It appears that the purpose of the bond issue is to fund the contract obligations of the village with the Electric Light Company for the year 1922.

In my letter to the authorities of the village, I called their attention to the fact that inasmuch as the Electric Light Company has not yet performed service under the said contract with the village for the whole of the year 1922, the money coming to the Electric Light Company under said contract was not yet due and payable save and except only that part thereof which respects service performed by the Company for the year 1922, and that inasmuch as sections 3916 and 3917 of the General Code authorize the funding of such indebtedness only as is due and payable, said issue of bonds cannot be approved on the transcript as submitted for the reason as above stated that said issue covered in part a contract obligation of the village which was not yet due.

I noted another serious defect in the proceedings relating to this bond issue, to which I called the attention of the authorities of the village, but as yet I have received no information of any kind, with respect to the correction of either the transcript of proceedings touching objections noted by me in said letter and under the circumstances I feel that I have no discretion to do otherwise than to disapprove this issue of bonds and to advise you not to purchase the same.

Respectfully,
JOHN G. PRICE,
*Attorney-General.*

---

3389.

## MIAMI CONSERVANCY DISTRICT—SERIES OF QUESTIONS ANSWERED RELATIVE TO SAID DISTRICT.

1. *The directors of a conservancy district are authorized to extend to the holders of bonds issued by the district the option of receiving payment of such bonds at a bank other than the state treasury.*

2. *The bonds of a conservancy district may be sold without advertisement or competitive bids.*

3. *The proceeds of the sale of bonds by a conservancy district must be paid into the treasury of the district in full, but may then be deposited in banks as depositories provided that sufficient bonds are taken to secure such deposits. The directors of such a district are not authorized to loan any part of the proceeds of such bond sale to a bank otherwise than as a depository.*

4. *The directors of a conservancy district are authorized to procure bonds covering the fidelity of employes and agents, and policies of insurance covering the risk of liability and collision. The premiums of such bonds and insurance policies may be paid out of district funds.*

5. *Though as a matter of law it is probably a rule that damages to business caused by the removal of a town site in order to construct the works necessary for a conservancy district, are not a liability of the district, yet sums paid to persons injured in business on account of such damages to avoid litigation and secure the prosecution of the work with dispatch, do not constitute illegal payments.*

6. *Where preliminary to the formation of a conservancy district, an unofficial committee of citizens incur expenses in the formation of plans, etc., such expenses will be reimbursed by the district out of funds procured by the special assessment for organization expenses.*

7. *A conservancy district is authorized to enter into cost-plus contracts and to agree to reimburse contractors for the expense of state Workmen's Compensation premiums.*

8. *There is no requirement that the directors or officers of a conservancy district in purchasing supplies, materials and equipment, secure competitive bids.*

9. *The chief engineer of a conservancy district is not authorized to modify or alter a contract made by a board of directors, but alteration made by him may subsequently be ratified by the board of directors.*

10. *The purchase of supplies by a conservancy district from one of its own employes is not a violation of section* 12910 *of the General Code.*

COLUMBUS, OHIO, July 22, 1922.

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

GENTLEMEN:—Some time ago the Bureau requested the opinion of this department as follows:

> "This department is making an examination of the financial affairs of the Miami Conservancy District organized under the conservancy act of the legislature—sections 6828-1 to 6828-79, inclusive, of the General Code. This act contains special features in relation to the sale of bonds, letting of contracts, etc., that differ radically from the general laws and we find it necessary to respectfully request your opinion upon the construction of said act in relation to the following facts and conditions:
>
> Section 6828-47 G.C. provides: 'Board of Directors May Issue Bonds—How Paid—How to be used—Additional levies;—bond of treasurer.—Bank may be selected as depository.'
>
> The board of directors passed a resolution making bonds issued by the district payable at the State Treasury or the National City Bank of New York at the holders option, attaching a copy of said resolution to each bond issued,and also established an account at said National City Bank of NewYork for the purpose of paying such bonds and interest. Said bank charges the bonds and coupons redeemed by it to such account without further authorization and forwards such bonds and coupons to the State Treasury who in turn remits the amount thereof to said National City Bank of New York. This arrangement results in a loss of interest on deposits in a considerable amount.
>
> *Question* 1: Is such action on the part of the board of directors legal under the provisions of the conservancy act?
>
> The board of directors sold bonds aggregating over $33,000,000 to one firm without advertising or getting competitive bids.
>
> *Question* 2: Was such action legal under the provisions of the conservancy act?
>
> The board of directors did not receive payment in full for the last two installments of bonds sold to the National City Company but allowed a substantial proportion of the amount due to remain in the hands of the purchaser in the form of a loan for which the district receives a lower rate of interest than it pays as interest on the bonds.
>
> *Question* 3: Is such an arrangement on the part of the board of directors legal under the conservancy act?
>
> Other matters pertaining to such act, on which we respectfully request your opinion are as follows:
>
> The district by resolution of the board pays the premium on the surety bonds given by employes; and also on bonds of at least one of the depository banks to secure pay-roll deposits. The district also pays one-half of the pre-

mium on automobile liability and collision insurance carried by district employes who drive either district owned or privately owned automobiles in the district's service.

*Question* 4: Are such payments legal?

When it was determined by the original plan to construct the Huffman dam, it became necessary to move the Village of Osborn. It would seem that by requiring the people to move from said village that the inhabitants or most of them would suffer damages to their business. To compensate them the district assumed various and sundry 'business claims.' These claims varied in amount from those of laborers at $25.00 to the claim of Tranchant & Finnell, millers, of over $27,000.00. The aggregate of such claims at the date of this audit was $148,435.00. They were secured by Judge Brown in the form of contracts, he representing a committee of unnamed business men of Dayton, and in a large measure said contracts were executed prior to the time when the district was functioning. Some of such claims were actually paid by the Dayton citizens relief commission along with the costs of the preliminary engineering, etc., the amounts so paid being later refunded to said commission from the district funds.

*Question* 5: Are the payments of such business claims legal?

*Question* 6: Is the refund to the citizens' relief commission of over $300,000.00 as referred to above legal?

In opinions of the Attorney-General for 1917, page 2061, it is held that contractors may not charge state liability insurance premiums to the state. We find that the contractors charged considerable of such expense to the district in cost-plus contracts.

*Question* 7: May the district's funds be legally used for such payments?

Before any construction work was begun the board of directors advertised for bids for doing all of the work necessary to complete the general plan. Later a resolution was passed declaring the bids received to be unsatisfactory and determining to do the work by organizing its own force and purchasing the necessary equipment, materials and supplies. Under this authority considerable equipment was purchased, the cost of which aggregates approximately $2,000,000.00. So far as ascertainable, such purchases were not made after advertising and on competitive bidding, and at least a part of the equipment was second handed. Some of such equipment was purchased from an employe of the district, Mr. C. H. Locher, Construction Manager, to the amount of $45,000.00.

*Question* 8: Under the provisions of the act, notably section 6828-16 G. C., had the board of directors after the action above described authority to enter into minor contracts in excess of $1,000.00 without advertising for bids and with other than the lowest bidder?

*Question* 9: Is there any authority contained in such act for the modification or alteration of a contract by parties other than by the board of directors?

*Question* 10: Does the purchase of equipment from Mr. Locher, Construction Manager, an employe of the board of directors, under the provisions of section 6828-11 G. C., come within the prohibition of section 12910 General Code?

The purchasing agent has purchased all materials, supplies and repairs without advertisement and competitive bidding. This involved some 1,500,000 sacks of cement, thousands of cars of coal, expensive repairs to equipment and other materials and supplies, all involving some millions of dollars. In view of the facts stated in the preceding section and in view of section 6828-11 G. C.,

*Question* 11: Were such purchases legal?"

A discussion of the Bureau's first question will determine certain principles that will be of service in connection with all the questions.

