vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meeting."

The above statute clearly directs each board of education to organize on the first Monday in January after the election of members of such board, and to elect its officers including a president, vice-president, and clerk. The terms of office of the officers of the retiring board expire with the life of the board. A board of education is not permitted under the law to elect officers for terms which will extend beyond the life of the board electing them.

In an opinion of my predecessor, which will be found in the reported Opinions of the Attorney General for 1932, page 88, it is said:

"'With respect to elected boards, the apparent intent of the law is that they shall elect their own officers and that they shall not elect them for terms running beyond the life of the board. This is evidenced by the provision that the term of a clerk be limited to two years at most, or for no longer time than until a new board organizes. It should be noted that the life of a board of education is two years. That is to say that the terms of some members on the board expire each two years and new members are elected, providing the scheme of electing boards of education, and of the organization of those boards, as set up by the school code of 1904, is carried out."

I am therefore of the opinion in specific answer to your question that the board of education for the school district to which you refer, that organized on the first Monday of January, 1934, should elect its own clerk, and that the former clerk has no right to the position, regardless of the length of term for which the former board had attempted to elect him.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2294.

PUBLIC DANCE—"BARBECUE" NOT GIVING PUBLIC DANCE WITHIN MEANING OF SECTION 13393, GENERAL CODE WHEN.

SYLLABUS:

A proprietor of a so-called "barbecue" who serves light lunches and refreshments, and who furnishes a small dance floor and permits his patrons to dance as an incident to the real business of the "barbecue" but does not advertise that he is conducting a dance, and charges no admission other than the cost of food and refreshments, and where the music is furnished by a music box which is operated by the placing of a coin in the machine by one of the patrons, is not giving a public dance within the meaning of section 13393, *General Code.*

COLUMBUS, OHIO, February 17, 1934.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"Under date of October 24, 1933, your office issued an opinion to Hon. Ernest L. Wolff, Prosecuting Attorney at Norwalk, Ohio. The first paragraph of the syllabus reads as follows:

'Where a proprietor of a restaurant maintains a floor for dancing, employs an orchestra, permits dancing and advertises in a newspaper that a dance is to be held but does not charge any admission other than the cost of food and refreshments, such constitutes a "public dance" within the meaning of Section 13393, General Code. A person conducting a public dance without a permit may be prosecuted under section 13393-2, General Code.'

In the case submitted to you by Mr. Wolff, the proprietor of the restaurant employed an orchestra, and advertised dancing in a newspaper, although no charge was actually made for the dancing itself.

We have, in this County, numerous places, some of which go under the name of 'Barbecue', permitting dancing at any time they are open, providing the customer places a nickel in the music box and thereby furnishes the music. There is one place in particular known as 'The H Barbecue'. Regular meals are not served, but light lunches can be obtained at almost any time of the day or night. There is no regular closing time and the proprietor remains open as long as there is any business, but the usual closing time is not later than one or two A. M. Dancing is not advertised but the establishment is equipped with a music box known as an Orchestrope, and by the placing of a nickel in this machine a musical number is played. There is a small dance floor connected with the lunch room, and the patrons may dance to the music of the orchestrope. No charge is made for the dancing, and any patron who is purchasing refreshments may take advantage of this machine by placing a nickel therein.

My specific question is whether or not an establishment of this kind should obtain a permit from the Probate Court for dancing under Section 13393 of the General Code."

Section 13393, General Code, referred to in your letter, reads as follows:

"No person shall give a public dance, roller skating or like entertainment in a city, village or township without having previously obtained a permit from the mayor of such city or village if such public dance, roller skating or like entertainment is given within the limits of a municipal corporation, or from the probate judge if such public dance, roller skating or like entertainment is given outside a city or village, or permit another so to do. All permits issued under the authority of this section shall be subject to revocation at all times. The provisions of this section shall not apply to charter cities where the licensing authority is vested in some other office than the mayor."

In my opinion No. 1759, rendered October 24, 1933, I was called upon to pass on the question of what constitutes a public dance within the meaning of section 13393, supra. In this opinion an attempt was made to review all the authorities in Ohio on this question. In view of this fact, I shall not attempt to again go into detail in discussing what constitutes a "public dance."

At the outset I might say that the question of what constitutes a public dance is a mixed question of law and fact. The test usually laid down by the courts is whether it is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation. See 48 A. L. R. 147; 29 L. R. A. (N. S.) 331, 332.

