

In view of the foregoing, and since your department has no jurisdiction over pawnbrokers who have obtained a municipal license as provided in section 6337 to 6346, inclusive of the General Code, your other question as to the amount of interest that may be exacted by a pawnbroker licensed by a municipality under those sections apparently becomes immaterial so far as your department is now concerned, and will be reserved for future consideration.

Respectfully,

JOHN G. PRICE,

*Attorney-General.*

1161.

ROADS AND HIGHWAYS—CLAIMS FOR MATERIAL FURNISHED  
STATE—PAID IN PART WITHOUT INTEREST.

*Inquiry of state highway commissioner as to claim for material furnished state discussed and answered; claim as presented to be paid in part without interest.*

COLUMBUS, OHIO, April 16, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Some time ago you submitted for the opinion of this department the following:

"On the 6th day of August, 1915, this department entered into contract with the firm of Pace Bros., for the improvement of section "F" of the Cleveland-East Liverpool road, I. C. H. No. 12, Cuyahoga county.

The work on this contract proceeded under the management of Pace Bros. until about the middle of April, 1917, when said firm became insolvent.

On May 1, 1917, the state highway department authorized Mr. W. A. Stinchcomb, county engineer, to proceed with the completion of the improvement on a 'force account' basis. Under this arrangement the work was completed and we are now holding to the credit of the account the sum of \$690.34.

During the early part of the year 1919 we received an account from R. L. Beck for brick furnished for this improvement between the dates of February 27 and May 18, 1917, which account amounts to \$1,207.80, and bears the approval of W. A. Stinchcomb, county engineer, under date of August 29, 1919. After considerable correspondence, Mr. C. W. Tyler, attorney for R. L. Beck, makes the following statement in reference to the account:

'I am in receipt of your letter in reference to the above. While it is true that the bricks were originally ordered by Mr. Pace, still the delivering to Mr. Pace was not completed as the bricks were in cars. At the time of the Pace failure they were ordered by the county engineer's office to be delivered on the job.

In ordering the brick Mr. Beck relied on the county for his compensation.'

which statement is verified by a statement made by Mr. S. F. Pace, one of the firm of Pace Bros., under date of October 6, 1919, to this department reading as follows:

'The enclosed statement of Robert L. Beck for brick furnished on the Bedford-Twinsburg road is correct. This brick was furnished for us, but had not been delivered on the job when we discontinued operations, but were on the siding and were ordered put on the job by Mr. Stinchcomb.'

None of the brick covered in the account were placed by Pace Bros., but all were placed under the direction of Mr. Stinchcomb on 'force account.'

On August 12, 1919, The Sandusky Cement Company submitted to this department a copy of an assignment by Pace Bros. to them of \$1,565.18 of the funds on the above contract, which assignment was executed on February 9, 1917, and on the same date filed with the county commissioners of Cuyahoga county through Edward Crause, their clerk. A copy of said assignment marked 'Exhibit A' is hereto attached.

I would be glad to have from you at the earliest possible time your opinion as to the liability of this department in the case of each of these claims."

The copy which you enclose with your letter of the assignment referred to therein is as follows:

"EXHIBIT A

Cleveland, Ohio, February 9, 1917.

The Auditor of Cuyahoga County, Cleveland, Ohio.

Dear Sir:—We hereby assign to The Sandusky Cement Co., of Cleveland, Ohio, the sum of fifteen hundred and sixty-five and 18-100 dollars (\$1,565.18) of the funds coming to us under our contract for the improvement, I. C. H. No. 12, and you are hereby directed to make this payment to them as soon as it is practicable for your office to do so.

(Signed)

Very truly yours,  
PACE BROS., by S. Pace."

In response to a request for definite data respecting the above, you have furnished me, among other things, with your letter of March 24, 1920, the following:

First: Affidavit dated January 16, 1920, of York H. Smith, an employe of Robert L. Beck.

Second: Invoice of Robert L. Beck dated May 19, 1917, in amount \$1,207.80, said invoice being approved by W. A. Stinchcomb, resident engineer, on August 29, 1919.

Said affidavit reads as follows:

"State of Ohio, Cuyahoga county, ss:

York H. Smith being first duly sworn deposes and says that he is employed by Robert L. Beck as a salesman and that the facts stated in this affidavit are within his personal knowledge.

