

highways carry the public travel. Therefore, it would seem just as essential for the county commissioners to have the power to purchase a supply of materials to have on hand to be used to construct roads under its jurisdiction as it would be to have power to purchase such materials to repair or improve such roads.

Taking into consideration the objects and purposes to be attained in the enactment of the sections herein referred to relating to the power of county commissioners to purchase materials, together with the express language used, I am compelled to the conclusion that within other limitations provided by law with reference to the existence of public funds from which payments may be made for such purposes, the county commissioners may purchase material, even though it is intended to be used for the purpose of construction as distinguished from improvement, maintenance and repair. Such power exists from necessary implication in order to carry out the express powers granted to said commissioners in connection with the construction and maintenance of highways, if such power is not expressly granted to make such purchase in the language of the statutes hereinbefore mentioned.

In an opinion of the Attorney General, found in Reports of the Attorney General for 1920, Vol. II, page 1020, it was held that Section 7200, General Code, "by necessary implication confers on county commissioners authority to purchase a site, with building, for the purpose of housing and storing machinery, tools and equipment and conveyances owned by the county."

It may be pointed out in this connection that Section 5625-6, General Code, as enacted in 112 O. L. 394, authorizes a special levy without a vote of the people, within the fifteen mill limitation and subject to the control of the county budget commission, "for the construction, reconstruction, resurfacing and repair of roads and bridges other than state roads and bridges thereon." Of course, before any valid purchase could be made of such material the fund from which payment is to be made should be properly provided and the auditor's certificate under Section 5625-33, General Code, would have to be made before any such contract could be legally entered into.

In view of the foregoing and in specific answer to your inquiry, you are advised that it is my opinion that 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.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2845.

ELECTRIC LIGHT AND POWER PLANT—MUNICIPAL—SALE OF—EXCESS PROCEEDS PAYABLE TO SINKING FUND OR TO SPECIAL FUND FOR PERMANENT IMPROVEMENTS.

SYLLABUS:

Where a municipal electric light and power plant, having the character of a permanent improvement, as defined by Section 5625-1, General Code, is sold by the municipal corporation owning the same, the proceeds of such sale in excess of the amount required for the redemption of bonds issued for the acquisition or construction of such electric light and power plant should be paid into the sinking fund or the bond re-

irement fund of such municipal corporation, or into a special fund for the construction or acquisition of a permanent improvement or improvements of such municipal corporation, in the manner provided by Section 5625-10, General Code.

COLUMBUS, OHIO, November 8, 1928.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication in which you call my attention to Section 3704, General Code, and the applicable provisions of Section 5625-10, General Code, and ask my opinion upon the following question:

“May the proceeds of the sale of city electric light and power distribution system, in excess of the amount required for the redemption of electric light and power distribution system bonds and interest, be placed in a city’s general fund and be used for general purposes?”

Section 3704, General Code, and the last two paragraphs of Section 5625-10, General Code, referred to in your communication, read as follows:

Sec. 3704. “Money arising from the sale or lease of real estate, or a public building or from the sale of personal property, belonging to the corporation, shall be deposited in the treasury in the particular fund by which such property was acquired, or is maintained, and if there be no such fund it shall be deposited in the general fund. If the property was acquired by an issue of bonds the whole or a part of which issue is still outstanding, unpaid and unprovided for, such money, after deducting therefrom the cost of maintenance and administration of the property, shall on warrant of the city auditor be transferred to the trustees of the sinking fund to be applied in the payment of the principal of the bond issue.”

Sec. 5625-10. “ * * * If a permanent improvement of the subdivision is sold, the amount received for the same shall be paid into the sinking fund or the bond retirement fund of the subdivision, or into a special fund for the construction or acquisition of a permanent improvement or improvements.

Money paid into any fund shall be used only for the purposes for which such fund is established.”

Section 3704, General Code, is an old section of the statutory law of the state, the same being formerly, 1536-119, Bates Revised Statutes, and was enacted in its present form in 1904 (97 O. L. 516).

Section 5625-10, General Code, a part of which is above quoted, is a new section and was enacted by the 87th General Assembly as a part of House Bill No. 80, passed April 13, 1927, effective August 10, 1927, (112 O. L. 391). In considering the application of the above provisions of Section 5625-10, General Code, to the question presented in your communication, it is to be assumed that the term “permanent improvement” as used in this section of the General Code, carries the same meaning ascribed to it by Section 5625-1, General Code, enacted as a part of the same act, and by Section 2293-1, General Code, enacted as a part of the Uniform Bond Act which likewise went into effect on the 10th day of August, 1927, (112 O. L. 364).

By the provisions of Sections 5625-1 and 2293-1, General Code, the term "permanent improvement" is defined to mean, "any property, assets or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and including reconstructions, enlargements and extensions thereof, having an estimated life or usefulness of five years or more."

In the consideration of the question presented in your communication, it is manifest that if effect is given to the above quoted provisions of Section 5625-10, General Code, with respect to the sale of such public buildings, structures and real estate connected therewith of a municipal corporation as constitutes a permanent improvement within the meaning of said section, a different disposition is required to be made of the proceeds of the sale of such municipal property in excess of outstanding bonds issued for the purpose of constructing or acquiring said property, than that heretofore authorized and directed by the provisions of Section 3704, General Code; and that to such extent the provisions of Section 3704, General Code, are repealed by implication by the later provisions of Section 5625-10, General Code.

The question here presented, therefore, is whether assuming that the electric light and power plant referred to in your communication is a permanent improvement within the pertinent provisions of Section 5625-10, General Code, said section applies to the disposition to be made of the proceeds of the sale of such electric light and power plant in excess of the amount thereof required for the redemption of bonds issued for the acquisition and construction of said plant.

As above noted, the consideration of this question requires the determination of the question whether the pertinent provision of Section 3704, General Code, relating to the disposition to be made of the proceeds of the sale of such property have been repealed by implication by the provisions in Section 5625-10, General Code, above quoted. With respect to this question, it is to be noted that Section 3704, General Code, is a special statute in the sense that the same applies only to municipal corporations; while the provisions of Section 5625-10, General Code, are general, applying to all political subdivisions of the state.

Aside from the general presumption against repeals by implication, we are required to reckon with the strict rule of statutory construction that a general statute will not repeal a special statute unless the purpose so to do is clearly manifest. This rule of statutory construction is stated in the opinion of the court in the case of *Commissioners vs. Board of Public Works*, 39 O. S. 628, 632, as follows:

"Repeals by implication are not favored. So, particular and positive provisions of a prior act are not affected by a subsequent statute treating a subject in general terms and not expressly contradicting the provisions of the prior act, unless such intention is clear. *Perrysburg vs. Fosdick*, 14 O. S. 472; *Knox Co. vs. McComb*, 19 O. S. 320, 346; *Shunk vs. First National Bank*, 22 O. S. 508, 515; *Olds vs. Franklin Co.*, 20 O. S. 421; *Allen vs. Russell*, 39 O. S. 336.

The decided weight of authority supports the proposition that when there is a general act and also one local and special on the same subject, in conflicting terms, neither necessarily abrogates the other, but both are permitted to stand together, and it is immaterial which is of the later date. *Bishop on the Written Laws*, 112 b.; *Crane vs. Recder*, 22 Mich. 322; *People vs. Quigg*, 59 N. Y. 83."

A rule of construction, however, which found expression in the early judicial history of this state is that: "When a law enacts a thing to be done different from the

same thing required by a former law, the first thereby becomes repealed without any direct expression of such intention by the law-making power." *Moore vs. Vance*, 1 Ohio, 1, 10.

In the case of *Goff vs. Gates*, 87 O. S. 142, it was held :

"An act of the Legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

As a rule of construction corollary to that above quoted, it has been held that when there are many special acts in the sense that they each apply to specific and individual cases generally similar, a later statute, general in its terms will be considered general in its operation, and intended to apply to all specific instances and to replace and supersede the specific acts. *Allaby vs. Mauston Electric Service Company*, 135 Wisc. 345, 16.L. R. A. (N. S.) 420.

As considerations touching the application of the rules of construction above stated, it will be noted that besides the provisions of Section 3704, General Code, authorizing and providing for the sale of public buildings and real estate of municipal corporations, counties, townships and school districts, are likewise authorized by specific statutory provisions to sell real property belonging to said respective political subdivisions, some of which properties obviously may have the character of permanent improvements.

