

by a three-fourths vote of all members thereof waives such limitation, and in the resolution waiving such limitation there shall be set forth their reason therefor."

In view of this section, I am of the opinion that the reasoning of Opinion No. 156 of March 8, 1927, *supra*, is no longer applicable, as it is contemplated that there may be a departure from the rule therein laid down. I am further of the view that this section is dispositive of the question before me.

Six-tenths of the appropriation of \$1500.00 is \$900.00, or \$150.00 per month for the first six months, the rate fixed by the court. It follows, of course, in the event an additional appropriation is not made before the end of the year, the funds appropriated will be expended at the end of the tenth month. This is a matter for the consideration of the county commissioners, however, and is not in my opinion a matter within the discretion of the auditor.

The duty imposed by Section 1550, *supra*, upon the auditor to issue warrants for the payment of "such compensation" is clearly the compensation as is fixed by the court. The issuance of such warrants within the limitations of Section 5625-38, *supra*, does not in my opinion consist in other than the performance of a purely ministerial duty.

It is accordingly my opinion that when a court has fixed the annual compensation of a court stenographer, as provided in Section 1550, General Code, at \$1800.00 per year, and the board of county commissioners has appropriated only \$1500.00 for such purpose, it is the duty of the county auditor to issue his warrant on the county treasurer for the payment of such compensation in the amount of \$150.00 per month until such time as the appropriation shall have become exhausted.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1094.

COUNTY COMMISSIONERS—UNAUTHORIZED TO CO-OPERATE WITH
HIGHWAY DEPARTMENT IN CONSTRUCTING BRIDGE OUTSIDE
MUNICIPALITY PRIOR TO JULY 25, 1929.

SYLLABUS:

Under the provisions of Section 1191, General Code, as in force and effect prior to amendment by the 88th General Assembly, the county commissioners of any county, irrespective of the tax duplicate thereof, had no authority to co-operate with the Department of Highways in the construction or reconstruction of bridges and viaducts outside of the corporate limits of municipal corporations.

COLUMBUS, OHIO, October 23, 1929.

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

DEAR SIR:—Your letter of recent date is as follows:

"We are in receipt of a communication from County Surveyor George Montgomery, Youngstown, Ohio, reading as follows:

'In Re Akron-Youngstown Road, S. H. No. 18, Section "P".

In an estimate prepared by the State Highway Department on June 4, 1928, on the cost of removing the present bridge on the above highway and building a new concrete slab bridge and approach slabs the Director of Highways caused the expense thereof to be apportioned one-half to Mahoning County and one-half to the State of Ohio.

We prepared a transcript for the sale of bonds on the above estimate, which transcript was returned by the firm of S., S. and D. for the reason that under the provisions of Section 1191 of the Norton Highway Code, the county cannot cooperate with the State Highway Department in the construction of a bridge outside of the limits of a municipality.

As a result of the above opinion we could not sell sufficient bonds to take care of outstanding certificates of indebtedness and feel that the State should assume the entire cost of constructing the above bridge and forward to Mahoning County the amount which the State Highway Director apportioned to us.

We would appreciate an early answer on this matter as we have taken up all our outstanding notes except the amount due for one-half the cost of constructing the above bridge.

This project consisted of grading, widening and resurfacing with brick and constructing drainage structures and was let in two contracts, each of which was divided into two proposals in the following amounts:

Contract No. 1—Proposal No. 1.....	\$56,497.95
Contract No. 1—Proposal No. 2.....	4,473.00
Contract No. 2—Proposal No. 1.....	22,130.00
Contract No. 2—Proposal No. 2.....	190.00

Contract No. 1—Proposal No. 2 provided for the removal of the present bridge and the constructing of a new bridge and is the part of the contract which S., S. & D. are objecting to.

We respectfully request an opinion from you as to whether a county having a tax duplicate of real and personal property in excess of \$300,000,000 is authorized to co-operate with the Department of Highways in the construction of bridges outside of the limits of municipalities when the same is a part of a general road improvement as in this case."

It is apparent that an estimate of the cost of the bridge construction in question having been prepared in June, 1928, these proceedings became pending within the meaning of Section 26, General Code, prior to the amendment of Section 1191, General Code, by the 88th General Assembly. The provisions of Section 1191, General Code, as in force and effect prior to such amendment, therefore, appear to be applicable and such provisions will be considered in this opinion. This section provided in part as follows:

"The commissioners of any county may co-operate with the Department of Highways * * * in the construction or reconstruction of bridges * * * within municipal corporations * * * . * * * Provided, however, the county commissioners of any county having a tax duplicate of real and personal property in excess of three hundred million dollars shall also be authorized to cooperate with the Department of Highways in the reconstruction of state roads * * * ."

