

of Ohio by fee simple title, free and clear of all encumbrances whatsoever, except the taxes due and payable on and after the June, 1930, payment of taxes. From this exception in the warranty clause of said deed, I assume that in the negotiations relating to the purchase of this property you have assumed and agreed to pay the taxes which are now a lien upon said property, or that in any event said Catherine Green is not required to pay the same. However this may be, some adjustment should be made before the transaction relating to the purchase of this property is closed.

Encumbrance estimate No. 1157, which has been submitted as a part of the files relating to the above described property, has been properly executed and approved, and the same shows that there is a sufficient balance in the appropriation account to pay the purchase price of said property, which purchase price is the sum of \$275.00. Said encumbrance estimate likewise carries the notation that by action of the Controlling Board the purchase price of this property has been released by said board for the purpose of acquiring said property.

Said abstract of title, warranty deed and encumbrance estimate No. 1157 are accordingly hereby approved by me and the same are herewith forwarded to you.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2533.

MIAMI RIVER—DREDGING AND IMPROVEMENT THEREOF—EXPENDITURE OF MONEY—WHAT AMOUNTS AND BY WHOM.

SYLLABUS:

When the money necessary for the purpose is released by the Controlling Board out of the appropriation made by the 88th General Assembly for the improvement of the Miami River from Indian Lake to Quincy, the Superintendent of Public Works is authorized to expend such money for the acquisition of the Quincy Dam by appropriation or otherwise. The balance of the money in said appropriation account, when released for the purpose by the Controlling Board and to the extent of the money so released, may be paid over to the treasurer of the proper county to be used in addition to assessments levied by the joint board of county commissioners for the purpose of dredging and otherwise improving said river.

COLUMBUS, OHIO, November 14, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication, requesting my opinion on certain questions, hereinafter stated, with respect to your power and authority in the expenditure of an appropriation made by the 88th General Assembly in House Bill 513, for the improvement of the Miami River between Indian Lake and the Quincy Mill Dam. This appropriation, which is made to the Department of Public Works, is in words and figures as follows:

“For the removal of the Quincy Mill Dam and the dredging of Miami River, starting at the Quincy Mill Dam and dredge to Indian Lake, to deepen, widen and straighten; the Quincy Mill Dam to be removed before the dredging is started; subject to release and supervision by the Controlling Board ----- \$100,000.00.”

The questions presented in your communication arise by reason of the fact that a previous act providing for this improvement and for the participation of the State therein was enacted by the Eighty-sixth General Assembly under date of April 17, 1925, 111 O. L. 521. This act in section 1 thereof provided that the Miami River, located in Logan County between the Lewistown Reservoir and Quincy, may be improved in the manner provided in Sections 6536 to 6545, inclusive, of the General Code, relating to joint county ditches, save and except as otherwise provided in said act with respect to the participation of the state in said improvement.

Section 2 of said act provides that when a petition has been filed in accordance with Section 6536 of the General Code, requesting improvement of that portion of the Miami River located in Logan County between the Lewistown Reservoir and Quincy, and it has been found by the joint board of county commissioners or by the Court of Common Pleas that the proposed improvement is necessary and that it will be conducive to the public welfare and it is reasonably certain that the cost thereof shall be less than the benefits, the board of county commissioners shall proceed as in the case of joint county ditches, except as otherwise provided in said act. By Section 3 of said act, it is provided that when the joint board of county commissioners find for such improvement as provided in Section 2 of said act, and the surveyor has been ordered to make a survey, report and schedule as provided in Section 6541 of the General Code, such survey, report and schedule shall be submitted to the Director of Highways and Public Works for his approval.

Sections 4 and 5 of said act have perhaps more immediate application to your questions. These sections read as follows:

"Section 4. In case the Director of Highways and Public Works deems it necessary to remove any dam or dams from that portion of the bed of the Miami River which is located in Logan County, between Lewistown Reservoir and Quincy, to prevent the flooding of lands lying above such dam or dams, and he is unable to agree with the owners, lessees or other persons having a property right in such dam or dams, he shall request the attorney general to proceed to condemn the same in the name of the State of Ohio, in accordance with the provisions of Sections 442 to 454, inclusive, of the General Code; and all expenses incurred in connection with such condemnation proceedings shall be paid out of the funds provided for the dredging and improvement of the Miami River. In such condemnation proceedings the Attorney General may call upon the prosecuting attorney of the county in which the suit is pending to render such assistance in connection therewith as the Attorney General may deem necessary.

Section 5. For the benefit to the state's lands benefited by said improvement, the state shall pay twenty-five per cent of the total cost of said improvement, but in no event to exceed the sum of forty thousand dollars.

There is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated the sum of forty thousand dollars for the payment of the state's share of the costs of such improvement.

Within thirty days after the contract is entered into, the Director of Highways and Public Works shall draw his voucher in favor of the treasurer of the proper county against his appropriation in an amount equal to twenty-five per cent of the contract price and from time to time said Director of Highways and Public Works shall draw his voucher against this appropriation in favor of such treasurer in an amount sufficient to cover the state's share of damages and other proper costs and expenses, which various amounts shall be

paid into said county treasury to the credit of the fund of said improvement; but in no event shall such vouchers exceed the sum of forty thousand dollars."