Section 6828-47 of the General Code, a part of the conservancy act of Ohio, is very lengthy. The following quotation from it will be sufficient for the purposes of the first question:

> "The board of directors may, if in their judgment it seems best, issue bonds not to exceed ninety per cent, of the total amount of the assessments exclusive of interest, levied under the provisions of this act, in denomination of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent. per annum, payable semi-annually, to mature at annual intervals within thirty years, commencing not later than five years, to be determined by the board of directors, both principal and interest payable at the office of the treasurer of the State of Ohio." * * *

In connection with this provision, however, the following portion of section 6828-6 must be considered:

> "* * * Upon the said hearing, if it shall appear that the purposes of this act would be subserved by the creation of a conservancy district, the court shall, after disposing of all objections as justice and equity require, by its findings, duly entered of record, adjudicate all questions of jurisdiction, declare the district organized and give it a corporate name, by which in all proceedings it shall thereafter be known, and thereupon the district shall be a political subdivision of the State of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities and obligations; to exercise the right of eminent domain and of taxation and assessment as herein provided; to issue bonds *and to do and perform all acts herein expressly authorized and all acts necessary and proper for the carrying out of the purposes for which the district was created, and for executing the powers with which it is invested.*" * * *

It may not be out of place also to quote section 6828-74 of the General Code which provides as follows:

> "This act being necessary for securing the public health, safety, convenience or welfare, and being necessary for the prevention of great loss of life and for the security of public and private property from floods and other uncontrolled waters, it shall be liberally construed to effect the control and conservation and drainage of the waters of this state."

The last two provisions above quoted furnish the keynote to the interpretation of the conservancy act as a whole, and particularly of those portions of it which deal with the powers of the conservancy district and its officers. The general rule of law with which the Bureau is familiar, being called upon to apply it almost daily in the discharge of its functions, is that a grant of power to a public officer or board must be strictly construed, and that the maxim "The expression of one thing is the exclusion of all others" is to be rigidly applied to such statutes. Under such a rule there is, of course, some room for implication, as it is almost impossible, literally, speaking to create an express power or duty without also conferring some slight degree of implied power.

In the case of the conservancy act, however, the rule and the exception as they exist in ordinary cases are precisely reversed. By the express declarations of the statutes above quoted the powers of a conservancy district as such are not to be limited to those expressly granted, but are to include also the power to perform all acts necessary and proper for the carrying out of the purposes for which the district was created. As if to make the point even clearer, it is also declared that the act as a whole shall receive a liberal interpretation and not a strict one. The framers of this act undoubtedly understood the significance of language of this kind. The first of these provisions is borrowed from the Federal Constitution in which it has received the illuminating interpretation of Mr. Chief Justice Marshall in the case of McCulloch vs. Maryland, 4 Wheaton, 316. The following will be quoted from the opinion at page 411, et seq.:

> "The constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making 'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.' * * *
>
> The argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.
>
> Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use,in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end,and not as being confined to those single means, without which the end would be entirely unattainable. * * *
>
> In ascertaining the sense in which the word 'necessary' is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power 'to make all laws which shall be necessary and proper to carry into execution' the powers of the government. If the word 'necessary' was used in that strict and rigorous sense for which the counsel * * * contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; * * *
>
> We admit * * * that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohib-*

*ited, but consist with the letter and spirit of the constitution, are constitutional."*

The only remaining general question is as to whether the powers of the *district* as such inhere in the directors of the district. That is to say, it being established that the act as a whole shall have a liberal interpretation, and that the district as a body corporate shall have power to do and perform all acts necessary and proper for the carrying out of its purposes, etc., as well as the express powers that are granted, does it therefore follow that where a power is conferred not on a district as such, but on the board of directors of the district as in section 6828-47 of the General Code immediately under examination, such board of directors may exercise the implied power to do all acts necessary and proper, etc.? It is believed that an affirmative answer must be given to this question. In the first place, it is certainly clear that the powers of a corporate body can be exercised only through human agency. In the general enumeration of powers in section 6828-6 is included the power to issue bonds which is therein described as a power of the district. When we come to section 6828-47, however, we find that the function of issuing bonds is reposed in the directors. This means merely that the general corporate power of issuing bonds granted to the district as such is to be exercised for the district by the board of directors. In other words, the directors are the human agency through which the generally granted power is to be exercised. However, restrictions are found in section 6828-47 upon the exercise of that power by the directors which must of course be strictly observed. But it is impossible to escape the conclusion that in the issuance of bonds the directors in whom is reposed the function of so acting on behalf of the district, may exercise the implied power conferred upon the district by section 6828-6. So that applying the principles of the great leading case from which quotation has been made, the directors are at liberty to do anything in connection with the issuance of bonds for the district which they may consider convenient and adapted to the end for which the bonds are authorized to be issued, and which is not out of harmony with any express limitations on their action in this behalf.

