279.

CONTRACT—WHERE CONTRACT WITH STATE BECOMES IMPOSSIBLE OF PERFORMANCE DUE TO DESTRUCTION OF SUBJECT MATTER THROUGH NO FAULT OF CONTRACTOR—OBLIGATION OF CONTRACTOR ENDED BY OPERATION OF LAW—FUNDS CERTIFIED AS AVAILABLE FOR SUCH CONTRACT RELEASED.

SYLLABUS:

Where a contract is entered into by the State through the Director of Highways, whereby a contractor obligates himself to clean a certain well upon state lands, and install a pump thereon, and the contractor undertakes to perform his contract when the casing of the wall collapses, due to the condition of the same which was unknown to anyone at the time the contract was entered into, if the results of such collapse are such as to completely destroy the well and make it impossible to perform said contract and the contractor is in nowise at fault, such contractor is released of his obligation. If such contractor accepts a cancellation of such contract this relieves the State from any obligations to him under the contract and the contract is at an end and any funds certified by the Director of Finance as existing for such purpose are unencumbered by reason of the contract.

COLUMBUS, OHIO, April 28, 1923.

HON. LEON C. HERRICK, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—In a recent communication submitted by the State Architect, Robert S. Harsh, my opinion is requested upon substantially the following statement of facts:

> "On the 7th day of October, 1922, a contract was entered into with the Weinman Pump Manufacturing Co., of this city, for Cleaning of Wells together with labor and materials required for deep well pump in Ohio State Capitol Building; on November 8th, 1922, the Attorney General of Ohio approved this contract, and same was filed in the Auditor's office, and the contractor authorized to proceed with the work.
>
> After working for some time on the cleaning of this well and before the cleaning had been completed, the casing at a depth of about 80 feet collapsed, which after repeated efforts on the part of the contractor to reopen, was found could not be accomplished."

On March 14th, 1923, the Weinman Pump Manufacturing Company addressed a communication to the State Architect as follows:

> "On November 8th, 1922, our company entered into a contract with the State of Ohio to do the following work:
>
> Clean Well together with labor and material required for installing deep well pump in the Ohio State Capitol Building, Columbus, Ohio.
>
> Immediately upon receipt of this signed contract, we started our men to work on this well, and we found after working on this well that the casing was entirely eaten away, and was so thin that it caved in about 80 feet below the surface while we had our tools in the hole, consequently our tools were caught by the cave in. We worked with this well for

about three weeks trying to extract our set of tools, and finally had to give it up.

In going over our cost cards we find that we spent in labor, tools and other expenses to the sum of $755.00 on this well."

On April 4th, 1923, the State Architect advised the Director of Highways in part as follows:

"I have followed the work done by the Weinman Pump Co., in attempting to clean this well, and I am of the opinion that every effort was made on their part to carry out the contract. It so happens. however, that through no fault of theirs, the well caved in at about 80 feet below the surface, which cave-in could not have been foreseen by anyone before the work was started."

On the same date the Director of Highways notified the Weinman Pump Company in writing, that the contract was cancelled on account of the cave-in of the well. The Weinman Pump Company signed an acceptance of such cancellation.

In your communication you further state:

"I have prepared an encumbrance estimate which will release the funds encumbered by encumbrance estimate No. 6879, dated October 7th, 1922, for the sum of $1,674.00, the amount of the contract.

If this procedure complies with the law, kindly notify this Department so that this encumbrance may be removed and the Auditor's office notified that the contract has been cancelled."

From the foregoing it is believed to be evident that the contractor after having duly entered into a contract to clean the well in question and install a pump, abandoned the contract, on the ground that it was impossible of performance, and so notified the Department of Highways. Of course, it is a question of fact as to whether or not the contract was impossible of performance and no attempt will be made herein to determine this question. However, an attempt will be made to define the law relating to contracts under circumstances involving the impossibility of performance.

