RE: Bonds of City of Cleveland, Cuyahoga County, Ohio, $10,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated March 1, 1923. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of October 2, 1937, being Opinion No. 1264.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

2242.

COUNTY DITCHES—NOT PUBLIC PROPERTY UNDER PROVISIONS OF SECTION 3493 G. C.—COUNTY HAS PROPRIETARY INTEREST WHEN IT CONTRIBUTED TO CONSTRUCTION — WHEN DITCH SUPERVISOR IS AGENT OF BENEFITED LAND OWNERS—CONTRACTS NOT "PUBLIC"—STATUS WHEN RELIEF WORKERS MAY BE EMPLOYED—WHERE COST LESS THAN $50.00—WHERE DITCH CONSTRUCTED AT PRIVATE EXPENSE.

SYLLABUS:

1. *County ditches constructed entirely at the expense of the benefited land-owners are not "public property" within the meaning of Section* 3493, *General Code.*

2. *Where the county or political subdivision therein has contributed to the cost of constructing a county ditch, the county or political subdivision has a proprietary interest in the ditch and this interest is sufficient to constitute such ditches "public property" within the meaning of Section* 3493.

3. *Where the expense of cleaning and repairing the county ditch is apportioned to the benefited land-owners and contracts are let by the ditch supervisor for the performance of such work, such contracts are not "public contracts" as that term is used in Section* 3493 *since the ditch supervisor merely acts as the agent for the said benefited land-owners and not as agent for the county.*

4. *The contract which a ditch supervisor lets for cleaning and repairing the part of a county ditch which has been apportioned to a*

county or political sub-division therein is a "public contract" and if such contract provides that the necessary labor is to be furnished by the county or political sub-division, male recipients of relief may be employed to do the work under the provisions of Section 3493.

5. *Under the provisions of Section* 6701, *a ditch supervisor may, if the estimated cost is less than* $50.00, *upon being so ordered by the Board of County Commissioners, proceed to accomplish the necessary cleaning and repairing by employing the necessary labor and purchasing the necessary material. In such case, if the work is on a county ditch in which the city or a political sub-division has a proprietary interest, relief labor may be employed under provisions of Section* 3493; *however, if the ditch was constructed at private expense, it is not "public property" and, therefore, relief labor can not be employed under the terms of Section* 3493 *on the project.*

COLUMBUS, OHIO, April 6, 1938.

HON. H. LLOYD JONES, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR: I am in receipt of your recent communication which reads as follows:

> "Under the provisions of Section 3493, General Code, may township trustees use relief labor to clean out a county ditch within the township?
>
> May such labor be employed at a privately owned stone quarry within the township where the township receives crushed stone for use on township roads to the value of work done by such laborers?"

I will consider the questions in the order in which you have them set forth.

Section 3493, General Code, referred to in your letter provides as follows:

> "When public relief, not in a county or city infirmary is applied for, or afforded by the infirmary officials of any county or the trustees of a township or officers of a municipal corporation, and the applicant or recipient is able to do manual labor, such officers, shall require a male applicant or recipient to perform labor to the value of the relief afforded, at any time, upon any free public park, public highway, or other public property or public contract therein, under the direction of the proper authorities having charge or control thereof. If relief has been

afforded and such recipient refuses to perform the labor provided, record of the fact shall be made, all relief or support thereafter refused him, and he may be proceeded against as a vagrant."

Obviously a county ditch is not a public park or public highway and, therefore, if relief labor is used upon the repair of said ditches under provisions of Section 3493, the authority for so doing must lie within the terms "public property or public contract."

In considering whether county ditches are public property, it is necessary to refer to the laws providing for the construction of said county ditches. Sections 6442 to 6508 recite the procedure for the construction of county ditches. (These sections only refer to single county ditches, but for the purpose of this discussion, there is no difference between single county ditches, joint county ditches and interstate county ditches.)

Section 6463 in part provides that the cost of the construction of a county ditch shall be borne by the land benefited, except where there is benefit to the general public, in which case the commissioners shall assess an amount equal to the value of the benefit to the general public against the county, and likewise where there is a benefit to the state or county roads or highways. The section further provides that:

"* * * such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision, and shall be paid out of the general fund of such corporation or political subdivision of the state, except as otherwise provided by law.* * *"

In some cases, therefore, the entire cost of the location and construction of the county ditch is borne by the owners of the land benefited by the improvement, while in other cases part of the cost is borne by the county and benefited political subdivisions.

Where the cost is borne entirely by the benefited land owners, the law seems quite well established that such a county ditch is not public property. In referring to a county ditch, it was said in case of *Commissioners, et al.* vs. *Krause, et al.*, 53 O. S. 628, 631:

"It belongs to the land owners on whose lands, and for whose benefit it was constructed. The commissioners simply acted as a board before whom the necessary proceedings for the construction of the ditch had, by the statute to be conducted."

