yet passed upon the question should eventually determine that the purport of the Tumey decision is to the effect that the statutes creating mayors' courts and investing them with criminal jurisdiction are unconstitutional and that the judges thereof were de facto officers instead of merely being disqualified to act when proper and seasonable objection was made, mayors could not enforce collection of their fees as against the persons against whom such fees had been taxed, but having once collected them the parties against whom they had been taxed and from whom they had been collected, could not recover them from the mayors. Having once collected them the mayor could keep them, although in reality he was not entitled to them. Neither, however, is the municipal treasury entitled to the fees. As between the mayor and the municipal treasury, the mayor has the superior right, but having collected the fees and paid them into the municipal treasury he would have no legal remedy whereby he might recover from the municipality. If the mayor should bring suit against the municipality to recover the fees which he had unwittingly turned over to the municipality the court upon finding that neither of them were legally entitled to the fees would leave the parties to the suit where it found them and dismiss the action.

However, in such a case the municipal government through its legislative branch, might recognize the superior right of the mayor to the fees in accordance with the decision of *State* vs. *Nolte*, supra, as a moral obligation and allow the mayor's claim for such fees.

Specifically answering your question, I am of the opinion that claims made by a mayor of a city for fees which he had taxed and collected in the hearing of state cases, and which he had erroneously turned over to the municipal treasury may lawfully be allowed by the legislative branch of the city government and paid to such mayor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

574.

BOARD OF HEALTH—CITY BOARD MAY NOT LEGALLY EXPEND FUNDS FOR PRINTING REPORT SHOWING ACTIVITIES OF SAID BOARD.

SYLLABUS:

A city board of health may not legally expend its funds to pay the cost of printing and distributing to the public a quarterly or other periodical report showing the activities of the board of health.

COLUMBUS, OHIO, June 6, 1927.

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

GENTLEMEN:—Acknowledgment is made of your recent request reading as follows:

> "Section 4476 G. C. reads:
>
> 'On or before the fifteenth day of January of each year, the board of health or health department shall make a report in writing for the preceding calendar year to the council of the municipality and to the state commissioner of health. Such report shall be on the sanitary condition and prospects of such municipality and shall contain the statistics of deaths, the action of the board and its officers and agents and the names thereof. It shall contain other useful information, and the board shall suggest therein any further legisla-

tive action deemed proper for the better protection of life and health. Such board of health and health departments shall promptly furnish any special report called for by the state commissioner of health.'

We have been unable to find any other statute which requires a local board of health to make or publish reports.

QUESTION: May a city board of health legally expend its funds to pay the cost of printing and distributing to the public a quarterly report in the form of a bulletin as per sample enclosed?"

Accompanying your letter is a single sheet four page bulletin or report published by the City Health Department of the city of Hamilton, Ohio, which contains briefly the vital statistics for the months of January, February and March, 1927, a tabulation of infectious and contagious diseases reported, the nurse's report, sanitary report, report of food and milk inspection department, report of food condemned and destroyed, report of milk inspection, district physicians' report, and various recommendations of the department.

The answer to your question involves the status of boards of health of city health districts as created and established by the Hughes and Griswold health measures, passed by the Eighty-third General Assembly. The former act was passed April 17, 1919 (108 O. L., Part 1, p. 236), and was enacted "to create municipal and general health districts for the purpose of local health administration." The first twenty-eight sections of that act were designated as Sections 1261-16 to 1261-43, General Code, both inclusive. The act also amended Section 4404, General Code. The Griswold act (108 O. L., Part 2, p. 1085) was passed December 18, 1919, as an emergency measure and became effective at the time of its filing in the office of the Secretary of State on January 2, 1920. This act amended Sections 1261-16 and 4404, General Code, among others, and placed them in their present form.

Section 1261-16 of the General Code provides:

"For the purpose of local health administration, the state shall be divided into health districts. Each city shall constitute a health district an for the purposes of this act shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. * * *"

Section 4404, General Code, provides:

"The council of each city constituting a city health district, shall establish a board of health composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided."

The Hughes and Griswold acts abolished municipal boards of health established under section 4404, General Code, prior to its amendment in such acts and, as stated in an opinion of this department, rendered January 28, 1920, and appearing in Opinions of the Attorney General for that year, volume 1, page 130, on page 133:

"What might be termed a new quasi-political subdivision was created somewhat analogous to school districts, or, so far as a city of the required popu-

lation was concerned, it might be said that it then had a dual interlocking capacity. It constituted a municipal health district and its city council was empowered to establish a municipal health district board of health, while the duty and method of raising the necessary funds for this health district was not changed by the act, showing the interdependent character of the district and the municipality. The idea of separate identity is further indicated by the fact that by section 1261-38 the treasurer and auditor of the city are specifically designated as the treasurer and auditor of the health district.

