# VI.

# OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1905, TO DECEMBER 31, 1905.

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### (To the Governor.)

## POWER OF THE GOVERNOR TO HEAR CHARGES AGAINST AND REMOVE MAYOR.

March 16, 1905.

HONORABLE MYRON T. HERRICK, *Governor of Ohio.*

DEAR SIR: — I beg to acknowledge your communication of March 8th, requesting an opinion from this department as to your authority as governor to hear and determine charges against, and to remove from office, the mayor of a municipality of this State.

This inquiry necessitates an examination of Section 226 of the Municipal Code, passed October 22, 1902, which attempts to define the grounds of removal of mayors and to confer upon the governor authority to adjudge such removal for the reasons therein specified.

Section 226 reads as follows:

> "In case of misconduct in office, or bribery, or any gross neglect of duty, gross immorality or habitual drunkenness of any mayor, the Governor of the State shall remove him from office, upon notice and after affording to the said mayor, a full and fair opportunity to be heard in his defense. The proceedings for his removal shall be commenced by the Governor putting on file in his office, a written statement of the alleged causes for the mayor's removal, and he shall cause a copy of said statement to be served upon the mayor not less than ten days before the hearing of the matter. The proceedings had by the governor upon such removal shall be public and a full detailed statement of the reasons of such removal shall be filed by the Governor in the office of the Secretary of State and shall be made a matter of public record therein. The decision of the governor, when so filed, with the reasons therefor, shall be final and pending such investigation by the governor, he may suspend the mayor for a period of thirty days."

This section was not a natural or essential part of the plan of municipal government provided in the new Municipal Code, and seems to have been injected as an amendment thereto without a full consideration of its effect upon other statutes providing a complete method for the removal of municipal officers for misconduct or neglect of duty. The section is vitally defective and inoperative, in that it confers upon the governor no adequate means to exercise the power with which he is invested. The statute does not execute itself. It is provided that notice shall be given to the mayor "and a full and fair opportunity" to be heard in his defense; and yet no authority is given by compulsory process or otherwise to bring before the governor the witnesses to sustain the charges, or to secure to the accused the means of compelling the attendance of witnesses in his defense.

In the case of the State of Ohio v. The Fire Commissioners, 26 O. S., 30, the court found as a necessary condition precedent to sustaining the jurisdiction of a

board or body to remove a public officer that it must be "possessed of the means to try and determine questions of this character." So it has been held in this state and elsewhere in numerous decisions, that an officer can be removed only upon notice and after a hearing; and that any statute or procedure which does not supply these necessary ingredients to a fair trial is fatally defective. Dillon on Municipal Corporations, 4 Ed. Section 250; Dullam v. Wilson, 53 Mich., 392; Kennard v. Louisiana, 92 U. S., 480; State ex rel v. Sullivan, 58 O. S. 504.

In the last named case our supreme court held that where power was given to one officer to remove another for misconduct in office, such power could not be exercised arbitrarily, but only upon complaint, and "after a hearing had in which the officer is afforded an opportunity to refute the case made against him."

Section 226 of the Municipal Cole gives to the governor no power whatever to secure either to the accused or to those who make the complaint against him, a full and fair opportunity to present witnesses for the defense or the prosecution. If a mayor is charged with misconduct in office and you are asked to hear and determine the charge, no witnesses required by either side can be compelled to attend. The accused himself has it within his power to prevent the very thing sought by the statutes, to-wit; "a full and fair opportunity to be heard," by pretending to desire certain witnesses in his behalf and then secretly persuading such witnesses not to attend the hearing. No power being conferred to require such attendance, the accused could not be removed for the reason that he had been denied the most familiar and essential right, the opportunity to secure the attendance of witnesses in his own behalf.

For these reasons I am of the opinion that Section 226 of the Municipal Code is inoperative, and that the power therein sought to be conferred upon the governor ought not to be assumed or exercised. The conclusion here reached is further induced by the fact that Sections 1732 to 1736 inclusive of the Revised Statutes provide a full and complete method for the trial and removal of mayors as well as other public officers by the probate court, with all the essential incidents to the exercise of such jurisdiction, such as the power to compel the attendance of the accused as well as the witnesses for and against him, together with all the other judicial machinery necessary to the trial of such a case, and the enforcement of a judgment therein.

I am of the opinion therefore that this jurisdiction of the probate court rather than that attempted to be conferred upon the Governor ought to be invoked when complaint is made against the mayor of a municipality in this State for misconduct in office. As you are doubtless aware this has been the uniform view heretofore informally expressed by this department, in several cases presented during your administration, and is in accord with the judgment and practice of your predecessor.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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## CONCERNING POWER OF THE GOVERNOR IN GRANTING A REQUSITION.

September 27, 1905.

HONORABLE MYRON T. HERRICK, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR: — You inquire whether or not the provision in Section 5747

"That a person who is set at large upon a 'writ' shall not be again imprisoned for the same offense, unless by the legal order or process

> of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause or offense,"

applies to the granting of an application for a requisition where a previous application has been granted and the defendant released upon a writ of habeas corpus. In reply I beg leave to say that the above provision in Section 5747 does not in any way affect the power or jurisdiction of the governor in granting a requisition. It is only intended to protect persons who have been set at large upon a writ of habeas corpus from *imprisonment* for the same offense, without the process of a court having jurisdiction. The granting of the requisition is in no wise an imprisonment but is merely placing the defendant in the custody of the proper officers that he may be brought before a court of competent jurisdiction, to be dealt with according to law.

George H. Jones,
*Ass't Attorney General.*

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## POWER OF GOVERNOR TO GRANT PARDONS.

December 9, 1905.

Hon. Tod B. Galloway, *Secretary to the Governor, Columbus, Ohio.*

Dear Sir: — Your request for an opinion as to whether or not the power of the governor to grant pardons is restricted to those cases in which application is made to the State Board of Pardons is received.

In reply I beg leave to say that Section 11 of Article III of the Constitution provides that:

> "The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, *as to the manner of applying for pardons,* as may be prescribed by law."

Under this provision the power to grant reprieves, commutations and pardons rests solely with the governor. The Legislature has given authority, however, to prescribe regulations as to the *manner of applying* for pardons. This it has done by the creation of the Ohio State Board of Pardons as provided in Sections 409-42 to 409-49 R. S. Under these sections all applications for reprieves, commutations and pardons must be made to the said board. The governor is without authority to grant any reprieve, commutation or pardon unless the application is made to said board and the regulations as provided in Sections 409-42 to 409-49 are fully complied with.

Very truly yours,
Wade H. Ellis.
*Attorney General.*

**(To the Secretary of State.)**

## ARTICLES OF INCORPORATION OF THE SONNENBERG FIRE AND LIGHTNING INSURANCE ASSOCIATION.

January 13, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Your letter to January 12, referring to the proposed articles of incorporation of the Sonnenberg Fire and Lightning Insurance Association is received.

The purpose of the corporation as set out in its proposed articles does not comply with the Statutes of this State, Section 3686 to 3690 inclusive. Inasmuch as this is the second reference of proposed articles to this office I would suggest that in order that the articles of incorporation for the said company may be approved, its purpose should be stated substantially as follows:

"To enable its members to insure each other against loss by fire, lightning, tornado, cyclone or wind storm in the counties of Wayne, Stark, Holmes, Tuscarawas and Medina, Ohio, and to enforce any contract which may be by them entered into by which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members, in accordance with, and subject to the provisions of Sections 3686 to 3690 inclusive of the Revised Statutes of Ohio."

I return the proposed articles, the check for $25.00 and letter from the secretary of said Insurance Company.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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## REDUCTION OF CAPITAL OF PRODUCE EXCHANGE BANK, OF CLEVELAND, OHIO.

February 15, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of recent date submitting the communication and certificate of reduction of capital stock made by The Produce Exchange Bank, a savings and loan association, of Cleveland, Ohio. You desire an opinion from this Department relative to the legality of such certificate.

The capital stock of a corporation may be reduced pursuant to the requirements of Section 3264 of the Revised Statutes, and with the form of this certificate no exception could be taken as it is a literal compliance with the requirements of the section above cited; but Section 3797 R. S., provides a minimum capital for savings and loan associations doing business in such cities, of $50,000. The powers conferred by Section 3264 R. S., must be construed with reference to the minimum authorized capital of such banking corporation, and if decreased below the minimum amount authorized, it would amount to a voluntary surrender of its right to transact business as such banking company. The certificate and correspondence do not disclose the purpose of the reduction, and it may be that The Produce Exchange Banking Company is liquidating or retiring from business, but they cannot continue in business as such banking company after the reduction of their capital stock to $10,000. Very truly yours,

WADE H. ELLIS.

*Attorney General.*

## AMERICAN SAFE DEPOSIT AND TRUST COMPANY.

June 5, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I hand you herewith articles of incorporation of The American Safe Deposit and Trust Company of Zanesville, Ohio, which has been returned by you to Mr. George Brown, of Zanesville, assuming that I would not approve the same because the capital stock thereof was fixed at $10,000.00.

At the time of presenting the former articles by this same institution with the same amount of capital stock, I disapproved the same for the reasons then stated in my letter to you, because the former articles contained purposes therein which are not contained in Section 3821*a* and Section 3821*b* of the Revised Statutes. You will observe that the requirement concerning the capital stock of such companies is that mentioned in Section 3821*d*, and the limitation therein contained only applies when such corporations accept any trust which may be vested in, transferred or committed to it as provided in Section 3821*c*.

The former articles of incorporation had contained therein the power to act as agent or trustee in any capacity, which power is not conferred by Section 3821*a*. The corporation has now eliminated from the present articles all purposes which were objectionable in their former articles, and limits itself to the powers contained in Section 3821*a* and Section 3821*b*, which do not authorize the acceptance of any trust, and therefore are not governed by the provision as to the minimum capital stock contained in Section 3821*d*.

I have therefore approved the articles of incorporation and submit the same to you.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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## ARTICLES OF INCORPORATION OF THE GIBSONBURG BANKING COMPANY.

July 19, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I hand you herewith the certificate of amendment to the articles of incorporation of the Gibsonburg Banking Company, sent to me for my approval by you. In returning the same to you not approved by me, I beg to advise you of my reasons therefor as follows:

The Gibsonburg Banking Company purports by the certificate made by it to have been created a corporation for carrying on the business provided for in Chapter 16, Title II, Division II of the Revised Statutes of Ohio, governing savings and loan associations. It is proposed by the certificate of amendment to its articles of incorporation to enlarge the objects and purposes for which the company was originally formed, so that in addition to the objects and purposes carried on by it as a savings and loan association, it seeks to engage in the business of a safe deposit and trust company, preserving the same capital stock possessed by the original company, to-wit, $50,000. I assume that this amendment was thought by the stockholders of this banking company to be authorized by Section 3238*a* of the Revised Statutes, but no consideration seems to have been given to the provisions of Section 3821*gg* which provides,

"That any company now incorporated under the laws of the State of Ohio, as a savings and loan association, and having at the time of the passage of this act, a paid up capital stock of not less than $200,000, and organized and doing business in this state, or any company heretofore organized under the laws of this state, as a safe deposit and trust company, may also engage in business as a safe deposit and trust company, under and in accordance with the provisions of Sections 3821*a*, 3821*b*, 3821*c*, 3821*d*, 3821*e* and 3821g of the Revised Statutes of Ohio."

This section was construed by this department on the 21st day of November, 1904, in an opinion then addressed to your department, that, in the event of the business of a savings and loan association and that of a safe deposit and trust company being carried on by a single corporation, the capital stock of such corporation would not be that which is provided for savings and loan associations by Section 3797 R. S., but should be that required by the act of October 22, 1902 (Section 3821*gg*, R. S.), which is $200,000.

For the reason that the amendment to the articles of incorporation of this banking company evidences an intention on the part of the corporation to assume the powers of a safe deposit and trust company without enlarging its capital stock, as provided in the section above cited, I return the same to you without my approval.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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## ARTICLES OF INCORPORATION OF THE CAPITAL MUTUAL LIFE INSURANCE COMPANY.

July 31, 1905

HON LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of the proposed articles of incorporation of The Capitol Mutual Life Insurance Company handed to me by Mr. H. B. Arnold, and conveying your request that this department pass upon the same as required by Section 3589 R. S. In answer thereto I call your attention to two grounds of objection to these proposed articles. Both of the objections are made to paragraph "Fourth" thereof.

The proposed capital stock of the corporation is $300,000 to be divided into 300 shares of the par value of $100 each, and it is provided therein that only 1,000 shares shall be subscribed for, to be fully paid before commencing business, the remaining 2,000 shares shall be sold by the directors of the company "to such persons and at such prices as the directors may deem advisable."

Section 3591 requires that the *whole capital* of a life insurance company organized under that chapter of the Revised Statutes, shall, before proceeding to business, be paid in and invested as directed by the statute.

The provision in the proposed articles of the Capitol Mutual Life Insurance Company, is that one-third of the whole capital shall be subscribed, accepted, taken and fully paid before commencing business. This is not a compliance with the section under consideration, for if this company insists upon having a capital stock of $300,000 it must see that the whole amount is subscribed, paid in and invested as required by the statute cited before proceeding to business.

I would further call to your attention the attempted authorization of the directors of the company to sell stock "to such persons and at such prices as

they may deem advisable"; for in case of any subsequent increase of the stock which is to be sold by the board of directors, there should be a limitation inserted in the articles upon the powers of the directors to sell the same at not less than par.

Very truly yours,
WADE H. ELLIS.
*Attorney General.*

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## CERTIFICATE OF INCORPORATION OF THE BURIAL LEAGUE OF THE UNITED STATES.

September 7, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of an application of certificate of incorporation and other papers filed with you by The Burial League of the United States, located at Pittsburg, Pa., submitted to this department by you for an opinion as to whether or not the contract sought to be written within the State of Ohio by this corporation is in the nature of insurance.

We took this matter up with Hon. A. I. Vorys, the Superintendent of Insurance, and he has expressed the opinion that the same constitutes an insurance contract and the only way in which this corporation can be authorized to execute the same or to engage in that character of business within this State is by qualifying as an insurance company in the manner provided by the statutes of Ohio. In this opinion I fully concur.

I therefore return to you the papers submitted to me.

Very truly yours,
WADE H. ELLIS.
*Attorney General.*

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## AMENDMENT TO ARTICLES OF INCORPORATION OF THE AMERICAN BANKING CO.

September 20, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 16th inst. containing the amendment to the articles of incorporation of the American Banking Co., of Sandusky, Ohio, as made and certified by its board of directors and certified by its President and Cashier. The purpose of the amendment is, not only to change the name from that of The American Banking Co. to The American Banking and Trust Co., but also to enlarge the purposes for which the corporation was organized authorizing it to transact a safe deposit and trust company business, and to enjoy the privileges and powers granted to such companies, by Section 3821 et seq. R. S.

The only authority to combine the powers of safe deposit and trust companies with any other banking association is that contained in Section 3821gg R. S., and in the Act of May 10, 1902, (95 O. L. 531), and this only authorizes the consolidation of savings and loan associations with safe deposit and trust companies, and authorizes savings and loan associations to assume the powers of safe deposit and trust companies, under certain conditions. There is no authority conferred upon corporations formed for the purpose of doing a gen-

eral banking business to so enlarge their purposes as to assume the powers of a safe deposit and trust company.

It was held by the supreme court of Ohio in the case of State ex rel v. Taylor, (55 O. S. 61) that a corporation could only be organized under the laws of the State of Ohio for a single purpose, unless the statutes of the State otherwise provided. Each one of the several banking corporations permitted under chapter 16, title 2, div. 2 of the Revised Statutes, and of chapter 16*a*, same title and division, is limited to the powers as therein recited, and the purposes for which they may be organized, are defined under the several subdivisions of these chapters. It has been the uniform holding of this department that no banking corporation could assume the powers of any other form of banking corporation than that contained in the particular sections under which the bank is sought to be organized except in the case of savings and loan associations combining with safe deposit and trust companies, as in the sections above cited.

I am informed by your letter which accompanies the copy of the certificate of amendment of The American Banking Company, that this company originally was formed "for the purpose of doing a general banking business." If so, I assume that it was not organized as a savings and loan association and, if not, it has no authority by amendment to its articles of incorporation to assume the powers of a safe deposit and trust company, and I, therefore, return to you the certificate of amendment to its articles of incorporation, without my approval.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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## WHEN SUCCESSORS TO OFFICERS OF VILLAGE OF CLOVERDALE TO BE ELECTED.

September 21, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 20th inst., containing a letter from A. Combs, mayor of Cloverdale, Ohio, which you submit to me for a written opinion thereon. The question therein presented is as to when the successors of the present officers of that village shall be elected. I am advised by the mayor's letter that at the November election, 1904, they organized as a village and elected a mayor, clerk and three councilmen, each for the term of two years and three councilmen for the term of one year. This was done pursuant to the requirement of Section 193 of the New Municipal Code and Section 1565, old numbers, being Section 1536-21 Bates' Annotated Ohio Statutes, and after the enactment of the so-called "Chapman Law" (97 O. L. 37-40). The officers so elected began their respective terms on the first Monday of January, 1905. It clearly appears that at the coming November election there should be but three councilmen elected pursuant to the requirements of Section 193 of the New Municipal Code, and the term for which they shall be elected is two years. At the November election, 1906, the successors to the remaining officers would be elected for a term of two years, provided no change is made in the law as it exists at present, but should the constitutional amendment changing the time of the election of municipal and other officers be adopted (97 O. L. 640-641) it will operate to require that under Section 1 of that amendment all elections for municipal officers shall be held on the first Tuesday after the first Monday of November in the *odd* numbered years. A provision is made in that amendment that,

> "Every elective officer holding office when this amendment is adopted, shall continue to hold such office for the full term for which he was elected, and until his successor shall be elected and qualified, as provided by law."

Unless otherwise provided by the General Assembly the officers in office at the time of the adoption of the amendment will continue to hold their respective offices, and their successors would, in such event, be elected at the November election in the year 1907, and take their respective offices on the first Monday of January, 1908.

I herewith return to you the letter accompanying your request for an opinion.

Enclosure.

Very truly yours,
WADE H. ELLIS.
*Attorney General.*

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## CONCERNING ELECTION OF COUNTY COMMISSIONERS.

September 26, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — You have submitted to me the letter of Benj. Meck of Upper Sandusky, Ohio, for my consideration and answer to the following question:

> "Where three county commissioners are to be elected this fall, one for the full term of three years to fill the regular term, and two others to fill vacancies caused by death, shall the ballot designate for what term each is to run, or how will it be determined which of the candidates are to fill the respective terms?"

Mr. Meck contends that the nominees for county commissioners should go upon the ticket without any other designation than that of "county commissioners," and that the one who gets the most votes gets the longest term, and the next highest the next longer, and so on.

Considering this question and Section 841 of the Revised Statutes of Ohio, which has been cited by Mr. Meck, I have arrived at the conclusion that the ballot should designate the term for which each of the several nominees are candidates.

