approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

927.

PUBLIC CONTRACT—MONEY DUE CONTRACTOR NOT PAYABLE TO SURETY TO COVER MATERIALMAN'S CLAIMS—WHEN SUCH CLAIMS MAY BE FILED WITH BONDING COMPANY.

SYLLABUS:

1. *Where a contractor has performed all of the work required of him under a contract with the State for the construction of a building of the State, and there remain certain funds on the final estimate due the contractor, the amount so remaining due should be paid to such contractor, and the surety upon the bond of the contractor has no claim to said fund by reason of the fact that certain claims for labor or material furnished to the contractor in the construction of such building have not been paid.*

2. *Under the provisions of Section* 2365-3, *General Code, as amended,* 111 *O. L.* 72, *claims for labor or material performed or furnished in the construction, erection, alteration or repair of a public building, work or improvement, may be effectively filed with the sureties on the contract bond at any time after such labor or material is furnished, even though at the time such building, work or improvement may not have been accepted by the board or officer authorized to accept the same. In addition to this, such claims for labor or material may be effectively filed with such sureties after the acceptance of such building, work or improvement by the duly authorized board or officer, if the same be filed not later than ninety days after such acceptance.*

COLUMBUS, OHIO, September 27, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a communication from your department over the signature of T. Ralph Ridley, state architect and engineer, which communication reads as follows:

"SUBJECT: Liability of Globe Indemnity Co. on their bond issued to D. E. Gardner Co., general contractor for Auditorium, Ohio University, Athens, Ohio.

Your consideration and opinion is requested upon the following data:

The Globe Indemnity Co. bonded the above contractor in the sum of $240,000.00 on his contract for the Auditorium at Ohio University, the contract being in an amount of $226,953.00. Of this amount $108,958.43 was paid from state funds and $117,994.57 was paid from funds donated to the University.

The building was accepted by the State December 3, 1928, but final estimates were not issued to the Gardner Co. until January 28, 1929, in amounts of $5899.73 (donated funds), and $5447.92 (state funds). However, it was arranged with the Auditor of State's office to retain the sum of $1,267.27 due the Gardner Co. on their contract, to be paid later by voucher issued by Ohio

University, this money to be held until such time as the Gardner Co. would complete some changes in the doors of the auditorium.

The Gardner Co. is now in financial difficulties. The bonding company tells us that Gardner has about $3,000.00 worth of debts contracted on this building project, but they deny any liability as to the payment of same, claiming that no liens were filed within 90 days of the completion of the building, and all claims filed before the completion of the building would not be recognized by them.

We have an opinion rendered by your office December 23, 1927, settling a similar controversy which arose as to the liability of the Globe Indemnity Co., who bonded the J. J. Evans Co. for the construction of a building at Wilberforce University. However, the bonding company says that the law has been changed since that time.

Your opinion is asked upon the following questions:

1. Within what period of time can liens be filed against a bonding company, such liens being for material and labor contracted by the contractor during the erection of the building?

2. Would the state have authority to release this warrant for $1,267.27 to the contractor, he having completed the work on the doors of the auditorium? or

3. Should the contractor assign his rights to this warrant to the bonding company to settle claims which arose out of the construction of the building?

The contractor is not inclined to turn this warrant over to the bonding company, and the bonding company claims they are not liable as the liens were not filed within the proper time. One account against this contractor, to our knowledge, was filed with this office during the construction of the building, and this claim was for millwork furnished by the Athens Lumber Co.

The balance due the Gardner Co. of $1,267.27 should have been included in final estimate to them, but in order not to hold up all the money due him, arrangements were made with the auditor's office to retain this amount and later pay it by voucher, issued by the Ohio University, as soon as the work on the doors was completed."

In consideration of the questions presented in the above communication I assume that there is no question but that Ohio University is a state institution and that the buildings thereof are public buildings within the application of the provisions of Sections 2314, et seq., General Code.

It may be noted as an established principle of law, that claims of persons for labor or material furnished to a contractor or subcontractor in the construction of a state building can not be asserted as mechanic's liens against such building or against funds held by the state due to the contractor or a contract for the construction of such building. This ruling was made by the Attorney General in an opinion under date of August 25, 1913, Attorney General's Report, 1913, Vol. I, page 515. This ruling, supported by the decisions of the courts in this state, has been consistently followed by this office through succeeding administrations.

I do not deem it necessary to note at length the many opinions of this department upon this question; it is sufficient to note that my immediate predecessor declared and followed said rule in an opinion to the Director of Highways and Public Works under date of February 10, 1927, Opinions of the Attorney General, 1927, Vol. I, page 85. In this opinion my predecessor held that the provisions of Sections 8324, et seq., of the General Code, do not apply to construction work on public buildings of the State, and that material men and others who have furnished material, machinery

or power or who have performed labor in connection with the construction of such buildings should find their remedy in statutory provisions relating to bonds which are required to be executed by contractors to secure the performance of contracts for construction of State buildings, and to secure the payment of claims for labor and material furnished in the construction of such state buildings. See also on this point, *State ex rel. Merritt* vs. *Morrow,* 10 O. N. P. (N. S.) 279; *State of Ohio* vs. *The Citizens Trust & Guarantee Company,* 15 O. N. P. (N. S.) 149.

It follows from the application of the rule above noted to the question presented in your communication on the facts therein stated, that the State, through the proper authorities thereof having charge of the construction of the building here in question, has authority to issue a voucher and warrant to the contractor for said sum of $1,267.27, the amount retained from estimate due to said contractor for the purpose stated in your communication. And, inasmuch as The Globe Indemnity Company, the surety on the contract bond of said contractor, performed no services in completing said building, said bonding company has no legal right to any part of this money, nor any right to require the contractor to assign his rights to this money over to said bonding company.

This much is decided in an opinion of this department addressed to the Director of Highways and Public Works under date of November 15, 1927, Opinions of the Attorney General, 1927, Vol. III, page 2274. In this opinion it was held that:

> "Where a receiver has been appointed for a contractor after he has performed all of the work required of him under a contract with the State for a road improvement, and there remains certain funds by virtue of a final estimate due the contractor, the amount so remaining due should be paid by the Director of Highways and Public Works to such receiver, and the surety upon the bond of the contractor has no claims to said fund by reason of the fact that certain labor claims or material bills in connection with said contract have not been paid."

It does not appear that any receiver was appointed for the contractor in the case here presented and the retained money should be paid to the contractor.

It follows from the conclusion above reached with respect to the disposition of said retained money in the amount above stated, that aside from the common law right of persons furnishing labor or material in the construction of the building here in question, to recover therefor from the contractor or subcontractor to whom said labor or material was furnished, the only remedy of persons furnishing such labor or material in the construction of said building, is that given to them by the contract bond executed by the contractor, which bond I assume is in substantial conformity with the provisions of Section 2316, General Code, and with those of Sections 2365-1, et seq., General Code, securing the payment of claims for labor and material furnished in the construction of this building. It is not easily seen how your department is interested in the questions arising between persons furnishing material and labor in the construction of this building, on the one hand, and the bonding company on the other, with respect to the liability of the bonding company under the terms of its bond for the payment of such labor and material claims. Waiving this point, however, and addressing myself to the remaining questions in your communication, it may be noted that both Sections 2316 and 2365-2, General Code, require the contractor, under a contract for the construction of public buildings, or other public works of the State, to execute a bond conditioned among other things, for the payment by the contractor or by the subcontracter, of indebtedness which may accrue to any person, firm or corporation, on account of labor performed or materials furnished in the construction of said public buildings or works of the State.

