

4765.

APPROVAL, BONDS OF NEWTON TOWNSHIP RURALSCHOOL DISTRICT, MIAMI COUNTY, OHIO, \$87,000.00 (LIMITED).

COLUMBUS, OHIO, October 7, 1935.

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

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4766.

APPROVAL, BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$50,000.00.

COLUMBUS, OHIO, October 7, 1935.

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

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4767.

COUNTY COMMISSIONERS—ROAD MACHINERY AND MATERIALS PURCHASED—APPROVAL BY SURVEYOR—LEASE OF MACHINERY.

**SYLLABUS:**

1. *Under section 7187, General Code, all bills for labor or for material purchased by the board of county commissioners must be approved by the county surveyor excepting purchases of road machinery and equipment.*
2. *The requirements of section 6948-1, General Code, with reference to specifications and estimates, have application to purchases made for specific improvements as contradistinguished from purchases made by the board of county commissioners under sections 7203 and 7214 of the General Code for general use in the construction of roads.*
3. *The gasoline taxes and the motor vehicle license taxes distributed to the counties for the purpose of road improvement, are county funds within the meaning of section 7187 of the General Code.*
4. *In the event the board of county commissioners grant to the surveyor power to proceed by force account under section 7198 of the General Code without reservation, the surveyor has the sole responsibility and authority to*

rent or lease equipment. However, if the board of county commissioners reserves the power to itself, it may lease machinery and purchase material.

5. The board of county commissioners is not limited as to kind or quantities of materials purchased for general use in the maintenance and repair of roads by the report or recommendation of the surveyor.

6. The board of county commissioners may lease equipment owned by the county to township trustees or private persons so long as such action does not interfere with the county's use of the same, notwithstanding the surveyor has the custody thereof.

7. The board of county commissioners has power to provide for the repairs of road machinery and equipment, irrespective of the wishes and recommendations of the surveyor.

8. Under the provisions of section 6948-1 of the General Code, a contract may not be legally let for maintenance and repair or any other improvement unless an estimate of the cost is made for all items.

9. The board of county commissioners may order plans and specifications for road improvements prepared by the county surveyor, to be revised. The board of county commissioners' action in this respect is final and cannot be interfered with unless such action amounts to fraud or constitutes a gross abuse of discretion.

10. When the county surveyor has been fully authorized to proceed under section 7198, General Code, purchases made, contracts entered into for labor, leasing of machinery or materials may be approved by the surveyor and paid by the county auditor without consideration of the board of county commissioners.

11. In reference to proposed contracts, an "estimate" has reference to an approximation of the amount of material for items that will be required in order to construct a given project and an approximation of the cost thereof. On the other hand, the use of the word with reference to estimates made by a surveyor or engineer in charge of a project after the contract is awarded, has reference to fixing as a mathematical certainty the amount due to a contractor upon a given project in view of the contract price and the state of completion of the work.

12. Section 5541-8 of the General Code requires that all disbursements of the funds distributed to the township trustees under the provisions of said section shall be disbursed upon vouchers of the township trustees approved by the county surveyor.

13. It is the purpose of section 2345 of the General Code to make it possible to obtain competition in engineering ability as well as in labor and materials, and when the board of county commissioners has invited plans under said section, any reasonable plan which is proposed and which in the discretion of the board of county commissioners is in the best interest of the public, may be accepted.

COLUMBUS, OHIO, October 8, 1935.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Acknowledgment is made of your communication in which you submit for my opinion a list of questions propounded by C. J. Knisely, one of your examiners. The preliminary statement preceding the listing of the inquiries reads:

“Considerable difference of opinion exists between the County Commissioners and County Surveyors throughout the State relative to the authority, rights, and duties with respect to the construction, maintenance and repair of County roads and bridges.

Several cases exist in which the County Commissioners:—

a. Buy road materials without regard to the suitability of the material for the purpose intended, and without any estimate or specifications therefor as provided in Section 6948-1 and 2792 of the General Code.

b. Buy and store road materials beyond the present requirements, which will not likely be needed for construction, improvement and maintenance of the County roads for several years.

c. Leasing trucks or other equipment not designed, intended or adapted for use on road construction or maintenance.”

In order to avoid confusion, the questions will be separately discussed in the order presented. The first inquiry reads:

“REFERENCE:—Attorney General’s Opinion No. 34, January 18, 1933 Bills or estimates of cost of materials furnished by contractor pursuant to a contract for construction of a County road must be presented to and approved by the County Surveyor as required by Section 7187, General Code, before the same may be paid by the County Auditor.

Q. What is meant by or constitutes a ‘contract’ and ‘contractor’ as the terms are used in the aforesaid opinion?

Remarks: These terms have been interpreted by the various officials to mean only written contracts, while a number of Surveyors and County Auditors have interpreted the word contract to mean any order, purchase order, or other order direct or implied for the purchase of road materials and supplies whether written or oral.

The aforesaid opinion refers to materials furnished by a contractor pursuant to a contract for ‘Construction of County roads’.

Q. Are ‘bills or estimates’ of cost of materials furnished by

a contractor pursuant to a contract for the 'maintenance and repair' of a county road required to be approved by the County Surveyor as provided by Section 7187 of the General Code, before the same may be paid by the County Auditor?"

An analysis of the question presented, together with the citations therein referred to, indicates that the real question presented is what is an estimate within the meaning of section 7187, General Code, or, in other words, the question presented is whether the surveyor is required to approve bills for road materials and supplies purchased by the board of county commissioners before payment may be made.

The opinion referred to held, as disclosed by the syllabus, that:

"Bills or estimates of cost for materials furnished by a contractor pursuant to a contract with the county for the construction of a road, must be presented to and approved by the county surveyor as required by Section 7187, General Code, before the same may be paid by the county auditor."

The language of the section is definite and certain and requires that the surveyor shall approve all estimates for the construction, improvement, maintenance and repair of roads and bridges by the county.

Without considering the technical question of what constitutes a contract, it is believed that any action on the part of the board of county commissioners which results in labor or material being furnished in connection with a road improvement or the purchase of material for such purpose, must be approved by the county surveyor. In this connection, however, your attention is called to my Opinion No. 4139, issued April 10, 1935, to John E. Silbaugh, Prosecuting Attorney, Lancaster, Ohio, in which, among other things, it was held:

"Coming to your third question, I may say that there does not appear to be any statutory requirement for the county surveyor to approve the purchase of road machinery by county commissioners. It is true that section 7187, General Code, requires the county surveyor to 'approve all estimates which are paid from county funds for the construction, improvement, maintenance and repair of roads and bridges by the county.' However, it is believed that the word 'estimates' does not include the bill for the purchase of road machinery by county commissioners, under section 7200, General Code."

From the foregoing, it must be concluded that all bills for labor or

material purchased by the board of county commissioners must be approved by the county surveyor excepting purchases of road machinery.

The second inquiry reads as follows:

"REFERENCE:—Attorney General's Opinion No. 2834, November 8, 1928. County Commissioners have authority to purchase materials for general use in connection with repair of highways within their jurisdiction as well as to make such purchases for the improvement, maintenance and repair of highways.

Q. Are specifications and estimates as required in Section 6948-1, General Code, necessary before making the aforesaid purchases and is the approval of the County Surveyor as required in Section 7187 of the General Code necessary before the same may be paid by the County Auditor?

Q. Would the foregoing provisions apply where the materials were purchased without competitive bidding?"

Section 6948-1 of the General Code, to which you refer reads:

"Before undertaking the construction, reconstruction, widening, resurfacing, repair or improvement of a road, the county commissioners shall cause to be made by the county surveyor an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment and all other items of cost and expense. If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such work by contract, proceed to construct the same by force account. Where the total estimated cost of the work exceeds three thousand dollars per mile, the commissioners shall be required to invite and receive competitive bids for furnishing all the labor, materials and equipment and doing the work, as provided in G. C. §6945, and to consider and to reject the same, before ordering the work done by force account. When such bids are received, considered and rejected, and the work done by force account; such work shall be performed in compliance with the plans and specifications upon which the bids were based. The provisions of this section shall apply both to new construction and to repair work."

In making reference to the opinion of the Attorney General, No. 2834, dated November 8, 1928, undoubtedly it was intended to refer to Opinion No. 2844, found in *Opinions of the Attorney General*, 1928, page 2564, the syllabus of which reads:

"County commissioners have legal authority under existing law to purchase material for general use in connection with the construction of highways within their jurisdiction, as well as to make such purchases for the improvement, maintenance and repair of such highways."

An examination of said opinion, together with the sections referred to, clearly indicates that the provisions of section 6948-1, supra, do not apply to purchases of materials for general use under section 7214, General Code, and its related sections, irrespective of whether the materials were purchased with or without competitive bidding. In other words, section 6948-1 has application to purchases made for specific improvements as contra-distinguished from purchases made by the board of county commissioners under sections 7203 and 7214 for general use in connection with the construction of roads.

The third inquiry presented in substance is whether funds arising from the gasoline tax and motor vehicle licenses are county funds within the contemplation of section 7187, supra.

Section 5537 of the General Code, which provides for the distribution of one of the gasoline tax funds, in so far as your question is concerned, provides:

"Twenty-five per cent. of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties."

Section 5541-8, General Code, which provides for another gasoline tax distribution, also provides in part:

"Forty-five per cent of said sixty-seven and one-half per cent shall be appropriated for use in and shall be used in the several counties of the state in proportion to the number of motor vehicles registered from each of said counties during the calendar year preceding the making of such appropriation."

