

Under date of September 5, 1929, I rendered to your predecessor, Hon. Robert N. Waid, an opinion which is found in Opinions of the Attorney General for 1929, volume II, page 1417, the syllabus of which reads as follows:

"The provisions of Sections 8324, et seq., General Code, are not applicable to state works or improvements, and the Director of Highways is without authority to withhold funds due to a contractor under a contract entered into with the state for the construction of works or improvements of the state under the direction of the Director of Highways, on the ground that a person or corporation has filed with such Director a sworn itemized statement of material furnished to such contractor and used in the construction of such works or improvement for the purpose of seeking a lien upon such funds."

Upon re-examining the statutes, and decisions of the courts, I am of the opinion that the above ruling was correct, and I hereby affirm the same.

With respect to your specific question as to whether this balance should be held for the creditors, or should it be paid to the trustee in bankruptcy, the trustee in bankruptcy is not obligated to assume and perform the liabilities under an executory contract, however, when he does elect to accept and perform such executory contract, he accepts the contract, subject to exactly the same liabilities, and is entitled to the same benefits as the bankrupt.

In Collier on Bankruptcy, Thirteenth Edition, Vol. 2, p. 1739, the law is summarized as follows:

"Trustees in bankruptcy may either assume or renounce executory contracts of the bankrupt as they deem best for the interests of the estate, and they are entitled to a reasonable time to elect whether to accept such contracts or to repudiate them. * * If they elect to assume such a contract, they are required to take it cum onere, as the bankrupt enjoyed it, subject to all its provisions and conditions, in the same plight and condition that the bankrupt held it."

In view of the foregoing, I am of the opinion that you owe no debt to the creditors whose claims would have been valid against the surety and that these creditors have no authority to press a claim against the funds in your hands, and that therefore the balance of the funds should be paid to the trustee in bankruptcy when, and as he becomes entitled to the same, under the contract of the bankrupt.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3823.

CHURCH PROPERTY—USED EXCLUSIVELY FOR PUBLIC WORSHIP
—SUBJECT TO ASSESSMENTS FOR STREET IMPROVEMENTS.

SYLLABUS:

Under section 3812 of the General Code, a municipality has the authority to levy assessments for street improvements upon church property used exclusively for public worship, where such church property lies within the municipality.

COLUMBUS, OHIO, December 8, 1931.

HON. HOWARD GOLDSBERRY, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—YOUR recent request for an opinion is as follows:

“Under section 3812 of the General Code, does a municipality have authority to levy assessments for street improvements upon church property within a municipal corporation, used exclusively for public worship?”

Would the rule set down in the case of Jackson, Treasurer, versus The Board of Education of Cedarville Township Rural School District, Green County, found in 115 Ohio State, at page 368, apply to the above facts?”

General Code Section 5349, with reference to exemption of church property from taxation, reads as follows:

“Public school houses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation. This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state, but leaseholds, or other estates or property, real or personal, the rents, issues, profits and income of which is given to a city, village, school district, or sub-district in this state, exclusively for the use, endowment or support of schools for the free education of youth without charge, shall be exempt from taxation as long as such property, or the rents, issues, profits or income thereof is used and exclusively applied for the support of free education by such city, village, district or subdistrict.”

The courts and the legislature have a well defined distinction between general taxes and special assessments, and the courts have on numerous occasions held that the fact that property is exempt from general taxation does not render it exempt from local assessments. See *City of Lima vs. Cemetery Association*, 42 O. S., 128; *Watterson vs. Halliday*, 2 O. N. P. (N. S.), 693; *Gilmour vs. Pelton*, 5 O. Dec. Rep., 447.

In the case of *City of Lima vs. Cemetery Association*, the court held in the first branch of the syllabus as follows:

“In a general sense, a tax is an assessment, and an assessment is a tax; but there is a well-recognized distinction between them, an assessment being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed.”

In the third branch of the syllabus of this same case the court held that a cemetery association was not exempt from special assessments, as follows:

"An incorporated cemetery association is not relieved from an assessment for a street improvement by a statutory provision exempting its lands from taxation, such exemption being regarded as confined to taxes as distinguished from local assessments.

While this decision of the court discusses cemetery associations whose property is exempt from general taxation by reason of General Code section 5350, and church property is exempt from general taxation by reason of General Code section 5349, upon an examination of these sections it is to be noted that all of these sections were originally separate paragraphs of Revised Statutes section 2732. The decision of the Supreme Court in *Lima vs. Cemetery Association* would, therefore, be equally applicable to church property.

The case of *Jackson, Treasurer, vs. Board of Education of Cedarville Township Rural School District*, cited in your request, is affirmatory of the reasoning in the earlier holding of the Supreme Court of Ohio except that its subject matter is school property.

It is therefore my opinion that under Section 3812 of the General Code, a municipality has the authority to levy assessments for street improvements upon church property used exclusively for public worship, where such church property lies within the municipality.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3824.

DELINQUENT LAND TAXES—UNDER AMENDED SECTION 5704, GENERAL CODE, LIST IS TO BE CERTIFIED BY COUNTY AUDITOR AFTER AUGUST, 1932, SETTLEMENT—THEREAFTER LIST MAY BE PUBLISHED.

SYLLABUS:

Under Section 5704, General Code, as amended in Amended Senate Bill No. 326, enacted by the 89th General Assembly, the delinquent land tax list therein provided for is not to be made up and certified by the county auditor until after the settlement had by the county auditor with the county treasurer in August, 1932.

Inasmuch as the original provisions of Section 5704, General Code, requiring the county auditor to publish the delinquent land tax list between the twentieth day of December and the second Thursday in February, were repealed when said Amended Senate Bill No. 326 went into effect on October 14, 1931, there is now no authority for the publication of any delinquent land tax list until such list is made up and certified by the county auditor after said August, 1932, settlement.

COLUMBUS, OHIO, December 8, 1931.

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

GENTLEMEN:—This is to acknowledge the receipt from you of a communication which reads in part as follows: