

2839.

APPROVAL, BONDS OF KNOX COUNTY IN AMOUNT OF \$250,000 FOR ERECTION OF COUNTY MEMORIAL BUILDING.

COLUMBUS, OHIO, February 4, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2840.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN MAHONING, WILLIAMS AND PICKAWAY COUNTIES, OHIO.

COLUMBUS, OHIO, February 4, 1922.

Department of Highways and Public Works, Division of Highways, Columbus, Ohio.

2841.

ADMINISTRATIVE CODE—DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS HAS AUTHORITY TO PURCHASE MACHINERY, TOOLS, EQUIPMENT, SUPPLIES AND MATERIAL FOR PURPOSES NAMED IN SECTIONS 1191, 1224 AND 1231 G. C.—ALSO HAS AUTHORITY TO SELL AND EXCHANGE WORN-OUT MACHINERY, TOOLS AND EQUIPMENT UNDER SECTION 1231 G. C.—SUBJECT TO REQUIREMENTS OF SECTION 6 OF APPROPRIATION ACT (109 O. L. 415).

The enactment of section 154-37 G. C. (109 O. L. 105; 116) did not operate to transfer to the Department of Finance the power conferred on the Department of Highways and Public Works by sections 1191, 1224 and 1231 G. C. to purchase machinery, tools, equipment, supplies and material for the purposes named in the latter sections; or the power conferred on the Department of Highways and Public Works is to exercise these functions of purchase, sale and exchange, subject, primarily, to the requirements of sections 1191, 1224 and 1231, and secondarily to the requirements of section 6 of the General Appropriation Act, 109 O. L. 415.

COLUMBUS, OHIO, February 6, 1922.

HON. W. ALBERT DAVIS, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your communication of recent date requesting the opinion of this department upon the following:

"In view of the provisions of section 154-37 and of section 6 of the general appropriation bill found in 109 O. L. 415, what is the correct procedure in the matter of purchase of machinery, tools, equipment, supplies and material for use in the construction of highways under sections 1191 and 1231 G. C.; in the maintenance of highways under section 1224 G. C., and in the sale and exchange of machinery, tools and equipment under 1231 G. C.?"

Sections 1191, 1231 and 1224 G. C. are quite lengthy, and it is sufficient, for the purposes of your inquiry, to state the substance of them.

Section 1191 G. C. deals primarily with the application by the county commissioners or township trustees for aid by the state in the construction of highways. If county commissioners or township trustees do not avail themselves of the privilege to make application for state aid, then an alternative is provided for by the section in the following language:

"If the county commissioners or township trustees do not make application for the apportionment to such county on or before the first day of May then the state highway commissioner shall enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof in said county, either by contract, force account or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof, except that portion to be assessed against abutting property, from the apportionment of the appropriation due said county and unused or unapplied for by the said county or any board of trustees thereof, as hereinafter provided."

Referring next to section 1231 G. C. as amended in 109 O. L. 299, we find that it has particular reference to work on main market roads. The opening lines of the section are to the effect that the Director of Highways and Public Works

"subject to the provisions of law governing the state highway department, shall have power to purchase such equipment and materials, and employ such labor as may be deemed necessary to execute any work upon said main market roads."

Further along in the section are these provisions:

"The state highway commissioner is hereby authorized to sell, either at private sale, or at public sale, after such notice as he may deem proper, any machinery, tools or equipment that through wear have become unfit for use. The proceeds of such sale shall be paid into the state treasury to the credit of the state highway improvement fund. The state highway commissioner is also authorized to exchange such machinery, tools and equipment for new equipment and pay the balance of the cost of such new equipment from any funds available for that purpose."

The closing sentence of the section reads:

"The funds appropriated or available for main market roads shall be used for carrying out the provisions of the section."

It may be stated that said section 1231 G. C. has primary reference to the ex-

penditure of the so-called main market road fund accruing from the setting aside to main market road improvement of twenty-five per cent of the state highway improvement levy. (See section 1221 G. C.)

Section 1224 G. C. has primary reference to the expenditure of the state's share of automobile license tax funds accruing under the provisions of section 6292 G. C. Said section 1224 is to the effect that the state highway commissioner shall maintain and repair those sections of inter-county highway and main market roads which have been originally constructed by the aid of state money or taken over by the state after being constructed. Among its provisions are the following:

"The state highway commissioner may enter into a contract with any individual, firm or corporation which gives sufficient bond for the faithful performance of said contract, or with the county commissioners of any county or the township trustees of any township in which such highway is situated for the repair and maintenance of such highways, or any part thereof, according to the plans and specifications provided by the state commissioner, or for the furnishing of the material or labor for such repair and maintenance, or the state highway commissioner may furnish the material or labor or both and supervise the repair and maintenance."

(Somewhat similar provisions on the subject of maintenance and repair are to be found in the last paragraph of section 1221, G. C.)

It is thus seen that under the quoted provisions of said sections 1191, 1224 and 1231, the state highway commissioner in lieu of proceeding by contract, may proceed by force account as that term is used in the strict sense, or in other words, as force account has been described in an opinion of this department of date December 13, 1917, appearing in Opinions of Attorney General, 1917, Vol. III, p. 2332, of which opinion the fourth headnote reads:

"4. The term 'force account' implies that the department officer or board having work to do, instead of entering into a contract for the performance of the work, assumes a direct oversight of the same, employing men with teams, purchasing material and paying for the same without reference to any contract whatever."

The quoted provisions of section 1191 confer on the Director of Highways and Public Works a somewhat broader power than is implied in the strict sense of the term "force account," since said section authorizes proceedings either by contract, force account, or in such manner as the state highway commissioner may deem for the best interests of the public; but for present purposes, it will be assumed that your inquiry relates only to the relations of the Department of Finance with the Department of Highways and Public Works in the matter of procedure under force account in the strict sense, as above defined.

The quoted provisions of sections 1191, 1224 and 1231 have all been in effect for a number of years. The principal point raised by your inquiry is the effect upon these quoted provisions of the going into effect on July 1st, 1921, as a part of the administrative code of the provisions, underscored below, of section 154-37, which reads:

"The department of finance shall succeed to and exercise all powers and perform all duties vested by sections one thousand eight hundred and forty-six and one thousand eight hundred and forty-seven of the General Code

jointly in the secretary of state and the auditor of state, which said powers are hereby transferred to and vested in said department.

The department of finance shall succeed to and exercise all powers of the state purchasing agent in the office of the secretary of state, and the secretary of state and auditor of state with respect to the purchase of supplies and equipment required for the use and maintenance of state officers, boards and commissions, the commissioners of public printing and the supervisor of public printing, and shall exercise all powers and perform all duties as to purchases heretofore vested in the Ohio board of administration under the provisions of section one thousand eight hundred and forty-nine of the General Code. Wherever powers are conferred or duties imposed upon any of such departments, offices or officers with respect to the matters and things herein mentioned, such powers and duties shall be construed as vested in the department of finance. *In addition to the powers so transferred to it, the department of finance shall have power to purchase all other supplies, material and equipment for the use of the state departments, offices and institutions, excepting the military department and institutions administered by boards of trustees, and, excepting as to such department and institutions, to make contracts for and superintend the telephone and telegraph service for the state departments, offices and institutions. So far as practicable, the department of finance shall make all purchases under authority of this chapter from the department of public welfare in the exercise of the functions of said department in the management of state institutions."*