In Section 2966-32 R. S., governing the form of ballot to be used by the voter the following language is used:

> "All ballots shall be printed on the best quality No. 2 book paper, in black ink, and with the exception of the heading which shall be in display, in brevier type, the name or *designation of the office* in lower case, and the name of the candidate therefor in capital letters, with a space of at least one-fifth of an inch following each name; the name of each candidate shall be printed in a space defined by ruled lines, and with a blank square on its left inclosed by heavy dark lines; if, upon any ticket, there be no candidate or candidates *for a designated office.* a blank space equal to the space that would be occupied by such name or names, if they were printed thereon, with the blank spaces herein provided for, shall be left," etc., etc.

The question here presented involves the construction of what is meant by "designation of the office" or a "designated office" as used in the above section.

This language was construed by the circuit court of the 6th circuit in the case of State ex rel O'Donnell v. Shafer et al, 18 Ohio Circuit Court Report 525, where the court in the first paragraph of the syllabus said:

> "Where several members of a board are to be elected at one election, but for different terms of office, the ballots must state to which term the candidate is elected, otherwise the ballots will be declared void, although the entire election may be invalidated thereby."

The court in the body of the opinion (p. 529) further said:

> "That under circumstances like these, where the board has been filled, and afterward it becomes necessary to elect for terms of different lengths, there is no method provided by law for determining which shall have the long term and which the other, except for the electors to designate upon their ballots whom they desire for the different terms, and that was not done in this case."

This makes it imperative for the elector to designate upon his ballot the term for which each of the nominees are candidates, and the opinion cited further holds that the words "designation of office" means the designation of the term for which the party is a candidate, and that the term must be designated as a part of that required to appear under this section of the statute.

In the case of the State of Ohio ex rel Cole v. Chambers, 20 O. S. 336, the Supreme Court said that where one (school) director for the full term of three years and one director for the unexpired term of two years are being chosen, a designation by the electors, upon the ballots, of the terms of the persons voted for, is authorized by law, and such designation cannot be disregarded by the officers holding the election. In the case above cited there was presented the question of the election of school directors pursuant to the provisions of the statute found in Swan & Critchfield Revised Statutes, vol. 2, p. 1347. To show that the question therein presented is the same as here involved, it should be noted that there was a provision made in that Act as in the section governing the election of county commissioners (841 R. S.) and also contained in the old sections existing before the codification (S. & C. R. S. vol. 1, p. 343), wherein it was provided that the person receiving the highest number of votes shall receive the longest term, the person receiving the next highest number, the next longer, etc.

I therefore conclude that it would be proper and necessary to designate the terms of the candidates and that if not so designated the ballots will be void.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## REGARDING ORDINANCE OF THE CITY OF SANDUSKY, CHANGING BOARD OF PUBLIC SERVICE.

October 2, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of your favor of this date enclosing copy of an ordinance adopted by the city council of the city of Sandusky on the 7th day of August, 1905, wherein the city council has sought to change the board of public service of that city from three to five members and to provide that their salaries shall be $200.00 each, except that the board "shall elect annually by a majority vote one of its members to act as supervisor of public works who

shall give his whole time and attention to the service of the city, and who shall not be engaged in any other business or employment, and who shall be paid an additional salary of $1,000 per year."

As the question is presented to you regarding the validity of this ordinance to in this manner create a board of public service of five persons and fix their compensation, and which question you have submitted to this department for its construction, I beg to advise that pursuant to Section 117 of the Municipal Code, full power is given to the city council to determine the number of directors of the board of public service, and to fix their compensation and this having been done by the council in office at the time of the adoption of the Municipal Code, the same can be changed or altered, but not so as to affect the term of office or the compensation of the members thereof during their respective terms.

In so far as the city council has attempted to exercise its power pursuant to the provisions of Section 117 cited, no exception could be taken, but it has attempted by section one of the ordinance under consideration, to provide for the compensation of an individual member of the board of public service, *to be chosen by a majority vote of such board* to act as *supervisor of public works.* The power is attempted to be conferred by this ordinance upon the board of public service to select such person to perform the services mentioned in the ordinance and who is to receive the additional compensation as therein provided.

The powers sought to be conferred upon the board of public service are *ultra vires.*

First, because it is an attempt to confer upon the board of public service the power to choose or elect one of its members to act as supervisor of public works. By Section 139 of the Municipal Code it is provided that,

> "The directors of public service * * * shall manage and supervise all public works etc."

That which is attempted to be imposed upon this one individual by a majority vote of the members of the board is by this section made the statutory duty of each and every member thereof. And such duty calls for the combined judgment of all members of the board, and it cannot be surrendered to one member nor can such ordinance, by designating him as "supervisor of public works" be the reason for paying him $1,000 per year additional. A public officer cannot abdicate or surrender his duty to another. The rule is thus stated by Throop on Public Officers:

> "It is well settled that where the power is conferred upon two persons, or where by death or vacancy a power originally conferred upon a larger number has been devolved upon two only, and they are authorized to act, both must join in order to validate the execution thereof."
>
> "The general rule, that where a statute confers upon three or more persons the power to act in a matter of public concern, requiring the exercise of discretion and judgment, and contains no directions respecting the number of those who may exercise the power, such exercise will not be valid unless all act, or unless all meet, have a consultation and a majority act, has been established by many adjudications of the American courts."
>
> "Where the statute, expressly or by necessary implication, requires all or a certain number to act, the act of a smaller number is of no more legal validity than the act of the same number of private individuals."

Second, no authority is given by the statute to the department of public service whether it consists of three or five directors, to elect or choose "a supervisor of public works." An attempted creation of that power in the board of public service by an ordinance of council, is void and of no effect.

Third, there being no such power vested in the board, the board cannot choose which one of its members shall receive the compensation of $1,200.00 per year. The power to provide for compensation to officers of the city is left by the Municipal Code to the city council. This necessarily implies the designation of the board or officer which is to receive the compensation. To attempt to leave it to any board, other than council, to designate the officer who is to receive the greater compensation is in excess of the powers of the board and therefore void.

Having arrived at the foregoing conclusions with regard to the ordinance so enacted it only remains to inquire whether it can be treated as one changing the board of public service from three to five members and stand as a valid enactment of the council independent of the foregoing provisions. Upon examination of the ordinance I find it is so inter-related that it could uot be said that it would have been enacted by the council in the form that it has, had it not been for the provision attempting to give to the board of public service the foregoing illegal power, and further in fixing the salary of a supervisor of public works as it has done. These provisions contained therein seem to have been the moving cause for its enactment, and so deciding, the portion of the ordinance designating the number of the board of public service must fall with the balance thereof, and the whole ordinance is invalidated.

Very truly yours,

WADE H. ELLIS.

*Attorney General.*

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## SAVINGS AND LOAN ASSOCIATION ASSUMING POWERS OF SAFE DEPOSIT AND TRUST COMPANY.

October 30, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of yours of the 28th inst., enclosing a letter from Julius G. Penn, Attorney-at-law, for my consideration, I beg to say that in my opinion a savings and loan association organized pursuant to Section 3797 Revised Statutes, cannot assume the powers of a safe deposit and trust company pursuant to Section 3821*a* Revised Statutes et seq., with a capital stock of but $50,000. Nor can a corporation be created in Ohio with all the powers of a savings and loan association and a safe deposit and trust company unless it has the minimum capital provided by Section 3821*gg* R. S., viz: $200,000.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## AMENDMENTS TO ARTICLES OF INCORPORATION OF WESTERN RESERVE INSURANCE CO.

November 6, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I hereby acknowledge receipt of your favor of the 4th inst., enclosing certificate of increase of capital stock, also copy of amendments to

articles of incorporation of the Western Reserve Insurance Company of Cleveland, Ohio, the same being presented for my approval.

As these amendments present several important questions I beg to suggest that you notify the Western Reserve Insurance Company that I desire to hear from their counsel upon the following propositions:

(1) If the increase of capital stock of the company was made pursuant to Section 3592 R. S., being a general section covering the procedure for increasing the capital stock of insurance companies, is the certificate sufficient as made by the officers of said company, that the increase was authorized by "a vote of the holders of the majority of the stock," the statute cited authorizing the same to be done if the holders of two-thirds of the stock should consent?

(2) If the amendment to the articles of incorporation of said company by which the purpose of the company has been changed, was made pursuant to Section 3238*a* R. S., is the procedure therein provided applicable to fire insurance companies, the statute apparently limiting such procedure to those corporations "incorporated under the *general* corporation laws of the state?"

I will retain the papers referred to until I further hear from the company.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## LEGALITY OF ARTICLES OF INCORPORATION OF THE OHIO COLLATERAL LOAN CO. OF CLEVELAND.

November 29, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of your communication of the 28th inst., enclosing the articles of incorporation of the Ohio Collateral Loan Co. to be located at Cleveland, Ohio, and requesting an opinion of this department as to the legality of the same, I beg to advise you that the original act for the incorporation of collateral loan companies was passed April 16, 1885, found in Vol. 82, p. 132 of the Ohio Laws, and is now embraced in the Revised Statutes, being Section 3821*h* to 3821*q*, inclusive.

You will observe by Section 4 of the original act, that there was contained a requirement therein that $50,000 should be first duly subscribed before the stockholders could organize and proceed to transact business. This was reduced by the amendment to the act providing that $20,000 should first be duly subscribed, etc., before the stockholders could organize and proceed to the transaction of business. This is the only provision in the act that seems to name a minimum amount of capital for such companies. Section 2 of the act provides for a maximum amount of capital in the following language: "It shall not exceed $500,000, in shares of $100.00 each." The requirement above cited that $20,000 must be subscribed before the company can be authorized to transact any business directly compels the company to be incorporated with at least that amount of capital stock.

As the articles of incorporation of the Ohio Collateral Loan Co. only provide for a capital stock of $10,000 it is my opinion that there is no authority for such incorporation. I therefore return them to you for your action thereon.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## ARTICLES OF INCORPORATION OF UNION LOAN AND SECURITY COMPANY.

December 5, 1905.

HON. LEWIS C. LAYLIN, *Secretary of State, Columbus, Ohio.*

DEAR SIR: — I have your favor of the 2nd inst., relative to The Union Loan and Security Company, whose articles of incorporation you present to me requesting an opinion thereon as to whether a corporation of its character could be incorporated under the general corporation laws.

The purpose of the company in question as set forth in its articles of incorporation is that of "transacting the business of making and negotiating loans on real estate and personal security."

This does not constitute the business of a savings and loan association nor of any form of banking as provided by the statutes of Ohio, while it might be considered as incident to and a part of the powers of all forms of banking. The statutory test which I apply to it is that contained in Section 3235 R. S., being one of the sections of the general corporation law under which miscelllaneous corporations are created, viz:

> "Corporations may be formed in the manner provided in this chapter for any purpose *for which individuals may lawfully associate themelves"* * * *

excepting certain forms of corporate organizations that can have no relation to this question.

It lies within the power of individuals to associate themselves together for the purpose of making and negotiating loans on real estate and personal security, and it is a legitimate business in which any individual, partnership or association might lawfully engage. This being true, and there being no statutory provision forbidding the creation of such corporations in the method sought by this company, I do not see how you could properly withhold issuing certified copies of the articles of incorporation as provided by the statutes governing your duties in that respect, unless it be in the character of the name assumed by this company, over which you have full control as provided by Section 3238 R. S.

Very truly, yours,

WADE H. ELLIS,
*Attorney General.*

(To the Auditor of State.)

## REFUNDING DOW TAX PAID IN CERTAIN CASES.

January 31, 1905.

HON. A. L. CORMAN, *Dow Tax Deputy, Department of Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your letter of January 27, is received. You inquire whether keepers of houses of illfame, who have paid the dow tax, but who claim that they have not sold intoxicating liquors since the payment of said tax — are entitled to a refunder of the entire amount so paid by them?

The only provision for a refunder of the dow tax is found in Section 4364-112 R. S. This section provides among other things that the refunding order therein referred to shall be for a proportionate amount of the assessment and that such assessment shall in no event be less than $50.00, when the person discontinues the business.

In the case proposed by you the county auditor therefore, cannot refund the entire amount of the dow tax paid and assessed but only a proportionate amount, and such auditor should retain at least $50.00 of the dow tax so assessed and paid.

I return you the three enclosures, being letters from James S. Thomas, of Portsmouth, Ohio.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

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## RIGHT OF SHERIFF TO CHARGE MILEAGE ON EACH OF TWO WRITS WHEN SERVED AT THE SAME TIME.

February 2, 1905.

HON. E. M. FULLINGTON, *Deputy Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your communication dated January 30, 1905, in which you request a construction of Section 1230*b* R. S., relative to the right of the sheriff of Champaign County to charge mileage on each of two writs served on William Wooley in the Ohio State Reformatory at Mansfield, when both writs were served at the same time, is received. In reply I beg leave to say that while the Supreme Court has held in the case of Richardson v. The State, 66 O. S., p. 111, that the *"mileage"* allowed a public officer is intended to compensate him for the expense of his travel on official business and that where mileage is provided the officer is not entitled to any other compensation for personal expenses, yet there has been no decision of the court touching the question you submit. Section 1230*b* contains this provision:

> "For the service of *every writ* or *summons* and return thereof * * * when only one defendant is named therein twenty-five cents; * * * and mileage as in other cases."

If mileage is claimed by the officer on both these writs it must be based upon this language contained in this provision, viz: *"every writ or summons."* While it is true the officer makes but one trip for the service of *both* writs, yet

if mileage is to be allowed on only *one* writ we are met with the pertinent query, upon which writ is it to be allowed?

Take the instance where two subpoenas are issued in a criminal case and served upon the same person and at the same time, one on behalf of the State, and the other on behalf of the defendant. If mileage is to be allowed only for the one trip actually taken by the officer, upon which subpoena shall the mileage be allowed? Manifestly, under the language of the statute just quoted the claim for mileage attaches to the one as strongly as the other and were it sought to compensate in mileage for only the miles actually traveled it could only be accomplished by reducing the mileage to one-half upon each subpoena. This, I think, the law would not permit. I am, therefore, of the opinion that the only construction to be placed upon the language of Section 1230*b*, as above quoted, is to allow the statutory mileage upon both writs.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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POWER OF BOARDS OF REVIEW, COUNTY AUDITORS AND TAX INQUISITORS.

Febuary 17, 1905.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — You have submitted to this office the following questions coming from the auditor of Hancock County:

1. Have the board of review and the auditor the right to increase the returns made on stocks of merchandise by assessors, where such stocks have been returned by the owner without being sworn to as required by law?

2. Can the board of review take this matter out of the hands of the auditor and fix the amount?

These two questions may be considered and answered together. Section 2784 R. S., provides that in every case in which any person, company or corporation refuses or neglects to swear to his return the assessor shall report the fact of such refusal and the auditor shall add to the amount returned, or ascertained, 50 per cent. of such amount; and the amount thus increased shall be the basis of taxation for the year. I am of the opinion that this language must not be construed to mean that the return cannot be increased beyond the 50 per cent. additional; but that the proper construction of the same is to regard such return as any other made by an individual, company or corporation and subject to review by the proper taxing authorities.

As to who are the proper authorities to increase, equalize or review personal property returns, I beg to advise you as follows:

The new boards of review for the cities of the state established by the act of May 10, 1902, (95 O. L. 481), have superior and final authority in all such matters within the municipal corporation for which they are appointed. This act gives to such boards all the powers heretofore conferred upon and exercised by the annual city boards for the equalization of the value of real and personal property, moneys and credits; the decennial city boards for the equalization of the value of real property; the annual city boards of revision; and the decennial city boards of revision, under any and all laws theretofore in force in the municipalities where the new boards of review are established. Among the powers thus succeeded to by the boards of review is that of calling before them the owners of property, moneys, credits and investments for the purpose of ascertain-

ing the value thereof; of equalizing the value of real and personal property; of placing upon the tax duplicate any real or personal property which has not been listed for taxation, and of increasing the value of all property, moneys, credits and investments which have, in their judgment, been listed at less than their true value in money. It is clear, therefore, that the new boards of review have original and final jurisdiction to increase, decrease and equalize the value of real and personal property within the municipality for which they are appointed.

Now, as to the powers and duties of the county auditor. In the first place it is his duty to lay before the city boards of review the assessors' returns and any information he may have with respect to inequalities or under or over valuations of property within the municipality for which such board of review is appointed. In the next place the county auditor is empowered by Section 2781 and 2781*a* to enter upon the tax duplicate all *omitted* personal property; and it would seem that by Section 2781*a* the county auditor has the further power to enter on the tax lists any property not returned according to the true value thereof in money. But the power of the auditor and that of the board of review to increase the value of personal property returned for taxation must not be construed so as to produce a conflict between the respective jurisdictions of these two taxing authorities. Therefore, if Section 2781*a* confers upon the auditor the right to do more than to list omitted property; that is to say if it confers upon him the power to *increase* the values of property which, in his judgment, have not been returned according to its true value in money, this authority must be subject to the superior jurisdiction of the board of review, created specifically for the purpose of passing upon such questions; and if the board of review has fixed the value of personal property whose owner's return was insufficient, there is no power in the auditor to disturb such valuation, for it is not to be assumed that the legislature intended to subject the owners of personal property to a review of their returns and a hearing upon the question by two different taxing authorities.

Now, as to the power of the county auditor under Section 2781*a* to fix for five years next preceding the year in which a return is corrected, the value of personal property, I beg to advise you that, in my judgment this power is clearly conferred, and may be exercised by such auditor, whether the correction for the one year is made by the county auditor or by the board of review. It may be well to add, however, in order to prevent any misunderstanding of this statute, that the taxes thus discovered are due to the public treasury only, and no commission or compensation whatever should be paid to a tax inquisitor in this behalf, unless he has personally procured the evidence which results in the increased or omitted valuations. The law authorizing contracts with the so-called tax inquisitors contemplates that the persons with whom such contracts are made shall, in every instance, perform some actual service in return for the compensation paid; and if the county auditor upon his own motion increases the tax duplicate by adding omitted property, or by increasing the values contained in returns of personal property, or if the board of review supplies such omissions or makes such additions, the tax inquisitor is not entitled to receive any remuneration for the same, either for the next preceding five years or for any other period.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## APPLICATION OF DOW TAX TO PROPRIETORS OF HOUSES OF ILL FAME.

April 18, 1905.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your letter of April 13 received. You inquire

> "Do the proprietors of houses of ill fame become liable for the Dow Tax when they take money from their patrons, for the purchase of liquors, and procure the same from some nearby saloon, and charge a greater amount of money to their patrons for the liquors than such proprietors pay at the saloons?"

In my opinion the proprietors of houses of ill fame, selling liquors under the circumstances detailed in your inquiry, are liable for the Dow Tax.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## COLLECTION OF DOW TAX.