What then has been done in the instance about which the Bureau inquires? The directors have by supplementary resolution made certain bonds payable either at the State Treasury or at the National City Bank of New York, at the holders' option. It will be noted that they have not made these bonds payable elsewhere than at the State Treasury in the sense that they cannot be redeemed at the State Treasury. That is, the holder of any of these bonds has the right to have them redeemed at the state treasury if he so desires. The option of securing payment at the National City Bank of New York is additional and alternative. Now, section 6828-47 requires that the principal and interest be payable at the office of the treasurer of the State of Ohio. This has been complied with, for the principal and interest are payable at the office of the treasurer of the State of Ohio. But if section 6828-47 were subject to the ordinary rules of interpretation in such cases, we would have to infer a provision against making bonds optionally payable anywhere else. Because the section is not to be so interpreted, however, and because the board of directors is vested with authority to do anything that is adaptable to a legitimate end and not expressly forbidden, this inference cannot apply to this section. So that the conclusion is reached that the action inquired about in the Bureau's first question was authorized by the conservancy act.

So far as the second question is concerned, it is sufficient to state that there is no requirement of the conservancy act that the bonds be sold at competitive bidding. The only reference to the process of selling is found later in section 6828-47 in the following words:

"All of said bonds shall be executed and delivered to the treasurer of said district, who shall sell the same in such quantities and at such dates as the

board of directors may deem necessary to meet the payments for the works and improvements of the district."

There is no general statute of the state requiring public bonds to be advertised before being sold. Section 2294 of the General Code comes closest to being such a provision, but it is general only in the sense that it applies to a number of public authorities, viz., boards of county commissioners, boards of education, township trustees and commissioners of free turnpikes. We do not therefore even encounter the question as to whether the conservancy act is an exception to any general rule because of its silence on the point; for we have no general rule. The answer to the Bureau's second question is therefore in the affirmative.

The facts on which the Bureau's third question is predicated are traversed by by the explanation made by the secretary-treasurer of the district who makes the following statement:

"The last two installments of bonds were sold to the National City Co., and the full proceeds thereof received by the treasurer and accounted for by him to the Board of Directors, as the minutes show. At the request of the Board of Directors itself, the National City Co. accepted a re-deposit of a portion of these funds, at the prevailing depositary interest rate; and as the district needs funds, repays to the district in such amounts as may be desired for its current uses. At the time of this transaction the treasurer delivered temporary bonds of the district in the same numbers, denominations, and amounts as provided in the various resolutions providing for their issue, pending the issue of definitive bonds, which were delivered later.

The facts of the arrangement are as above, and were fully understood by the district's former auditors, who treated the entire matter on the basis of a cash transaction, and in their reports so show. The district's books of account do not clearly show the transaction to have been as above; but in view of the analysis of the former auditors, who were familiar with the details of the transaction, it was not deemed necessary to re-vamp the books of account in that respect."

The following provisions of section 6828-47 of the General Code bear upon this question:

"Said district treasurer shall * * * execute and deliver * * * a bond * * * conditioned that he shall account for and pay over as required by law, and as ordered by said board of directors, any and all money received by him on the sale of such bonds, * * * and that he will only sell and deliver such bonds to the purchaser or purchasers thereof under and according to the terms herein prescribed * * *. The said treasurer shall promptly report all sales of bonds to the board of directors, and the board shall issue warrants at the proper time for the payment of the maturing bonds so sold and the interest payments coming due * * *. The successor in office of any such district treasurer shall not be entitled to said bonds or the proceeds thereof until he shall have complied with all the foregoing provisions applicable to his predecessor in office; provided, if it should be deemed more expedient to the board of directors, as to moneys derived from the sale of bonds issued or from any other source, said board may by resolution, select some suitable bank or banks or other depository, which depository shall give good and sufficient bond, as temporary or assistant treasurer or treasurers, to hold and disburse said moneys on the orders of the board as the work progresses, until such fund is exhausted or transferred to the treasurer by