The proviso that county commissioners of any county having a duplicate in ex-

cess of three hundred million dollars shall have further authority to co-operate with the Department of Highways only extends to the reconstruction of state roads. Insofar as the construction of bridges and viaducts outside of municipal corporations is concerned, it appears that counties having a tax duplicate in excess of three hundred million dollars are in the same position as those having a tax duplicate of less than three hundred million dollars, unless it can be said that a bridge is included in the term "state roads".

It is evident from a careful reading of this section that there is no express authority contained therein whereby county commissioners may cooperate with the Department of Highways in the construction or reconstruction of bridges or viaducts except such bridges and viaducts as are within municipal corporations.

In an opinion of my predecessor, appearing in Opinions of the Attorney General, 1927, Vol. IV, p. 2600, consideration was given to this section of the General Code. At p. 2602, it is said:

"It will be observed that, under the provisions of the above quoted statute, the only cases in which the county will be able to co-operate with the state after the first day of January, 1928, are:

(1) In the abolishment of railway grade crossings on the state highway system or any extension thereof;

(2) In the construction or reconstruction of bridges and viaducts within municipal corporations;

(3) In widening the paved portion of any state road where the paved portion of such road is constructed or reconstructed to a width greater than eighteen feet;

(4) In those counties having a tax duplicate of real and personal property in excess of three hundred million dollars, the county commissioners shall be authorized to co-operate with the Department of Highways in the reconstruction of state roads.

It is important to note that after the first day of January, 1928, the only basis upon which the smaller counties will be able to co-operate with the state in the matter of the construction and reconstruction of highways is where the highway is being widened to a width greater than eighteen feet. Even then such co-operation is limited to participating in such portion of the cost as is occasioned by such widening.

Your attention is also directed to the fact that in the several larger counties having a tax duplicate of real and personal property in excess of three hundred million dollars, under the express terms of Section 1191, *supra*, co-operation is limited to the *reconstruction* of state roads within said counties."

I concur in these views of my predecessor.

The remaining matter for determination, as previously indicated, is whether or not, in the event a bridge is a part of a road improvement, as indicated in your letter, the authority to cooperate in the "reconstruction of state roads" granted to counties having a tax duplicate in excess of three hundred million dollars, includes such bridges.

I am not unmindful of the fact that in the broad sense a bridge is decidedly a part of the road. It is in many instances such a vital part of the road as to render a road useless without it. The Legislature, has, however, throughout the Norton-Edwards Act, seen fit to make certain provisions for the construction, reconstruction and widening of roads and other certain provisions for the construction and reconstruction of bridges and viaducts. As an illustration, it was provided in Section 34 of the act (Section 1214, General Code) that not less than five per cent nor more than ten per cent of the cost of constructing a state highway, excepting therefrom the

cost of bridges and culverts, shall be assessed upon the property on each side of the improvement. Section 79 of the act provided as follows: "Before undertaking the construction, improvement, maintenance or repair of a state highway, or a bridge or a culvert thereon, the Director of Highways shall make" an estimate of the cost of such work. It being evident that distinct provisions were made for the construction or reconstruction of bridges, the authority to cooperate in the reconstruction of state roads as contained in Section 1191, General Code, did not include the authority to co-operate in the construction or reconstruction of bridges outside of municipalities. This view is strengthened by the fact that this same section specifically provides that the commissioners of a county may co-operate with the Department of Highways in the construction or reconstruction of bridges and viaducts within municipal corporations. The provision is clearly exclusive.

It may be noted that the 88th General Assembly has amended Section 1191 General Code, so that in the event proceedings were started after the effective date of such amendment, the county commissioners of any county having a tax duplicate in excess of three hundred million dollars shall be authorized to co-operate with the Department of Highways in the "construction, reconstruction, resurfacing, widening or repair of state highways, including the bridges and viaducts thereon."

In conclusion, and in view of the foregoing, it is my opinion that under the provisions of Section 1191, General Code, as in force and effect prior to amendment by the 88th General Assembly, the county commissioners of any county, irrespective of the tax duplicate thereof, had no authority to co-operate with the Department of Highways in the construction or reconstruction of bridges and viaducts outside of the corporate limits of municipal corporations.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1095.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS
DUTIES AS TREASURER OF BOWLING GREEN STATE COLLEGE—
D. C. BROWN.

COLUMBUS, OHIO, October 23, 1929.

HON. H. B. WILLIAMS, *President, State College, Bowling Green, Ohio.*

DEAR SIR:—You have submitted for my approval, bond in the penal sum of \$10,000.00 upon which D. C. Brown appears as principal and United States Fidelity & Guaranty Company appears as surety, conditioned for the faithful performance of the duties of said principal as treasurer of Bowling Green State College.

You have further submitted a certified copy of a resolution of your board of trustees determining the amount of said bond in the sum above stated, as required in House Bill No. 44 as enacted by the 78th General Assembly, 101 O. L. 320.

Inasmuch as said bond appears to have been executed in conformity to law, I have endorsed my approval thereon and return the same herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.