June 5, 1905

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your letter of June 5, received. You submit this statement of fact, A leases from B a building and fixtures and uses such building and fixtures in trafficking in intoxicating liquors. B advances the money to pay the Dow Tax upon such traffic and A agrees to pay B $1.00 per day to apply on the re-imbursement of B for paying such tax. A discontinues busines 20 days after the fourth Monday in May. B then leases to C the same premises for the purposes aforesaid and C agrees to re-imburse B at the rate of $1.00 per day for the payment of the Dow Tax.

Upon this statement of fact you inquire whether the State can collect $50.00 as against A for the period he engaged in the traffic in intoxicating liquors and also whether C can be charged with the full Dow tax for the assessment year, amounting to the sum of $350.00?

In reply to your inquiry I would say that Section 4364-10 of the Revised Statutes of Ohio provides that the Dow tax assessment shall attach and operate as of the fourth Monday of May each year, consequently A became liable to pay the Dow tax from the fourth Monday of May until such time as he ceased to do business. Thereupon A would be entitled to a refunder by virtue of Section 4364-11 R. S., but the State in that case would be entitled to demand and receive the sum of $50.00 and no more. A having conducted the business for a period of 20 days after the fourth Monday of May and then discontinued business, the assessment as against C could only date from the time C commenced the business of trafficking in intoxicating liquors, and he would pay the proportionate assessment for the remainder of the year, and in no event can the beginning of his assessment precede the time of his commencing business.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

## NOT DUTY OF A BUILDING AND LOAN COMPANY TO LIST ITS CONTINGENT OR RESERVE FUND FOR TAXATION.

August 16, 1905.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Yours of the 15th inst. presents to my consideration the following question: Should the contingent or reserve fund of a building and loan company be listed for taxation?

The answer to this question is to be determined by whether such fund becomes and is the separate property of a building and loan company, or whether it is the individual property of the members thereof.

Regarding the subject of taxation of the shares and credits in building and loan associations, Section 3836-7 R. S., provides as follows:

> "The shares and loans, advanced to its members, shall be exempt from taxation, except shares or stock upon which no loans have been made or money advanced by the company, shall be considered and held as credits, *and the said members individually shall list for taxation the number of shares held by them, and the true value thereof in money,* on the day preceding the second Monday in April in each year, and the same shall be assessed at such valuation for taxation and taxes as other property.

The language employed in the foregoing section plainly makes it the duty of the individual member to list the number of shares held by him at its true value in money. Is the contingent or reserve fund, created by the building and loan company, the property of the association to be separately listed by it, or is it the property of the members thereof? In the case of Seibel v. Building Association, 43 O. S. 371, quoting from page 375, the Supreme Court of Ohio has said:

> "Each member is also entitled to a pro rata share of the reserve fund, whether a borrowing member or not."

In view of this position of the Supreme Court I therefore express the opinion that it is not the duty of the building and loan association to list its contingent or reserve fund for taxation, but that it is the duty of the individual members thereof.

I herewith return to you the letter of A. J. Layne, member of the city board of review of Ironton.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## LIABILITY OF STATE IN CERTAIN BILLS PRESENTED BY PROSECUTING ATTORNEY OF ALLEN COUNTY.

November 21, 1905.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — Your letter of November 11, is received. You refer to this department two bills against the State of Ohio for services and expenses of agents employed by the prosecuting attorney of Allen County, Chio, incurred in

gathering evidence in the prosecution of the case of the State of Ohio v. Elisha Bowsher and Thomas K. Williams, who were convicted and sentenced to the Ohio Penitentiary; also a bill of Fenner Brothers for taking pictures to be used as evidence by the prosecution, and you inquire whether the charge contained in said bills should be paid by the State of Ohio.

In reply I beg leave to say that neither of these bills are a proper charge against the State of Ohio. If the appointment of S. A. Earnest and A. L. Fleet was made under the provisions of the act passed by the last General Assembly, authorizing the judge or judges of the court of common pleas to appoint a secret service officer for the prosecuting attorney's office, then they will receive their compensation from the county treasury of Allen County.

The photographers' bill is not such an item of costs as is provided for in Section 7332 of the Revised Statutes. This section provides that,

> "Upon sentence of any person for a felony the *officers* claiming costs * * * shall deliver to the clerk itemized bills thereof, who shall make and certify under his hand and the seal of the court a complete bill of costs made in the prosecution, including any sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor or on the request of the governor made to the President of the United States, etc."

There is no authority in this section to include in this cost bill items of cost made in the prosecution other than the costs *claimed* by officers legally entitled to compensation and sums of money paid by the county commissioners on account of requisition proceedings.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## WHETHER CITY COUNCIL HAS POWER TO CONTRACT WITH BANKS FOR DEPOSIT OF SCHOOL FUNDS.

December 15, 1905.

HON. W. D. GUILBERT, *Chief Inspector and Supervisor of Public Offices, Columbus, Ohio.*

DEAR SIR: — Under Section 135 of the Municipal Code, provision is made for the deposit of public moneys coming into the hands of the city treasurer, by the council of the municipal corporation.

By Section 136 of the Municipal Code, it is provided that the treasurer shall receive and disburse school funds and all other funds belonging to any department of the city government.

Section 3698 of the School Code of April 25th, 1904, confers upon boards of education the power to deposit school funds under contracts with banking institutions.

The question presented, is whether since the passage of the school code, the city council has power to contract with banks for the deposit of any of the school funds?

I am of the opinion that it has no such power. In the first place, Section 3968 is the latest expression of the legislative intent. The provisions for the deposit under this section are so widely different under Section 135 of the Code, that it cannot be said that the power of designating depositories for school funds

is to be exercised by both the council and the school board or by the one first attempting to exercise it.

The board of education not only has, under Section 3698, jurisdiction in contracting for these deposits superior to that of the city council because Section 3698 was enacted after Section 135 of the Municipal Code, but also under the rule of statutory construction that a particular provision takes precedence over a general one. In so far therefore, as Section 135 of the Municipal Code attempts to cover deposits of school funds it is modified by the provisions of Section 3968 and the board of education has exclusive jurisdiction over the deposit of such funds. Any contract, however, entered into by the city council and a bank prior to April 25, 1904, is binding upon the parties thereto, even though the contract runs to some period since the enactment of the school code.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## WHETHER DOWER ESTATE SUBJECT TO PROVISIONS OF INHERITANCE TAX.

June 7, 1905.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I am in receipt of a letter to you from Hon. Froome Morris, assistant prosecuting attorney of Hamilton County, wherein is raised the question whether or not a dower estate is subject to the provisions of the inheritance tax law.

Mr. Morris says that the contention is that a dower interest grows out of the statute creating the same and not out of any statute of inheritance, and that therefore it is not taxable under the inheritance tax law. I do not consider it important that the statute under which the dower estate arises is not part of the general inheritance statute. It seems to me that he most serious question is, when the right of succession attaches. That is whether the right of succession to the dower estate arises at the time the husband became seized of the property or only upon his death. I find no authorities that seem to be decisive of either of the questions suggested, and because of the importance of the proposition I desire that Mr. Morris submit the case to the proper court in Hamilton County.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## AMOUNT OF COMPENSATION TO BE PAID COUNTY AUDITOR AND TIME OF PAYMENT THEREOF.

December 8, 1905.

HON. W. D. GUILBERT, *Auditor of State, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of yours of the 5th inst., in which you request an opinion of this department as to the construction of Section 1069 Revised Statutes, in which is involved the two questions as to the amount of compensation which should be paid to the county auditor and the times of the payment thereof.

The questions presented involve not only the construction of Section 1069 Revised Statutes, which governs and controls in the computation of the compensation of the county auditor for services in connection with such moneys, but they also further involve the consideration of Section 1115 R. S., which provides the time of the semi-annual settlements to be made between the county auditor and the county treasurer. The portions of those sections of the Revised Statutes to which I call your attention are as follows:

> Section 1069.
>
> "The county auditor on *settlement semi-annually* with the county treasurer and the Auditor of State, shall be allowed as compensation for his services the following percentages on all moneys collected by the county treasurer on the grand duplicate of the county * * * * and on moneys collected on levies made by school boards, 1% to be paid as nearly as possible in equal monthly payments or that monthly estimates in lieu of said salary shall be allowed to said auditor and paid to him by the county treasurer."
>
> Sec. 1115.
>
> "The county treasurer shall, on or before the 15th day of February, in each year, settle with the auditor of his county, for all taxes that he has collected at the time of making such settlement; and he shall also on or before the 10th day of August in each year, settle with the auditor for all taxes that he has collected at the time of making said settlement, not included in the preceding February settlement. * * * ."

As to the amount of compensation to be paid the county auditor, the recent decision of the Supreme Court, in the case of the *State of Ohio on the relation of Bender, Treasurer,* v. *Lewis, Auditor,* decided November 28, 1905, is conclusive.

In that case it was contended on the part of the county auditor that under Section 1069, R. S., his compensation should be the graduated percentages provided for therein, calculated upon the *entire gross* collections of the grand duplicate of the county, including in the basis the collections made under levies by school district boards, the compensation so ascertained, to be deducted from the shares or portions of revenue payable to the state, county, township, corporations and school districts, *and in addition thereto, a further compensation* as also provided in Section 1069, of 1% on the *gross collections* under such school board levies.

The court in passing upon the question said:

> "There seems to be no dispute about the right to the 1% of moneys collected on levies made by the school boards, and this being conceded, it is insisted that when the auditor takes the collections on the grand duplicate as the basis for the percentage allowed in the preceding language of the section, he should, before laying the percentage, deduct from the amount of the grand duplicate the aggregate of the collections made upon levies by the local school boards; otherwise he will receive double percentage on such school funds."

The court in commenting upon this contention said that the effect of the amendment was to provide for the compensation of county auditors, and after it fixes a per cent on the several sums collected on the grand duplicate of the county, which includes school moneys levied by local boards, it provides an additional 1% on moneys collected on levies made by school boards.

It thus seems very clear that the county auditor shall be allowed the graded

percentages provided by Section 1069 R. S., upon all moneys collected by the county treasurer on the grand duplicate of the county, and in addition to that amount so computed, the further amount of 1% on moneys collected on levies made by school boards.

Second. The provision contained in Section 1069 R. S., as to the time of payment of the compensation to the auditor is that it is "to be paid as nearly as possible in equal monthly payments or that monthly estimates in lieu of said salary shall be allowed to said auditor and paid to him by the county treasurer."

You will observe by Section 1115 that "the semi-annual settlements shall be made with the county treasurer on or before the 15th day of February and on or before the 10th day of August in each year, and by Section 1069 it is provided that upon the semi-annual settlements, the auditor *shall be allowed* as compensation for his services the following percentages" (then follows the percentages not necessary here to quote).

The provision contained in the same section above quoted as to the auditor being paid his salary in equal monthly payments as nearly as possible, provides the time of the actual payment to the auditor, while he shall be allowed in his semi-annual settlement the amounts computed by the percentage given.

The one is a direction when to *allow* the compensation in the settlements made and the other is a statutory direction that the same be paid as nearly as possible in equal monthly payments.

From this I deduce that the auditor can only be allowed this compensation at the time of the semi-annual settlements upon the moneys actually collected by the county treasurer, and if not then allowed and paid as provided by that act he is not entitled to have the same allowed to him upon his next or any subsequent semi-annual settlement with the county treasurer.

These conclusions are based upon two considerations:

First: That there cannot be charged upon revenues of any subsequent year, the payment of an auditor's compensation for periods preceding the time for which the levy was made, for if this were permitted it would be using the taxes levied and collected for one purpose, for another and entirely different one, and further might entirely exhaust the revenues for any given period in order to pay the claims due the county auditor which should have been settled and allowed at the time of the semi-annual settlements mentioned in Section 1115 R. S.

Second: That the county auditor is estopped by his several semi-annual settlements made with the county treasurer to claim further or other compensation than was allowed to him at the time of such settlements, and which have been fully paid to him.

This should not be considered as forbidding the allowance to the county auditor of his compensation as computed by the percentages upon the undistributed moneys for the current year in the county treasury at the time of the semi-annual settlement in February, 1906, for upon such settlement he is entitled to have allowed the compensation as computed according to the rule announced in the fore-part of this opinion.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

**(To the Bureau of Inspection and Supervision of Public Offices.)**

## FEES OF SHERIFFS. SUPPLEMENTAL TO OPINION OF DECEMBER 12, 1904.

January 4, 1905.

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

DEAR SIR: — Your communication of the 3d inst., referring to the fees of the sheriff of Cuyahoga County for the transportation of children to the Cincinnati House of Refuge and which is supplemental to the inquiry made by you under date of the 3d ultimo, has received my consideration. After further investigation of the subject, and agreeing fully with the opinion expressed by this department under date of the 12th inst. as to the method of the computation of the fees for such services, the payment of the same not having been particularly provided for to be paid out of the county treasury, I am of the opinion that the allowance made under Section 1231 R. S., to the sheriff of not more than $300.00 per annum, is meant to include, among other services, those which have been performed by sheriffs in cases of the character referred to.

I herewith return to you your copy of the opinion of December 12, 1904.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

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## CONCERNING SUPPLY OF WATER BY MUNICIPAL WATER WORKS FOR FIRE PURPOSES AND TO SCHOOL AND CITY BUILDINGS, ETC.

January 9, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt of yours of the 4th inst., containing an inquiry addressed to your department by the President of the Board of Water Works of the city of Findlay. The question involved is this; does the enactment of the law creating the bureau, passed May 10, 1902, (95 O. L. 511-515) directly or by implication repeal Section 2417 R. S., (1536-528) and can a charge lawfully be made for water furnished for fire purposes, and also to the city schools and city buildings and otherwise, when the water works is owned by the city?

By the creation of the Bureau of Inspection and Supervision of Public Offices, pursuant to the act above cited, it is provided for the Bureau, under the administration of the Auditor of State, which was not supplementary or revisory of any existing law, but created original powers to be exercised by the body to be appointed under the act, subject to the Auditor of State.

The purpose of the act was made evident in its title which is "An act to create a Bureau of Inspection and Supervision of Public Offices, and to establish a uniform system of public accounting, auditing and reporting, under the administration of the Auditor of State." It does not by its terms purport to repeal any existing law. There is no repealing section attached thereto. If it should be absolutely impossible to harmonize this law in all its parts with other existing acts, the principle of repeals by implication should be applied, and to the extent

that such acts would be inconsistent with the provisions of this act, the same would be by implication thereby repealed. Repeals by implication are not favored. This has been repeatedly announced by our supreme court, but I do not find any inconsistency between the provisions of this act and that of Section 2417 R. S. and kindred sections, so that we are not called upon to adopt any such construction.

By the provisions of Secticn 2417 it is provided:

> "No charge shall be made by the trustees or board for supplying water for extinguishing fire or cleaning fire apparatus or for furnishing and supplying connections and fire hydrants and keeping the same in repair, for fire department purposes, or the cleaning of market houses, or for the use of public school buildings, or for the use of any public building belonging to the corporation, or for any hospital, asylum or other charitable institution devoted to the relief of the poor, or aged, infirm or destitute persons or orphan children * * * ."

This has always been construed as requiring that such institutions, buildings, houses and departments should be supplied by the municipal water works with water for their several purposes, free of charge.

The act creating the Bureau of Inspection and Supervision of Public Offices is to establish a uniform system of public accounting, auditing and reporting. This is to be done in the method to be provided and installed by the Bureau under the administration of the Auditor of State.

With regard to public service industries, it provides a method for keeping an account therewith, which includes the accounts of Water Works, which shall show the true and entire cost of the ownership and operation thereof, the amount collected annually by general or special taxation for services rendered to the public, and the amount and character of the services rendered therefor, and the amount collected annually from private users, if any, for services rendered to them, and the amount and character of the services rendered therefor.

By Section 3 of the act it is required that,

> "Separate accounts shall be kept for each department * * * and public service industries * * * and all service rendered by (any) * * * public service industry to another shall be paid for at its true and full value by the department, public improvement, undertaking, institution or public service industry receiving the same, and no department, public improvement, undertaking, institution or public service industry shall be benefited in any financial manner whatever by an appropriation or fund made for the support of any other department, public improvement, undertaking, institution or public service industry * *."

It is the foregoing language which it is contended repeals the provisions of Section 2417. Bearing in mind the purpose of this act to be the creating of a method of "accounting, auditing and reporting" it should not be so construed as to extend its terms to repeal existing laws unless absolutely essential to its purpose. I am of the opinion that the purpose and the language of the law does not contemplate nor include the repeal of the existing provisions by which the institutions, departments, etc., are permitted to obtain water free of charge, and that the object and purpose of the act, by the employment of he language above used, indicates that while the municipal water plant cannot charge such institutions, departments, etc., for the water used by them, yet that the board of trustees, having the same in charge, is required to keep and maintain an account of the water and service furnished to each of such departments, institutions, etc., so that

the municipality and the State, through the reports made to your Bureau, may be fully informed as to the true and actual expense or economy accruing from the operation and maintenance of such public service industry.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## FEES PROPERLY CHARGEABLE IN TRANSCRIBING CERTAIN RECORDS AND PLATS ORDERED TO BE DONE BY THE COUNTY COMMISSIONERS.

January 25, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt of your inquiry under date of the 23d inst., containing the letter of the county recorder of Cuyahoga County, in which there is suggested for determination the fees properly chargeable under the provisions of Section 1158 Revised Statutes, in transcribing certain records and plats ordered to be done by the county commissioners.

The questions suggested are as follows:

1. "Is a broken line indicating the center line of street or original lot line, to be counted as one line, or is each portion to be counted as one line?"

2. "Are the arrows (indicating direction) on the plats to be counted?"

His letter is accompanied with a plat representing several lots or premises on opposite sides of a public street, down the center of which street is projected a line.

The question suggested by the recorder seems to be one easy of solution. Section 1158 R. S. was amended March 31, 1904 (97 O. L. p. 58), in which among other language the following is used:

> " * * * * * for transcribing defaced or injured records of plats, not exceeding fifty cents for the first six lines and three cents for each additional line; a line for the purposes of this section to be such portion of such record as can be drawn by a continuous stroke of the pen without change of the rule, regardless of intersecting lines."

My construction of the foregoing language, applying it with special reference to the plat drawn by the recorder, is, that if the line constituting the boundary of one, two, or more adjacent tracts of land, can be drawn by a continuous stroke of the pen without change of the rule, it should be so drawn and count as one line, and it is of no consequence how many different lots or tracts may be bounded or marked by such line, it should count but one line in the computation of the fee provided therefor; likewise with each of the lines reaching across the page in either direction. There would, therefore, be under this method of computation upon the plat referred to but ten perpendicular parallel lines and four horizontal lines. The line running down the center of the street should count as but one line.

I do not find upon the plat referred to any particular form of "arrow" indicating directions, as referred to in the letter, but should such be upon the original plat, it should be transcribed in the transcription thereof, and the fee therefor should be computed by the rule contained in Section 1158 as amended.