It is believed that the principle which is determinative of the point at issue is that which furnished the ground for the conclusion of my predecessor in an opinion dated January 31, 1918, directed to the State Highway Commissioner, and found in Volume I, Opinions of Attorney-General, 1918, at page 209. In that opinion consideration was given to the question whether sales of worn-out machinery, tools and equipment belonging to the State Highway Department should be had under the provisions of section 1231 G. C. or of 196-12 G. C. My predecessor noted that sections 1231 and 196-12 in their then form were found in acts of the General Assembly, passed respectively on March 20, 1917, and March 21, 1917, and that while section 1231 in terms conferred upon the State Highway Commissioner the power to dispose of worn-out machinery, tools and equipment, said section 196-12 in terms conferred the same power upon the State Purchasing Agent. In resolving the seeming inconsistency between the two provisions, my predecessor applied this rule as stated by him at page 210 of the opinion:

"The proposition is well established and is universally held by the courts that the provisions of a special act will control in reference to a certain matter rather than the provisions of a general act which might include the same matter for which provision is made in the special act."

In concluding the opinion, my predecessor said:

"Our own supreme court in *State ex rel. vs. The Mayor, et al.*, 14 O. S., 472, lays down this proposition in the fifth branch of the syllabus:

'It is an established rule in the construction of statutes that a subsequent statute, treating a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be construed as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning.'

From all the above it is quite evident what answer should be given to the question propounded by you. The provisions of the White-Mulcahy act giving your department the power and authority to purchase supplies and equipment and to sell or exchange the same, should be given force and effect, notwithstanding the provisions of the act creating the state purchasing department having to do with the same matter, viz.: purchasing, selling and exchanging supplies and equipment for the different officers and departments of the state.

Hence, you will govern your acts in reference to the above matters by the provisions of the sections of the General Code which apply directly to your department, and not by the provisions of the act creating the state purchasing department.

To be sure the principle herein enunciated applies only to such supplies and such equipment in reference to which you are given the specific power and authority to purchase, sell or exchange. In other respects your department would be controlled by the state purchasing act just the same as are all other departments of the state."

It is of interest to quote from the opinion of the supreme court in the case thus cited by my predecessor, State ex rel. vs. The Mayor, 14 O. S. 472, the comments of the court on a Pennsylvania case. After citing the latter case, Brown vs. County Commissioners, 21 Penn. St. R., our own supreme court say:

"This last case presented a question of statutory construction which is closely analogous to the question here before us. There, the legislature of Pennsylvania had, by special act, established a county board, for the county of Philadelphia, consisting of the members, for the time being, of the senate and house of representatives from the city and county; and the act declared that it should not be lawful for the county *commissioners* of that county to levy any tax or borrow any money without the consent of the county board. By a subsequent general act, 'relating to counties and townships and county and township officers,' it was declared that 'the corporate powers of the several counties and townships shall be exercised by the commissioners and supervisors thereof respectively.' It was held by the supreme court of the state, that this provision of the general act, did not repeal, by implication, the provisions of the prior special act above referred to; and Black, C. J., delivering the opinion of the court, says: 'It seems to be well settled, that a general statute without negative words, cannot repeal a previous statute which is particular, even though the provisions of one be different from the other. Precisely such are the statutes before us. It is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances of one county had made necessary.' Applying this remark and the rule which it sanctions, to the case before us, we say—it is against reason to suppose that the legislature, in framing a general system for the organization and ordinary government of municipal corporations, intended to repeal, wholly or in part, pre-existing special acts which had been passed in view of the supposed interests and wants of particular localities, in respect to a subject matter not connected with their organization or ordinary government."

Later cases adhering to rule of construction thus laid down by the supreme court are:

Commissioners vs. Board of Public Works, 39 O. S. 628;
Shunk vs. Bank, 22 O. S. 508;
State ex rel. Olds vs. Commissioners, 20 O. S. 421;
Doll vs. Barr, 58 O. S. 113; 120.

The opinion of my predecessor had particular reference to the sale of worn-out machinery, tools and equipment; but it is clear that what he said on that subject had full application in principle to the purchasing power vested in the State Highway Commissioner by the quoted provisions of sections 1191, 1224 and 1231, which quoted provisions were in effect at the time the previous opinion was rendered.

When the rule of statutory construction stated is applied to the situation created by the enactment of the underscored provisions of section 154-7 as compared with the quoted provisions of sections 1191, 1224 and 1231, the result is that since the provisions in question in section 154-37 are general and affirmative in character, they cannot be taken as overriding or affecting provisions special in character, such as are those in the quoted provisions of said sections 1191, 1224 and 1231.

As against the view just stated, it cannot be claimed with any force that the provisions of section 154-37 now in question do not present a case of seeming inconsistency with the quoted provisions of sections 1191, etc., but were designed to effect a transfer of the functions described in the latter provisions. It is to be borne in mind that the State Highway Department (now part of the Department of Highways and Public Works) is governed by a complete code (Sects. 1178 to 1231-7); that this code had its beginning as early as 1904 and has since been the subject of both frequent and comprehensive amendment and that the policy of the General Assembly in legislating as to the Highway Department has been to prescribe specific procedure directly applicable to the Highway Department alone rather than to leave the department to be conducted under general statutes. Examples of this policy are to be found not only in the statutes considered in the opinion of my predecessor above referred to, but also in a comparison of section 1224-1, relating to the use by the Highway Department of prison made brick, with section 196-6, relating generally to the use of supplies and equipment furnished by the state purchasing agent; and in a comparison of section 1206 and related sections governing the Highway Department in the matter of letting of contracts, amount of contractors' bonds, completion of defaulted contracts, etc., with sections 2314 et seq., prescribing a substantially different procedure as to the state's contracts generally. Moreover, sections 1191, 1224 and 1231 permit the State Highway Commissioner to proceed by contract as well as by force account, and thus charge that officer with the responsibility of deciding as to which of the two methods it will be in the public interest to adopt in a given case. Under these circumstances, it is to be presumed that had the General Assembly intended to transfer to another department the responsibility as to a part of one of the two methods of building or repairing roads, i. e., the so-called force account method, it would have done so in the clear and unmistakable language of transfer, such as is used in the first part of section 154-37, relating to transfer of the purchasing power previously resting in the state purchasing agent and the board of administration. The fact is that when the underscored language of section 154-37 is compared with the positive language of the first part of the section, it cannot be said that even in letter does the underscored language provide for a transfer of functions theretofore provided for by specific statute. Again, the most that can be claimed for the underscored language when it is compared with the specific terms of sections 1191, etc., is that it vests an option in the Department of Finance either itself to make the purchases contemplated by the latter sections or to permit the Department of Highways and Public Works to make them; and it is not in the nature of things that the General Assembly would leave to an executive

officer or department the matter of deciding whether a function is to be carried out by the officer specifically named by statute, or by some other officer. It is to be noted, too, that while the Administrative Code, containing section 154-37, was passed on April 19, 1921, section 1231 was subsequently amended (Act April 28, 1921, 109 O. L. 299); and though, the purpose of the latter amendment was to permit the Highway Commissioner to proceed on force account when local authorities were paying part of the cost, rather than to enlarge upon the force account powers themselves as authorized by section 1231 previous to the amendment, the fact remains that in making the amendment the General Assembly referred to the State Highway Department and not to the Department of Finance as being authorized to purchase equipment and materials, and to sell and exchange worn-out machinery, tools and equipment.

Recurring to the underscored language of section 154-37, it is to be said that it has a wide field of operation other than in being applied to purchasing functions already specifically provided for by statute. It will be borne in mind that in the conduct of the state government, many purchases are to be made by various departments, for which no authority is found except in the appropriation bills. For examples of this, we need go no further than the appropriations to the Department of Highways and Public Works. See Appropriation Act, 109 O. L. 415. In this act at pages 441 and 442 are large appropriations for (1) policing, patrolling and maintaining highways; (2) for constructing, improving, maintaining and repairing main market roads; and (3) for constructing, improving, maintaining and repairing inter-county highways, to the expenditure of which several appropriations the specific provisions of sections 1224, 1231 and 1191, respectively, are primarily applicable. On the other hand, we find in the same appropriation bill such items as "Supplies—* * *—Office; Motor Vehicle; General Plant;" "Materials—General Plant;" and "Equipment—Replacement—Office; Motor Vehicle; General Plant." (p. 441.) The expenditure of the latter items is not referable to such specific provisions as are found in sections 1191, 1224 and 1231.

Upon the whole, then, it is to be concluded that the underscored language of section 154-37 is to be taken, not as the language of a transfer of powers, but as a general provision originally conferring upon the Department of Finance power to make purchases of supplies, material and equipment for the use of departments (other than the military department and institutions administered by boards of trustees), in those cases wherein the purchases are not provided by permanent statute to be made in a given way.

Your letter mentions section 6 of the Appropriation Bill 109 O. L. 408. The effect of that section has already been discussed in the two concluding paragraphs of Opinion 2491 of this department, dated October 18, 1921, and directed to the Department of Finance; and no more need be said of it here than that the purchases inquired about in your letter first above quoted are to be made in conformity with the requirements of sections 1191, 1224 and 1231, primarily, and in conformity with the provisions of said section 6, secondarily.

Perhaps some further brief reference should be made to the subject of sale and exchange of worn-out machinery, tools and equipment. Consistently with what has been said, such sale and exchange are to be made by the Department of Highways and Public Works in conformity with section 1231 G. C. In the case of exchange or "trading in" of worn-out machinery, etc., competition may be had in the transaction, in accordance with the spirit of section 6 of the Appropriation Bill, through the medium of calling for bids on new machinery, etc., with the condition of the bidder's taking old machinery as a part consideration; or in case this course is not practicable, the matter may be submitted to the controlling board before an exchange is made.

While there may be some inconsistency between the views herein expressed, and certain general statements made in subdivision (3) of said Opinion 2491 of date October 18, 1921, it is to be said that the previous opinion did not go into a critical examination of the difference in terms in section 154-37 as between the transfer of the purchasing powers of the purchasing agent and board of administration, and the general conferring of power by the language of that section in cases other than the purchasing agent and board of administration; nor into a critical examination of the relation between section 154-37 and the specific provisions above quoted from sections 1191, 1224 and 1231.

It is proper to state that your department, by virtue of the authority conferred on it by section 154-28, G. C., may prescribe for the Department of Highways and Public Works in the making of the purchases in question, such general rules as to accounting, reporting, procedure, etc., not inconsistent with statute, as may be thought to be in the public interest.

In the light of what has been said, you are advised in specific answer to your inquiry, that notwithstanding the provisions of section 154-37, G. C., purchases of machinery, tools, equipment, supplies and material for use by the Department of Highways and Public Works on force account under authority of sections 1191, 1224 and 1231, are to be made by the Department of Highways and Public Works in conformity with the requirements of said sections and of section 6 of the General Appropriation Act, and not by the Department of Finance; and that the sale and exchange of worn-out machinery, tools and equipment as mentioned in section 1231, G. C., is also to be made by the Department of Highways and Public Works, subject to the requirements of said section and of said section 6 of the Appropriation Act.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2842.

MUNICIPAL CORPORATIONS—RESURFACING STREETS UPON ASSESSMENT PLAN—MAY USE FUNDS ACCRUING UNDER SECTION 6309-2 G. C. (AUTOMOBILE LICENSE TAX).

In resurfacing streets upon the assessment plan provided for by sections 3812 et seq. G. C., municipalities in providing for their share of the cost, may make use of the funds accruing to them under the provisions of section 6309-2, G. C.

COLUMBUS, OHIO, February 6, 1922.

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

GENTLEMEN:—You have recently submitted for the consideration of this department the following inquiry:

"In a city where it has been determined to resurface certain streets, the cost of the same to be paid one-half by the property owners by special assessment and the other half by the city, could such resurfacing be deemed a repair within the meaning of section 6309-2 G. C., and if so, could the city's portion of such resurfacing be paid from moneys from automobile taxes under said section?"