Section 2365-3, General Code, which is more immediately applicable to the questions here under consideration, provides as follows:

> "Any person, firm or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, at any time after performing such labor or furnishing such material, but not later than ninety days after the acceptance of such building, work or improvement by the duly authorized board or officer, shall furnish the sureties on said bond, a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until after sixty days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond, as provided in Sections 11242 and 11243 of the General Code, said action to be commenced not later than one year from the date of acceptance of said building, work or improvement."

I am inclined to the view that the provisions of Section 2365-3, General Code, apply to a contract bond executed to secure the performance of a state building contract such as that mentioned in your communication, and that this section of the General Code not being inconsistent with Section 2316, General Code, should be read and applied in connection with said last named section. See *Surety Company* vs. *Slag Company,* 117 O. S., 512. In considering the application of Section 2365-3, General Code, above quoted to the first question presented in your communication, it is noted that prior to the amendment of said section to its present form, 111 O. L., 72, such section of the General Code, provided that:

> "Any person, firm or corporation to whom any money shall be due on account of having performed any labor or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within ninety (90) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation."

Construing this provision of Section 2365-3, General Code, as it then read, the Supreme Court of this State in the case of *Surety Company* vs. *Schmidt,* 117 O. S., 28, held that the statements therein referred to in said section to be effective may be furnished to the bonding company after the acceptance of improvement by a duly authorized board or officer. As above noted, however, said Section 2365-3, General Code, has been amended and, in its present form it authorizes any person, firm or corporation who has performed labor or furnished material in the construction, erection, alteration or repair of a building, work or improvement constructed by the State or a political subdivision thereof, to file a claim therefor with the sureties on the contract bond "at any time after performing such labor or furnishing such material, but not later than ninety days after the acceptance of such building, work or improvement by the duly authorized board or officer."

It thus appears that such statements or claims may be effectively filed with the sureties on the contract bond at any time after such labor or material is furnished even though at the time such building, work or improvement may not have been accepted by the board or officer authorized to accept the same. In addition to this, such claims for labor or material may be effectively filed with such sureties after the acceptance of such building, work or improvement by the duly authorized board or officer, if the same be filed not later than ninety days after such acceptance.

It does not appear that the former opinion of this department referred to in your communication involved a consideration of the questions here presented, which are I believe, sufficiently answered by what I have said above.

Respectfully,
GILBERT BETTMAN,
Attorney General.

928.

APPROVAL, BONDS OF CITY OF MARIETTA, WASHINGTON COUNTY—$55,000.00.

COLUMBUS, OHIO, September 27, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

929.

SENATE BILL NO. 146—DISPOSITION OF FINES AND PENALTIES COLLECTED BY POLICE AND MUNICIPAL COURTS—IMPLIED REPEAL OF CODE SECTIONS—WHEN MONIES RETAINED BY MUNICIPAL COURT CLERK PAID INTO TREASURY—LIMITATION OF AMOUNTS PAYABLE TO LAW LIBRARY ASSOCIATION.

SYLLABUS:

1. *Section* 3056 *of the General Code, as amended by the* 88*th General Assembly* (113 *O. L.* 249), *which became effective July* 21, 1929, *is applicable to all municipal and police courts existing in Ohio on the effective date of said act.*

2. *Said section, as amended, does not repeal special provisions requiring fines and penalties arising under specific laws to be paid into definite and specific treasuries, such as collections of such fines and penalties for violation of the agriculture law, and many other sections. The section does repeal by implication Section* 6212-19 *of the General Code, relating to the distribution of fines and penalties arising under prohibition laws, to the extent only that five hundred dollars, collected as the county's share, and one thousand dollars collected as the municipality's share, may be subject to the provisions of Section* 3056, *General Code.*

3. *The amount retained by the clerk of a municipal court equal to the compensation allowed by the county commissioners to the judges, clerks and prosecuting attorney of such court in state cases, should be paid into the municipal treasury when the acts establishing such courts require all fines and penalties collected for state and ordinance's cases to be paid to such treasury.*

4. *In the case of a county, not more than five hundred dollars may be paid in any one year, including the county's share of fines and penalties arising from the prohibition laws.*