I herewith return to you the letter and plat referred to.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## APPROPRIATION FOR WATER RENTS AND LIGHT RECEIPTS.

February 15, 1905.

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

DEAR SIR: — Your query of the 6th inst. has received my consideration and in answer thereto I beg to say that the water rents and light receipts resulting from the operation of municipal plants are "sources of revenue" of the municipality, as mentioned in Section 43 of the municipal code. I direct your attention to the part of that section containing the following words:

> "In all municipal corporations council shall make, at the beginning of each fiscal half year, appropriations for each of the several objects for which the corporation has to provide, out of the monies known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes *and all other sources of revenue.*"

Such rents and receipts being classed as revenues of the municipality the same should be appropriated by council under the direction of the section above quoted, before they may be expended by the municipal authorities.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## PUBLICATION OF ORDINANCES.

February 25, 1905.

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

GENTLEMEN: — I am in receipt of your communication of the 20th inst., containing the inquiry as to whether or not an ordinance making semi-annual appropriations, pursuant to the requirements of Section 43 of the Municipal Code, is an ordinance of a general nature such as to require publication under the provisions of Section 1695 R. S.

The ordinance to be one of a general or permanent nature as mentioned in Section 1695 must be a necessary step toward an ultimate object, which object cannot be accomplished without the enactment of the ordinance. (Kerlin Bros. v. Toledo, 20 C. C. 603.) Under the terms of Section 43 of the Municipal Code it is provided that

> "In all municipal corporations council shall make, at the beginning of each fiscal half year, appropriations for each of the several objects for which the corporation is to provide, out of the moneys known to be in the treasury, or estimated to come into it during the six months

next ensuing from the collection of taxes and all other sources of revenue," etc.

It is apparent that the making of the appropriations by ordinance, is mandatory upon the council. Without the appropriations having been properly made the expenditures of the various departments could not be authorized. It is, therefore, in my opinion, necessary to publish such ordinance as required by the provisions of Section 1695 R. S. Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## WHO HAS AUTHORITY TO MAKE AND ENTER INTO CONTRACTS FOR CONSTRUCTION OF WATER WORKS.

March 24, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt of your recent communication presenting therewith the inquiry made by the Board of Trustees of Public Affairs of the village of Crestline as to who has the authority to make and enter into contracts for the construction and extension of water works in villages.

In answer thereto I call your attention to Section 205 of the Municipal Code, which requires that when a village has water works constructed, or that are in process of construction, or when they are ordered constructed, the council of such village shall at such time establish a board of trustees of public affairs for the village.

By the same section the board is vested with all the powers, and authorized to perform all the duties that are provided to be performed by the trustees of water works under former Sections 2407 to 2435 Revised Statutes, and further such other duties as may be prescribed by law or ordinance not inconsistent therewith. I assume that in the village of Crestline a board of trustees of public affairs has been established by the council thereof.

Looking to the power and authority which has been heretofore conferred upon trustees of water works in existing legislation, prior to the adoption of the Municipal Code, it is apparent that by Sections 2415 and 2419 Revised Statutes, being Sections (1536-526) and (1536-530) Bates' Annotated Revised Statutes, 4th Edition, and which are specifically retained in force by Section 205 of the Municipal Code, the power to make the contracts for the building of water works, buildings, reservoirs and the repair thereof, etc., etc., is vested in the board of trustees of public affairs, and the manner of making such contracts is therein fully set forth.

If it is necessary to sell bonds of the village for the construction of such plant, that power is not vested in the trustees of public affairs, but all municipal corporations, including both cities and villages, are required to follow the directions contained in Section 97 of the Municipal Code in selling and disposing of the bonds of such village. In other words, in order to construct water works in a village, if it becomes necessary to sell the bonds of the village to obtain the money for such purpose, such bonds are sold the same as any other bonds and following the same procedure as to advertisement, etc.

I return herewith the communication of the Trustees of Public Affairs.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

## CONCERNING COMPENSATION OF COUNCILMEN WHOSE TERMS HAVE BEEN EXTENDED BY LEGISLATIVE ACT.

March 27, 1905.

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

DEAR SIR:— I have your request for an opinion upon the proposition submitted by Mr. Joseph Kraus, a member of the city council of Cleveland, Ohio, which involves the compensation of councilmen whose terms have been extended by a legislative act. I am of the opinion that the compensation of such members who were serving under the ordinance first passed by the city council, pursuant to the requirements of Section 117 of the Municipal Code, should be paid the compensation provided in that ordinance, which should not be increased nor decreased during their term of service under the election first held, under the authority of that section of the code. If such members, or any of them, continue to serve under the extension of their terms made by the legislative act, such members should only receive the compensation which had been established by the ordinance above referred to, as it would be construed that such extended terms were merely continuations of the terms for which they had been elected.

The new ordinance passed by the city council, increasing the salary of members thereof from $50.00 to $100.00 per month could only take effect as to such members thereafter elected. Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## FEES TO BE ALLOWED WITNESSES IN POLICE COURT.

April 3, 1905.

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

GENTLEMEN: — I beg to acknowledge receipt of your communication requesting an opinion relative to the amount of fees that should be allowed to witnesses in the police court of the city of Columbus in state cases wherein the charge is a misdemeanor. I refer you to Section 1302 R. S., and also to Section 1536-822 Bates' Annotated Ohio Statutes. The two sections cited are perfectly consonant with each other, and the practice adopted by the officers of the police court in Columbus has been to conserve the expenses incident to the administration of the police court by charging (so I am informed by the city law department) in the cost bill but fifty cents for each day's attendance of each witness and the customary mileage, while, strictly speaking, the statute authorizes the payment of one dollar. As this would be a question between the witness and the officer issuing a warrant for the same, it would seem that his acceptance of the fifty cents, and receipt therefor, would be in full payment of his fees.

Your second inquiry is as to the method of payment of the same. This is provided for by Section 1302 R. S., by the clerk of the police court certifying to the auditor of the county and that officer drawing his warrant upon the county treasury for the amount so certified. This I understand to be the practice pursued in the city of Columbus and which is fully warranted by the section above cited. Very truly yours,

WADE H. ELLIS,
*Attorney General.*

## RIGHT OF COUNTY COMMISSIONERS TO CONTRACT WITH CLERK OF COURT FOR FILING AND REFILING PAPERS.

April 7, 1905.

HON. A. B. PECKINPAUGH, *Deputy Inspector, Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

DEAR SIR: — Your communication dated April 5, enclosing a copy of resolution and contract made by the commissioners of Jackson County, Ohio, with the clerk of courts of said county is received.

You inquire as to the authority of the county commissioners to make such a contract and whether or not payment out of the county treasury can be had by virtue of said contract?

I have been unable to find any statute authorizing the county commissioners to enter into a contract with the clerk of court for the filing and refiling of papers in his office. There is a provision for indexing, but that does not seem to be the purpose of this resolution.

I herewith enclose copy of resolution.

Very truly yours,

W. H. MILLER,
*Ass't Attorney General.*

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## PAYMENT OF PHYSICIANS' FEES IN CASES OF COMMITMENT TO BOYS' INDUSTRIAL SCHOOL MAY NOT BE PAID FROM COUNTY TREASURY.

May 2, 1905.

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

DEAR SIR: — Your letter of April 21, is received. You inquire whether

> "In the absence of any specific provision of law, fees charged for a physician's certificate in cases of commitment of persons to the Boys' Industrial School may legally be paid out of the county treasury?"

In my opinion such charges may not legally be paid out of the county treasury.

I return letter addressed to Samuel A. Hudson, Department of Auditor of State, and signed by C. B. Adams of the Boys' Industrial School.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## PAYMENT OF PREMIUM ON SURETY BOND.

June 1, 1905.

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

GENTLEMEN: — In answer to your inquiry as to whether the premium on a surety bond given by the treasurer of a city can be legally paid out of the public funds of such city, I beg to say that by Section 1738 R. S., official bonds

to be given by all municipal officers are generally described. In this, and kindred sections of the Municipal Code, no provision was made for the payment of any premiums on such bonds, out of the public funds of the city. By the act of April 22, 1904, (97 O. L. 182), it was provided that:

> "Where any bond may be required or permitted by law, or ordinance, or the head of any department of this state, or any division of government of municipality thereof, the execution of the same as surety shall be sufficient by a company authorized by the laws of this State to guarantee the fidelity of persons holding places of public or private trust."

and further provided:

> "In all * * * cases, where by the foregoing provisions of this act a corporate surety or guarantor is required, the premium to be paid to any such company or companies for becoming such surety or guarantor shall be paid out of the general funds of the divisions of government by or for which the person giving such bond or undertaking was appointed or elected."

This act thereby authorized such premium to be paid out of the public funds and made the same a charge thereon, but, in the case of State ex rel v. Robbins, (71 O. S. 273, 295) the supreme court, having under consideration the constitutionality of this act, declared it to be unconstitutional and void, being in violation of Article I, Sections 1 and 2 of the Constitution. I believe the decision of the court to be sufficiently broad as to render null and void the quoted portions of the act set forth above, and that being the only authority under which such payments from public funds had been authorized, that authority falls with the balance of the act and leaves no provision conferring such power upon such officers.

It therefore follows that no such payments can be legally made from the public funds of any municipality.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## MANAGEMENT AND CONTROL OF JOINT CITY AND COUNTY WORKHOUSE LOCATED AT ZANESVILLE.

July 7, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt of your letter of the 7th inst., containing the inquiry as to whether Section 2107 R. S. as amended in 97 O. L. 448, applies to the management and control of the joint county and city workhouse, located at Zanesville; and whether such workhouse should be under the management of a joint board composed of the county commissioners and the board of public service of the city, as provided in the act of April 26, 1904, (97 O. L. p. 448); or whether it should be managed by the board of directors provided for in Section 2107 (2) designated as Section 1536-385 of Bates' Annotated Ohio Statutes? The act above referred to expressly repeals Section

2107 R. S. and also expressly repeals the act of March 10, 1886, and th supplemental act passed April 14, 1900, by which a similar workhouse created under forms of special legislation and applying to Greene county, was governed. The so-called joint county and city workhouse, located at Zanesville, is governed by the provisions of the act of March 19, 1887, (84 O. L. 136) and is not expressly repealed by the act above referred to.

While the legislation in question might be condemned by the courts in a proper action instituted for that purpose, yet it is sufficient to say that it has never so been challenged and that the act in 97 O. L. 448 does not expressly repeal the same. Repeals by implication are not favored, and, in my opinion, the Muskingum County act still provides the method for the government of the workhouse in that county and that its provisions should be lollowed in that regard and not the provisions of the act of April 26, 1904.

Respectfully submitted,

WADE H. ELLIS,
*Attorney General.*

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## COMPENSATION OF CITY SOLICITOR.

June 6, 1905.

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

GENTLEMEN: — Acknowledging the receipt through your department of the inquiry of the city solicitor of the city of Greenville, Ohio, and referred to this department for a written opinion thereon, I beg to say that, pursuant to Section 137 of the Municipal Code, if a city solicitor acts as prosecuting attorney of the police court he is entitled to such additional compensation as the county commissioners shall allow, in addition to the salary allowed him as city solicitor. Such amount may be fixed by the county commissioners, having regard to the limitations prescribed by Section 1814 R. S., otherwise known in Bates' Annotated Ohio Statutes as Section (1536-345 R. S.).

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## CONCERNING TERM OF CLERK OF VILLAGE OF GREENFIELD, OHIO.

August 24, 1905.

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

GENTLEMEN: — In answer to yours of the 24th inst., requesting a written opinion of this department upon the question suggested to you by the village clerk of Greenfield, Ohio, I would say under the statement of facts as made to you by the clerk it appears that he was appointed to that office to fill a vacancy caused by the resignation of the clerk who had been duly elected. His appointment was made May 1, 1904; in November, 1904, he was elected clerk without mention as to the time for which he was to serve.

The term of clerk in villages is fixed by Section 201 of the new Municipal Code, at two years, and it is provided that "He shall serve until his successor is elected and qualified."

By Section 228 thereof, it is further provided:

> "In case of death, resignation, removal or disability of any officer or director in any department of any municipality, the mayor of such city shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor shall be duly elected and qualified or until such disability is removed."

The election at which the predecessor of the appointed clerk was elected was, by Section 222 of the Code, fixed for the first Monday of April, 1903, and he began his term of office on the first Monday in May, 1903, to serve for a term of two years. If the legislation had remained the same as it was at the time of the election of such clerk, his term would have expired on the first Monday of May, 1905, but, by the amendment to Section 222 of the Code, passed March 17, 1904, it was provided that:

> "The election of the successors of all elective municipal officers whose terms now expire on the first Monday of May shall be held on the first Tuesday after the first Monday of November next following the expiration of such terms and all elective municipal officers whose terms would otherwise expire on the first Monday of May previous to the election of their successors, shall hold their offices until their successors are elected and qualified."

By the same act Section 223 was amended and it provides that the boards and officers serving when this act goes into effect shall hold their respective offices until their successors are appointed, as required herein. The supreme court of this state in the month of June, 1905, in the case of the State of Ohio ex rel Gunn v. Witt, held that in the case of a city clerk the act of March 17, 1904, operated to extend their official terms until January, 1906. The clerk of the city council is an appointive office, created by Section 118 of the Municipal Code, and is also known as city clerk, and that section provides that such clerk shall serve for two years. Thus the decision of the supreme court in the case above quoted is plainly applicable to the question here presented, for the term of the village clerk of Greenfield would expire in January, 1906, by reason of the provision contained in Section 222 as amended March 17, 1904, to-wit:—

> "The election of the successors of all elective municipal officers whose terms now (at the time of the passage of the act) expire the first Monday of May, shall be held on the first Tuesday after the first Monday of November next following the expiration of such term"

which means that such election should be held next November.

I herewith return to you the correspondence submitted with your question.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## CONCERNING INTEREST ON OBLIGATION OF VILLAGE OF SOUTH CHARLESTON, OHIO.

September 15, 1905.

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

GENTLEMEN:—I beg to acknowledge the receipt from your department of an inquiry presented by Leon H. Houston, member of the village council of

South Charleston, Ohio, regarding the payment of a certain note or certificate of indebtedness made under proper authority of the village, and duly authorized under date of January 2, 1897. The question presented is, does the obligation bear interest from its date until fully paid? That portion of the obligation referring to interest says:

"With interest at the rate of 7% from date, until paid."

Following the rule as laid down by Dillon on Municipal Corporations, that the rule in respect to interest on debts against municipal corporations does not ordinarily differ from that which applies to individuals except where there is a statute of the state controlling the question, it seems to be clear that the village under this form of obligation would be liable for the interest recited therein, as well as the principal.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## FEES OF JUSTICES OF THE PEACE.

September 19, 1905.

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

GENTLEMEN: — Your letter of September 15, is received, requesting a construction of the following provision of Section 621 of the Revised Statutes of Ohio, to-wit:—

"Except as hereinafter provided, justices of the peace, for services rendered, shall be entitled to the following fees .. .. .. for sitting in the trial of any cause, civil or criminal, where a defense is interposed, whether tried to a justice or a jury, one dollar .. .. .. "

Your inquiry is particularly addressed to that portion of the section referred to which allows a justice of the peace a one dollar fee for sitting in the trial of a criminal case where a defense is interposed.

I am of the opinion that in all cases in which a justice of the peace has jurisdiction to render a final judgment in a criminal case he is entitled to a fee of one dollar where the defendant pleads not guilty, but that a justice of the peace is not entitled to the one dollar fee referred to in Section 621 when he holds a preliminary hearing.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## PAYMENT OF NOTES ISSUED BY CITY OF ELYRIA.

September 26, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt, through your department, of an inquiry from the City Auditor of Elyria, Ohio, upon which you request a written opinion from this department. The question presented follows:

> "The city of Elyria has issued several notes under authority of Section 95*a* of the New Municipal Code (97 O. L., 520) and it is desired to know whether the auditor shall pay these notes direct from the assessment fund or whether the amount thereof is to be transferred to the sinking fund trustees and they retire the notes?"

This involves a consideration of the duties of the trustees of the sinking fund, and of the language employed in Section 101 of the Municipal Code, which is as follows:

> "All municipal corporations having outstanding *bonds* or *funded debts* shall, through their councils, and in addition to the other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all *bonds* and *funded debts,* and for the payment of all judgments final except any condemnation of property cases, and the tax so raised shall be used for no other purpose whatever."

Are the notes issued pursuant to the provisions of Section 95*a* of the Municipal Code embraced within the term "funded debts" as used in the foregoing section? If so, it would follow that the trustees of the sinking fund are designated as the officers to provide a fund for and to retire the same.

We are to understand the expression "funded debt" to have been used in the sense and indicating the meaning in which it has been ordinarily used and understood by legislators and the commercial world. A "funded debt" has a well defined signification. The funding of a debt is the pledging of a specific fund to keep down the interest and ultimately to discharge the principal.

1st Bouv. Law Dic., 551. 1st McCullough's Com. Dic., 689.

A funded debt rests on some pledge of the public or corporate revenue or property, which is set apart as *a fund* to keep down the interest and extinguish the principal of the debt. When the extinguishment of the debt is contemplated, it is called a *sinking fund,* and it is so denominated by Section 101 of the Municipal Code.

Accepting this definition of the term, I observe that the notes or obligations issued pursuant to the authority contained in Section 95*a Supra,* are issued in anticipation of the collection of special assessments. It is provided by that section that the special assessments constitute a fund for the payment of the expense of the improvement, and that the unexpended balance *remaining in the fund* after the cost and expense of the improvement have been paid, shall be applied to the payment of the notes and the interest thereon until both are provided for. The fund thus being provided for the payment of this character of debts, the fund is pledged for their payment, and the same in every respect answers the definition of a "funded debt," and it would follow that they should be retired through the trustees of the sinking fund.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## THE LENGTH OF TIME FOR WHICH THE CITY CAN LEASE A ROOM IN THE CITY BUILDING.

September 26, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt, through your department, of an inquiry from the city auditor of Steubenville, Ohio, upon which you request a written opinion from this department. The question presented follows:

> "For what length of time can a city lease a room in the city building which is not necessary for city purposes?"

The general power conferred upon municipal corporations to sell or lease the real estate owned by it is contained in Section 23 of the New Municipal Code as follows:

> "All municipal corporations shall have power to sell or lease any real estate or to sell any personal property belonging to the corporation, when such real estate or personal property is not needed for any municipal purpose."

The procedure is outlined in Sections 23 and 24 of the Municipal Code and there is no limitation contained in those sections as to the term of years for which such lease might be executed. There are certain restrictions placed upon this power which are contained in Section 45 of the Municipal Code and these limitations only apply to the leasing of the electriv light plant and equipment, or the water-works plant or both. The limitation there placed upon the power conferred upon municipal authorities is limited to leasing for a period of not exceeding ten years. The only statutory restriction which would seem to place a limitation upon the power of the municipal authorities to lease its real estate is that contained in Section 1691 R. S., which provides that:

> "The council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected."