Further authority for the proposition is the case of *Gilmore* vs. *Commissioner,* 17 O. App. 177. I quote from page 180 as follows:

> "The construction of this ditch was undertaken by the county commisioners on the petition of parties interested, and in accordance with Section 6433 et seq., General Code, as such sections were numbered in 1920. The commissioners found what the damages and compensation in making the improvement should be, and they accordingly were, assessed against the lands to be benefited thereby, excepting the building of two new bridges. Their finding in this behalf was as follows (Defendants' Exhibit 2, page 5):
>
> 'That said improvement is not of sufficient importance to the public to cause said damages and compensation which have been assessed to be paid out of the county treasury, no more than the board of county commissioner of Hocking County, Ohio, have agreed to build the two new bridges as required by the said improvement.'
>
> Under this finding the ditch became an improvement in which only the assessed landowners were interested, and which, when completed, became their personal property.* * *"

The Court then came to the conclusion that the letting of the contract by the commissioners for the construction of the county ditch was not a public contract.

Perhaps the following quotation from *County Commissioners* vs. *Gates,* 83 O. S. at page 30 is suffcicient authority in and of itself to dispose of this issue.

> "* * * The board of commissioners acts in such matters as the construction of ditches in a political rather than a judicial capacity, and that body also in such action is clothed with such powers only as the statutes afford. The board represents in general in a proceeding of this character the land-owners whose lands are to be benefited by the improvement. In its corporate capacity the county has no special interest in the improvement. It is local in character, not differing in that respect in principle from the establishment of sewers in municipalities. It is only when the proofs adduced show that the health, convenience or welfare of the public at large, the county, requires the construction of the ditch, that the board is authorized to represent the county in that regard, the provision of statute being that if it be found not only that the public health, convenience or welfare

will be promoted by the improvement, but that the same is of sufficient importance to the public, then the board may cause the damages and compensation which have been assessed to be paid out of the county treasury, or a part thereof to be so paid, but if, in the opinion of the board, the improvement is not of sufficient importance to the public, then the board must fix and determine the proportionate amount thereof which should be paid by the several land-owners benefited by the improvement. In the present case that was all that was done. No finding appears which relieves the ditch from being simply a private ditch as between the land-owners benefited and the public at large, and in such case the county has no proprietary interest in the ditch."

This question arose in a somewhat different manner in the case of *Smith, et al.* vs. *Griffin*, 6 O. C. D. 232 in which case the court held that the Board of County Commissioners was not liable for damages for a breach of a ditch improvement contract entered into by the county engineer pursuant to the authority vested in him for the relation to the construction of county ditches. In this case the Court, from aught that appears in the decision, was considering the case in which the entire expense was to be borne by the benefited land-owners and made the following statement at page 233:

"It is true that under the provisions of the statute, the the enforcement of proper and sufficient drainage of lands in localities requiring it, is worked out through application to the Board of Commissioners, who, together with the engineer and other instrumentalities provided, have charge of the work; yet in the performance of such official duties they are not acting as agents of the county at large; nor can they bind the county at large by any neglect or wrongful act while conducting and managing the execution of the ditch work.

If any relation of agency exists in such case, they would seem to be more the agents of the parties interested in the drainage, and who, by petition, have invoked the action of the commissioners, than of the taxpayers and people of the county."

On the basis of these authorities, I am impelled to the conclusion that where the cost of the construction of county ditches is borne entirely by the benefited land-owner, said county ditches are not in any sense of the word public property.

However, where the county or a political sub-division therein does

contribute to the cost of the construction of the ditch, a contrary conclusion would seem to follow. The following statement which I quote from 14 O. J., page 809 is based on statements which are obiter in the case of *County Commissioners* vs. *Gates*, supra:

> "But where a portion of the cost of an improvement is assessed against and paid by the county for benefits to the public at large, the county has a proportionate proprietary interest therein."

Although as indicated, it is my opinion that the statement upon which this quotation is based is merely obiter dictum in the case, I think the statement is sound for it is reasonable that the county should receive an interest for the portion of the expense borne by the county.

There is a further question, whether such a proprietary interest is sufficient to constitute such county ditches as "public property." In construing the term "public property" as used in Section 3493, it is proper to consider the general purpose and intention of the Legislature. The reading of the section convinces me that the term was used in its broadest sense in Section 3493 as the main purpose of the section seems to be to enable political sub-divisions to require male recipients of relief to perform labor on all properties upon which the public at large has an interest. In the light of this broad purpose, I am inclined to the belief that the proprietary interest which the county receives when it contributes to the construction of a county ditch is sufficient to constitute the county ditch, when constructed, "public property" within the meaning of Section 3493.

The phrase "public contract" as used in Section 3493 also presents difficulties and I believe, therefore, we should consider the statutory provisions in regard to the cleaning out and repairing of county ditches. Section 6691 provides for the appointment of a "ditch supervisor". Section 6693 provides in part as follows:

> "The ditch supervisor shall have supervision of the cleaning out or repair of all ditches, drains or watercourses located and constructed in his township or townships, which have theretofore been located and constructed by township trustees, or by county commissioners as single county ditches, or by county commissioners as joint ditches, and shall at all times be under the direction and control of the commissioners. The ditch supervisor is authorized to repair tile * * * and to clean out and keep ditches, drains or watercourses in repair as provided by law; * * *"

Section 6692 provides that the ditch supervisor may be provided with an assistant "when actually engaged in measuring a ditch, drain or watercourses". Applying the rule of statutory construction, expressio unius est exclusio alterius, it must be concluded that the ditch supervisor has no right to employ assistants for any other purpose.