order of the said board of directors. For such deposits the district shall receive not less than two nor more than four per cent interest per annum. The funds derived from the sale of said bonds or any of them shall be used for the purpose of paying the cost of the works and improvements and such costs, expenses, fees and salaries as may be authorized by law and shall be used for no other purpose. * * *. This act shall, without reference to any other act of the Legislature of Ohio, be full authority for the issuance and sale of the bonds in this act authorized, which bonds shall have all the qualities of negotiable paper under the law merchant, and when executed and sealed and registered in the office of the state treasurer in conformity with the provisions of this act, and when sold in the manner prescribed herein and the consideration therefor received by the district, shall not be invalid for any irregularity or defect in the proceedings for the issue and sale thereof, and shall be incontestible (incontestable) in the hands of bona fide purchasers or holders thereof for value. No proceedings in respect to the issuance of any such bonds shall be necessary except such as are required by this act."

(The last provision might have been relied on in support of the answer to the Bureau's second question had it been necessary to do so.)

It is clear that the directors have express authority to provide depositories for moneys derived from the sale of bonds, and this is what the secretary-treasurer claims was done in substance when the transaction about which the Bureau inquires was had. He seems to concede that the books and records of the district do not clearly reflect what was intended to be done. Possibly this should be corrected so that they may do so, and the Bureau would be justified in recommending such correction. As the question is put by the Bureau itself, this department would have to reach the conclusion that the action of the directors was unauthorized; for despite the principle of liberal construction above adverted to, it seems to be the clear intent of section 6828-47 that the moneys derived from the sale of bonds shall either be received intact or deposited in depositories as therein required. This express provision constitutes a negation of any implied power to act in any contrary manner.

In this connection, it is observed that the explanation of the secretary-treasurer does not state that the National City Bank gave a good and sufficient bond as temporary or assistant treasurer. This is expressly required by section 6828-47 for the deposit of the proceeds of a bond issue, and the board of directors had no authority, in the opinion of this department, to dispense with this requirement. And if it should appear that it was dispensed with or overlooked, the deposit, in the opinion of this department would be illegal as a deposit, and of course wholly unauthorized as a loan other than a deposit. If this should prove to be the case, the answer to the Bureau's third question would be in the negative. If otherwise, in the affirmative.

In connection with the Bureau's fourth question, it is observed that section 6828-11 of the General Code authorizes the board of directors of the district to "employ * * * such other engineers, attorney, and such other agents or assistants as may be needful, and provide for their compensation, which, with all other necessary expenditures shall be taken as a part of the cost of the improvement." Nowhere in that nor any other section, however, is there found any requirement that any of the employes or subordinate officers or assistants of the board of directors shall give bond. That is to say, no duty is imposed upon these subordinates in the matter of giving bond. On the other hand, the broad implied powers of the board of directors are sufficient to authorize than either to require the subordinates to give a bond, or to procure a bond for the faithful performance of their duties by such subordinates. There is a difference between these two things. Where the law or superior administrative action requires a public employe to give a bond, the duty is thus imposed upon him to qualify for the performance of his functions in this manner, and in the absence of a statute

authorizing the premium on a surety bond to be paid out of the public funds, it is inferable in the ordinary case that such an expense constitutes an obligation of the employe himself incidental to his primary obligation to give the bond. But where there is no such requirement, but the bond is procured by the public employer for the protection of the public, no such inference arises. The transaction may then be said to be similar to insurance, and the public or the employer takes the attitude of the insured, the insurable interest clearly residing in it.

In view of the liberal construction which permeates the whole act, and in the absence of any express provision to the contrary therein, it is the opinion of this department that the board of directors of the conservancy district is authorized to bond its subordinate employes and to pay the premiums out of the funds under its control.

The same remarks apply to the payment of premiums on automobile liability and collision insurance policies. The district would be liable for damages caused by the neglect of one of its employes in operating a motor vehicle in and about its business. To insure against such a risk is commendable and authorized. Collision insurance which covers the risk of damage to an automobile while being operated by or under authority of the insured, is also a proper safeguard when the motor vehicle is owned by the district. Such insurance might not be proper on privately owned automobiles; but it is not clear from the Bureau's statement of facts that this has been done.

Several provisions of the conservancy act bear upon the Bureau's fifth question. It appears that instead of having a number of claims for damages adjudicated in the manner pointed out by these provisions, which will be quoted, the promoters of the Miami Conservancy District secured informal settlement of these claims, and it is presumed the requisite releases whereby the district was secured against future litigation were obtained. In the case of property damage, the right to do this would be indisputable. That power would be implied from the express power to sue and be sued, and incur debts, liabilities and obligations, even without the express authorization of all acts necessary and proper, etc. The question submitted by the Bureau really arises out of the nature of the damage claims, which appear not to be damages to real estate and personal property as such, but damages to business. This statement requires consideration of some of the provisions which thus far have not been quoted. Section 6828-12 provides in part as follows:

> "No construction shall be made under the authority of this act which will cause the flooding of any village or city, or which will cause the water to back up in any village or city unless the Board of Directors shall have acquired and paid for the right to use the land affected for such purpose, *and shall have paid all damages incident thereto.*"

This section requires the board of directors to acquire and pay for not only the right to use the land affected, but also all damages incident thereto. Among the duties of the appraisers of benefits, etc., provided for by section 6828-27 are the following:

> "They shall thereupon proceed to appraise * * * the damages sustained and the value of the land and other property necessary to be taken by the district for which settlement has not been made by the board of directors."

(Herein is, of course, express recognition of the right of the directors to settle damage claims in advance.)

This provision does not limit the damages sustained to such as result from the depreciation of tangible property.

The same section contains the following:

> "The appraisers shall appraise all damages which may, because of the

execution of the official plan, accrue to real or other property either within or without the district, which damages shall also represent easements acquired by the district for all the purposes of the district. * * * The appraisers in appraising benefits and damages shall consider only the effect of the execution of the official plan."

This section contains intimations in both directions.
Section 6828-30 provides for the report of the board of appraisers, and contains the following:

"Such record shall contain * * * a description of the property appraised, the amount of damages appraised, and the appraised value of land or other property which may be taken for the purposes of the district. They shall also report any other benefits or damages or any other matter which in their opinion should be brought to the attention of the court."

This section seems to contemplate the possibility of damages other than to those to property as such. Perhaps the most significant provision is that of section 6828-62 which is in part as follows:

"In case any person * * * shall consider itself injuriously affected *in any manner whatsoever* by any act performed by *any official or agent* of such district, or by the execution, maintenance or operation of the official plan, in case no other method of relief is offered under this act the remedy shall be as follows:

* * * The person * * * considering itself to be injuriously affected shall petition the court before which said district was organized for an appeal of damages sufficient to compensate for such injuries. The court shall thereupon direct the board of appraisers of the district to appraise said damage and injuries, and to make a report to the court on or before the time named in the order of the court. * * * *No damages shall be allowed under this section which would not otherwise be allowed in law.*"

This provision seems to contemplate business and other personal damages as well as damages to property as such. Yet, it closes with the significant provision that no damages shall be allowed under this section which would not otherwise be allowed in law.

The question now arises as to whether a person injuriously affected in his private business by the making of a public improvement referable to the police power of the state is entitled to damages from the public on that account, over and above the damage to his tangible property, and rights in tangible property that results from the making of the improvement. The following statement of the law applying to this subject is found in 20 C. J. 779:

