1762.

APPROVAL, BONDS OF VILLAGE OF OAKWOOD, OHIO, IN AMOUNT OF $12,600 FOR FIRE ENGINE HOUSE.

COLUMBUS, OHIO, December 31, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1763.

APPROVAL, BONDS OF CITY OF IRONTON, OHIO, IN AMOUNT OF $12,000 FOR STREET IMPROVEMENTS.

COLUMBUS, OHIO, December 31, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1764.

APPROVAL, ARTICLES OF INCORPORATION OF THE AMERICAN ASSURANCE AND BONDING COMPANY OF CINCINNATI, OHIO.

COLUMBUS, OHIO, December 31, 1920.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of The American Assurance and Bonding Company of Cincinnati, Ohio, are herewith returned to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1765.

ROADS AND HIGHWAYS—DISCUSSION AS TO AUTHORITY OF STATE HIGHWAY COMMISSIONER TO USE EQUIPMENT OF A CONTRACTOR WHO HAS BEEN REMOVED FROM STATE WORK—WHERE GENERAL ASSEMBLY RELEASES CONTRACTOR FROM LIABILITY FOR FAILURE TO COMPLETE ROAD CONTRACT—NOT AUTHORIZED TO PAY CONTRACTOR RENT FOR USE OF EQUIPMENT TO COMPLETE CONTRACT—BENTZ CASE.

1. *In the absence of the consent of the contractor, the state highway commissioner is not authorized to retain and make use of the equipment of such contractor in completing the work embraced in the contract, after the contractor has been removed from his work.*

2. *Where, following the completion of work embraced in a contract, the General Assembly has released the contractor from liability arising because of his having failed to complete his contract, the State Highway Commissioner is not authorized to pay to such contractor rent or royalty on account of the use by the*

state of such contractor's equipment in completing the contract, even though the state prior to the time of the release by the General Assembly, has agreed to pay such rental or royalty.

COLUMBUS, OHIO, December 31, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—You have recently written to this department as follows:

"Permit me to submit the following statement of facts and to make formal request upon you for your opinion regarding the procedure authorized on my part by virtue of the highway law:

On August 1, 1915, the state highway department of Ohio awarded a contract to Bentz Brothers, contractors of Columbus, Ohio, for the construction of the McConnellsville-Athens road, I. C. H. No. 162, section "F," located in Morgan county, Ohio.

The above described contract was formally forfeited by my predecessor, Clinton Cowen, and 'force account' contract awarded to Clifford Shoemaker, in August, 1916. Investigation discloses that Mr. Shoemaker took charge of the completion of the above named contract and used equipment found on the site of the improvement. It is alleged by Bentz Brothers that said equipment belonged to Bentz Bros., the original contractors. From what I can learn, this equipment was used by Clifford Shoemaker, the authorized agent for the state by virtue of his 'force account' contract.

Subsequently the 83d General Assembly enacted into law a bill relieving Bentz Brothers and their bondsmen of all responsibility in connection with the contract.

Bentz Brothers now present a claim covering rental of such equipment used by Clifford Shoemaker, 'force account' agent of the state and used by him on the above contract.

Your opinion is respectfully requested on the following:

1. Does the state highway commissioner have authority to conscript the equipment of a defaulted contractor and use such equipment to complete the contract?

2. Do I, as state highway commissioner, have authority to pay to Bentz Brothers a reasonable rental covering the period such seized equipment was used by 'force account' agent, Clifford Shoemaker?

3. Considering such payment a legitimate charge against the cost of completion of Bentz Brothers contract, am I authorized to make payment thereof from the Rotary Fund?"

Before taking up your inquiries for answer, it should be stated for the sake of exactness that the contract to which you refer was entered into on July 23, 1915, by the state of Ohio, acting through Clinton Cowen, state highway commissioner, with Frank J. Bentz.

The bill to which you refer as having been enacted by the 83rd General Assembly was passed on January 21, 1920, and is now found in 108 O. L. (Pt. II) at page 1131, and reads in full as follows:

"(House Bill No. 571)
An Act
Providing for the Relief of Frank J. Bentz.

Be it enacted by the General Assembly, of the state of Ohio:

Section 1. Whereas, Frank J. Bentz was awarded the contract for the construction of section F of the McConnelsville and Athens road, I. C. H. No. 162, petition No. 1342, in Marion township, Morgan county, Ohio, and had more than half completed the contract when said contract was taken over by the state highway department to be finished by force account; and

Whereas, Subsequently he was drafted by the federal government for war service and was therefore unable to give the contract his attention which contract will be completed by the highway department; and

Whereas, Said Frank J. Bentz has returned from overseas where he was wounded in the battle of the Marne, and finds that through no fault of his own, he and his bondsmen are still held on his contract bond; therefore,

Section 1. Be it enacted that the contract entered into between the said Frank J. Bentz and the highway department of the state of Ohio as hereinbefore specified is hereby declared to be cancelled and annulled and the said Frank J. Bentz and his bondsmen are hereby relieved from all obligation and liabilities incurred by reason of failure to complete said contract."

On December 22, 1919, about one month before the passage of the act just quoted, your department had formally referred to this department for collection the claim of the state against Mr. Bentz and his surety growing out of the contract in question; and in making such reference your department set forth, among other things, that the state highway department, having removed Mr. Bentz from the work in the year 1916, proceeded with the work by force account and finished it about December 1918 at a cost of $39,296.38 over and above the original contract,—the last named amount representing the loss to the state as shown by the records of your department.

On the day next following that on which above-mentioned House Bill No. 571 was passed, another bill known as House Bill No. 727 was passed, now appearing in 108 O. L. (Pt. II), p. 1168, reciting in substance that Morgan county, Ohio, had advanced the sum of $39,296.38 for use by the state in completing the Bentz contract, and directing the state highway department to reimburse that county in the amount named,—with interest from December 1, 1918. It will thus be seen that the loss to the state as certified to this department for collection corresponded exactly to the amount recognized by the General Assembly as having been advanced by Morgan county.

What has been said serves to show that while there are recitals in House Bill No. 571 which might be thought to indicate a belief on the part of the General Assembly that the state had not yet completed the work, yet in fact the work had been done for more than a year when House Bill No. 571 was passed, which fact was recognized by the General Assembly in enacting House Bill No. 727 and fixing December 1, 1918, as the date at which interest should begin to run in favor of Morgan county.

Referring, now, to your first question, as to whether the state highway commissioner may "conscript the equipment of a defaulted contractor and use such equipment to complete the contract," it is to be said that an examination of Mr. Bentz's contract fails to reveal any provision giving the state authority on the contractor's default to retain and make use of his equipment. In the absence of such provision, the answer to your first question is in the negative.

Coming to your second question: For the purposes of this opinion it will be assumed that Mr. Bentz, when the state removed him from his work, objected to

the state's retaining his equipment, and it will be further assumed that Mr. Bentz actually entered into a binding agreement with the state whereby he was to receive an agreed, or a reasonable, rental or royalty from the state for its use of his equipment during completion of the work by the state. You will note that the assumption of fact just stated will afford a basis for the consideration of Mr. Bentz's present claim in its most favorable light from his standpoint. Proceeding, then, upon such broad assumption, how stands the claim?

You will already have noted from the closing lines of House Bill No. 571 that the release given by the state to Mr. Bentz was

> "from all obligation and liabilities incurred by reason of failure to complete said contract."

What was the status of Mr. Bentz's obligation and liability when the release was given?

Section 11317 G. C. reads:

> "A counterclaim is a cause of action existing in favor of a defendant against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action."

Section 11319 G. C. reads:

> "A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."

Plainly, upon the assumption (above made) that the claimant had entered into a valid contract with the state for rental or royalty for the use of his equipment, it follows that the amount of such rental or royalty constituted at the time of the release by the state, a valid cross-demand in favor of Mr. Bentz as against the claim of the state. Since such cross-demand grew out of the very transaction which gave rise to the state's claim, and since the amount of the cross-demand, had it been paid, would have been added to the state's claim as an item of cost on force account, it is clearly to be concluded that from a legal aspect the release granted by the state must be accepted as having taken into account the fact of the existence of the cross-demand, with the result that the claimant, by accepting the benefit conferred by the release of the state, has in legal effect waived his cross-demand, and cannot now be heard to assert it so far as an executive officer of the state is concerned. The right to set up such cross-demand is fully conferred by sections 11317 and 11319, above quoted; and the fact that the state is plaintiff in an action does not prevent a defendant from claiming set-off,—our supreme court having held in the early case of State vs. Franklin Bank, 10 Ohio, 91:

> "In a civil action by the state, the defendant may set off a debt due to him from the state."