Section 6309-2 of the General Code, which provides for the distribution of the motor vehicle license tax, provides in part:

"\* \* \* In the treasuries of such counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways, and for no other purpose, and

shall not be subject to transfer to any other fund. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway in which the existing foundations thereof are used as a subsurface of the improvement thereof, in whole or in substantial part; \* \* \*

(2) Five per centum of all taxes collected under the provisions of this chapter, together with interest earned by fees deposited by the treasurer of state as provided in section 6309 of the General Code, shall constitute a fund for the use of the several counties for the highway and road purposes specified in paragraph (3) of this section. Said fund shall be divided equally among all the counties in the state. Said fund shall be paid out on vouchers prepared by the registrar and warrants drawn by the auditor of state in equal proportions to the county auditor of each county within the state to be used for the purposes herein designated.

(3) Thirty-seven per centum of all taxes collected under the provisions of this chapter shall be for the use of the county in which the owner resides or in which the place is located at which the established business or branch business in connection with which the motor vehicle registered is used, as the case may require, for the construction, reconstruction, improvement, maintenance and repair of roads and highways."

From the foregoing, it appears that while the gasoline and motor vehicle license taxes are levied and distributed under general law, when the same are distributed and find their way into the county treasury, they are for all practical purposes county funds and are certainly to be regarded as county funds within the meaning of section 7187 of the General Code.

The fourth question reads:

"In the maintenance, repair and construction of roads may County Commissioners lease road machinery, trucks and other equipment directly, or should they authorize the County Surveyor to lease said road machinery and equipment as provided in Section 7198 of the General Code?

Remarks:—Some County Commissioners have attempted to lease road machinery, trucks, etc., and repair, reconstruct and maintain county roads without any supervision whatsoever by the County Surveyor as provided in Sections 7184 and 7192, General Code.

Q. May County Commissioners or the County Surveyor rent or lease county road equipment to Township Trustees or private individuals?"

Section 7198 of the General Code, referred to in this question, reads:

"The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

When the board of county commissioners has authorized the surveyor to proceed under section 7198, it appears that he takes the sole responsibility for the purchasing of material or leasing of equipment, unless, as pointed out in my Opinion No. 4139, supra, the board sees fit to limit his powers in the resolution granting him authority to proceed by force account. The board may decide to reserve the right to purchase the material itself.

Section 7200 of the General Code provides in part:

"The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary. The county commissioners may also at their discretion purchase, hire or lease automobiles, motorcycles or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business."

While section 7200 refers to the purchase of tools and machinery and other equipment and provides for the purchasing, hiring or leasing of "automobiles, motorcycles or other conveyances", it could logically be argued that there is no authority in the board of county commissioners to lease machinery. However, it would seem that this would be a narrow construction and that the power to lease may be included within the power to purchase. In any event, as hereinbefore pointed out, it has been held that the board of county commissioners may reserve to itself the powers which it may grant to the surveyor under section 7198, and it would therefore appear that the board may, if it sees fit, lease equipment in connection with a road improvement. If the board of county commissioners grants to the surveyor power to proceed under section 7198 without reservation, then, of course, it becomes the duty of the surveyor to hire labor, lease machinery and purchase materials. On the other hand, if the power is reserved in the board, it is believed that it may do so. However, it would appear that while the board may lease equipment and buy materials, it should follow the provisions of sections 7184 and 7192 of the General Code in giving the surveyor general charge and supervision of the construction of the work.

The second branch of the fourth question will be considered in connection with the seventh inquiry presented herein.

In the fifth inquiry, the following question is presented:

"REFERENCE:—Section 7187 of the General Code; The County Surveyor shall report to the County Commissioners on or before the first day of April of each year the condition of roads, bridges and culverts in the county and estimate the probable amount of funds to repair the county roads, bridges and culverts or to construct any new roads, bridges or culverts required within the county.

Q. Are County Commissioners permitted to purchase road materials in excess of the amount set forth in the aforesaid estimate or to let contracts for more money than stated in said estimates?"

Section 7187, General Code, to which reference is made in this inquiry, provides in part:

"The county surveyor shall report to the county commissioners on or before the first day of April in each year the condition of the county roads, bridges and culverts in the county, and estimate the probable amount of funds required to maintain and repair the county roads, bridges and culverts, or to construct any new county roads, bridges or culverts required within the county."

While the surveyor is required to make a report containing a general estimate of the probable needs for all roads and bridges, it would not seem that the same is binding upon the board of county commissioners under section 7214, General Code, and its related sections. The board should consider such report, but it is not limited in its purchases by said report. Of course, when a specific improvement is undertaken the same must be done under the direction of the surveyor.

In this connection, reference is made to the *Opinions of the Attorney General*, 1933, page 311, the syllabus of which reads:

"1. The county commissioners are authorized by section 7214, General Code, to purchase materials for road repairs and construction, and in making such purchases, they are not required to let the contract therefor by competitive bidding.

2. The county surveyor has nothing to do with the kind of such materials so determined to be purchased, except where the county commissioners have authorized the surveyor to make the purchases for work that is to be done by force account."

The sixth inquiry reads as follows:

"REFERENCE:—Section 7184 of the General Code; The County Surveyor shall have general charge of the construction, improvement and repair of highways, bridges and culverts under the jurisdiction of the County Commissioners.

Q. What are the respective duties and legal procedure of the County Commissioners and the County Surveyor in the construction, reconstruction, improvement, maintenance and repair of bridges and highways on county roads?"

Section 7184, General Code, to which reference is made, provides in part:

"The county surveyor shall have general charge of the construction, reconstruction, improvement, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners."

The inquiry is as to the respective duties and procedure of the board of county commissioners and the surveyor in the construction and improvement of roads. The opinion last above referred to is of some assistance in connection with the immediate question.

It will be observed that section 6906, General Code, provides in substance that the board of county commissioners shall have power to improve county roads.

Section 6911, General Code, provides that the board of county commissioners in the resolution finding that the public convenience and welfare requires a given improvement, shall provide for plans in the following language:

"They shall in said resolution order the county surveyor to prepare the necessary surveys, plans, profiles, cross-sections, estimates of cost and specifications for said improvement as may be necessary, together with an estimated assessment, based upon the estimate of cost so made, upon the real estate to be charged therewith, of such part of the estimated damages, costs and expenses of such improvement as are to be specially assessed, which estimated assessment shall be according to the benefits which will result to such real estate. In making such estimated assessment, the surveyor may take into consideration any previous special assessment made upon such real estate for road improvements. The county commissioners may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, provid-

ing therein for different widths of roadway, different materials or other similar variations. The county surveyor may, without instructions from the county commissioners, prepare and submit to the county commissioners alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or other similar variations. Where alternate surveys, plans, profiles, cross-sections, estimates and specifications are approved by the county commissioners or submitted by the county surveyor on his own motion, the county commissioners and county surveyor acting together, shall constitute a board for the selection of the particular plan, profile, cross-sections, estimate and specifications to be used and shall, after the opening of bids, determine, by a majority vote of such board which of said surveys, plans, profiles, cross-sections, estimates and specifications shall be finally adopted for said improvement. After the passage of the resolution provided for in this section, all subsequent proceedings of the county commissioners with respect to said improvement may be had by a majority vote."

In the *Opinions of the Attorney General*, 1921, page 566, this section was under consideration. The syllabus of that opinion reads:

"If, as permitted by section 6911 G. C., bids for work on county roads are received on several types of improvement, the county surveyor and board of county commissioners must, after bids are opened, agree as to the type of improvement to be made. After such agreement has been arrived at, it then becomes the duty of the county commissioners by virtue of section 6945 G. C. to ascertain the lowest and best bidder from among those who have submitted proposals as to the particular type of improvement which has been agreed on; and it is for the commissioners to say whether they will ask the opinion of the surveyor as to who is the lowest and best bidder."

Section 6911, *supra*, has since been amended but not as to the points considered in the foregoing opinion. The section, of course, has to do with projects that are contract jobs rather than force account improvements.

Under section 7198, *supra*, as hereinbefore pointed out, the surveyor, when authorized by the board of county commissioners, may proceed to buy labor and material and lease machinery and has the sole responsibility unless restricted in the authority granted by the board of county commissioners. However, it would seem that the board of county commissioners should re-

quire plans to be submitted and approved before proceeding to authorize the force account project. *Opinions of the Attorney General*, 1921, page 830.

It is believed that the foregoing sufficiently discusses the relative duties and powers of the surveyor and the board of county commissioners in road proceedings.

The seventh inquiry presented reads:

"REFERENCE:—Section 7200 of the General Code; All such machinery, tools, and equipment belonging to the county shall be under the care and custody of the County Surveyor.

Q. Have County Commissioners authority to direct the use thereof or lease such machinery, tools, equipment and conveyances as mentioned in the aforesaid Section?

Q. If the County Surveyor has the custody, have the County Commissioners authority to repair and pay for said repair without the approval of the Surveyor?"

In considering this inquiry, it will be noted that section 7200 of the General Code provides in part:

"All such machinery, tools, equipment and conveyances belonging to the county shall be under the care and custody of the county surveyor. All such machinery, tools, equipment and conveyances owned by the county shall be plainly and conspicuously marked as the property of the county. The county surveyor shall annually on the fifteenth day of November make, or cause to be made, a written inventory of all such machinery, tools, equipment and conveyances indicating each article and stating the value thereof and the estimated cost of all necessary repairs thereto and deliver the same to the county commissioners, who shall cause the same to be placed on file. At the same time he shall file with the county commissioners his written recommendations as to what machinery, tools, equipment and conveyances should be purchased for the use of the county during the ensuing year and the probable cost thereof. The county commissioners shall provide a suitable place or places for housing and storing machinery, tools, equipment, materials and conveyances owned by the county, and may purchase the necessary material and construct, or enter into an agreement with a railroad company to construct, one switch or spur track from the right of way of such railroad company to land or storage house owned by the county. All expenditures authorized by the provisions of this section shall be paid out of any available road funds of the county."

In connection with this question, it is believed to be helpful to consider the *Opinions of the Attorney General*, 1931, page 626, which dealt with the right of the township trustees to lease equipment to the board of county commissioners, and in which it was held as disclosed by the syllabus:

"Township trustees may legally lease road machinery to the county surveyor when the county commissioners have authorized him to improve a county road by force account under the provisions of Section 7198, General Code, providing such machinery is not needed by the township during the term of the lease."

While, of course, this opinion was the converse of the proposition you present, it is believed analogically the reasoning therein applies to the power of the board of county commissioners to make such leases. The opinion above quoted points out that there is no express authority on the part of the board to make such leases, but concludes that there is sufficient implied power. It is pointed out that the township trustees have power to cooperate with the board of county commissioners in the improvement of roads. It will be further noted that the board of county commissioners has power to cooperate with township trustees in such matters. If the board has equipment and the trustees are in need of the use of same, it would seem reasonable that the two public agencies may cooperate with reference to the use of same. It is my opinion that the board may legally lease its equipment to the township trustees.

However, you also raise the question as to whether such equipment may be leased to private persons. This question is not so easily solved, as it involves in a sense the question of public authorities entering into competition with private enterprises. However, inasmuch as such equipment undoubtedly would be used in public road work and would tend to aid some public authority, I am inclined to the view that the board may, if it sees fit, lease such equipment. It has been held that the board may lease real estate owned by the county when it does not interfere with the public use of same. *Opinions of the Attorney General*, 1931, page 626.

Also in the case of *The Minamax Gas Company vs. State, ex rel.*, 33 O. App., 501, it was held, as disclosed by the second headnote, that:

"County commissioners may temporarily lease real estate owned by county, subject to repossession when public needs require, without complying with Section 2447 et seq., General Code, requiring competitive bids after due advertisement in case of sale of real estate not needed for public use."

By the same logic no good reason can be advanced against the board

of county commissioners making such leases when the same do not interfere with the public use of such machinery.

In this connection, your attention is directed to a discussion in *O. Jur.*, Vol. II, page 476, wherein it is stated:

"The board of county commissioners is vested with the title to the property of the county. Such board may take and hold title to anything that a county may hold or own, although in the actual custody or expenditure the county may, under some statute, be obliged to act by an officer, or officers, other than its commissioners. It has been said that the commissioners may exercise the right of an owner over the county property, subject, of course, to any special uses of the county for which it is held. So far, at least, as the acts to be performed are such as a trustee may legally perform, the commissioners are the owners and the persons to act."

In the case of *State of Ohio, ex rel., vs. Allen, County Auditor*, 86 O. S., page 244, in the opinion by Donahue, J., a comprehensive discussion is made with reference to the title of the property of the county being vested in the board of county commissioners. The following is quoted from said opinion:

"As early as the case of *Carder vs. Commissioners of Fayette County*, 16 Ohio St., 354, this court declared that: 'The board of county commissioners is the body—the *quasi* corporation—in whom is vested by law the title to all the property of the county. In one sense they are the agents of the county, and in another sense they are the county itself. It is in this latter sense that they acquire and hold in perpetuity, the title to its property. In this capacity they not only act for the county, but also act as the county.'"

It will be observed that the above opinion affirms a policy that has been the established law of this state for nearly a century, to the effect that the title to all property of the county is vested in the board of county commissioners for the purpose of control. Therefore, it is believed that the legislature, in providing that the surveyor should have the care and custody of such equipment, did not intend to establish a different rule from that generally adhered to with reference to the powers of the board. In other words, in the provision that the surveyor shall have the care and custody of such machinery, it would seem that outside of the right to use the same for improvements that are under his supervision, he has no authority except to use, properly house and protect the same. While, of course, a board of county commissioners has only such powers as are expressly granted to it by law, it is a

fundamental rule of construction that it has such implied powers as are necessary to carry into effect the express powers.

An examination of section 7200, General Code, will disclose that the board of county commissioners has the sole power to make purchases irrespective of any recommendations that the surveyor makes. After stating that the surveyor shall have the care and custody, the statute further provides that the surveyor shall make written reports to the board containing an inventory of all such machinery, stating the value and estimated costs of all necessary repairs thereto thereby indicating that he is still responsible to the commissioners. It is a well known rule of statutory construction that a statute is not to be construed by taking one particular sentence standing alone but it must be construed with the context of the section and the context of the related sections. Taking into consideration the fundamental rule as hereinbefore stated with reference to all the title to property being vested in the board of county commissioners, together with other sections and the policy of the law with reference to the power of the board over the purchase and management of such machinery, the conclusion is irresistible that whatever power is conferred with reference to the management of said machinery after it is purchased, lies in the board of county commissioners. Of course, the board cannot abuse its discretion in such matters. Undoubtedly, if in connection with a given improvement a given piece of machinery would be needed by the county surveyor, the board could not properly lease such equipment so as to interfere with the public use of the same. On the other hand, if they have no present use for a given piece of machinery and the township trustees need such equipment or a private individual has use for the same, it is believed that the board of county commissioners has implied power to lease the same. It is a well known fact that such equipment deteriorates rapidly when not in use and like other machinery its value decreases because of newer inventions coming to take its place and no doubt in many instances it would be to the financial advantage of the county to receive rental upon the equipment in order to help lighten the burden of the county in the construction of roads.

As has been hereinbefore pointed out, the courts have held that the board of county commissioners has implied power to lease real estate owned by the county when such property is not needed for a public use. By the same logic, it certainly could rent an article of personal property.

Coming to the second branch of this inquiry, unquestionably, the board of county commissioners would have power to provide for the repairs of such equipment, and it is believed that the same reasoning with reference to the approval of the bills for such repairs by the county surveyor applicable to purchases made under section 7200 hereinbefore discussed, would be applicable to the question presented. That is to say, if the board may purchase such equipment irrespective of the wishes and recommendations of the surveyor, it

likewise would have the power to repair the same independent of his judgment and approval.

The first branch of the eighth inquiry presented reads:

"REFERENCE:—Section 6948-1, General Code. Before undertaking the construction, reconstruction, widening, resurfacing, repair or improvement of a road the County Commissioners shall cause to be made by the County Surveyor, an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment and all other items of cost and expense.

Q. May County Commissioners purchase road materials without having an estimate and specifications made and placed on file therefor by the County Surveyor?"

This question may be disposed of by perusing the discussion with reference to the second question. In other words, the board of county commissioners in making general purchases is not required to follow the estimate of the surveyor. However, if a specific improvement is in progress, apparently the provisions of section 6948-1, supra, require estimates of all items. It would follow that a contract may not be legally let for maintenance and repair or any other improvement unless the estimate of the cost is made as required by section 6948-1, supra. It probably could be argued with some plausibility that maintenance and repair is not necessarily included within the language of section 6948-1, supra. However, it is thought that said language is sufficiently broad so as to include maintenance and repair.

In connection with this inquiry, reference is made to *Opinions of the Attorney General*, 1931, page 1457, in which it was held, as disclosed by the first and second branches of the syllabus:

"1. Under Section 2792, General Code, a county surveyor is required to submit plans, specifications, details and estimates of cost of an improvement, repair, construction or reconstruction to the board of county commissioners for approval, when the board of county commissioners requests the same, and, when submitted, such plans, specifications, details and estimates are subject to alteration by said board.

2. A board of county commissioners may determine the amount, kind and size of material to be used in an improvement, repair, construction or reconstruction."

The second branch of the eighth inquiry reads as follows:

"Q. May County Commissioners let a contract for the maintenance and repair of a road without an estimate and specifications therefor made and placed on file by the County Surveyor?"

In connection with this inquiry, reference is made to *Opinions of the Attorney General*, 1931, page 1457, supra, for a discussion of the surveyor's duties under section 6948-1, supra, and especially reference is herein made to the third branch of the syllabus of the opinion hereinbefore referred to, which reads as follows:

"A county surveyor has the authority to purchase materials needed in making of emergency repairs under the provision of Section 2792-1, General Code."

As hereinbefore indicated, if a specific improvement is contemplated, then estimates are required to be filed. On the other hand, the board of county commissioners may make purchases for general use under section 7214, supra, without specifications or estimates. However, when a contract is let or a specific improvement is undertaken for the maintenance and repair of a road, estimates and specifications therefor are required to be placed on file by the county surveyor.

The ninth inquiry reads:

"REFERENCE:—Section 2793, General Code; The County Surveyor shall be responsible for the inspection of all public improvements made under the authority of County Commissioners. He shall keep in suitable books a complete record of all estimates and summaries of bids received for contracts for the various improvements together with a record of all estimates made for payment on the work.

Section 2792, General Code; He shall prepare plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, road drains, ditches, and other public improvements excepting buildings constructed under the authority of any board within the county.

Q. May County Commissioners purchase road materials without reference to any special improvement and without having any specifications or estimates therefor prepared and placed on file by the County Surveyor?

Q. May the County Auditor issue his warrant for the payment of said materials without the approval of the County Surveyor?

Q. Do the above sections apply to the maintenance and repair of County roads?"

In answer to branch one of this question, it may be stated that the conclusions hereinbefore reached, to the effect that under section 7214, supra, the board of county commissioners may purchase road materials for general use without an estimate of the surveyor and is required to obtain an estimate when a specific improvement is contemplated, is dispositive of this inquiry.

The second branch of the question may be answered by reference to the answer of branch two of question one, in which it was pointed out that all bills and estimates for materials furnished should be approved by the surveyor before being paid by the county auditor.

The third branch of this question must be answered in the affirmative in view of the conclusion in connection with question one.

Question ten reads:

"Q. May County Commissioners order plans and specifications for a road improvement revised so as to include a material practically worthless or a method or type of construction the use of which would result in a flagrant waste of public funds?"

As pointed out in my Opinion No. 4139, hereinbefore referred to, the board of county commissioners has power to require the revision of plans and specifications. However, like any other public authority said board is answerable to an abuse of such discretion. In every case it would be a question of fact to be determined and decided by the courts as to whether a given action amounted to an abuse of its power or fraud upon the public. In the first instance, the board determines the question and because the surveyor might disagree with its judgment in this respect would in no wise disturb its decision. On the other hand, if it could be established by competent evidence that the action of the board was fraudulent or wholly against the interests of the public in its decision with reference to a given project, undoubtedly it could be enjoined. However, as above indicated, this would be a matter for the courts to decide and, in the absence of such a decision, the action of the board of county commissioners would be final.

Question eleven reads:

"Q. If the County Surveyor refuses to revise the estimate and specifications as submitted by him as ordered and directed by the County Commissioners on the grounds that said revision would result in a wilful and flagrant use of public funds, what recourse would the County Commissioners have?"

In the event the surveyor should refuse to revise the estimates and specifications, undoubtedly an action in mandamus could be instituted against him to require him to perform his duties with reference to said revision. In such

a case, undoubtedly he could set up as a defense the wrongful decision of the board of county commissioners and the matter could be determined before the court upon the facts presented.

The twelfth inquiry is as follows:

"REFERENCE:—*Attorney General's Opinion No. 649*, June 21, 1927. The power and duty to employ the necessary labor and the teams, lease the necessary equipment and purchase such materials as may be required are exclusively vested in the County Surveyor.

Q. May County Commissioners lease road equipment, trucks, etc., for the maintenance and repair of roads?"

It is believed that this inquiry is sufficiently answered in the conclusion with reference to question four, wherein it was indicated that the board of county commissioners could reserve this power in granting the surveyor power to proceed under section 7198, supra.

The thirteenth inquiry presented reads:

"REFERENCE:—*Attorney General's Opinion No. 3139*, April 10, 1931; When the County Commissioners have authorized the Surveyor to construct and repair county roads by force account, as required in Section 7198, General Code, the Surveyor has the sole power to contract with laborers with reference to construction of such improvement and the approval of the County Commissioners is not required as a condition precedent to the payment of such wages.

Q. In the maintenance and repair of county roads by force account under Section 7198, General Code, is the approval of the County Commissioners required as a condition precedent to the payment of such wages?"

From what has been said hereinbefore, it clearly appears that when authority is given the county surveyor under section 7198, to the extent that he is authorized by the county commissioners to proceed, the sole responsibility rests with the surveyor. When duly authorized, purchases made or contracts entered into for labor, leasing of machinery or materials may be approved by the surveyor and paid by the auditor without consideration of the county commissioners. See Opinion No. 4139, supra.

Question fourteen reads:

"What constitutes an estimate as the word is used in Section 7198, Section 7187, Section 6948-1 and Section 2793 of the General Code?"

In considering the above inquiry, it may be stated that the word "estimate" is used rather loosely in the statute. However, for practical purposes, it is believed this in connection with public contracts it has a rather definite meaning. In reference to proposed contracts, an estimate has reference to an approximation of the amount of material or items that will be required in order to construct a given project and an approximation of the cost thereof. On the other hand, the use of the word with reference to estimates made by a surveyor or engineer in charge of a project after the contract is awarded, has reference to fixing as a mathematical certainty the amount due to a contractor upon a given project in view of the contract price and the state of completion of the work. In other words, the lexicographers indicate that the word "estimate" has different meanings, one of which is in substance to approximate quantities and costs, and another is to fix the worth or value of a thing. It would therefore seem that in the preliminary estimates the approximations are made, whereas, in estimates of completed projects a definite mathematical computation is made as to amounts due. It is believed that a more specific answer to this particular inquiry may not be made.

The fifteenth inquiry reads as follows:

"REFERENCE:—Section 5541-8, General Code; All contracts for materials and for work done by contract shall be approved by the County Surveyor before being signed by the Township Trustees.

Q. What is meant by the word 'contract' as used in the above Section? Does it mean an order, purchase order or warrant for payment thereof?"

Section 5541-8, referred to, after providing for the distribution of seventeen and one-half percent of the highway construction fund, among other things, touching the expenditure thereof, provides:

" \* \* \* and, provided further that all such improvement of roads shall be under the supervision and direction of the county surveyor as provided in section 3298-15k of the General Code; and provided further that no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk; and provided further that all contracts for material and for work done by contract shall be approved by the county surveyor before being signed by the township trustees and all disbursements of such funds shall be upon vouchers of the township trustees approved by the county surveyor."