"Strictly speaking business or the good will thereof is not property within the meaning of the statutes relating to eminent domain, although there is authority to the contrary; (see H. J. and Canada) and in the absence of statutory provision therefor, one whose land is taken or injured cannot recover compensation for loss or interruption of business or trade, inability to perform contracts, or inconvenience in carrying on business, although there is contrary authority. (Cited from La., Mich., England and Canada). This general rule has been applied to loss of business caused by the temporary occupation or obstruction of a highway or of lands not belonging to claimant * * * Nor, save in exceptional cases (Cited from Colo., Ill., and Mass.) does

the loss, inconvenience, or expense arising from a removal of one's business or property which is necessitated by the appropriation of the land constitute an element of the damages to be allowed, although there is authority to the contrary. (Canada.) There are many decisions to the effect not only that loss of profits, present or future, does not constitute an element of damage, but also that neither the value of the business carried on upon land taken, nor the amount of the profits derived from it is to be considered in determining the market value of the property. There is, however, much authority in support of the doctrine that * * * it is proper to take into consideration the good will of the business, the advantage for business of the land taken or injured, its productiveness, and the income and net profits which may reasonably be derived from it, and the incidental loss or injury to the business, present or prospective, not as independent items of damage, but as bearing on the question of the market value of the land and its depreciation by the construction or operation of the improvement."

These principles are supported by the citation of the following Ohio cases:

Railroad Co. vs. Railroad Co., 30 O. S. 604;
Railroad Co. vs. Zinn, 18 O. S. 417.

These cases, however, do not very strongly support the proposition for which they are cited, with the exception of the following quoted from the opinion in the first of them:

"The second question arises on that part of the charge relating to consequential damages wherein the jury are instructed that * * * they should take into the account the road-bed, right of way, station grounds, and other property, which go to make up its railroad, and used by it, * * * in maintaining and operating its road as a whole, and inquire how much less valuable it is rendered by the construction of plaintiff's tracks across it."* * *

In substance, this rule involves all the probable consequences to the future business of the corporation, and not damages to the defendant's qualified title to real estate.

It looks to the burdens imposed on the business of maintaining and operating a railroad, and not to the diminished value of defendant's tangible property. It involves the idea that damages to its property as a whole, in its general use * * * is to be considered * * *. Damages to the trade or business of the defendant are too remote. They depend on contingencies too uncertain and speculative to be allowed."

(Here follows the citation of several cases, none of them, however, dealing with the question of temporary damages for which settlement was made as in the case about which the Bureau inquires. That is to say, the Ohio case is clearly authority that future estimated damages to business are not to be taken into consideration except in connection with depreciation of the value of property as a business site.)"

However, the weight of authority of other states supports the text of Corpus Juris and makes it appear most likely that no damages could have been recovered from the district for temporary loss of business due to the removal of the village of Osborn to the new site. This question, however, cannot be regarded as fully settled in Ohio, especially since the conservancy act, while not explicit enough in its terms to manifest clearly an intention to depart from the general rule and allow damages of this character, as a matter of express statutory provision, is nevertheless not entirely devoid of intimations in that direction.

Hence, it is too much to say that the payment of these business claims was positively illegal. It may have been unwise, but that of itself would not stamp it as wholly unauthorized. If the directors in accepting the work of the citizens committee preliminary to the formation of the district had reason to believe that these matters would be litigated, and were advised by their counsel that there was even a serious doubt as to the outcome of such litigation, the waiver of the theoretical and strict legal rights by the directors in order to secure prompt and unembarrassed prosecution of the work of the district, would seem to be within their general power. For this reason a negative answer is returned to the Bureau's fifth question.

The Bureau submits no facts in connection with its sixth question, but the attached statement of the secretary-treasurer of the district, shows that the citizens' relief commission incurred a large expense involving surveys, plans, expenses of organization and other incidental expense which became necessary in the organization of the district before any money could be derived from the sale of bonds or otherwise by the directors; and the authority to reimburse for these promotion expenses can be found in section 6828-43 of the General Code. The section provides in effect that preliminary expenses which cannot be immediately met out of funds of the district are to be paid out of the general funds of the county comprising the district, subject to reimbursement out of the district treasury when it is in funds. It also makes provision for a levy of an assessment for organization and other incidental expenses "which may be necessary up to the time money is received from the sale of bonds or otherwise." It also provides that "if such items of expense have already been paid in whole or in part from *other sources* they may be repaid from the receipts of such levy." There is no limitation here on the character of the "other sources" from which expenses subject to repayment in this manner may be incurred in the first instance. In the opinion of this department this expenditure is authorized.