As against the conclusion above stated, that claimant must be held to have waived his cross-demand, it is not a valid argument that in the event the state had brought action, the option rested with claimant whether he would set up his

cross-demand; for in the first place it cannot be assumed at this late day, in aid of the claim now in question, that both claimant and his surety would have failed to assert the set-off if the state had not released its claim; and in the second place we must keep in mind that such status as sections 11317 and 11319 were enacted for the purpose of affording or more firmly establishing an efficient and simple remedy as to claims (now known as set-off and counter-claim) whose essential validity and justice had already been fully recognized by the law, for which reason it is plain that the matter of option as to remedy has no bearing on the question of relationship as between cross-demands.

For the reasons indicated, you are advised in specific answer to your second question that you are without authority to pay the rental claimed, covering the period during which Mr. Bentz's equipment was used by the state in completing the contract. This view renders unnecessary a consideration of your third question.

Respectfully,
JOHN G. PRICE,
Attorney-General.

ADDENDUM—OPINION NO. 1765, DATED DECEMBER 31, 1920.

Since the foregoing opinion was written, investigation at your department has developed the fact that Mr. Bentz's contract was before the highway advisory board on several occasions, and that in September of 1918, the board held a hearing in connection with which my predecessor, together with Mr. John F. Kramer, then special counsel, submitted a memorandum to the board, from which I quote the following:

> "Let us now go one step farther and notice what the claims of Bentz Brothers are. As we understand it, they make three claims:
>
> (1) That they should have been allowed larger estimates for work done from time to time during the progress of the improvement.
>
> (2) That they should have been paid rentals on machinery used by the Engineering Service Company, said machinery belonging to Bentz Brothers.
>
> (3) That they should be paid for quarries opened up and developed by them, the products of which were afterwards used by the state in carrying forward said work.
>
> Suppose we would admit that all these claims are correct,—what would be the result? Section 1209 G. C., from which section we quoted above, provides that the state highway commissioner shall pay
>
> 'the full cost and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work.'
>
> From this provision it is quite evident that if the state highway advisory board should hold that Bentz Brothers ought to be paid certain sums of money based upon their claims, the money would eventually have to be recovered back from Bentz Brothers and the surety on their bond; that is, the total cost and expense of the improvement would be enhanced and increased by whatever amount would be awarded to Bentz Brothers under their claims. It would be a strange proceeding indeed to hold that the state of Ohio should pay to Bentz Brothers a sum of money upon

claims made by them when it has already developed that Bentz Brothers owe the state of Ohio something like twenty-two thousand dollars upon this contract. This is evident from the fact that they entered into a contract to complete the work for $40,888.00, while the cost and expense of the work up to date is $62,895.13.

Further, we would like to suggest to the advisory board this question: From whence would the money come to pay Bentz Brothers? The state highway department has no contingent fund from which it can pay such claims as this. In the matter of this improvement the records show that the county agreed to pay $26,000.00 and the state agreed to pay $25,000.00, or a total of $51,000.00 was appropriated for this improvement. This amount of money has already been used and considerably more than this amount has been used. Hence there is nothing in the fund at all out of which Bentz Brothers could be paid, and the only recourse, as said before, would be to the bond which has been signed by Bentz Brothers themselves and by a certain surety company."

It thus appears that prior to the time of the giving of the release by the General Assembly, consideration had been given both by your department and this department to the claim described in the present opinion. The highway advisory board, in conformity with the views of my predecessor, as set forth in the memorandum mentioned, entered the following on September 24, 1918:

"*Morgan County*—I. C. H. No. 162, section "F"—Brief of Special Counsel Kramer presented.

A brief dated September 10 addresed to the board by John F. Kramer, special counsel, signed by Attorney-General McGhee was submitted in which the following suggestions were made:

(1) That the state highway advisory board has no jurisdiction whatever in reference to those matters which took place prior to the time of its coming into existence.

(2) That it has no authority whatever in law to make a finding upon the claims presented to it herein, and that there is no money whatever out of which any sum allowed by it could be paid, even though the board should make a finding; and

(3) If Bentz Brothers have a general claim for damages against the state, it is one which would have to be adjusted by the legislature of the state and not by the state highway advisory board."

Respectfully,
JOHN G. PRICE,
Attorney-General.

1766.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN PUTNAM COUNTY, OHIO.

COLUMBUS, OHIO, December 31, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*