In the case of State ex rel. Jewett v. Sayre, 91 O. S., page 85, this question was pretty thoroughly discussed in an opinion written by Judge Donahue and the following is quoted from said opinion:

"It is true that the contractor is not excused from substantial performance of his contract merely because performance may be difficult, dangerous or burdensome. Nor does the mere impossibility of performance necessarily relieve the promisor from the payment of damages for failure to perform, unless the contract itself contains a provision, express or implied, releasing him from damages in case the contract becomes impossible of performance. There is, however, a conflict of authority upon this subject, but the great weight of authority seems to support the rule stated in 3 Elliott on Contracts, section 1891: "Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction * * * that the promisor remains responsible for damages,

notwithstanding the supervening impossibility or hardship. It must be borne in mind, however, that it is equally well settled that when performance depends upon the existence of a given person, purpose or thing and such existence or continued existence was the assumed basis of the agreement, the death of the person or the destruction or non-existence of the thing without fault puts an end to the obligation."

It will be observed that the rule is against the relieving of the contractor from damages in those cases where impossibilities arise unless he has protected himself against the same in the contract. In the case under consideration there is no such provision in the contract. However, as pointed out in said opinion it is an equally well settled rule that when the performance of the contract depends upon the existence of a thing, the continuance of which was the basis of the agreement, the destruction of such thing without the fault of the contractor puts an end to the obligation.

In the case under consideration the finding of the State Architect certainly would be strong evidence to support the proposition that the well under consideration was destroyed. If this be true then under the decision above quoted the law would end the obligation of the contractor. Of course, there does not appear to be any express statutory authority authorizing the Director of Highways to cancel a contract. However, it is believed that no consideration need be given to this phase of the question for the reason that the law itself puts an end to the contractor's obligation under such circumstances. In the case above noted it was argued that the county commissioners had no statutory authority to rescind the contract in question but the courts reasoned that such discussion would be idle "for the reason that the contractor had abandoned his contract and notified the commissioners that he would make no further efforts to complete the same. Right or wrong the contractor refused to comply further with the terms of this contract. It was not then a question of rescinding the contract although in fact the resolution did purport to rescind it."

It was further pointed out that the only thing left for the commissioners in this case was to proceed as in other cases of breach of contract relative to the reletting of the contract and if in their opinion a suit against the contractor and mondsmen would fail they might compound the debt under section 2416 G. C. Of course, there is no such provision as the authority granted the commissioners under section 2416 G. C., vested in the Director of Highways relative to the compounding of the debt or releasing of an obligation. However, the rule of law remains as above stated, that when the subject matter about which the contract is made is destroyed the obligation of the contractor is ended. So then there is no action necessary on the part of the Director of Highways to do that which is already done by operation of law.

Sections 2328 to 2332 of the General Code relate to the method of procedure when the contractor fails to prosecute the work. In examining these provisions it will be observed that they are not applicable in view of the circumstances. The law does not require vain and unreasonable things to be attempted. Of course, the contractor would be liable in damages under his contract if the destruction of the well and non-performance was due to some fault of his and was not excused by the impossibility of performance.

However, it has been held that where a contractor had entered into a contract to repair a building and through no fault of the contractor the building was destroyed this excused the performance of the contract and the contractor under such circumstances was entitled to the value pro tanto for the material and labor

furnished. Therefore, it is possible to conceive that technically the contractor under consideration might have had a claim against the state for the services rendered. However, his acceptance of the attempted cancellation would release any claim that he might have under the contract.

In view of the foregoing citations and discussions it is the opinion of this department that if the contract under consideration was impossible of performance and the contractor was not at fault and the well in question was destroyed, the obligations of the contractor were terminated and excused. It is my further opinion that the contractor in his acceptance of the proposed cancellation of the contract has released the state from any possible obligations under said contract. This, of course, necessarily results in the conclusion that the fund originally certified available for this purpose is in nowise encumbered or obligated on account of said contract.

Respectfully,
C. C. CRABBE,
Attorney General.

280.

APPROVAL, BONDS OF VILLAGE OF EUCLID, CUYAHOGA COUNTY, $1,400, IN ANTICIPATION OF COLLECTION OF SPECIAL ASSESSMENTS FOR SEWER AND WATER CURB CONNECTIONS.

COLUMBUS, OHIO, April 30, 1923.

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

281.

APPROVAL, BONDS OF GRANVILLE VILLAGE SCHOOL DISTRICT, LICKING COUNTY, $35,875.00, TO SECURE ADDITIONAL FUNDS TO COMPLETE ERECTION OF HIGH SCHOOL BUILDING.

COLUMBUS, OHIO, April 30, 1923.

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