1109.

APPROVAL, BONDS OF AUSTINTOWN RURAL SCHOOL DISTRICT, MAHONING COUNTY—$150,000.00.

COLUMBUS, OHIO, October 4, 1927.

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

1110.

APPROVAL, BONDS OF THE VILLAGE OF BROOK PARK, CUYAHOGA COUNTY—$32,090.82.

COLUMBUS, OHIO, October 4, 1927.

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

1111.

APPROVAL, BONDS OF THE CITY OF DELAWARE, DELAWARE COUNTY, OHIO—$22,000.00.

COLUMBUS, OHIO, October 4, 1927.

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

1112.

ROADS—CO-OPERATION BETWEEN STATE AND COUNTY IN MAIN MARKET ROADS—AUTHORITY OF DIRECTOR OF HIGHWAYS—RIGHT OF WAY—CONDEMNATION OF LAND.

SYLLABUS:

1. *By the terms of Section* 1231, *General Code, the Director of Highways and Public Works is authorized to cooperate with a county in the improvement of any main*

market road, or in the doing of any part of the work incident to such improvement, upon any basis of the division of the cost of such work between the state and the county as the director may deem just.

2. Where the Department of Highways and Public Works, with the co-operation of county commissioners, is improving a main market road by grading and widening the same, upon such terms with reference to the division of the cost and expense of such work between the state and county as have been approved by the Director of Highways and Public Works, it is the duty of the county commissioners to provide the requisite right of way.

3. In such case if the commissioners and the owners of the required land are unable to agree, the county commissioners are authorized by Section 1201, *General Code, to condemn and appropriate for public use land or property as may be necessary for the improvement, and in such a proceeding the county commissioners are the sole proper parties plaintiff.*

COLUMBUS, OHIO, October 5, 1927.

HON. CARL Z. GARLAND, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date in which you request my opinion. Your letter reads:

> "The Atlantic & Pacific Highway which runs through a portion of this county is *Main Market Road* No. 13 and *Inter-county Highway* No. 7.
>
> Please advise me whether or not the county commissioners of this Clermont County have authority to and can legally agree and pay for the neeessary right of way to be purchased from the abutting property owners in the event they contribute $10.00 toward the necessary expense of grading and widening the road, the grading and widening to be under the supervision of the State of Ohio. The above mentioned right of way to be purchased for the purpose of properly grading and widening of said A. & P. Highway by the state.
>
> Please advise further whether or not in the event they are permitted to proceed as in question No. 1 they have authority and would be the sole and proper party in a condemnation suit under Section 1201, G. C., to appropriate property along the highway for the above mentioned purpose.
>
> Please refer to Attorney General's Opinions of 1921—page 187."

Your inquiry presents two questions:

1. May the county commissioners agree to provide and pay for the necessary right of way for the widening and improving of an inter-county highway, which is also a main market road, where the county commissioners are contributing a nominal sum toward the expense of grading and widening such inter-county highway and main market road?

2. If the county commissioners have such authority, and appropriation proceedings are necessary, are the county commissioners the sole and proper parties to bring such proceedings?

Before proceeding to a consideration of the two questions presented by you it is necessary first to determine whether or not the improvement in question may be made upon the basis set forth in your letter. In other words, is the Department of Highways and Public Works authorized to co-operate with a county in the improvement of

an inter-county highway, which is also a main market road, with the county paying a merely nominal sum toward the cost and expense of such improvement?

In determining these questions it should be kept in mind that while all inter-county highways are not main market roads, all main market roads are inter-county highways; that is, main market roads are located upon and along the route of a portion of the inter-county highways of the state. See Opinions, Attorney General, 1923, p. 686. And as stated in *Shafer et al.* vs. *Streicher, a Taxpayer, etc.*, 105 O. S. 528, "the code provisions relating exclusively to main market roads are not applicable" to inter-county highways.

By Section 1189-1 of the General Code, the legislature has provided that "the road * * * known as inter-county highway Number Seven, extending along the Ohio River between Cincinnati, Ohio, and Gallipolis, Ohio, and through the counties of * * * Clermont * * * is hereby declared to be a main market road to be known and designated as the Atlantic and Pacific Highway; * * * "

Sections 1178 to 1231-10, inclusive of the General Code, in the chapter entitled "State Highway Department" relate to the Department of Highways and Public Works, and the construction and reconstruction, and maintenance and repair of state highways.

Section 1191, General Code, makes provision for application, by county commissioners, for state aid in the construction, improvement, maintenance or repair of any inter-county highway. This section reads in part as follows:

> "The commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of inter-county highways. Such application shall be filed prior to March first of the calendar year in which such appropriation may be made, or become available. If the county commissioners have applied for such aid prior to March 1st, and upon examination of the application by the state highway commissioner it is found to be irregular, it shall be the duty of such commissioner to immediately notify the board of county commissioners and request that they make the proper correction or amend the application and return the same to the office of the state highway commissioner within thirty days thereafter.
>
> If the county commissioners or township trustees do not make application for the apportionment to such county on or before the first day of May then the state highway commissioner shall enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof in said county, either by contract, force account or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof, except that portion to be assessed against abutting property, from the apportionment of the appropriation due said county and unused or unapplied for by the said county or any board of trustees thereof, as hereinafter provided. The board of county commissioners of any county or the board of township trustees of any township thereof shall, however, be authorized to make said application for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of inter-county highways at any time after the first day of May of the calendar year in which such appropriation may be made or become available provided that at the time such application is made the state highway commissioner has not entered into any contract or incurred any obligations on behalf of the state involving the expenditure of the funds for which application is made. * * * "

The remainder of this section provides that assessments upon benefited property shall be made by the Director of Highways and Public Works when a part of the inter-county highway system or main market road system is improved by the state without the co-operation of county commissioners or township trustees and sets forth the procedure to be followed in making such assessments.

Section 1224, General Code, provides in part as follows:

"The Director of Highways and Public Works shall maintain and repair to the required standard, and when in his judgment necessary, shall resurface, reconstruct or widen all inter-county highways and main market roads and bridges and culverts constructed by the state, by the aid of state money or taken over by the state after being constructed. In repairing inter-county highways and main market roads the director shall not be limited to the use of the material with which such inter-county highways or main market roads were originally constructed, but may repair such inter-county highways or main market roads by the use of any material which he deem (s) proper. When in the repair of an inter-county highway or main market road the director changes the type of such road and uses, as the principal material in making such repair, a material different from that which the road was originally constructed, not more than ten per cent of the cost and expense of such repair may be assessed against the property abutting on said road, or within one-half mile on either side thereof or within one mile on either side thereof, in the manner hereinbefore provided in the cause (case) of the construction of a road under the supervision of the Department of Highways and Public Works.

Nothing in this chapter shall be construed so as to prohibit a county, township or municipality or the federal government, or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of said state highways. When a bridge or a culvert on a state highway shall require renewing, it shall be constructed and the cost apportioned as herein provided for the construction and improvement of bridges and culverts on inter-county highways.

* * * * * * * * * "

With reference to the apportionment of the cost and expense of the improvement of an inter-county highway when the same is improved upon a co-operative basis between the Department of Highways and Public Works and the county commissioners, Sections 1213 and 1213-1 respectively read as follows:

Section 1213. "Whenever there are one or more improvements to be made in a county, the state shall pay sixty per cent of the cost and expense thereof, provided an amount sufficient for that purpose has been appropriated by the state for expenditure in such county.

Whenever there are one or more improvements to be made in a county, and sixty per cent of the cost and expense thereof exceeds the amount appropriated by the state for expenditure in such county, then the state shall pay such proportion of the cost of said improvement or improvements as may be agreed upon by the Director of Highways and Public Works and the county commissioners or township trustees."

Section 1213-1. "In any county in which on the twentieth day of December of any year the aggregate of the tax duplicate for real estate and personal property is twenty-two million dollars or less, and in which county

there are at least seven hundred miles of public highways, the Director of Highways and Public Works may, if he deems it proper, enter into an agreement with the county commissioners of such county at any time during the ensuing calendar year, by the terms of which agreement the state may assume and pay not more than ninety per cent of the cost of any improvement petitioned for by such county commissioners.

In any county in which on the twentieth day of December of any year the aggregate of the tax duplicate for real estate and personal property is more than twenty-two million dollars and less than thirty million dollars and in which county there are at least seven hundred miles of public highways, the Director of Highways and Public Works may, if he deems it proper, enter into an agreement with the county commissioners of such county at any time during the ensuing calendar year, by the terms of which agreement the state may assume and pay not more than seventy-five per cent of the cost of an improvement petitioned for by such county commissioners.

* * * * * * * * * . "

With certain exceptions, including the one hereinafter pointed out, these sections place a direct limitation upon the proportion of the expense to be borne by the state in all improvements of inter-county highways, wherein state aid is granted and the improvement made with, as expressed in the statutes, the co-operation of the county commissioners. You will observe that Section 1213-1 is in reality a qualification of the hard and fast rule established by Section 1213. Section 1213 first states categorically that the state shall pay sixty per cent of the cost and expense of one or more inter-county improvements, provided there has been a sufficient appropriation to meet this figure. The language is clear that this percentage is a fixed one and no authority to deviate either above or below the percentage is granted except by the language of the last sentence of the section. It is there provided that where there are one or more improvements to be made in a county, in the event that sixty per cent of the cost and expense of the improvement exceeds the amount appropriated by the state, then the state shall pay such proportion of the cost as may be agreed upon. Clearly, in so far as this section is concerned, the authority to agree upon other than a sixty per cent contribution is contingent upon the lack of state funds and it necessarily follows that in that event the state's proportion may be decreased, but not increased.

In so far as the improvement of an inter-county highway is concerned, authority for an increase of the state's proportion is found in the language of Section 1213-1, supra. The modification therein contained is to the effect that the state may assume ninety per cent of the cost of the improvement of inter-county highways in counties having a duplicate of twenty-two millions or less and seventy-five per cent of the cost in counties in which the duplicate is more than twenty-two million dollars and less than thirty million dollars, subject to the further condition that such counties must have at least seven hundred miles of public highway. The net result of these sections appears clearly to be that generally speaking the state cannot in any event assume more than ninety per cent of the cost of the improvement of an inter-county highway without taking the improvement out of the state aid or co-operative category. Certain exceptions, however, to the limitations contained in Sections 1213 and 1213-1, are provided in other sections of the Code, as for example, Section 1217 and Section 1231.

These conclusions are in accord with an opinion of my predecessor in office, rendered before the effective date of Section 1213-1 as originally enacted (107 v. 69, 128) and the enactment of Section 1231, General Code, infra, in its present form (109 v. 299). This opinion is reported in Opinions, Attorney General, 1917, Vol. 1, page 493, and the syllabus reads as follows:

"In the construction, improvement, maintenance and repair of inter-county highways, the state, under the provisions of Section 1213 G. C., cannot pay more than fifty per cent of the cost and expense of one improvement, even though the amount expended by the state on the other improvement, or improvements, is enough less than the half of the cost and expense thereof, to reduce the total amount expended in the county to fifty per cent of the cost and expense of all the improvements."

In the opinion, after quoting Section 1213, as it then read, it was said as follows:

"The first part of this section provides that whenever the cost and expense of the improvement to be made in a county, whether it be one or more than one, does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent of such cost and expense.

The second part of said section provides that when the cost and expense of the improvement made in a county, whether it be one improvement or more than one, exceeds twice the amount apportioned by the state to a county, then the state shall pay such proportion of the cost of such improvement or improvements, as may be agreed upon by the state highway commissioner and the county commissioners or township trustees.

Now your question is as to whether in the event that there are two improvements made in a county the state could pay more than fifty per cent of the cost and expense of one improvement provided it would pay enough less fifty per cent of the cost and expense of the other improvement, so as to bring the amount paid by the state upon both improvements within the amount apportioned by the state to the county.

* * * * * * * *

* * * Answering your question specifically, I am of the opinion that the state can not pay more than fifty per cent of the cost and expense of any improvement made within a county, and therefore the state could not pay more than fifty per cent in one improvement and less than fifty per cent in another, even though the sum of the two would not exceed the amount apportioned by the state to any county."

Section 1231, General Code, above referred to, fixes a different basis for the division between the state and county of the cost and expense of an improvement, when the road to be improved is a main market road. This section as amended on April 28, 1921 (109 v. 299), reads in part as follows:

" * * * The state highway commissioner shall be authorized to co-operate with a county, township or village in the improvement of any main market road, or in the doing of any part of the work incident to such improvement, *upon any basis of the division of the cost of such work between the state and such county, township or village which he may deem just.* He shall be authorized to do the grading at the expense of the state and co-operate with such county, township or village in constructing the pavement; or he may co-operate with such county, township or village in doing the grading, and construct a pavement at the expense of the state. He shall be *authorized generally to do any part of the work at the expense of the state and co-operate in doing any other part of the work upon any basis of division of cost between the state and the county, township or village which he may deem just.* Counties, townships and villages shall be authorized to co-operate with the state highway commissioner in the doing of any work upon such main market roads

upon any basis of division of the cost thereof between the state and the county, township or village approved by the state highway commissioner, and the procedure shall be the same, except as may be otherwise provided herein, as in the case of co-operation in constructing an inter-county highway.

* * * * * * * *

When the contracts are let for the construction of main market roads, the provisions of Sections 1178 to 1231-11, General Code, relating to the letting of contracts for inter-county highways, shall apply in all respects to letting of contracts for such main market roads. County commissioners, township trustees and village councils in addition to the special powers herein conferred shall have the same power and authority to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by law in the construction, improvement, maintenance and repair of inter-county highways; and in case the commissioners of any county, the trustees of any township, and the council of any village, or any such authorities, determine to co-operate in the construction, improvement, maintenance or repair of any main market road, the procedure, except as herein otherwise authorized, shall be the same as in the case of co-operation by such authorities, in the construction, improvement, maintenance and repair of inter-county highways, as provided in Sections 1178 to 1231, General Code. * * * "

The act in which the above section was last amended was passed as an emergency measure, Section 3 of the act stating:

"Such emergency consists in the fact that on many of the main market roads of the state, connecting important industrial and agricultural centers, there are unimproved portions, greatly interfering with and impeding transportation; and in order to correct such condition it is necessary that the state highway commissioner be vested with full power to proceed immediately with the improvement of such unimproved sections."

Prior to its amendment on April 28, 1921, with reference to the basis upon which the state and a county might co-operate in the improvement of a main market road, Section 1231, supra, (107 v. 69, 137), provided, *inter alia,* as follows:

" * * * County commissioners, township trustees and village councils shall have the same power and authority to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by this act in the construction, improvement, maintenance and repair of inter-county highways; and in case the commissioners of any county, the trustees of any township and the council of any village, or any of such authorities, determine to co-operate in the construction, improvement, maintenance or repair of any main market road, the procedure shall be the same as in the case of cooperation by such authorities, in the construction, improvement, maintenance and repair of inter-county highways, as provided in this act. * * * "

While Sections 1213 and 1213-1, General Code, were enacted and in their present form on March 27, 1925, (111 v. 130) and are therefore later enactments than Section 1231, supra, since Section 1231 is a statute dealing specifically and only with such inter-county highways as have been designated main market roads, and Sections 1213 and 1213-1 deal generally with all inter-county highways, Section 1231 must be re-

garded as an exception to the provisions of Sections 1213 and 1213-1. The rule of statutory construction here applicable is stated in 36 Cyc. 1151, as follows:

> "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and *where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.*" (Italics the writer's.)

In view of this well settled rule of statutory construction, as well as certain others not necessary to be here stated, it seems clear that Section 1231 was not repealed by the amendment of Sections 1213 and 1213-1, on March 25, 1925, and that it remains an exception to the provisions of such sections.

It follows that since the provisions of Section 1231, relating to the improvement of main market roads are still effective, and since by the express terms thereof the Director of Highways and Public Works is authorized "to cooperate with a county * * * in the improvement of any main market road, or in the doing of any part of the work incident to such improvement, *upon any basis of the division of the cost of such work between the state and such county* * * * which he may deem just," if the director deems the contribution of ten dollars, or any other sum, by the county of Clermont to be just, the improvement in question may be made by the state *with the cooperation of the county commissioners* as those terms are used in the various statutes relating to state aid. Furthermore, by the terms of Section 1231, in case it be determined to proceed with such improvement, "the procedure shall be the same * * * as in the case of co-operation in constructing an inter-county highway."

This brings us to a consideration of the question as to whose duty it is to provide the requisite right of way, where an inter-county highway is being improved by the state, with the co-operation of county commissioners:

Section 1201, General Code, provides in part as follows:

> "If the line of the proposed improvement deviates from the existing highway, or if it is proposed to change the channel of any stream in the vicinity of such improvement, the *county commissioners or township trustees making application for such improvement must provide the requisite right of way. If the board of county commissioners or township trustees are unable to agree with the owner or owners of such land or property as may be necessary for such change or alteration, or if additional right of way is required* for the same, and the county commissioners or township trustees are unable to agree with the owner or owners of the land or property in question then *the board of county commissioners* or township trustees, as the case may be, may *by resolution declare it necessary to condemn and appropriate for public use such land or property,* and shall proceed to fix what they deem to be the value of such land or property sought to be condemned or appropriated, together with the damages to the residue, if any, and deposit the value thereof together with such damages with the probate court of the county for the use and benefit of such owner or owners, and thereupon the board of county commissioners or township trustees shall be authorized to take immediate possession of and enter upon said lands for the purpose aforesaid. * * * " (Italics the writer's.)

This section then prescribes the procedure to be followed by the county commissioners and the probate judge when appropriation proceedings are necessary.

Section 1202, General Code, relates to the acquiring of the requisite right of way, when the Director of Highways and Public Works proposes to improve an inter-county highway or main market road without the cooperation of either the county commissioners or township trustees, and authorizes him to proceed to condemn the necessary land or property in the same manner as that prescribed for county commissioners. In view of the fact that, as above determined, the improvement under consideration is being made *with the cooperation of the county commissioners* it is unnecessary herein to quote this section.

Section 1201, supra, was construed by the Supreme Court of Ohio in the case of *Uncapher* vs. *Curl,* et al., decided on June 1, 1927, and reported in the Ohio Law Bulletin and Reporter for July 11, 1927. The syllabus in that case reads as follows:

> "When in the construction of an inter-county highway by state aid under Section 1191 et seq., General Code, it becomes necessary to widen the existing highway by taking property of an adjoining landowner, the commissioners of the county in which such highway is located must provide the requisite right of way for such deviation from the boundaries of the existing highway, and are authorized by Section 1201, General Code, to pay 'the owner or owners of such land or property as may be necessary for such change or alteration' the value of such land or property so taken."

In the opinion Judge Day speaking for the court said:

> "Under the construction that we give Section 1201, General Code, it should not be confined to simply the straightening of curves, and the changing of the line around hills or other obstructions; but the intent of the legislature was to require the county commissioners to provide the requisite right of way for the proposed improvement if additional land outside the existing highway was required to complete such improvement. Whenever the boundaries of the existing highway were departed from, that was a deviation from such highway, in a broad and liberal sense of the word, and to give it any more restricted meaning and confine the word 'deviate' to a change in the line of the road for the purposes of eliminating curves, angles, or grades is to give the section too narrow a construction. If such a construction is given as does not permit paying compensation for property taken in placing the line of the proposed improvement at some other point outside the existing highway, and property is so taken without compensation, there is clearly a violation of a constitutional right.
>
> It is our duty to attribute to the legislature an intention to enact a valid and constitutional law, and to give such construction to its enactments as will not be inconsistent with constitutional guaranty. Our conclusion, therefore, is that under Section 1201, General Code, power is granted to the commissioners in providing a requisite right of way for the improvement in question to make proper compensation to the owner of private property taken for such public purpose. * * * "

In the opinion to which you refer in your letter, viz., the opinion reported in Opinions, Attorney General, 1921, Vol. I, p. 187, a conclusion contrary to the holding of the Supreme Court in the Uncapher case, supra, was reached, the syllabus of such opinion reading as follows:

"Neither Section 1201, G. C., nor Sections 6860 to 6878, G. C., confer power on county commissioners to purchase or appropriate land for the widening of a section of inter-county highway or main market road from forty to fifty feet."

With reference to this opinion, it is sufficient to say that the Supreme Court has determined the law to be otherwise than as set forth in this opinion and the opinion should, therefore, be disregarded.

In view of the foregoing, specifically answering your questions, it is my opinion that:

1. By the terms of Section 1231, General Code, the Director of Highways and Public Works is authorized to co-operate with a county in the improvement of any main market road, or in the doing of any part of the work incident to such improvement, upon any basis of the division of the cost of such work between the state and the county as the director may deem just.

2. Where the Department of Highways and Public Works, with the co-operation of county commissioners, is improving a main market road by grading and widening the same, upon such terms with reference to the division of the cost and expense of such work between the state and county as have been approved by the Director of Highways and Public Works, it is the duty of the county commissioners to provide the requisite right of way.

3. In such case if the commissioners and the owners of the required land are unable to agree, the county commissioners are authorized by Section 1201, General Code, to condemn and appropriate for public use such land or property as may be necessary for the improvement, and in such a proceeding the county commissioners are the sole proper parties plaintiff.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1113.

TAX LEVY—SUPREME COURT DID NOT ORDER A TAX LEVY OUTSIDE THE 15 MILL LIMITATION TO PAY JUDGMENT AGAINST VILLAGE OF BREMEN—STATE OF OHIO, EX REL. TURNER VS. VILLAGE OF BREMEN.

SYLLABUS:

The Supreme Court in the case of State of Ohio, ex rel. Sarah H. Turner vs. The Village of Bremen, et al., did not order a tax levy to be made outside the fifteen mill limitation to pay the judgment against such village concerned in said case.

COLUMBUS, OHIO, October 5, 1927.

HON. W. S. DUTTON, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

"About 12 years ago Sarah E. Turner secured a judgment against the village of Bremen, in this county, in the sum of $3000.00. The matter has been in litigation during the said time and very recently the Supreme Court