The questions stated in your communication are as follows:

1. Will the Superintendent of Public Works be bound by the terms of the act which limit the expenditures of the state to twenty-five per cent of the total cost of the improvement?

2. Can the Superintendent of Public Works expend a portion of this appropriation in acquiring the rights of the owners of the said Quincy Dam, regardless of what the county commissioners may do?

3. Is it necessary to comply with the provisions of Section 5 that require him to turn over to the treasurer of the county a voucher against his appropriation in an amount equal to twenty-five per cent of the contract price or can he pay the entire price of acquiring the rights of owners of the dam?

In your communication you state that the supplementary appropriation bill makes no reference whatever to the original act, but appropriates \$100,000.00, subject to release and supervision by the Controlling Board, and with reference to this statement of fact, the question presented by you is as follows:

4. Is the appropriation when so released available to the Superintendent of Public Works for carrying out the purpose of the appropriation?

It appears from your communication and from other information that I have received that after the enactment by the 86th General Assembly of the act above referred to, certain proceedings were initiated before the joint board of county commissioners of Logan, Shelby and Auglaize Counties for the improvement of the Miami River under the provisions of said act, but that said proceedings were not carried to completion by reason of a disagreement between the boards of county commissioners of said respective counties constituting the joint board, that said proceedings have long since terminated without any effectual action being taken for the improvement of said river under the provisions of said act of the 86th General Assembly or otherwise. In the meantime the appropriation of \$40,000 made in said act as the state's share of the cost and expense of this improvement, including the acquisition by condemnation or otherwise of the Quincy Dam, lapsed, as did an appropriation in the same amount made by the 87th General Assembly for this purpose.

I am further advised that it is now the intention of the property owners to be benefited by this improvement and of others interested therein to cooperate with the State of Ohio in the improvement of said river by filing a petition therefore with the joint board of county commissioners of the three counties above named.

In consideration of the question presented in your communication with respect to the expenditure of the moneys of the state appropriated by the 88th General Assembly, it is clear that the provisions of the act making said appropriation are to be read in connection with the provisions of the act of the 86th General Assembly above referred to, insofar as the provisions of said former act are still in full force and effect, and except insofar as the provisions of said appropriation are in conflict with the provisions of said former act. Inasmuch as the appropriation act of the 88th General Assembly here under consideration appropriates the sum of \$100,000 for the cost and expense of this improvement, including the acquisition of the Quincy Dam, the answer to your first question is that the state is not limited to the payment of twenty-five per cent of the total cost of said improvement, unless, of course, such twenty-five per cent of the cost and expense of said improvement, including the acquisition by condemnation or otherwise of said Quincy Dam, should exceed the sum of \$100,000.

The act of the 86th General Assembly, above referred to, clearly expresses the intention of the Legislature that the participation of the state in this improvement, including the acquisition of the Quincy Dam by appropriation proceedings or otherwise, shall be had by the state in connection with the improvement of said Miami River by proper proceedings to be had before the joint board of county commissioners of the counties interested and affected by said improvement. I am of the opinion, therefore, that you are not authorized to appropriate or otherwise acquire and remove said Quincy Dam except as a part of a program for the improvement of said river to be participated in by the counties interested in said improvement. Inasmuch, however, as Section 4 of said act of the 86th General Assembly, above quoted, provides that all expenses in connection with the condemnation proceedings relating to the removal of Quincy Dam shall be paid out of funds provided for the dredging and improving of the Miami River, which funds are, I believe, moneys appropriated by the Legislature for this purpose, I am further of the opinion that you are authorized to acquire and remove said dam by appropriation proceedings or otherwise by payment made directly to the owner of such dam out of moneys released for this purpose by the Controlling Board out of said appropriation; and that you are not required to issue a voucher against this appropriation to the treasurer of any of the counties interested for the payment of the cost of acquiring and removing said dam.

Responsive to the other questions presented in your communication, I am of the opinion that the balance of said appropriation made by the 88th General Assembly over and above the amount necessary to be expended in the acquisition and removal of Quincy Dam, when the same is released from time to time by the Controlling Board and to the extent of the money so released, may be paid over to the treasurer of the proper county for use in connection with moneys secured by assessment made by the joint board of county commissioners for the purposes of said improvement.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2534.

PROSECUTING ATTORNEY ELECT—CRIMINAL CASES PENDING—NO RESPONSIBILITY CHARGED TO—INCUMBENT OF OFFICE MAY EMPLOY PROSECUTOR ELECT IN PREPARATION OF CASES FOR TRIAL.

SYLLABUS:

A newly elected prosecuting attorney has no legal responsibility in connection with the preparation of criminal cases now pending, until such time as he assumes the duties of his office.

The present prosecuting attorney may properly employ the newly elected prosecuting attorney prior to the time of taking office, in connection with the investigation and discovery of evidence and the preparation of cases which will later be for trial, and pay for said services from the fund arising under Sections 3004 and 3004-1, of the General Code.

COLUMBUS, OHIO, November 14, 1930.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting my opinion upon the following: