriate such property as may be necessary in the location or construction of a bridge on a highway improvement on the state highway system.

Section 21 of the act also makes specific provision that in case the Director of Highways is unable for any reason to purchase necessary right of way for the construction of a bridge, he may proceed to condemn the necessary land or property. In making the necessary preliminary steps under the act, it is the duty of the Director of Highways to fix what he deems to be the value of the property sought to be appropriated, also the damages, if any, to the residue, which sum so fixed he is required to deposit with the Probate Court together with a true copy of his finding as to the necessity and a description of the property which shall be recorded in the records of the Probate Court.

Subdivision 3 of Section 21 provides that the Probate Court shall forthwith notify the owner of the amount of money deposited, with a detailed description of the property sought to be appropriated. Thereafter, on application therefor, by such owner, the Probate Court shall turn over to him the money so deposited.

By Section 22 of the Act (Sec. 1201-1, General Code), the owner so notified may decline to accept the money and in lieu thereof give notice in writing to the Probate Court of his intention to appeal, as appears in Subdivision 1 of Section 1201-1, General Code, as follows:

"Such owner or owners shall, within ten days after the service of said notice by the sheriff, or within fifteen days after the date of publication, if service be made by publication, give notice in writing in duplicate to the Probate Court of an intention to appeal from the amount of compensation or damages, or both, so fixed by the director."

Having done so, provision is then made by statute that the appellant shall give a bond conditioned to pay all costs made on appeal if he fails to sustain the appeal or the appeal is dismissed. The appeal having thus been perfected, it becomes the duty of the Probate Court, under the provisions of the Act, to summon a jury, which jury shall determine first, the question of the necessity of the improvement, if the owner has appealed therefrom and second, assess the compensation and damages.

By Subdivision 8 of Section 1201-1, General Code, provision is made, among

other things, that the jury, upon motion of either party, before any testimony shall be submitted, shall examine the property taken, claimed to be damaged thereby, and after the jury has returned to the Probate Court, the parties shall offer their evidence to the jury under the direction of the court, in accordance with the rules of law and procedure governing civil cases in the Court of Common Pleas.

Subdivision 9 of Section 1201-1, General Code, among other things provides:

"If a new trial shall not be granted for cause shown, the Probate Court shall render a judgment in favor of the appellants for the amount of the verdict, if any, returned by the jury in their favor. In case of the filing of a petition in error in the Court of Common Pleas, a bill of exceptions shall be allowed as in cases in the Court of Common Pleas. *Any judgment against the director may be enforced by writ of mandamus.* (Italics the writer's).

In view of the language of the statute, *supra*, it seems to me that when the owner of the property, after having been notified that the amount of the compensation and damages, if any, is on deposit in the Probate Court for him, declines to accept the money and elects to perfect an appeal, the sum of money deposited should then be taken down by the Director of Highways. In other words, when an appeal is perfected the Probate Court must fix a day not more than twenty days thereafter for the trial of the case by a jury, and if a new trial be not granted for cause the court shall render a judgment in favor of the appellant for the amount of the verdict, if any, returned by the jury, which judgment may be enforced against the Director of Highways by a writ of mandamus. Before the jury, the amount of compensation and damages becomes a new subject of determination, and the amount deposited, in my opinion, should be entirely eliminated from further appearance in the case, because if the amount on deposit remains in the proceedings it might become known to the jury and induce it to render a verdict for a sum at least equal to the sum on deposit which on evidence adduced at the trial might manifestly be too much. In the specific question under consideration, it seems that on the trial of the case before the jury, the deposit of the Director of Highways was \$1100.00 higher than the verdict returned by the jury on the evidence.

Answering your question specifically, I am of the opinion that when the owner of property appropriated under the Norton-Edwards Act, perfects an appeal as to the amount of compensation and damages, you, as Director of Highways, should at that time withdraw the amount of money on deposit.

The verdict of the jury on motion of the property owner having been set aside by the court, and a new trial granted, I am of the opinion that there is no occasion for reappraisal or redeposit of money in the Probate Court, but simply another jury trial had on the pending appeal of the owner of the property.

Respectfully,

GILBERT BETTMAN,
Attorney General.