But the Supreme Court held in the case of the Gas and Fuel Co. v. the City of Chillicothe, 65 O. S. 186, 207, that:

> "The contracts referred to in Section 1691 are contracts for services performed, and supplies furnished for the corporation."

It therefore cannot be extended to limiting the general power conferred by Section 23, Municipal Code, which contains no limitations or restrictions whatsoever. In the case of McGoldrick v. Lewis, 12 Ohio Dec. 46, the Superior Court of Cincinnati, by Judge Smith, in construing the powers of county commissioners to contract, said:

> "There is no rule of law that public officers cannot enter into a contract the performance of which will extend beyond their terms of office. Such contracts are so frequently made and are so numerous that it is unnecessary to call attention to any specific instances. They will readily occur to any one. The rule with respect to the time during which the contract made by public officials may continue, is, that unless limited by statute, *it may continue for such time as under the circumstances is reasonable.*"

There being no limitation by statute upon the general power conferred as above cited, we adopt the conclusion announced in the foregoing opinion that the term may continue "for such time as under the circumstances is reasonable."

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## FEES OF CHIEF OF POLICE.

November 28, 1905.

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

GENTLEMEN: — The several questions presented by you in yours of the 24th inst. have received my attention. Noting the subject matter of the questions I shall answer the same in divisions as they refer to the same subject. The first three questions presented involve the fees of clerks of police courts in state cases, and presenting them seriatim as they appear in your letter, they are as follows:

1. Should such *fees* when collected of defendants, be deposited in the city or county treasury?

2. If ordinance of council so provides, may such fees be retained by the clerk?

2. May the county commissioners legally make an allowance under Section 1309 R. S. for such services? If so, should such allowance be paid by said clerk into the city treasury?

These three questions can be considered together. The sections of the Revised Statutes bearing upon the same are Section 1804 to 1812, old number R. S. (being Sections 1536-835 to Section 1536-843, Bates' Statutes, 4th edition), and Section 1792, old numbering, (being Section 1536-812 R. S.) and the conclusions herein arrived at refer only to those police courts in the various cities, which, under the provisions of the Revised Statutes, are permitted clerks.

Bearing upon the question suggested I refer you to Section 1792, old number, (1536-812 R. S.) as follows:

> "Prosecutions for offenses against the *laws of the State* shall be brought and conducted in the name of the State, and prosecutions for *violations of city ordinances* shall be brought and conducted in the name of the corporation; and in any case a new trial may be granted within the same time and for the same causes as in like cases in the Court of Common Pleas."

Section 1799, old numbers (1536-822 R. S.) is as follows:

> "Witnesses in the police court shall be allowed the same fees in cases arising from a violation of the ordinances, as are allowed in like cases before justices of the peace, which shall be paid in the same manner; and in state cases the same fees as in like cases in the Court of Common Pleas, which shall be paid in the same manner."

The last portion of Section 1798, old numbers, (1536-821 R. S.), is as follows:

> "And they (jurors) shall receive the same fees as are *allowed* jurors in the court of common pleas in such cases, which shall be payable out of the *county treasury* in *State cases,* and out of the city treasury in cases for the *violation of ordinances.*"

Section 1807, old numbers (1536-838 R. S.), is as follows:

"He (the clerk) shall, on the first Monday of every month, make, under oath, to the city auditor, a report of all fines, penalties, fees, and costs imposed by the court in city cases, showing in what cases the same have been paid, and in what cases they remain unpaid; and also at the same time, he shall make a like report to the county auditor as to state cases; and he shall immediately *pay into the city and county treasuries, respectively,* the amount then collected, or which may have come into his hands, from all sources, during the preceding month."

Section 1803, old numbers (1536-839 R. S.) is as follows:

"He (the clerk) shall give such bonds, with sureties, as may be required by the council and county commissioners, and shall receive for his services, in cities of the first class, in *city cases,* a fixed salary to be prescribed by ordinance of the council, of not less than twelve hundred dollars nor more than two thousand dollars per year, and for *state cases* such further allowance as the county commissioners may deem proper, but not exceeding twelve hundred and fifty dollars per year, and in cities of the third grade a, and third grade c, of the second class, in *city cases,* a fixed salary, to be prescribed by ordinance of the council of not less than six hundred dollars nor more than one thousand dollars per year and for *state cases* such further allowance as the county commissioners may deem proper, but not exceeding two hundred dollars per year."

It is thus shown by the sections above cited that the salary of the clerk of the police courts is payable from two different sources, viz:—a fixed salary to be prescribed by ordinance of the council for services in *city cases* and a certain salary allowed by the county commissioners for services in *state cases.*

It is further shown by the foregoing sections that prosecutions for offenses against the laws of the state shall be brought in the name of the state, and prosecution for violations of city ordinances shall be brought in the name of the corporation, thus showing that there are two separate classes of actions or prosecutions contemplated to be brought in police courts.

The report required by the above cited Section 1807, old numbers, compels the clerk to report the fines, penalties, fees and costs in city cases to the city auditor, and the same in state cases to the county auditor. Upon consideration of the same I am of the opinion that when *fees* are collected of defendants they should be deposited under the provisions contained in Section 1807 old numbers, (1536-336 R. S.) as follows: If they are fees in city cases, viz:—under violation of ordinances they should go into the city treasury; and if they are such fees as accrue in state cases or those in which prosecutions are brought and conducted in the name of the state, they should go into the county treasury.

In answer to the second question proposed above, it is sufficient to say that the policy of the General Assembly in providing for the compensation of clerks of police courts seems to have been to place the same upon a salary basis, or, as denominated in Section 1808 R. S., "a fixed salary," and there being no provision in the Revised Statutes, so far as I have observed, to authorize the payment of fees to such clerks the same could not be authorized by an ordinance of council of such cities as have police courts.

The power is not conferred upon the county commissioners to make an allowance to clerks of police courts for their services by virtue of Sections 1306, 1307, and 1309, R. S., but the authority vested in the county commissioners to fix any compensation to such clerks, is by favor of Section 1808, old numbers, Revised Statutes.

The remaining questions submitted are as follows:

4. Should the fees of chiefs of police in police courts in state cases, when collected of defendants, be deposited in the city or county treasury?

5. If the ordinance of council so provides may such fees be retained by the chief of police in such cases?

6. May the county commissioners legally make an allowance under Section 1309, R. S. for such services; if so, should such allowance be paid by city chief into the city treasury?

7. May the chief of police receive from the county treasurer and retain for his own use his fees taxed against defendants sentenced to the workhouse, such fees not being collected of the defendants?

8. May such officer retain his fees taxed in penitentiary cases?

9. May such officer retain his fees taxed in full against defendants found insolvent, or should allowance be made by the county commissioners under Section 1309 R. S.?

10. Are such fees required by law to be paid from the county treasury and if allowed by the county commissioners should the same be paid into the city treasury?"

Your letter does not inform me as to the character of fees which are presumed thereby to accrue in favor of chiefs of police. It merely inquires as to "the fees of chiefs of police in police courts in state cases" and does not specify as to whether it is to be understood as contemplating fees to be paid as witnesses or for services such as are performed by a constable in making arrests or otherwise, as provided in Section 7129 and 7137 and in similar proceedings. If the inquiry is to include witness fees for such officer I call your attention to Section 1315 R. S., denying to any police officer any witness fees in any cause prosecuted under any criminal law of the state, or any ordinance of a city or cities of certain classes heretofore recognized, before any police judge or mayor of any such city, justice of the peace, or other officer having jurisdiction in such causes, so that it is clear that no witness fees can be paid to such officer or charged in any such cases as part of the costs therein.

It will be observed that the salary of policemen, as well as all officers, clerks and employes in any department of the city government shall be fixed by ordinance or resolution of the city council, as provided in Section 227 M. C. His salary and compensation being thus fixed by the municipal council he is compelled to render service under the direction of the board of public safety of the city and is not entitled to receive any fees in addition to such salary, for, as I have said in regard to the fees of clerks the policy of the General Assembly in providing for the compensation of chiefs of police seems to authorize the council to place them upon a salary basis, which shall not be increased nor diminished during the term for which they may have been appointed.

By virtue of Section 126 M. C., it is required that "all fees pertaining to any office shall be paid into the city treasury"; therefore whatever fees of any nature allowed to such officer for services performed by him as such officer, should be paid, by virtue of the section last cited, into the city treasury.

This can also be taken as an answer to the second question that the city council cannot, by ordinance, provide that the chief of police may retain such fees, for that would be contrary to provisions of Section 126 M C.

The county commissioners cannot legally make an allowance under Section 1309 R. S. for services performed by the chief of police. He is not such officer as is embraced within the language of Sections 1306, 1307, 1308 and 1309 R. S. As it has been held by the supreme court of this state that the chief of police is an officer (State v. Wyman, 71 O. S. p. 1) his office would, in my opinion, be

included within the terms of Section 126 M. C., and all fees, if any, pertaining to such office should be paid into the city treasury, without respect to the source from which they came.

This seems to cover the inquiries contained in all the foregoing questions.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CONCERNING RESOLUTION AND ORDINANCE ADOPTED BY THE CITY COUNCIL OF MARION, OHIO.

November 28, 1905.

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

GENTLEMEN: — Acknowledging the receipt of your favor of this date enclosing a copy of a resolution and ordinance adopted by the city council of the city of Marion, Ohio, relative to which you present certain questions for my consideration, I beg to say that the resolution and ordinance recite that certain demand notes were issued by the city council of Marion in anticipation of the collection of special assessments. It appears that these were issued pursuant to Section 95*a* of the new municipal code, being the act of April 27, 1904, that the indebtedness thereby contracted amounts to about $22,000, and the notes bear interest at the rate of 6% per annum. The question presented is as to whether the same constitutes such corporate indebtedness that it may be refunded by issuing bonds therefor, and whether such bonds can be exchanged with the consent of the holder or holders of the notes without making a public sale of the bonds.

It appears that by the resolution and ordinance adopted by the city council that they seek to exchange the bonds issued pursuant to Section 95*a* M. C. By Section 97, the latter paragraph of which it is contended confers this power upon the city council, limits the right to exchange such bonds with the "holder or holders of outstanding bonds." In the sense in which the word "bonds" is used in Section 97 M. C. no authority is conferred upon the city council to make such exchange for the *notes* issued in pursuance of the above authority. But in such case as that mentioned in the resolution and ordinance it is incumbent upon the council to provide for a public sale of bonds as required by Section 97 M. C.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CITIES HAVING POLICE COURT AS DISTINGUISHED FROM MAYOR'S COURT, SOLICITOR ACTS AS PROSECUTING ATTORNEY.

December 26, 1905.

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

GENTLEMEN: — I beg to acknowledge the receipt of your inquiry of the 23rd inst., containing the letter to Hon. William L. Day, city solicitor of Canton, Ohio. In answer I would say that the opinion of this department, as here-

tofore expressed, has been that in those cities having a police court as distinguished from a mayor's court, the solicitor shall be the prosecuting attorney thereof, and shall receive for his services in that respect, such compensation as the city council may prescribe, *and such additional compensation as the county commissioners shall allow.* It is optional with the county commissioners whether or not additional compensation is provided, but the authority is conferred upon them, if they see fit to exercise it, to allow additional compensation for such services.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CLERK OF SINKING FUND TRUSTEES AN APPOINTIVE OFFICE.

December 26, 1905.

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

GENTLEMEN: — Acknowledging the receipt of your favor of the 23rd inst., containing the letter of S. T. Quigley, city auditor of Marion, Ohio, I beg to advise you thereon that the clerk of the sinking fund trustees is an appointive officer, and that the term of his office would be controlled by the opinion expressed by the Supreme Court in the case of the *State of Ohio ex rel Gunn,* v. *Peter Witt,* in which that court held that "the act of March 17, 1904, to amend certain sections of the Revised Statutes, relating to the tenure of municipal and other officers (97 O. L. 37) extends the official term of clerks of municipal councils, who were in office at the time of the passage of the act, until the election of their successors in January, 1906."

The salary of an officer, clerk or employe shall not be increased or diminished during the term for which he may have been elected or appointed (see Section 126 of the Municipal Code).

This, upon the section cited and the opinion of the supreme court expressed in the foregoing case, leads me to the conclusion that any attempt to increase the compensation of the clerk of the sinking fund trustees, after it has once been fixed and established, cannot affect the incumbent thereof during his existing term.

Very truly yours,

WADE H. ELLIS,

*Attorney General*

**(To the Superintendent of Insurance.)**

INSURANCE EXCHANGE COUPON CO., OF CLEVELAND

March 8, 1905.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — Your letter of February 9, relating to the business proposed to be engaged in by The Insurance Exchange Coupon Company of Cleveland, Ohio, has received my consideration, and I append to each of the several questions addressed to me the result of my investigation thereof, stating the questions in the order in which you have presented them as follows:

> *First:* "Are the proposed operations of this company in violation of the Act of the General Assembly of October 14, 1900, entitled 'An Act to provide for the better protection of persons dealing with Bond Investment Companies'?"

Upon examination of the so-called "Bond and Investment Company" statutes, now known as Sections 3821*r* to 3821*z* R. S., it is apparent that the business therein regulated is that of "placing or selling certificates, bonds, debentures or other investment securities of any kind or description, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan," etc.

It is required of such companies that before doing business in Ohio they shall deposit with the State Treasurer $100,000.00 in cash or bonds of the character named in the statutes, and requiring that such deposit shall be made out of the paid up capital stock of such company.

I am of the opinion that the character of coupon issued by The Insurance Exchange Coupon Company does not bring it within the definition of certificates, bonds, debentures or other investment securities as mentioned in such act, and therefore that the proposed policy of that company is not in violation of the act referred to.

> "*Second.* Calling your attention to Sections 283, 3604, 3656 and 3644, Revised Statutes, does the law require The Insurance Exchange Coupon Company to be authorized by the insurance company and obtain license from the Superintendent of Insurance, as agent of every insurance company in which it is proposed to have coupons redeemable, and can The Insurance Exchange Coupon Company propose to redeem the coupons in insurance in 'any duly authorized company doing business in Ohio,' unless The Insurance Exchange Coupon Company is licensed as the agent of every company doing business in Ohio?"

Under the plan of business proposed to be carried on by this company it would be necessary for it to be first duly authorized by such insurance company as an agent thereof, and also licensed by you as Superintendent of Insurance before it could lawfully engage in such business, provided other objections do not arise to interdict the character of business in which it seeks to engage.

If such business be carried on by The Insurance Exchange Coupon Company for a given life or fire insurance company, the relation sustained between such insurance companies, and the company in question would be that of principal and agent. The sections of the Revised Statutes to which you have referred in the above question sufficiently define what should constitute an agent in the transaction of the business of insurance. The plan described in the circulars

accompanying your letter would require of The Insurance Exchange Coupon Company such duties as would constitute it an insurance agent. This is made more apparent by the consideration of the following authorities defining who are held to be agents of insurance companies:

Insurance Co v. Aickles, 23 O. C. C., 594.
Insurance Co. v. McGooky, 33 O. S., 555.
Insurance Co. v. Williams, 39 O. S., 584.
Insurance Co. v. Eshelman, 30 O. S., 647.
Insurance Co. v. Wilkinson, 13 Wall., 222.
Rowley v. Empire Ins. Co., 36 N. Y., 550.

> *Third:* "Can The Insurance Exchange Coupon Company promise the redemption of the coupons in insurance in any company authorized in Ohio, until it shows that it has authority to make such promise and redemption by such insurance companies?"

The answer to this question is properly embraced in that given to your second question above. It implies that an agency for the insurance company or companies must have been created before authority has been conferred upon such coupon company to make the representations contained in this question. The agency not only embraces the authorization by the insurance company but further requires that such agent be licensed by the Superintendent of Insurance before the power is given to engage in the business in question. In regard to such agents a discretion is vested in you as Superintendent of Insurance, as held in the case of Vorys, Superintendent of Insurance v. State ex rel Connell, 67 O. S. 15.

> *Fourth:* "Assuming that The Insurance Exchange Coupon Company becomes the agent of a life insurance company licensed in this State, and, as such agent, proposes to redeem the coupons by rebates of premiums due on the proposed life insurance to the extent of the value named in the coupons, will such transactions be a violation of Section 3631-4, Revised Statutes (Anti-Rebate, Anti-Discrimination Law)"?

The section of the Statute above referred to controls life insurance companies and their agents doing business in Ohio, but has no reference to those engaged in the fire insurance business. The plan proposed in the literature of the company appended to your letter, if adhered to, would not, in my opinion, be a violation of the act above cited. Such plan would not create any distinction or discrimination in the amount or payment of premiums or rates charged for policies or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract it makes; nor does it constitute a rebate of premiums payable on any policy nor extend any special favor or advantage in the dividends or other benefits to accrue thereon, or offer any valuable consideration or inducement that is inhibited by the section of the statute in question.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

## AS TO ENFORCING THE PENALTIES PROVIDED BY SECTION 2745*b* R. S.

March 14, 1905.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — After giving full consideration to your request under date of March 4, for an opinion from this department as to your duty in enforcing the penalties provided by Section 2745*b* R. S., against certain insurance companies which are charged with having re-insured a portion of their risks in other companies not authorized to do business in this state, I beg to advise you as follows:

The authority conferred by this section authorizing you "upon notice and satisfactory proof" of the re-insurance in outside companies forbidden by Section 2745*b*, to revoke the charter of any offending company for a period of not less than ninety days, is as far-reaching as that given to the courts to oust of their franchises corporations violating the laws of the state. It would seem, therefore, that in the exercise of such authority, the legislature intended the Superintendent of Insurance to be affected by the same considerations which influence the courts in exercising the jurisdiction conferred upon them in like matters; and since the courts, under the numerous decisions which it is unnecessary to cite, have uniformly held that they will not render a judgment of ouster except where the violation of the law has been wilful and intentional, a mere innocent transgression of the statute now under consideration, and especially one induced by honest mistake, or by misinformation, ought not to constitute such "satisfactory proof" of a violation of the law as would justify the imposition of the penalty provided.

Whether this be the correct view of the question, or not, it is clear that in a construction of such a statute as that now under consideration every reasonable doubt ought to be resolved against a harsh and unjust application of its terms.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## CONCERNING THE RAILWAY ADJUSTING BUREAU.

March 24, 1905.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — I have considered the inquiry propounded in your letter of recent date concerning the proposed contract between various interurban railway companies in this vicinity establishing "The Railway Adjusting Bureau."

This association proposes to unite the work of adjusting personal injury and other damage claims arising out of the operation of the several railway lines which are parties to the agreement.