Section 2447, General Code, authorizing the commissioners of a county to sell real property of the county not needed for public use, provides that the proceeds of such sale or such parts thereof as the county commissioners may designate, may be placed by the commissioners in a separate fund to be used only for the construction, equipment, maintenance or repair of other county buildings.

Sections 3281 and 4756, General Code, providing respectively for the sale of real property of townships and school districts, make no special provision with respect to the disposition of the proceeds of such sales; and in the absence of such special provision the sale of property so made has been heretofore covered into the general funds of said political subdivisions.

The act of the General Assembly of which Section 5625-10, General Code is a part, is a comprehensive law providing plans and procedure relating to the budgets of political subdivisions of the state, including municipal corporations; and as a part of such budget plan and procedure relating thereto, it is provided by the terms of Section 5625-10, General Code, above quoted, that the proceeds of the sale of a permanent improvement of a political subdivision shall be paid into the sinking fund or bond retirement fund of the subdivision, or into any special fund for the construction or acquisition of a permanent improvement or improvements.

Giving effect to the rule of construction stated by the Supreme Court in the case of *Goff vs. Gates*, supra, and to the corollary rule of construction above noted, I am constrained to the view that effect must be given to the later provisions of Section 5625-10, General Code, with respect to the question here presented, and that the provisions of Section 3704, General Code, directing the payment of the proceeds of the sale of such property in excess of the outstanding bonds against such property into the general fund of the municipal corporation, have been repealed by implication.

On November 14, 1927, this department directed to you an opinion addressed to the question whether the proceeds of the sale of a public improvement of a municipal corporation which was acquired by an issue of bonds, which are still outstanding and

unpaid, could be placed in a special fund for the acquisition of a permanent improvement. Opinions of the Attorney General for 1927, Vol. III, page 2234. In this opinion it was held :

"Where a permanent improvement, as defined in Section 2293-1, General Code, for the acquisition of which bonds have been issued, the whole or part of which issue is still outstanding, unpaid and unprovided for, is sold, the proceeds of such sale should be placed in the sinking fund, to be applied to the payment of the principal of such bonds as provided in Section 3704, General Code. If there be any surplus remaining after the required amount has been so deposited, such surplus may be placed in a special fund for the acquisition of a 'permanent improvement,' or otherwise disposed of, as provided in Section 5625-10, General Code."

In said opinion after considering the provisions of Sections 3704 and 5625-10, General Code, above quoted, it was said :

"It seems to me, therefore, that Section 5625-10, General Code, and Section 3704, General Code, are inconsistent in their provisions relative to the disposition of the proceeds of the sale of a permanent improvement as to any excess of such proceeds over and above the amount required by Section 3704 to be paid into the sinking fund to be applied to the payment of the principal of the bond issue. To the extent of any such inconsistency the provisions of Section 5625-10, General Code, being later in point of time, are controlling, and it is my opinion that when the property sold is a 'permanent improvement,' defined by Section 2293-1, General Code (112 O. L. 365), as any property, asset or improvement, with an estimated life of usefulness of five years or more, any surplus over and above the amount required to be placed in the hands of the trustees of the sinking fund need not be placed in the general fund but may be placed in a special fund for the acquisition of a permanent improvement or otherwise disposed of, as provided in Section 5625-10, General Code. Where the property sold is not a 'permanent improvement,' any such surplus must be deposited in the general fund, as provided in Section 3704, General Code.

For the foregoing reasons it is my opinion that where a permanent improvement, as defined in Section 2293-1, General Code, for the acquisition of which bonds have been issued, the whole or part of which issue is still outstanding, unpaid and unprovided for, is sold, the proceeds of such sale should be placed in the sinking fund, to be applied to the payment of the principal of such bonds as provided in Section 3704, General Code. If there be any surplus remaining after the required amount has been so deposited, such surplus may be placed in a special fund for the acquisition of a 'permanent improvement,' or otherwise disposed of, as provided in Section 5625-10, General Code."

Giving effect to the former opinion of this department above referred to and the independent conclusions herein reached with respect to the construction and application of the provisions of Section 5625-10, General Code, to the specific question here presented, I am of the opinion that assuming the electric light and power plant referred to in your question is a permanent improvement within the meaning of Section 5625-10, General Code, your question should be answered in the negative.

Respectfully,

EDWARD C. TURNER,

Attorney General.