This affiant says that on the 27th day of February, 1917, he caused to be shipped a car of brick over the P. R. R. company's road known as car No. 284210, containing 9,200 No. 2-4" and on the 28th day of February, 1917, he caused to be shipped B. & O. railroad car No. 147186, 13,000 No. 2-4", and on the first day of March, 1917, over the P. L. car No. 857038, 11,600 No. 2-4".

This affiant further says that said orders aforesaid were placed in pursuance to an order by Pace Brothers, for brick to be used on certain job known as Cleveland-East Liverpool job. This affiant further says that

said cars arrived at Bedford siding March 6th and March 10, 1917, respectively. This affiant further says that shortly after the arrival of said cars on said siding aforesaid, the Pace Brothers failed in business and the said job aforesaid was taken over and completed by the road repair department of the county of Cuyahoga, acting for the state highway commissioner.

This affiant further says that between the 20th and 25th day of April, 1917, he received an order from the road repair department of the county of Cuyahoga, the same being under the control of the county commissioners and engineer of said county, to deliver the said brick from the siding aforesaid to the job, which the said road repair department were then completing after the default of the said Pace Brothers. This affiant further says that all of said cars aforesaid were released as being empty on May 1, 1917.

This affiant further says that the original bills received from the railroad company for freight and demurrage were left with W. A. Stinchcomb, county engineer, and that he has been informed that the said bills have been presented to the state highway commissioner.

Further affiant saith not.

(Signed)

YORK H. SMITH.

Sworn to and subscribed before me this 16th day of January, 1920.

(Signed)

CLAYTON W. TYLER, Notary Public."

"Cleveland, Ohio, May 19, 1917.

Sold to County of Cuyahoga Bedford-Twinsburg Road, Samuel Pace and W. S. Pace, Pace Brothers, Cleveland, Ohio.

Feb. 27	P. R. R. 284210, 9,200 No. 2-4" paving block		
	per thousand .....	\$13 50	\$124 20
Feb. 28	B. & O. 147186, 13,000 No. 2-4" paving block		
	per thousand.....	13 50	175 50
March 1	P. L. 857038, 11,600 No. 2-4" paving block		
	per thousand .....	13 50	156 60
May 1	Demurrage on P. L. 857038 placed 3/6-2		
	released 5/1-7 P. M.....		216 00
May 1	Demurrage on P. R. R. 284210 placed 3/10-2		
	P. M. released 5/1-7 A. M.....		196 00
May 1	Demurrage on B. & O. 147186 placed 3/10 2 P. M.		
	released 5/1-7 A. M.....		196 00
May 1	Labor unloading cars P. R. R. 284210 B. & O.		
	147186, and P. L. 187038 to stop demurrage.....		16 75
May 18	Teaming on 33,800 No. 2-4" paving block from		
	Pennsylvania yards to Bedford-Twinsburg road job		
	at, per thousand.....	3 75	126 75
			<hr/>
			\$1,207 80

Of course, upon the default of the contractors, Pace Brothers, the duty of the state highway commissioner both under the contract and under the statutes, was to take charge of the work and finish it. Any cost over and above the contract price would be chargeable to Pace Brothers and their surety. Your department proceeded with the completion of the contract through the agency of the resident engineer in Cuyahoga county, Mr. W. A. Stinchcomb.

The brick now in question were not actually on the site of the work when Pace Brothers became insolvent and defaulted, but on the contrary, were on board

card at Bedford siding, one car having arrived there on March 6, 1917, and two cars on March 10, 1917. Hence, Mr. Beck, the seller of the brick, had the right on account of the insolvency of Pace Brothers to retake the brick if he so desired. It appears, however, that Mr. Beck did not avail himself of this legal privilege, but allowed the brick to remain on the siding for considerably more than a month without doing anything about them. It then appears that Mr. Beck had some talk with the resident engineer as to the disposition of these brick. The resident engineer in his letter dated June 10, 1919, directed to Mr. C. E. Blosser, division engineer, has the following to say in this connection:

"When Pace Bros. defaulted on this job and the state took over this work for completion with one of our repair gangs, we took possession of all the material that was on the job and attempted to take advantage of any satisfactory arrangements which Pace Bros. had made with material supply people for material on this job.