In considering this question, it would seem that it is the intent of the inquisitor to determine what expenditure must be approved by the surveyor. In this connection, it will be noted that the section provides that "all disbursements of such funds shall be upon vouchers of the township trustees approved by the surveyor". It may be further stated that any action taken which results in labor or material being furnished to the township trustees for road purposes under the provision would be construed as a contract within the meaning of said section. It would further appear that by the terms of said section all disbursements of said funds should be approved by the county surveyor whether by contract or otherwise.

The sixteenth and last question propounded reads:

"Upon request of Board of County Commissioners the County Surveyor submits a plan and estimate for the construction of a bridge on a skew. Under Section 2345 of the General Code a prospective bidder submits plans as follows:

*Plan A.*—A plan for some type of bridge at right angles to center line of roadway at same location.

*Plan B.*—A plan for a different type of bridge at same location and same skew as that provided in plan submitted by Surveyor.

*Plan C.*—A plan for same type of bridge but at a different location.

*Plan D.*—A plan for a different type of bridge at a different location and at right angles to the center line of the bridge.

Q. May County Commissioners accept above plans and let contract on any one of above plans?

Q. May County Commissioners accept above plans, take bids and reject all bids and order County Surveyor to build the bridge by force account under any one of above plans?"

Section 2345 of the General Code, to which reference is made, provides:

"The county commissioners may also invite, receive and consider proposals on any other plan at the option of bidders, and shall require that any such plan together with specifications shall be filed in the office of the county auditor for a period of fifteen days prior to the date for receiving bids. Such plans and specifications shall show the number of spans, the length of each, the nature, quality and size of the materials to be used, the strength of the structure when completed, and whether there is any patent on the proposed plan, or on any, and if any, what part thereof."

This section was under consideration by the Attorney General in

*Opinions of the Attorney General*, 1931, page 1459, in connection with the duties of the surveyor under sections 2792 and 2792-1, General Code. The following is quoted from said opinion:

"As to the authority of a board of county commissioners to alter such plans if they deem it necessary, it should be noted that there is nothing in said Section 2792, General Code, which makes the finding of the county surveyor binding upon the county commissioners, nor does such section prohibit the plans, specifications, details and estimates of costs made by such county surveyor from being subject to change or rejection by the county commissioners.

An examination of the various sections of the general code relative to the duties of the county surveyor and the county commissioners impels the conclusion that the plans, specifications, details and estimates of costs prepared by the county surveyor under the authority of the above section are subject to review and change by the county commissioners.

Section 2343, General Code, relative to the building of bridges by county commissioners, reads in part as follows:

' \* \* \* Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor.'

Your attention is called to the case of *State, ex rel. Gillespie vs. Bd. of County Commissioners*, 111 O. S. 1, in which it was held, as disclosed by the second branch of the syllabus, that

'Where a bidder submits a proposal to erect the substructure under a plan furnished by the county surveyor, but the commissioners award a contract for construction of an entire bridge as a monolithic unit to another bidder under his plan, the first named bidder has not established a clear legal right to have a contract awarded to him. (*State, ex rel. Ross vs. Board of Education*, 42 Ohio St., 374, followed).'

From the foregoing, it would seem that the object and purpose of section 2345, supra, is to obtain competition in engineering ability as well as in labor and materials, and if any reasonable plan is proposed which, in the discretion of the board of county commissioners, is in the best interests of the public, it may be accepted. If conducive to the public interest, it is believed that any one of the plans which you mention could be accepted. Furthermore, inas-

much as the board of county commissioners may reject any or all bids, it is believed that it could proceed to construct such an improvement by force account on any of the plans proposed. In other words, a given plan submitted might best meet the requirements of the public in the judgment of the board, but, on the other hand, the bid for such an improvement might be entirely out of line. In such an event, it probably would be wise to request the surveyor to make a new estimate before proceeding with force account construction, although it is doubtful whether it is necessary.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4768.

APPROVAL, NOTES OF EAST CARLISLE RURAL SCHOOL DISTRICT, LORAIN COUNTY, OHIO, \$3,606.00.

COLUMBUS, OHIO, October 8, 1935.

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

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4769.

CHATTEL MORTGAGE—COUNTY RECORDER MUST ENTER NAMES OF PARTIES TO CHATTEL MORTGAGE IN BOOK PROVIDED BY COUNTY.

**SYLLABUS:**

*Section 8562, General Code, requires the names of all parties to chattel mortgages deposited with the county recorder, as well as other data therein set forth, to be entered in a book provided by the county for such purpose, and there is no authority to enter such data in a card index file.*

COLUMBUS, OHIO, October 8, 1935.

HON. O. W. MARRIOTT, *Prosecuting Attorney, Mansfield, Ohio.*

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

"I have been consulted by the county recorder of this county