It is true that a former Attorney-General assumed to hold, as stated in the Bureau's seventh question, that under no circumstances is it legal for Workmen's Compensation premiums to be included in the cost of an improvement, on the basis of which a contractor's compensation on the cost-plus plan can be figured. No reason, however, is given for this conclusion in the opinion cited. The former Attorney General argues that in case of strict force account work, the employers would be employes of the state which carries its own compensation insurance, so that the contractor would not be obliged to carry such insurance himself. Then assuming, but not deciding, that it is possible for a state officer or board to enter into a cost-plus contract other than on strict force account, the former Attorney General says that

> "the contractor has no more right to charge into the cost of the improvement as a contract charge against the state the premium so paid than he would have to charge against the state such premiums in a case where the contract is for the construction of an improvement for a particular sum certain to be paid to him."

The only other reason suggested is that it is the duty of the contractor to comply with the provisions of the Workmen's Compensation Act. This department does not concur in this holding. To be sure, cost-plus contracts are unusual. They are, however, apparently authorized by the broad provisions of the conservancy act. What shall be the items of cost which the public shall assume are matters of negotiation in making the contract between the public and the contractor? The fact that it is the primary duty of the contractor to comply with the Workmen's Compensation Act does not argue that the State might not agree to reimburse the contractor for this expenditure and to pay him a percentage thereof on the cost-plus basis.

The only restriction upon the manner of entering into contracts is that found in section 6828-16, referred to in the Bureau's eighth question. This section provides in full as follows:

> "When it is determined to let the work by contract, contracts in amounts to exceed one thousand dollars shall be advertised after notice calling for bids shall have been published, once a week for five consecutive weeks completed on date of last publication, in at least one newspaper of general circulation within said district, where the work is to be done, and the board may let said contract to the lowest or best bidder who shall give a good and approved bond, with ample security, conditioned on the carrying out of the contract. But said contract shall not be let to another than the lowest bidder unless upon a hearing before the court and upon notice to all parties interested, an order be obtained therefor. Such contracts shall be in writing, and shall be accompanied by or shall refer to plans and specifications for the work to be done, prepared by the chief engineer. Said contract shall be approved by the board of directors and signed by the president of the board and by the contractor, and shall be executed in duplicate. Provided, that in case of sudden emergency when it is necessary in order to protect the district, the advertising of contracts may be waived upon the unanimous consent of the board of directors, with the approval of the court or judge in vacation."

Accordingly, the Bureau's seventh question is answered in the affirmative.

The Bureau's statement of fact in connection with the eighth question submitted seems to show that after a preliminary determination to let the work by contract, the directors rescinded this action and determined to proceed on what is sometimes loosely known as "force account." The facts stated by the Bureau show that in purchasing equipment there was no advertisement nor competitive bidding. It is sufficient to state that no provision of the conservancy act requires advertisement and competitive bidding in the purchase of equipment, supplies, etc. It does require competitive bidding on the whole of the work let by contract, but such is not this case.

In its ninth question the Bureau also inquires whether there is any authority contained in such act for the modification or alteration of a contract by parties other than by the board of directors. It is sufficient to state that there is no such authority. This seems to be conceded by the secretary-treasurer, who states that the board was cognizant of all that was done by way of minor alterations under the authority of the chief engineer, and that a suitable resolution can be passed ratifying his acts. Undoubtedly, the passage of such a resolution should be recommended to cover this point.

The Bureau also inquires whether the purchase of equipment from an employe of the district constitutes a violation of section 12910 of the General Code. This section forbids an interest on the part of a public employe in a contract for the "purchase of property * * * for the use of the county, township, city, village, board of education or a public institution with which he is connected." A conservancy district is not a "public institution." It is declared by section 6828-6 of the General Code to be a "political subdivision of the State of Ohio", but it is not one of the subdivisions named in section 12910. This section being penal must be strictly construed, so that the answer to the Bureau's tenth question is in the negative.

The Bureau's eleventh question seems to be fully covered by the answer to the eighth question. Nothing has been found in section 6828-11 of the General Code reflecting upon this question.

Respectfully,

JOHN G. PRICE,

*Attorney-General.*