As I recall, Mr. Beck had some brick sent in on this job which was on cars, upon which demurrage was running. I believe that this brick was shipped by Mr. Beck before he knew of the difficulties we had had with Pace Bros. It may be that I told Beck of the default of Pace Bros., and I may have suggested that he haul the brick to the job. I do remember that we tried to take advantage of the price which Pace had with Beck for securing the additional brick required for the completion of this work, which, however, Beck refused to comply with."

The resident engineer in a letter to this department of date November 24, 1919, further stated:

"I hardly believe that it can be construed that I ordered the brick placed on the job by Mr. Beck, as I recall the brick were delivered on railroad siding by Beck, subject to removal by the contractor, who had defaulted on this job and who did not unload the brick. With demurrage piling up, Beck consulted me as to the thing to do, and I told him, as I now recall, that the brick would be required for the work and that if Pace did not complete it the state or county would have to, and would require brick, and I stated that it seemed to me the best thing to do would be to unload the brick."

It clearly appears also from the affidavit of York H. Smith that the brick were ordered in the first instance by Pace Brothers and not by the state of Ohio.

Your statement of facts shows that there is but \$690.34 remaining on hand out of the original contract covered by the contract between Pace Brothers and the state; hence, if Mr. Beck's bill is paid in full at the sum of \$1,207.80, the difference between that amount and said \$690.34 becomes chargeable to Pace Brothers and their surety.

On the other hand, if any sum less than the \$690.34 is paid to Mr. Beck, the amount remaining out of said \$690.34 becomes due Sandusky Cement Company on account of its assignment from Pace Brothers.

While perhaps not pertinent to a discussion of your inquiry, it may be stated here that information furnished this department by the clerk of the United States district court at Cleveland, Ohio, is to the effect that on April 3, 1917, an involuntary petition in bankruptcy was filed against Pace Brothers, but no adjudication or reference was ever made in the matter, and on March 7, 1919, the petition was dismissed for want of prosecution.

Returning to the situation created by the delivery of the brick in question to

the state, after the default of Pace Brothers, it is quite plain that the price to be paid Mr. Beck for said brick was purely a matter of agreement between him and the state as represented by the resident engineer. The statements of the resident engineer in that connection, as above quoted, are certainly not to be taken as indicating that the state was to pay for both demurrage and cost of brick. The invoice above copied shows that the demurrage amounted to more than the price of the brick. The fact that this demurrage accrued was not due to any fault of the state, and is a matter for Mr. Beck to adjust with Pace Brothers. Certainly the resident engineer would not enter into any such arrangement as paying for both brick and demurrage when he was at liberty to go into the open market and buy brick, as he had to do later on because, as his statements indicate, Mr. Beck refused to allow the state the advantage of his original price to Pace Brothers for the remaining brick needed to complete the job.

Under the foregoing circumstances, my opinion is that Mr. Beck is entitled to payment for the brick furnished the state at the price indicated in his invoice, to-wit, 33,800 brick at \$13.50 per thousand, total, \$456.30.

He is also entitled to the item of \$16.75 for unloading the brick, and he is entitled as well to the item of \$126.75 for hauling of brick from siding to job.

The sum total of the items named is \$599.80, and this leaves a balance of \$90.54 out of the \$690.34. Such balance should be paid The Sandusky Cement Company under its assignment from Pace Brothers. It should be stated in this connection that in the light of the views above expressed there is in reality no question of "priorities" as between The Sandusky Cement Company and Mr. Beck as the term "priorities" is usually understood. In other words, Mr. Beck in the sale of his brick to the state is in the same position as would be any other material man who sold brick to the state for the completion of work. It is simply a case of the state paying Mr. Beck what it justly owes him as a material man, charging the amount to the account of Pace Brothers, and turning over to The Sandusky Cement Company the balance left out of the contract price.

In some of the correspondence the question is raised whether interest is to be allowed Mr. Beck from the time the brick was delivered to the state. In the case of *State ex rel. Parrott vs. Board of Public Works*, 36 O. S. 409, the supreme court at page 414 of the opinion, after referring to the general principle that a state, in enacting statutes, is presumed to intend them to regulate the conduct of its subjects and not its own conduct, concludes that the state is not bound by the statute providing for the allowance of interest. The third and fourth branches of the syllabus read:

"3. The state is not bound by the terms of a general statute, unless it be so expressly enacted.

4. In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the state for delay in the payment of money."

In view of the law as thus laid down, you are advised that under the facts as submitted, you are without authority to allow interest on Mr. Beck's claim.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*