In my judgment such a contract would not constitute insurance, for the sole object is to more efficiently and economically perform the public duty required of the railroad companies, and is merely the exercise of powers incidental to the railroad business. The agreement or association is far less like insurance than that upheld by the Supreme Court in the case of the State ex rel v. The Pennsylvania Ry Co. (68 O. S. 9). That such a contract does not constitute a trust is clear from the fact that the parties to it do not, in any way, seek to control competiting lines of business, for it can hardly be said that there is competition in injuring passengers on railway trains or in promptly paying damage claims therefor.

Inasmuch as this proposed agreement does not affect, in any way, the rights of claimants or their remedies in the courts, and is in every other respect harmless to the general public, I am unable to find anything unlawful in it.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RIGHT OF THE OHIO FARMERS INSURANCE COMPANY TO INVEST IN BONDS OF RAILROAD COMPANY BEFORE ROAD COMPLETED.

September 25, 1905.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR: — I enclose herewith brief of Mr. Lee Elliott, General Counsel for the Ohio Farmers Insurance Company, touching the right of that company to invest in the bonds of a railroad company which has not yet constructed its road. I heard Mr. Elliott and Mr. Collister on this question the other day and advised them that in my judgment, Section 3638 of the Revised Statutes which authorizes investments by such insurance companies "in stocks, bonds or other evidences of indebtedness of any solvent, dividend paying institution, incorporated under the laws of this or any other state or of the United States, except its own stock," means to forbid an investment in the bonds of any corporation which was not *at the time the investment is made or takes effect* solvent, and earning money. Of course it is not necessary that its stock should be earning any particular amount of dividends, but it is necessary that over and above all its fixed charges, such as running expenses, interest on bonds, etc., something should be earned by the company.

I said further to Messrs. Elliott and Collister that if the railroad company, in the bonds of which they desired an investment to be made by the insurance company, is in the situation or condition above described at the time the investment is made or takes effect, such investment will not be, in my judgment, contrary to law.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## BONDS ISSUED BY THE BOARD OF EDUCATION OF A CITY SCHOOL DISTRICT MAY NOT BE ACCEPTED FOR DEPOSIT UNDER THE PROVISIONS OF SECTIONS 3591, 3605, 3641 and 3660 R. S.

November 29, 1905.

HON. A. I. VORYS, *Superintendent of Insurance, Columbus, Ohio.*

The sections above referred to of the Revised Statutes provide for a certain character of investments and deposits to be made by insurance companies within the State of Ohio, and in defining the character of such investments and deposits among others there is embraced the bonds "of any municipality." The question presented is whether the bonds of a city school district are included within the language "of any municipality." In the case of Finch v. Board of Education, 30 O. S. 37, in passing upon the question as to whether or not the board of education of the city of Toledo was such a corporation that an action could be

maintained against it for damages sustained by a scholar, the supreme court used the following language:

> "Owing to the very limited number of corporate powers conferred on them, boards of education rank low in the grade of corporate existence, and hence are properly denominated *quasi* corporations. This designation distinguishes this grade of corporations for municipal corporations, such as cities and towns acting under charters or incorporating statutes, which are vested with more extended powers and a larger measure of corporate life. This superior grade, from the nature of their organization, benefits received, and power to raise needed funds, are held responsible, by the common law, for private personal injuries caused by their own negligence or that of their servants, whilst the inferior grade of public *quasi* corporations are liable for damages resulting from their negligence, only where made so by express legislation. This grade includes the defendant. It possesses but limited powers and small corporate life. A corporation in some sense political, but in no sense a municipal corporation."

In the case of Beach v. Leahy, Treasurer, 11 Kas. 19, the supreme court of Kansas had before it a question involving the validity of certain bonds issued by the school district. There was involved in it the question as to whether a school district was "a corporation" as that term was used in Article XII of the Constitution of that state. The court in passing upon it used the following language:

> "But with reference to counties, townships, and school districts, the case is different. True, they are called in the statute bodies corporate: Gen. Stat., p. 253, par. 1; p. 1082 par. 1; p. 920, par. 24. Yet they are denominated in the books, and known to the law, as *quasi corporations* rather than as corporations proper. They possess some corporate functions and attributes, but they are primarily political subdivisions, agencies in the administration of civil government, and their corporate functions are granted to enable them more readily to perform their public duties." * * * * * * In Harris v. School District, 8 Foster, (28 N. H.,) 61, Bell, J. says: "School districts are *quasi* corporations of the most limited powers known to the laws. They have no powers derived from usage. They have the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more." In the case of School District v. Wood, 13 Mass., 192, Ch. J. Parker remarks concerning school districts: "that they are not bodies politic and corporate with the general power of corporations, must be admitted; and the reasoning advanced to show their defect of power, is conclusive."

In the case of Fitzgerald v. Walker, 55 Ark. p. 148, the question there presented was whether "an improvement district" was or was not a municipality within the meaning of Section 1 of Article XVI of the Constitution of that state which prohibited "any county, town or other municipality" from issuing any interest-bearing evidences of indebtedness. In passing upon the question the court made use of the following language:

> "Section 1, Article 16, of the Constitution of 1874, declares that 'Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-

bearing evidences of indebtedness,' except such as may be authorized by law in pay for existing indebtedness. In support of the second ground of relief stated in the complaint, it is argued that the board of improvement is a 'municipality,' within the meaning of the section quoted above, and that the contract is therefore *ultra vires* because it stipulates for the making and delivery of promissory notes bearing interest. But a municipality is defined to be a 'city, a municipal corporation' (Anderson's Law Dictionary, p. 692); and this is evidently the meaning in which the term is here used by the constitution. The fact that an improvement district is organized to accomplish a purpose which in a limited sense may be said to be 'municipal,' does not make it a 'municipal corporation.' It exercises no legislative powers, and lacks many other essential characteristics of a corporation for the government of a city or town."

In the case of Township of Sheridan v. Frahm, Treasurer, 102 Ia., p. 5, the question was presented to the supreme court of Iowa as to whether a school district was, or was not, a municipality within the law of that state which provided that a certain proportion of taxes levied and collected on saloons should be paid over by the county treasurer to the municipality in which the business was conducted. The court in passing upon that question used the following language:

"The question presented on this appeal is whether the school district is a municipality within the meaning of said section. Appellant's contention is that the word 'municipality' applies only to incorporated cities and towns, and several definitions are quoted in support of this contention. Appellee contends that this court has, in a number of cases cited, held that a school district, such as plaintiff, is a municipality, and that the terms 'municipality' and 'municipal corporations' are synonymous. It is true that these terms have been used, in some instances, as synonymous, but not when the question was so directly presented as now. It is legislative intention in the use of this word for which we are now to inquire, rather than the technical or general sense in which it is used; yet these are proper to be considered in arriving at the legislative intention. It is a fact that places for the sale of intoxicating liquors are very generally within incorporated cities or towns, and that it is exceptional when that business is carried on elsewhere. While chapter 62 requires the tax to be assessed and collected whether or not the place be within the incorporated limits of a city or town, we are satisfied that in providing for a disposition of the revenue derived from this tax only counties and incorporated cities and towns were contemplated."

In the matter of Werner, an application for a writ of habeas corpus, 129 Cal. 567, the question presented was whether a sanitary district created by the laws of California was, or was not, a municipality. The court in passing upon that question used the following language:

"A sanitary district, no more than an irrigation district, or a reclamation district, or a drainage district, possesses police powers properly belonging to cities and municipal bodies exercising local governmental functions. Such districts are created for the purpose generally of some special local improvement, and should exercise only such powers as may be conferred upon them by the legislature in the line of the object of their creation. Although in the nature of public cor-

porations, they are not municipal corporations in the proper sense of that term. All municipal corporations are public corporations, but the converse does not follow that all public corporations are municipal. Railroad corporations are deemed *quasi* public corporations, but they are not deemed *quasi* municipal corporations. In some of the cases expressions may doubtless be found which would seem to indicate that public corporations and municipal corporations are synonymous, but it is, nevertheless, inaccurate to designate a drainage district or a sanitary district, although public corporations, as municipalities. Webster defines 'municipal' as pertaining to a city or corporation having the right of administering local government — as municipal rights, municipal officers; and 'municipality' is defined as a municipal district, a borough, a city, town or village. The Century Dictionary defines 'municipal' as pertaining to local self-government or corporate government of a city or town; and 'municipality,' as a town or city possessed of corporate privileges of self-government; a community under municipal jurisdiction. Bouvier's Law Dictionary says 'municipal' strictly applies only to what belongs to a city. Among the Romans cities were called municipia. In a general sense, we say that all law other than international is municipal law, but when we speak of corporation as municipal we mean cities or towns."

In the case of Heller v. Stremmel, 52 Mo., p. 309, the supreme court of the state of Missouri had before it the question as to whether the St. Louis school district was, or was not, a municipal corporation comprehended within the act of the General Assembly of the state of Missouri, which provided that no persons should "be eligible to the office of justice of the county court of St. Louis county who at the time of his election shall hold any office under a *municipal* or railroad corporation created by the laws of the state of Missouri."

The court in passing upon this question made use of the following language:

"It is contended by the plaintiff that 'the Board of President and Directors of the St. Louis Public Schools' is a municipal corporation, and that defendant being a director in said Board, is not eligible to the office of Justice of the County Court.

"A municipal corporation is defined by Bouvier to be: 'A public corporation created by government for political purposes, and having subordinate and local powers of legislation. An incorporation of persons, inhabitants of a particular place or connected with a particular district, enabling them to conduct its local, civil government.' (2nd Bouvier's Law Dic. 21; see also 2 Kent, 317, p. 275.) 'The Board of President and Directors of the St. Louis Public Schools' is not a corporation created for *political* purposes, nor is it created for the purpose of enabling the people of the district named, to conduct its local, *civil* government, and the mere fact that its limits of jurisdiction are the same as that of the city of St. Louis, makes no difference in that particular; it is just the same as if it had constituted a township, or any other district described, as a School District. The corporation is created to take charge and control of the public schools and make rules for the management of the schools, to take possession and charge of all lands and lots which have been received for the inhabitants of St. Louis for school purposes, and to dispose of the same, and apply the proceeds to purposes of education under the provisions of the act. In fact, the corporation is created by the state to assist in carrying

out the general common school system of education adopted by the state, and although the particular district is separately organized and incorporated by the legislature, it is no more a *municipal corporation*, than is the Board of Directors of any other school district in the state."

From consideration of the foregoing authorities I am of the opinion that the word "municipality" as used in the foregoing sections of the Revised Statutes of Ohio do not include city school districts and, therefore, the bonds of such districts cannot be accepted by the Superintendent of Insurance as a compliance with the demands of either of the statutes in question. It may be unfortunate that school bonds are not included within the securities in which insurance companies may invest to comply with the statutes referred to, but the remedy for the oversight rests with the General Assembly.

WADE H. ELLIS,
*Attorney General.*

**(To the State Board of Health.)**

WHETHER COUNCIL OR BOARD OF HEALTH OF A VILLAGE CAN CONTRACT WITH ONE PERSON FOR THE CLEANING OF CESSPOOLS, ETC.

January 30, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of yours of the 23d inst., containing the following questions:

> 1. Can the council or the board of health of a village enter into a contract with one person for the cleaning of closets, cesspools, etc., at a price to be agreed upon by the contracting parties, said contract to be made so that all other persons will be excluded from doing the work inside the corporation?
>
> 2. Inform me whether a contract providing for the disposal of garbage under Section 1536-761 R. S., will justify a municipal tax to pay for the same in excess of the ten mills which the municipality is authorized to levy.

Under Sections (1536-759 and 1536-761) full power is given to the council to authorize the board of health

> "To employ such number of scavengers for the removal of swill, garbage and offal, from the houses, buildings, yards, and lots within the city or village as it may deem necessary; and the board in such cases may make the contracts (therefor) thereof, subject to the approval of the council, and to be signed by the proper officers of the council, and may regulate the work to be done * * * ."

By Section 1536-761 R. S., the council is authorized to contract for a period not exceeding five years for the collection and removal of garbage, night soil, dead animals and other solid waste substances, at the expense of the municipal corporation or at the expense of persons responsible for the existence of such waste substances.

By section 1536-734 R. S.

> "The board of health may regulate the location, construction, repair, use, emptying and cleaning of all water-closets, etc. * * * * or other places where offensive or dangerous substances or liquids are or may accumulate."

Full authority is thus conferred upon village councils to authorize and provide for the entering into such contracts by the officers named and it can, undoubtedly, provide for the character of conveyances or vessels to be used in the removal of such nuisances and can further provide the hours of the day at which the same may be done.

Such powers should not be so construed as to forbid an individual citizen of a village from cleaning and purifying his own premises and thereby save himself the individual expense therefor, which might otherwise be charged to him by such public employe if the work was performed by such employe. If a contract is duly made and entered into between the village authorities and some person for the performance of such work it necessarily excludes all other

persons from doing the work at the expense of the corporation, but cannot forbid other individuals from doing the work for private parties, if it is done in the manner and with the character of vessels and conveyances which may be prescribed by the council, otherwise the power to regulate this necessary business would give the corporation authority to make contracts which would create, or tend to create, a monopoly and this has been so repeatedly denied by the courts that the citation of authority seems unnecessary. (Dillon on Municipal Corporations, Section 362).

In answer to the second question proposed I would say that the disposal of garbage does not justify a municipal tax in excess of the ten mills; for the purpose does not come within the express exceptions contained in Section 33 of the municipal code which provides for the aggregate of all taxes that may be levied by any municipal corporation (excluding certain express subjects) and the limitation there provided is ten mills on each dollar of valuation of the taxable property in the corporation on the tax list.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## POWERS OF BOARD OF PUBLIC SERVICE ACTING AS A BOARD OF HEALTH.

February 21, 1905

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge receipt of yours of the 15th inst., which contains the query, whether a board of public service of a city acting as a board of health, has authority to require master plumbers, journeymen plumbers and sewer builders to be licensed by such board, and to charge a fee therefor, both originally and for renewal of the same.

Under Section 7 of the municipal code the general powers of the municipalities have been classified and, under paragraph 13 thereof, among other powers vested in municipal corporations is the following:

> " * * * * to provide for the inspection of all buildings or other structures and for the licensing of house-movers, plumbers, sewer tappers and vault cleaners."

The first paragraph of that section provides that the powers of muncipalities (among others, the ones above mentioned) may be exercised under authority of council, as it may provide, by ordinance or resolution. It is clearly within the power of a city council to provide reasonable regulations tending to protect the public against the dangers of careless and inefficient plumbers and sewer tappers, and it would be proper for the municipality, in seeking such end, to provide for a system of licensing such plumbers and others, and also to provide for an annual renewal of such licenses, the revenue to be derived therefrom to be applied to such purposes. In the case of the State of Ohio v. Gardner, 58 O. S. 599, the court sustained such regulation but held that the method provided by the act of April 21, 1896, which was there under review, was unconstitutional.

The question as to which municipal officer or board might exercise such power on the part of the municipality should be determined by an examination of the statutes governing such boards and officers. The character of inspection conferred upon boards of health is such as is mentioned in Sections 2139 and 2140 (95 O. L. 433, 434.) In my opinion the sections of the statute governing

the powers of boards of health are not sufficiently broad to confer upon such boards authority to require plumbers, sewer tappers and others to take out a license, and as the board of public service when acting as a board of health has only such powers as are conferred upon boards of health, it would follow that they would not possess the power concerning which your inquiry has been made. Municipal corporations may provide for the same pursuant to the provisions of Section 7 above cited.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## AS TO REMOVAL OF GARBAGE, ETC.

June 7, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I am in receipt of yours of the 31st ult., calling for a written opinion from this Department on the following proposition:

> "Can a board of health pass a resolution requiring persons having garbage to use a can with a tight fitting lid for the storing of garbage, and also compel persons having garbage to pay the contractor employed by the board a specified fee for such removal?"

As to the general powers of boards of health in regard to the disposal of garbage and causing offensive or dangerous substances to be removed and nuisances abated, I cite you to my opinion rendered you under date of January 30, last.

In addition thereto I beg to call to your attention Sections 2142, 2144 and 2118 of the Revised Statutes by the original numbering designated in Bates' Annotated Ohio Statutes as Section 1536-759, 1536-761 and 1536-730.

The power to enact resolutions is given by the last numbered section and provides as follows:

> "The board of health of any city, village, hamlet or township may make such orders and regulations as it may deem necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of cities and villages; and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances; and in townships the posting of such orders and regulations in five conspicuous places within the township shall be deemed a sufficient notice thereof."

By Section 1536-761 it is provided that:

> "The said Council, legislative body or other governing board, is hereby authorized to contract, for a period not exceeding five years for the collection and removal of such garbage, night soil, dead animals and other solid waste substances, at the expense of such municipal corporation, or at the expense of persons responsible for the existence of such waste substance."

By Section 1536-759 authority is given to the council to,

"grant power to the board of health to employ such number of scavengers for the removal of swill, garbage and offal from the houses,

etc., as it may deem necessary; and the board in such cases may make the contracts thereof, subject to the approval of the council, etc."

Considering these three provisions, it appears to me that the ordinance or resolution, whereby it is sought to compel persons having garbage to pay to the contractor employed by the board a specified fee for the removal of the same, should be ordained or enacted by the council and not by the board of health, for the power seems to be conferred by Section 1536-761 expressly upon the council or other legislative body, meaning thereby other legislative bodies similar to the council, and when it is sought to charge a fee for a service of this kind against an individual or individuals, the authority so to do will be strictly construed.

The authority to require a certain kind of vessel to be used for the storing of garbage is vested in the council under the same general powers to provide for the removal of swill and garbage, as are contained in Section 1536-759 and kindred sections.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RELATING TO STOCK YARDS IN A MUNICIPALITY.

June 28, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Your inquiry as to the power of the council of cities and villages to prohibit the building of stock yards within the corporation limits has received my consideration.

Power is given by Section 7 of the New Municipal Code (paragraph 3) to municipalities "to prevent injury or annoyance from any thing dangerous, offensive or unwholesome; to cause any nuisance to be abated * * * and prevent injury and annoyance from the same, etc."

Under this grant of power the jurisdiction is conferred upon a municipal council to proceed to abate any nuisance which may be created by any business or calling. If as a question of fact, a stock yard is so kept as to become a nuisance it may be abated by the city council by the removal of that which is noisome and offensive to such an extent that it is detrimental to the comfort of those dwelling near the place or location of such yards; further if the conditions are such that the offensive or noisome vapors caused thereby cannot be abated without removal of the yards, the owners thereof can be compelled to remove the same. The mere declaration by the municipal council that such stock yards constitute a nuisance cannot subject it or them to removal unless the evidence would unqualifiedly show that the maintenance of the yards is in fact a nuisance and that it has become so noisome as to interfere with the rights of the public.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

## POWER OF BOARD OF HEALTH OF A CITY TO ABATE NUISANCES.

August 17, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of yours of the 10th inst., seeking an opinion of this department as to the power of a municipal board of health on the following facts:

> "A nuisance has been created in a certain city by a county and private institution emptying their refuse into a small run which flows through the city and has its outlet into a river inside of the city limits. Both institutions are located in a township outside of the corporate limits of the city."