The present situation is in many ways similar to my former opinion referred to in your letter. There are, however, certain distinctions. In the present case, the proprietor of this "barbecue" does not advertise. In my former opinion, certain advertisements appeared in the newspapers that dances were to be held. In an opinion to be found in Opinions of the Attorney General for 1927, Vol. I, page 521, a great deal of emphasis was placed upon this point in determining that a dance was a public dance. Also, in the present situation, the proprietor does not furnish an orchestra. He does, however, furnish an orchestrope but the patrons must first place a coin in the machine before it will commence to operate. Clearly, the attitude of the proprietor on the question of whether or not his patrons should dance, is one of indifference. In other words, the proprietor is not inviting the public in general to dance, even though he does furnish certain facilities for dancing. Likewise, the present case seems to present a situation of where the dancing is merely incidental to the main function of the "barbecue"; namely, to furnish food and refreshments.

While it is true that all these distinctions are not in themselves decisive of whether a dance is a public dance, nevertheless collectively they are important. Where the law depends totally upon a factual situation, it is important to weigh all the facts in determining what the law should be from the facts. Looking at the obvious intent of the statute, I cannot say that as a matter of law the proprietor in question is giving a public dance. The legislature intended that places where the public in general dance and where crowds gather, should be supervised. I do not think that the legislature had in mind a place like the one in question, nor did they intend the same to be classed as a public dance.

While the courts in Ohio have not passed upon the present question, nor upon similar facts, at least one court outside of Ohio has held that such does not constitute a public dance. In the case of *St. Josephs* vs. *Safris*, 221 Mo. A. 547; 282 S. W. 1032, the court held as disclosed by the first branch of the syllabus:

> "Proprietor of restaurant and confectionery, who had, in connection with such business, place where customers could dance free of charge, as incident to real business, and solely to promote it, *held* not keeping public dance house without license, contrary to city ordinance."

The ordinance in that case read as follows:

> "No person, firm or corporation shall keep a public dance house within the limits of the city of St. Joseph which shall be open promiscuously to the public, either upon the payment of an admission fee or otherwise without a written permit issued therefor by the chief of police and the humane officer."

From the opinion I quite the following:

> "The evidence shows that defendant operates a confectionery and restaurant business in which he sells candies, sodas, sandwiches, light

lunches, and a plate dinner during the noon meal hour. The business is located in a storeroom which fronts south upon Edmond street in said city. There is a soda fountain and a candy show case located near the street, immediately north of these are some open booths against the walls in which are tables and chairs where patrons may sit while being served. A portion of the room, about 15 feet square located at the rear thereof, is fenced off from the rest of the room by a railing. This part has a polished floor and was prepared by the defendant for dancing. At the entrance of this space and on the outside of the railing is an electric piano. Ordinarily there are no chairs or tables in this dancing space, but at times they are placed therein for the purpose of serving parties. Except when so used for serving parties, this space contains no furniture whatever. At no time does it have a place for an orchestra or seats for dancers. This space is maintained for the purpose of promoting defendant's confectionery and restaurant business by affording a place to dance for customers who are waiting to be served. No part of the public except defendant's customers may dance therein, and no admission charge or fee is made for the privilege of dancing. The customers are provided music for dancing by their dropping a coin in the piano. The piano is used, not only as a means of furnishing music for dancers, but also to furnish music in the main room. There are no stated or announced dances held. There is never a program or any other thing that is commonly connected with a dance. Any customer who is clean in appearance is privileged to dance in the place provided therefor. Very few customers take advantage of the opportunity to dance, and there are some days when there is no dancing.

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* * * The ordinance appears to be aimed at houses or halls devoted to public dancing or where such dancing is a substantial feature of the business and not to apply to a restaurant and confectionery business having in connection therewith and therein a place to dance free of charge as a mere incident of the real business carried on, and solely to promote such business."

Without further extending this discussion, it is my opinion, in specific answer to your question, that a proprietor of a so-called "barbecue" who serves light lunches and refreshments, and who furnishes a small dance floor and permits his patrons to dance as an incident to the real business of the "barbecue" but does not advertise that he is conducting a dance, and charges no admission other than the cost of food and refreshments, and where the music is furnished by a music box which is operated by the placing of a coin in the machine by one of the patrons, such does not constitute a public dance within the meaning of section 13393, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.