Section 4404, as contained in the Hughes act, reads:

'The council of each municipality constituting a municipal health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provisions by charter for health administration other than as in this section provided.'

It must be noted here that the subject of the first sentence of this section is changed from 'the council of each municipality,' as it was before, to 'the council of each municipality *constituting a municipal health district,*' but the rest of the statute is the same excepting the provision for charter municipalities making different provisions for health administration. Original section 4404 was repealed and there was no saving clause with reference to existing municipal boards of health. The effect of the repeal of a statute in the absence of constitutional limitations or saving provisions, is, as stated in 36 Cyc., 1234, 'as if it had never existed and of putting an end to all proceedings under it.' However, where the effect is practically that of amending the original section repealed, the matter of the old statute carried into the new statute suffers no break in its continuity, so there is no magic in the name which the legislature may give to the new act, whether it is termed an amendment or repeal that will defeat an otherwise evident intention. The question then is, was it the intention to abolish the municipal boards of health? Technically it would seem that such was the intention. The new board is not a municipal board, but a municipal district board. There can now be no such body known as the municipal board of health."

The effect of the Hughes and Griswold acts was, therefore, to abolish the old municipal boards of health and make health administration a matter of state rather than local concern. The duties and functions of boards of health of city health districts are defined by statute and cannot be enlarged or diminished by the cities themselves. They may be likened to city boards of education. The only power granted to cities in connection with health matters, in so far as the organization and functions of city boards of health are concerned at the present time, is that contained in section 4404, supra, providing that "nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district making provision by charter for health administration other than in this section provided." This language would seem to permit charter cities to prescribe the number of members of boards of health of such cities and the manner of their selection, but in my opinion goes no further.

Boards of health in city health districts are creatures of statute and it is well settled that creatures of statute may exercise only such powers and functions as are

specifically conferred upon them by statute or as are incidental to the powers and functions so conferred, and it follows that such creatures of statute may expend public funds in carrying out such functions and powers.

In order, therefore, for a city board of health to be justified in expending its funds to pay the cost of printing and distributing a quarterly report such as the one under consideration, authority to make such expenditure must be found in some statute. The provisions of the law of Ohio relative to the powers and functions of boards of health of city districts are found in sections 4404 to 4476, General Code, both inclusive. A search of these sections fails to reveal any specific or implied authority conferred upon such boards of health to publish quarterly reports such as the one under consideration or to publish other periodical reports.

In this connection it might be well to point out the fact that section 1261-19, General Code, which was a part of the Hughes and Griswold health acts, and which is one of the group of sections relative to general health districts created by section 1261-16, supra, provides that it shall be the duty of the district health commissioner to keep the public informed in regard to all matters affecting the health of the district. This language would apparently be broad enough to cover the publication of a pamphlet or a report such as the one under consideration, but section 1261-19 refers only to general health districts and cannot, in my opinion, be construed to cover city health districts as well as general health districts. No similar authority has been granted by the legislature to boards of health or health commissioners of city health districts.

It is therefore my opinion that a city board of health may not legally expend its funds to pay the cost of printing and distributing to the public a quarterly or other periodical report showing the activities of such board of health.

Respectfully,
EDWARD C. TURNER,
Attorney General.

575.

APPROVAL, ABSTRACT OF TITLE TO LAND IN HOCKING COUNTY.

COLUMBUS, OHIO, June 6, 1927.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 6, 1927, submitting for my examination warranty deed from Emery O. Bainter and Bertha Bainter of Hocking County, Ohio, covering the following described premises situated in the county of Hocking and state of Ohio, to wit:

> "Being the southeast quarter of the southeast quarter of Section 33, Township 12, Range 18, in Laurel Township, Hocking County, Ohio, containing 42 acres.
>
> Also the northeast quarter of the northeast quarter of Section 4, Township 11, Range 18, in Benton Township, Hocking Couuty, Ohio, containing 37 acres.
>
> Also Fractional Lot No. 4, in Section 3, Township 11, Range 18, Hocking County, Ohio, containing 11½ acres, more or less."

I have examined said deed and finding the same regular in form and to have been duly executed according to law, I hereby approve the same.

The warranty deed together with the abstract of title and encumbrance estimate