Quere: As to the power of the board of health of a city to abate such nuisances.

The act of May 7, 1902, (95 O .L. 421, 437) defines the limitations upon the powers of the various boards of health authorized by that act. Section 2118 in substance provides that the board of health of any city, village, hamlet or township may make such orders and regulations as it may deem necessary * * * * for the public health, the prevention or restriction of disease, and the prevention and abatement or suppressment of nuisances. Section 2122 provides that the board of health shall abate and remove all nuisances within its jurisdiction. Section 2117, which provides for the township board of health in speaking of the jurisdiction of such board of health says:

> "It shall be for the township outside the limits of any city or village, and such boards shall have the same duties and powers as are herein imposed or granted to boards of health in cities and villages."

Each and all of the preceding sections of the Revised Statutes and others which might be cited, rcognize that the city board of health, except in certain given instances, has no power to abate nuisances outside the limits of its city, and each of the sections recognize the supremacy of the local board of health, whether in township, city or village, within its particular jurisdiction. There is no claim made that the river or run, thus polluted, forms any portion of the water supply of the city. If it did it would be necessary to consider other statutes conferring additional powers, under such circumstances.

Upon consideration of the foregoing sections of the Revised Statutes, I am of the opinion that no power exists in a city board of health to change the conditions existing in a township outside of the city, but such change should be effected through the township board of health having jurisdiction thereof, or in case of its refusal to act, by the state board of health, which has power to abate nuisances under such circumstances.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

## POWER OF BOARD OF HEALTH OF VILLAGE TO COMPEL PROPERTY OWNERS TO CUT WEEDS, ETC., UPON STREETS ADJACENT TO THEIR PROPERTY.

August 23, 1905.

Dr. C. O. Probst, *Secretary State Board of Health, Columbus, Ohio.*

Dear Sir: — I beg to acknowledge the receipt of yours of the 21st inst., containing the query as to whether the board of health of a village has the power to compel the property owners, or agents of property, to cut the weeds and grass upon the streets adjacent to their premises. This can only be compelled to be done by the board of health when the same assumes such condition as would render it unsanitary and a nuisance.

It is within the power of the village council at any time to direct the mowing and cutting of the weeds and grass by lot owners, upon their properties, but the care of the streets proper, which would include from curb to curb, falls upon the village authorities, and the weeds and grasses growing within such portion of the street should be removed at the municipal expense.

Very truly yours,

Wade H. Ellis,
*Attorney General.*

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## CONCERNING HEALTH OFFICER OF THE VILLAGE OF SOMERVILLE, OHIO.

September 26, 1905.

Dr. C. O. Probst, *Secretary State Board of Health, Columbus, Ohio.*

Dear Sir: — Yours of the 21st inst. is received. I am requested to furnish a written opinion upon the following proposition:

> The village of Somerville, on May 12, 1903, appointed a health officer in lieu of a board of health. The appointment was approved by the state board of health on May 29, 1903. The term of office was for one year. On June 7, 1904, the council appointed one Frank Chapin as health officer for a term of one year. This appointment was approved by the state board on June 21, 1904. On various dates between June 9, and July 24, 1905, the state board of health addressed various communications to the village, directing the council to make an appointment for the succeeding year. Not hearing from the village council, on September 5, 1905, the state board appointed Dr. John L. McHenry as a health officer for a term of one year and the council was notified of this appointment. It is now claimed that the term of Frank Chapin, by reason of the Chapman law, will not expire until January, 1906, and Dr. McHenry refuses to withdraw, claiming that he is the duly appointed health officer of the village.

The Act of March 17, 1904, being the so-called Chapman law, operated to extend the official term of appointive as well as elective officers whose terms would otherwise have expired, until the first Monday of January, 1906. Mr. Chapin had been appointed by the council as health officer and had been approved by the state board on June 21, 1904. Ordinarily his term would have expired on June 21, 1905. In the case of State v. Craig, 69 O. S. 236, it was held by the supreme court that a health officer is an officer and not an employe; and it

was further held in the case of the State of Ohio ex rel Gunn v. Peter Witt that the official terms of all officers were extended until the first Monday of January, 1906. Mr. Chapin's term was thus extended and the appointment of Dr. McHenry was void.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## LENGTH OF TERM OF HEALTH OFFICER IN VILLAGE OF SUMMERVILLE.

October 7, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — Acknowledging the receipt of your communication of the 4th inst., I beg to advise that in the opinion of this department rendered on the 26th ult., regarding the length of term of the health officer in the village of Summerville, I expressed the opinion that the term of such officer was extended by the operation of the so-called "Chapman Law" (being the act of the General Assembly passed and approved March 17, 1904) to the first Monday of January, 1906. You now request my opinion as to how the opinion of the 26th ult. affects health officers in various villages where the members have been appointed pursuant to Section 187, Municipal Code (Sec. 1536-723 Bates' R. S.) where the terms of such officers vary from six months to five years.

The appointment of such officers should be made pursuant to Section 223 M. C., as amended in 97 O. L. 39, as that section includes health officers as embraced in Section 187 M. C. (Sec. 1536-723 Bates' R. S.)

Second. The terms of such officers should be fixed and established by the village councils pursuant to the provision of the section last above cited. Construing this provision in connection with Section 223 M. C., (97 O. L. 39) it is necessary to have the term of office definitely fixed in order to determine "the expiration of the term" as used in that section. The time of appointment of such officers is fixed by Section 223 *supra* as "not earlier than the second Monday in January, and not later than the first Monday in February" and refers only to the time of appointment of the successors of the present members.

Third. In case the village councils have not fixed the term of office of such health officers, those appointed thereto, where no definite term is fixed, are holding at the pleasure of the appointing power; but where the term has been fixed by ordinance of the council, the officers hold pursuant thereto. The so-called "Chapman Law" will only affect those who have been appointed for a definite term and it will serve to extend the terms of those so appointed until their successors have been duly appointed pursuant to the provisions of Section 223 M. C., (97 O. L. 39).

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## DUTIES OF THE HEALTH OFFICER OF MARYSVILLE, OHIO.

November 17, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — I have received your communication of even date containing a copy of the resolution and ordinance providing for appointing a health officer for the village of Marysville, Ohio. Upon examination of such ordinance it is

clear that the village council did not attempt to repeal the rules and regulations adopted by the board of health of the village of Marysville, but simply appointed in the place of the board of health a health officer, which it had the power to do. The rules and regulations which have been regularly adopted by the board of health of that village will still remain in force, and it will be incumbent upon the health officer appointed by such ordinance to enforce the same.

I herewith return to you my former communication of the 15th inst. with a copy of the ordinance attached thereto.

Very truly yours,
WADE H. ELLIS,
*Attorney General*

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## AUTHORITY OF BOARD OF HEALTH TO PREVENT ESTABLISHMENT OF FERTILIZER FACTORY.

December 4, 1905.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR: — The board of health of a city, village or township would have authority to institute proceedings for an injunction to prevent the establishment of a factory for the purpose of manufacturing fertilizer products, if the same could be shown to be operated in such a manner as to create a nuisance. This would depend upon the character of the business and whether or not it was in a populous community and its operation would necessarily create noxious or unhealthy conditions.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

**(To the Commissioner of Common Schools.)**

## DETACHING TERRITORY FROM TOWNSHIP SCHOOL DISTRICT WITHIN THREE YEARS.

March 6, 1905.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your communication dated March 6th, 1905, relative to detaching territory from a township school district within a period of three years after said district has been centralized is received.

In reply I beg leave to say that under Sections 3894 and 3895 territory may be transferred from one school district to another without regard to the question of centralization. After a vote upon the question of centralization has been taken, as provided by law, and results in favor of centralization the school district is still a *township* school district and the limitation of three years affects only the question as to the resubmission of the question of centralization and does not in any wise affect the authority of the boards of education to act under Sections 3894 and 3895 in transferring territory. If in order to carry out the centralization of the schools it is necessary to issue bonds for the purchase of sites and the erection of buildings, the board of education of the school district will make such levy annually upon the taxable property of the school district as is necessary to meet the payment of these bonds and the transfer of territory from the centralized school district to adjoining districts or the changing of the boundary lines of the centralized school district will in no wise affect the levy made by the school board. The annual levy will affect the taxable property situated within the district at the time of the levy.

Very truly yours,

W. H. MILLER,
*Ass't Attorney General.*

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## MAINTENANCE OF SUMMER SCHOOLS BY CITY BOARDS OF EDUCATION.

June 5th, 1905.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR: — Your communication dated May 31st, 1905, relative to the maintenance of summer schools by city boards of education is received. In reply I beg leave to say that Section 4007 of the Harrison School Code provides that,

> "Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such place as will be most convenient for the attendance of the largest number of such youth, and shall continue each and every elementary day school so established not less than 32 nor more than 40 weeks in each school year. All the elementary schools within the same school district shall be continued the same length of time".

Under this provision boards of education have authority to maintain elementary schools during the summer or winter months or both so long as they are not continued longer than 40 weeks in any one year.

Section 4009 provides that,

> "Any board of education may establish one or more high schools, whenever it deems the establishment of such school or schools proper or necessary for the convenience or progress of the pupils attending the same, or for the conduct and welfare of the educational interests of the district."

This section makes no provision as to the number of weeks high schools shall continue, leaving the question as to their duration entirely in the discretion of the boards of education.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

**(To the Fish and Game Commission.)**

## TONNAGE TAX ON FISH BROUGHT INTO PORTS FROM WITHOUT THE STATE.

January 5th, 1905.

HON. J. L. RODGERS, *Pres., State Fish and Game Commission, Columbus, Ohio:*

DEAR SIR: — Your letter of December 28th, enclosing communication to the Ohio Fish & Game Commission from H. C. Crossley, is received. You request an opinion on the inquiry made by Mr. Crossley. It is difficult to understand from the letter of Mr. Crossley just what inquiry he desires to make. He asks for,

> "A decision from the district attorney (Attorney General) in regard to the collection of the tonnage tax on fish brought into Ohio ports from without the state."

On March 28th, 1903, in the Attorney General's annual report for 1903, page 67, it was held that sub-division 2 of section 6968-2 of the fish and game act,

> "Does not authorize the placing by the State of Ohio upon fish caught in foreign waters (that is, waters foreign to the waters of this State) any tonnage or other tax."

I presume that the opinion referred to, answers the inquiry made by Mr. Crossley. If it does not, I should be glad to make answer to any further inquiry you desire to make.

I return the letter from Mr. Crossley to the Commission.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

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## OPEN SEASON FOR QUAIL.

February 6th, 1905.

COL. J. C. PORTERFIELD, *Chief Fish and Game Warden, Columbus, Ohio.*

DEAR SIR: — Your letter of February 2d is received. You inquire whether under a law fixing the open season for quail from November 15th to December 5th, the latter date would be included in the open season?

It is obviously the intention of the legislature to provide for an open season of 20 days for quail, and while the word "from" is generally a word of exclusion, where the intention appears otherwise, it may be treated as an inclusive word. So that in the case supposed, the open season would include November 15th but exclude December 5th. The word "to" is exclusive, consequently the 5th of December is excluded from the open season.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

## RELEASING PRISONERS FROM COUNTY JAIL COMMITTED FOR VIOLATING FISH AND GAME LAWS.

March 1st, 1905.

COL. J. C. PORTERFIELD, *Chief Fish and Game Warden, Columbus, Ohio:*

DEAR SIR: — Your letter of February 23d received. You inquire:

> "Is it legally within the jurisdiction of the county commissioners, under any pretext whatever, to release prisoners from the county jail committed there for violation of the fish and game laws?"

Section 10 of the fish and game laws provides that in case a person is convicted for the violation of the fish and game laws and fails to pay the fine and costs imposed upon him, he shall be committed to the jail of the county or to some workhouse * * * and he shall not be discharged or released therefrom by *any board or officer* except upon payment of the portion of the fine or costs remaining unserved, or upon the order of the cmmissioners of fish and game.

It follows from the section just referred to that the county commissioners have no authority to discharge or release persons convicted for violation of the fish and game laws, except upon the payment of the fine and costs remaining unserved, or unless the full term has been served.

Very respectfully,

GEORGE H. JONES,

*Ass't Attorney General.*

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## VIOLATION OF SECTION 20 OF FISH AND GAME LAWS.

March 1st, 1905.

COL. J. C. PORTERFIELD, *Chief Fish and Game Warden, Columbus, Ohio:*

DEAR SIR: — Your letter of February 13th, received.

You state that John Doe, charged with the violation of Section 20 of the Fish and Game Law, was convicted and the Justice assessed a fine of $15.00 and the costs, amounting to the sum of $78.00. In default of the payment of fine and costs, John Doe was committed to the county jail and there remained 16 days; that he then paid the balance of the fine and costs, that is, the sum of $77.00 and was discharged from custody. Upon this state of facts you inquire what shall the justice do with the money; that is, the $77.00.

Section 10 of the Fish and Game Law provides that whenever, upon conviction the person convicted fails to pay the fine and costs imposed upon him, he shall be committed to the jail in county * * * and shall there be kept and confined one day for each $1.00 fine and costs adjudged against him.

In the case proposed by you, in my opinion, the state should either receive the full amount of the fine out of money in hands of the justice, or else the money remaining in his hands should be pro rated upon the fine and costs remaining unpaid. The more equitable, and I believe the correct view is, that the money in the hands of the justice should be pro rated between the fine and the costs. The pro rata share to be applied to the fine now in the hands of the justice under the suggestion I have made should be paid to the president of the Fish and Game Commission.

Very truly yours,

GEORGE H. JONES,

*Ass't Attorney General.*

## RIGHT TO CATCH FOOD FISH FOR BAIT.

September 6th, 1905.

HON. J. C. PORTERFIELD, *Chief Warden, Columbus, Ohio:*

DEAR SIR: — Your letter of September 2d is received. You inquire whether,

> "Persons catching small perch, crappies or any young food fish for bait are exempt from prosecution under the provisions of Section 23 of the Fish and Game Law?"

Section 23 after prohibiting the catching of fish, except as therein stated, provides:

> "That nothing in this section shall prevent the taking of minnows for bait with a minnow seine not exceeding four feet in depth and ten feet in length."

The word "minnows" as used in Section 23 evidently does not include small food fish, but applies to a distinct species of fish known as "minnows" and which do not increase in size and become food fish, and which vary in length from one and a half to three inches long, and while the term "minnows" has been loosely applied to other small fish, I am of the opinion that the term "minnows" as used in Section 23 does not include small food fish.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

**(To the Prosecuting Attorneys.)**

## TREASURERS OF VILLAGES ARE TREASURERS OF THEIR RESPECTIVE SCHOOL FUNDS.

January 5, 1905.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: — Your communication dated January 4, 1905, is received. You inquire whether or not the treasurers of villages are now the treasurers of their respective school funds and if the same is true of villages where territory is attached for school purposes? Section 4042 of the Harrison school code provides that the treasurer of the village *shall* be treasurer of the school funds in a village school district and the school funds of said village district should have been transferred to the village treasurer on the first Monday of January, 1905.

You also inquire as to how a settlement with the county auditor of the transactions between September 1st and the beginning of the new year, is to be made? The statute provides for an annual settlement with the county auditor within the first ten days of September. The next settlement will be made within the first ten days of September, 1905, and will cover the transactions of the entire year.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## PAYMENT OF FEES FROM COUNTY TREASURY FOR HOLDING AN INQUEST, BY A MAYOR.

January 5, 1905.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — Your communication dated January 4, 1905, relative to the payment of fees out of the county treasury for holding an inquest, by a mayor, is received. In reply I beg leave to say that you fail to state in your communication whether or not the coroner, at the time he received the notice, was out of the county or unable from sickness or other causes to discharge the duties of his office. If the coroner was in the county and was able to discharge the duties of his office, it was his duty to hold the inquest and his authority to so act could not be delegated.

Section 620 of the Revised Statutes provides that when there is a vacancy in the office of coroner, or the coroner is absent from the county, or unable from sickness or other cause to discharge the duties of his office, any justice of the peace of the county is vested with all the powers and shall perform all the duties appertaining to the office of coroner and is entitled to the same fees as are allowed by law to coroners in such cases. I find no statute authorizing a mayor of an incorporated village or city to act as coroner.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

## SHERIFF'S COST BILL.

January 10, 1905.

HON. H. M. HAGLEBARGER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR: — Your communication dated January 10, 1905, relative to itemizing sheriff's lost cost bill under Section 1231 R. S., is received.

In reply I beg leave to say that the three hundred dollar allowance provided in Section 1231 is only to be paid for services rendered for which the sheriff, by reason of a failure to convict, or insolvency of defendants or other cause, has not received compensation, and then not in excess of three hundred dollars. The sheriff is only entitled to an allowance under this section for services rendered, and the cost bill should be itemized.

Very truly yours,

W. H. MILLER,

*Ass't Attorney General.*

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## MANNER OF FIXING COMPENSATION OF COUNTY SURVEYOR UNDER SECTIONS 845 AND 2789*a*.

January 16, 1905.

HON. CHARLES F. HOWARD, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR: — Your communication dated January 14, 1905, relative to fixing the compensation of your county surveyor under Sections 845 and 2789*a*, as amended by the last legislature, is received.

In reply I beg leave to say that since the surveyors' salary law has been declared unconstitutional by the supreme court, county surveyors are placed just as they were prior to the enactment of the law and will receive their compensation in fees and per diem.

Section 845 as amended by the last legislature provides for the employment of an extra engineer, for road, turnpike and ditch work, when necessary, upon the request of the county surveyor, and of course the county surveyor gets no fees or compensation under this section.

Sections 2789*a* and 2789*b* provide for the keeping up to date of a complete set of tax maps of the county, and provides the compensation to be paid draughtsmen and assistants, not to exceed four, and in no wise affects the county surveyor or his fees under the general law.

Very truly yours,

W. H. MILLER,

*Ass't Attorney General.*

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## POWER OF PROBATE JUDGE TO FIX ACTUAL MARKET VALUE OF REAL ESTATE OF DECEASED PERSON.

January 17, 1905.

HON. S. A. HOSKINS, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR: — Your letter of January 16, relating to the power of the probate judge in regard to fixing the actual market value of real estate of a decedent is received.

The action of the probate judge in fixing the actual market value of real estate for the purpose of ascertaining the amount of direct inheritance tax due the State of Ohio is predicated upon the existence of an administrator or executor of the estate and a return to the probate court by such administrator or executor of the real estate of the decedent.

Section 7 of the act known as the Direct Inheritance Tax Law (97 O. L. 399) provides specifically that the executor, administrator or trustee of the decedent shall inform the probate judge within three months after such executor, administrator, etc., has assumed the duties of his trust, what real estate, if any, shall pass to any person so as to become subject to the direct inheritance tax.

Section 9 of said Direct Inheritance Tax Law provides that the value of *such* property as may be subject to such tax shall be its actual market value as found by the court of probate.