Section 6695 provides that any owner of land may file an application with the ditch supervisor asking that "proper proceedings be had to clean out or repair the ditch, drain or watercourse." Section 6697 provides that the ditch supervisor, for the purpose of cleaning it or keeping it in repair, shall divide the ditch "into working sections and apportion such sections to the owners of lands according to the benefits that will be received by such cleaning or repair, provided, however, on petition of the owners of two-thirds in amount of the apportionment of the work to clean out or repair any ditch, the ditch supervisor may cause the work to be done as a unit in accordance with Sections 6700 and 6701 of this chapter, and shall apportion the costs of such work among the owners of land affected thereby, according to benefits."

Before considering Sections 6700 and 6701, I would like to point out that when the work of cleaning or repairing a ditch is done by a land-owner to whom it has been apportioned by the supervisor, it is a private obligation and in no sense can it be said that such work is performed on a public contract.

Section 6700 provides that if an owner to whom an apportionment is allotted neglects or refuses to clean out or repair a county ditch, the ditch supervisor shall sell the work of cleaning or repairing that apportionment of the ditch at "public outcry to the lowest responsible bidder". The section further provides that the ditch supervisor shall take separate contracts for each working section. It is also provided in this section as follows:

> "If any part of the apportionment for the cleaning or repairing of a ditch, drain or watercouse is apportioned to a county, township, municipality, or school district, the ditch supervisor shall let the contract for the completion of such work and give a certificate of the completion of such work to the contractor; * * *"

Section 6701 provides that if the cost of the work to be performed is less than Fifty Dollars ($50.00), the supervisor may award the contract for the job or may "if so ordered by the commissioners proceed to complete the work by employing necessary labor and by purchasing the necessary material to complete the work".

On the basis of the decision in the case of *Smith* vs. *Griffin*, supra,

it would seem to follow that where the contract is given for the cleaning and repairing of county ditches, the cost of which work is to be borne by a private land-owner, the contract is not a public contract but is a private contract and the county commissioners and ditch supervisor merely act as agents of such private land-owners. However, where the cost of the cleaning and repairing is to be borne by the county or political sub-division, it seems clear that such a contract is a public contract. The only way, however, by which relief labor under the terms of Section 3493 could be employed to perform labor where a contract has been let, would be if the contract provided that the county was to supply the labor. In the cases where the estimated cost is under $50.00 and the commissioners and supervisor decide to complete the work without letting a contract therefor, under the terms of Section 6701 and the work to be done is on a county ditch, the cost of the construction of which was partly borne by the county or a political sub-division thereof, relief labor may be employed under the terms of Section 3493.

Your second question is whether such labor may, under the terms of Section 3493, be employed at a privately owned stone quarry within the township under an agreement whereby the township receives crushed stone for use on township roads to the value of the work done by such labor.

It is clear that such work would not constitute labor done upon "any free public park, public highway, or other property" and the only question is whether it would constitute work on "public contract." The term "public contract" is a general term following more specific terms in Section 3493, General Code, and, therefore, I believe the statutory rule of construction of ejusdem generis is applicable. This rule of construction is that where general words in the statute follow specific words, the general words should not be interpreted to include things of a different class from those described by specific terms. (See Lewis, Sutherland, 2nd Edition, Vol. 2, page 814.)

Certainly the work in a privately owned quarry would not be in the same class as work on public property and, therefore, I am inclined to the view that the township has no authority to exchange relief labor for cruched stone as outlined in your inquiry.

Another factor impelling me to this conclusion is the rule of statutory construction which says that in the interpretation and construction of statutes, consideration should be given to the general scheme contemplated by the enactment. A consideration of the provisions of Section 3493, General Code, convinces me that the transactions described in your second question would not fit into the

scheme contemplated by the Legislature in the enactment of this section. The section provides that the labor shall be performed "under the direction of the proper authorities having charge or control thereof." It is manifest that the reference is to public authorities and I know of no statutes conferring authority upon any public officers to control and supervise work performed in a privately owned stone quarry.

Furthermore, it is said that in interpreting an ambiguous statute, a "construction should be favored which is safe to the state and citizens thereof," 37 O. J. 653.

I seriously doubt whether allowing political sub-divisions to sell relief labor (and that is what the transaction described in your second question amounts to) would operate for the welfare of the general public as distinquished from the welfare of certain individuals. (See *McLain* vs. *Public Utilities Commission,* 110, O. S. 1, 5.)

In view of the foregoing, it is my belief that the transaction contemplated in your second question is not authorized by Section 3493, General Code.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

2243.

APPROVAL — BONDS, CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $10,000.00, PART OF ISSUE DATED SEPTEMPER 1, 1936.

COLUMBUS, OHIO, April 6, 1938.

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

RE: Bonds of City of Cleveland, Cuyahoga County, Ohio, $10,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated September 1, 1936. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of March 14, 1938, being Opinion No. 2091.