Under these sections the Probate Judge, when he shall receive the information from the administrator, executor, etc., may, upon his own motion, determine the actual market value of such real estate, and in doing so may call witnesses in determining such value.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## LIABILITY OF COUNTY TREASURER WHERE COUNTY SAFE IS BURGLARIZED.

January 25, 1905.

HON. JOHN S. DAVIDSON, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — Your communication dated January 18, 1905, in reference to the liability of your County Treasurer in case the county safe in the treasurer's office is burglarized is received. In reply I beg leave to say that under the decision in the 6 O. S. 607, in the case of State v. Harper, et al, the Supreme Court has held that,

> "The felonious taking and carrying away the public moneys in the custody of a county treasurer, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defense to an action on his official bond. The responsibility of the treasurer in such case depends on his *contract,* and not on the law of *bailment.*

Under this decision were the safe in the county treasurer's office burglarized, the county treasurer would be liable.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## CONCERNING DEPOSITORIES OF SCHOOL FUNDS.

January 27, 1905.

HON. E. L. TAYLOR, JR., *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: — Replying to your letter of January 26, enclosing copy of an opinion of that date given to Mr. E. B. Zwayer of Groveport, Ohio, I beg to

say that the conclusions you have reached upon the several matters therein discussed are in accord with my own judgment thereon; except that with respect to the last question I have not sufficiently examined it to express any view upon the subject. Upon this question of a bank officer being interested in a depository contract with the school board, I call your attention to the cases of Grant v. Brouse, 1st Nisi Prius 145; Railroad Co. v. Morris, 10 C. C. 502; State ex rel v. Pinney, 47 Bulletin 820 and other authorities cited at page 177 of the Ohio Municipal Code Annotated.

Several prosecuting attorneys throughout the State have written me on the subject of the right of unincorporated banks to act as depositories of school funds, and I have uniformly replied that the question was one in which the State is not a party or interested, and that I had no authority to express an official opinion upon it. I have also advised them that I had considered the matter with you unofficially; that I understood you had reached a conclusion upon it, and that they might receive some valuable aid in the matter by writing to you. Among those whom I have so advised are Michael Cahill, Prosecuting Attorney of Preble County, Louis W. Wickham, Prosecuting Attorney of Huron County, and Charles W. Stage, Legal Counsel of Cuyahoga County.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## RIGHT OF DEPUTY SHERIFF TO ACT AS COURT CONSTABLE AND RECEIVE ADDITIONAL PAY THEREFOR.

February 3, 1905.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — Your communication dated January 26, 1905, relative to the copy of the opinion recently sent you, passing upon the right of a deputy sheriff to act as court constable and receive additional compensation therefor, is received. In reply I beg leave to say that while the opinion sent you referred particularly to the right of the sheriff to perform the duties of a court constable and receive compensation, yet, in effect, it applies with equal force to a deputy sheriff. The statutes fixing the duties of sheriffs and deputy sheriffs enjoins upon them the duty of attending the sessions of the court and the statute authorizing the appointment of a court constable is intended to relieve the sheriff, and his deputies, of the duties therein imposed. The sheriff and deputy therefore have authority by virtue of their office to perform these duties without special appointment, but are not entitled to extra compensation. The statute only provides compensation for a court constable when appointed by the court under provisions of Section 553.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## SECTION 1230 R. S. GOVERNS SHERIFF'S FEES IN LUCAS COUNTY.

February 3, 1905.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — Your communication dated January 26, 1905, is received. You inquire whether Section 1230 or 1230*b* governs sheriff's fees in your county.

You state that the circuit court in Lucas County has recently held Section 1230*b* to be unconstitutional. The court having so held the question would seem to be determined, and the fees would be governed by Section 1230.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## METHOD OF TRANSFERING INSANE PERSONS FROM MANSFIELD REFORMATORY TO STATE HOSPITAL.

February 6, 1905.

HON. J. A. LEONARD, *Sup't. Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR: — General Brinkerhoff has submitted to this Department your letter to him of February 1, and has requested us to communicate with you.

In the letter to General Brinkerhoff you inquire what method, if any, may legally be pursued to transfer an insane inmate of your institution to a State Hospital?

The only express provision of the Statutes authorizing the transfer of convicts to a state hospital is found in Section 7428 R. S. This section seems to contemplate that the convict becomes insane after his detention in the penitentiary, and provides the mode by which such convict may be transferred to the Columbus State Hospital. It would seem impossible to construe Section 7428 R. S., so that the case you propose in your letter might be brought within its terms. It is a well known fact that the Penitentiary of Ohio is situated in the city of Columbus, near to the Columbus State Hospital, and this section requires a certificate from the superintendent of the Columbus State Hospital before he can be removed from the penitentiary. So that we must conclude that Section 7428 must be confined to cover cases where the person sought to be removed is an inmate of the penitentiary at Columbus.

Section 7241 R. S., provides how an insane person may be taken care of before his trial for an offense against the laws of the State, and there is absolutely no provision after the prisoner has been sentenced and delivered to his place of captivity other than that found in Section 7428.

Until some provision is made by law for the transfer of insane persons from your institution to a state hospital, it is probably necessary to take such care of them as you can and upon their discharge from your institution have a proper inquest held in the county from which they came, and thus have them committed properly to one of the state hospitals.

Very truly yours,
GEORGE H. JONES,
*Ass't Attorney General.*

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## FEES OF PROBATE JUDGE FOR PLACING AN IMBECILE IN THE INSTITUTION FOR FEEBLE MINDED YOUTH.

February 7, 1905.

HON. E. L. TAYLOR, JR., *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: — Your letter of February 6, is received. You inquire,

"What fees the Probate Judge shall be allowed for services in proceedings to place an imbecile in the Institution for Feeble Minded Youth in the city of Columbus?"

The Probate Judge should be allowed the same fees in the case you propose as is provided in Section 719 Revised Statutes of Ohio.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## FEES AND PROCEEDINGS OF A JUSTICE OF THE PEACE UNDER SECTION. 4364-25 R. S.

February 6, 1905.

HON. FRANK M. ACTON, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR: — Your letter of February 3, is received. You inquire "whether the provision as to the payment of costs contained in Section 3718*a* R. S. is applicable to payment of costs incurred in a prosecution before a Justice of the Peace, under Section 4364-25 R. S.?"

Section 3718*a* as amended May 10, 1902 (Vol. 95 O. L. 517) confers jurisdiction upon justices of the peace in all cases of violation of the laws to prevent the adulteration of food and drink, etc., and in cases of violation of the laws under Sections 3140-2, 4364-24 and 4364-25 Revised Statutes of Ohio, and also prescribes the manner of procedure and how the costs shall be paid, so that the provision for the payment of costs under Section 3718*a* governs prosecutions under Section 4364-25 R. S.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## APPOINTMENT OF JOHN LAYLIN, COUNTY SURVEYOR AS ENGINEER UNDER SECTION 845.

February 13, 1905.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR: — The copy of a resolution relative to the appointment of John Laylin, county surveyor of Huron County, engineer under Section 845, as amended by the last legislature, is received.

After a careful consideration of this section I am of the opinion that it does not contemplate the appointment of the county surveyor as such engineer. This section is only intended to provide for the appointment of an engineer upon the written request of the county surveyor whenever the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or to their improvement or construction when, on account of the amount of work to be performed, the Board of County Commissioners shall deem it necessary. In other words, to provide additional help when the county surveyor and his deputies are unable to perform the work required.

The Board of County Commissioners may, however, under Sections 2789*a* and 2789*b* appoint the county surveyor, who shall employ such number of assistants as may be necessary, not exceeding four, to provide for the making, correcting and keeping up to date a complete set of tax maps of the county, and provides a compensation for the county surveyor not to exceed two thousand dollars per year, and the assistants not to exceed fifteen hundred dollars per year.

I herewith enclose copy of resolution.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RIGHT OF COUNTY COMMISSIONERS TO INSURE COUNTY BUILDINGS AGAINST FIRE.

March 10, 1905.

HON. JOHN S. DAVIDSON, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — Your communication dated February 28, in reference to the right of the county commissioners to insure the county buildings from loss by fire is received.

In reply I beg leave to say that while there is no express provision in the statutes authorizing the county commissioners to insure the public buildings from loss by fire, yet under Section 859 they are authorized to provide public buildings, such as court house, jail, infirmary, etc., and I am of the opinion that it is not beyond the scope of the authority of the county commissioners to make provision for the protection of these buildings and to provide against loss by fire by carrying reasonable insurance upon the same. I should think that the county commissioners would have the same authority over the county infirmary as they would over other public buildings in the county upon the question of insurance.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## DUTY OF PROSECUTING ATTORNEY UNDER SECTION 1273 R. S.

March 10, 1905.

HON. OLIVE N. SAMS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR: — Your communication dated March 2, 1905, relative to the duty of the prosecuting attorney under Section 1273 of the Revised Statutes is received.

This section provides that the "prosecuting attorney shall prosecute on behalf of the State all complaints, suits and controversies in which the State is a party * * * in the probate court, common pleas court and circuit court." All prosecutions under the Beal Law are had under the name of the State, and I am of the opinion that it is incumbent upon the prosecuting attorney to prosecute all such cases in the probate, common pleas and circuit courts.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

## TERM FOR WHICH TEACHERS ARE TO BE HIRED.

March 14, 1905.

Hon. B. W. Rowland, *Prosecuting Attorney, Cadiz, Ohio.*

Dear Sir: — Your communication dated March 11, is received. You say that the teachers in township "N" were hired by the board of education for six months and that the teachers accepted employment under these contracts; that the six months have nearly expired and that the teachers now claim that the school board, under the new School Code, have no authority to hire teachers for a period less than one year, and claim a right to teach eight months.

In reply I beg leave to say that Section 4017 of the Harrison School Code provides that "no person shall be appointed as a teacher for a term longer than four school years nor for a term less than one year, except to fill an unexpired term."

Under this provision the school board was without authority to hire teachers for a term less than one school year, but the teachers having accepted the employment for a shorter term cannot, in my judgment, insist upon employment beyond the term stated in their contracts. If the school board was without authority to make the contract, there is then no contract for six months or any other term and the teachers could only receive compensation for services actually rendered on a quantum meruit.

Very truly yours,
Wade H. Ellis,
*Attorney General.*

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## AUTHORITY FOR PAYING JURORS' FEES IN PROSECUTIONS FOR VIOLATION OF FISH AND GAME LAWS WHERE DEFENDANT IS ACQUITTED.

March 16, 1905.

Hon. Roy H. Williams, *Prosecuting Attorney, Sandusky, Ohio.*

Dear Sir: — Your letter of March 8, received. You inquire what authority of law there is for paying jurors' fees in cases of prosecutions for violation of the fish and game law where the defendant is acquitted, and if such authority exists you ask what fees a juror is entitled to, in such case?

Section 9 of the fish and game law as amended the last session of the legislature provides, among other things, that if the defendant be acquitted,

> "The costs in such case shall be certified under oath to the county auditor, who, after correcting the same if found incorrect shall issue his warrant on the county treasurer in favor of the person or persons to whom such costs and fees are due and for the amount due each person respectively."

In this section (9) is found the authority for paying jurors' fees and they are entitled to the same fees as in ordinary cases of prosecutions for misdemeanors.

Very truly yours,
Wade H. Ellis,
*Attorney General.*

## ARRANGEMENT, ASSORTMENT, ETC., OF PLEADINGS ETC., IN PROBATE COURT UNDER SECTION 533-1.

March 29, 1905.

HON. WILLIAM H. SHELDON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR: — Your communication dated March 27, is received. You inquire whether will proceedings, administration proceedings and land proceedings are included in Sections 533-1 and 533-2 of the Revised Statutes of Ohio, making provision for the assortment, arrangement and preservation of pleadings, accounts, vouchers and other papers filed in the probate court.

This Department has not, so far as I have any knowledge, given an opinion excluding will proceedings, administration proceedings and land proceedings from the provisions of these two sections.

Section 533-1 provides:

> "The probate judge of each county may cause to be assorted, arranged and preserved together all the pleadings, accounts, vouchers and other papers on file in the probate court of such county, in each estate, trust, assignment, guardianship or other proceeding, exparte or adversary, begun or commenced prior to the first day of May 1898, keeping the said pleadings, accounts, vouchers and other papers in each case or proceeding separate from the pleadings, accounts, vouchers and other papers in every other case or proceeding."

It seems clear to me that will proceedings, administration proceedings and land proceedings, as well as all other cases or causes in the probate court are included in this provision.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CONCERNING AUTHORITY TO APPOINT A COUNTY SURVEYOR AS COUNTY ENGINEER UNDER SECTION 845.

March 24, 1905.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — Your communication dated March 22, enclosing copy of the resolution appointing the county surveyor to the position of county engineer under Section 845, as amended by the last legislature, is received. In reply I beg leave to say that, in my judgment, this section does not authorize the appointment of a county surveyor to this position. This section only provides for the appointment of an engineer upon the request of the county surveyor, when the county commissioners "on account of the amount of work to be performed" deem it necessary.

Since the new surveyor's law has been declared unconstitutional, county surveyors receive their compensation in fees under existing statutes at the time of the passage of the surveyor's law, and are only entitled to such compensation as is provided for in these sections.

I herewith return copy of the resolution.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## CONSTRUCTION OF SECTION 3893—TERRITORY OUTSIDE OF INCORPORATED VILLAGE INCLUDED IN SUB-DISTRICT.

March 31, 1905.

HON. H. L. YOUNT, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your communication dated March 28, asking a construction of Section 3893 of the School Code relative to territory outside of an incorporated village included in the sub-district, is received.

In reply I beg leave to say that Section 3893 does not apply to the question you submit, but does apply to territory that is annexed to an incorporated city or village. Sub-districts which include within their boundaries incorporated villages are governed by Section 3888 which provides that:

> "Each incorporated village now existing or hereafter created, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a village school district."

Under this section a village situated within a sub-district becomes a village school district but does not include the territory in the sub-district outside of the incorporated village for the reason that such territory is *not attached to the village* for school purposes. Such territory outside the incorporated village remains a part of the township school district.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CONCERNING ACT OF APRIL 5, 1904, AMENDING SECTION 2907*a* REVISED STATUTES.

April 7, 1905.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your letter of recent date received. You inquire whether the act of April 5, 1904, amending Section 2907*a* of the Revised Statutes, is in force, and if the constitutionality of said act has been tested in the courts. The act of April 5, 1904, referred to, has neither been amended nor repealed, and I am not advised whether its constitutionality has been tested in any of the lower courts or not, but there is no decision by the supreme court of this state upon the constitutionality of the act.

You also inquire whether a person who has made proper application under the act of April 5, 1904, and within the time required by said act, but who has failed to pay the amount of money determined by the auditor to be due, can now pay such money and redeem the property?

I am of the opinion that if the application was made at the proper time there is no reason, if the money is tendered to the auditor, why the applicant should not have the benefit of the act.

Very truly yours,

GEORGE H. JONES,

*Ass't Attorney General.*

## CONCERNING CERTAIN ALLOWANCES TO SHERIFF BY COMMISSIONERS.

April 7, 1905.

HON. WILLIAM KLINGER, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: — Your communication dated April 6, is received. In reply I beg leave to say that in my opinion the sheriff has a right to present his bill for services rendered from the 6th day of January, 1902, to the 6th day of March, 1905, and if the bill is covered by the statutes providing compensation to sheriffs, the same should be allowed by the county commissioners. I get the idea, however, from your letter, that these bills that are now presented, particularly as to attendance upon trial, and committing and discharging prisoners, have been presented to the county commissioners and allowed as turnkey fees. Of course the sheriff is not entitled to receive compensation twice for the same services. As to the bills presented under Section 719 of the Revised Statutes of Ohio, this section does provide a fee of 35 cents per day to the jailer for keeping an idiotic or insane person. This section does not, however, expressly provide for the 75 cents per day for support. It seems to me that a careful comparison of the bills presented by the sheriff with the sections of the statutes governing compensation to sheriffs will clearly indicate to you whether or not the bills presented by the sheriff should be allowed by the county commissioners, and if in your opinion, the statutes do not warrant the payment out of the county treasurer, I would recommend to the commissioners that the bills be rejected. The sheriff can then proceed to collect by law, and the question can be determined by the court.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## CONCERNING THE ESTABLISHMENT OF A BOWLING ALLEY UPON SAME LOT WITH A SALOON.

April 7, 1905.

HON. T. B. MATEER, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR: — Your communication of recent date relative to one J. D. Gregory of your county constructing a bowling alley on the same lot with his saloon is received.

In reply I beg leave to say that I have no knowledge of any consultation with J. D. Gregory concerning this matter, and I have been unable to find any decision of the courts upon the construction of Section 7000. The language contained in said section seems to be plain and makes it an offense for any keeper of a public house or place where spiritous liquors are retailed to establish, keep or permit to be kept upon his lot or premises any ball or nine pin alley and provided a fine of from $10.00 to $100.00. This section seems to cover your case.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

## RESIDENCE OF CLERK OF BOARD OF EDUCATION.

April 7, 1905.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bradner, Ohio.*

DEAR SIR: — Your communication dated March 30, is received. You inquire whether or not under Section 3920 of the Harrison School Code the clerk of the board of education of a township school district may reside within an incorporated village?

Section 3920 is silent as to the *residence* of the clerk and only provides that he may or may not be a member of the board of education. The general rule as to elective officers is that the officer must be an elector of the district or division of territory he represents. The clerk of the board of education is appointed and not elected, and in the absence of any provision in Section 3920, as to the residence of the clerk, I am not able to say that a clerk would be disqualified by reason of not being a resident of the school district.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## MEMBER OF BOARD OF REVIEW SHOULD BE A FREE-HOLDER.

April 7, 1905.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — Your communication dated April 6, is received. You inquire whether or not a person who has been appointed a member of the board of review under the provisions of Section 819-1 R. S., and thereafter ceases to be a free-holder, can still retain his office? In reply I beg leave to say that the legislature evidently contemplated that the members of the board of review should be free-holders, and I am inclined to the opinion that when a member ceases to be a free-holder that he is no longer eligible to the office.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## PURCHASE OF ADDITIONAL LAND FOR INFIRMARY PURPOSES.

April 12, 1905.

HON. FRANK N. ACTON, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR: — Your communication dated April 10, relative to the purchase of additional land for infirmary purposes, by your county board of commissioners, is received. In reply I beg leave to say that Section 870 Revised Statutes of Ohio, gives authority to make said purchase. Section 2825 R. S., places a limitation upon the amount of money to be expended without a submission of the question to the qualified electors of the county. In my opinion payment should be made out of the county fund.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

## IN THE MATTER OF THE MAUMEE VILLAGE SCHOOL DISTRICT.

April 12, 1905.

Hon. William G. Ulery, *Toledo, Ohio.*

Dear Sir: — Your communication dated April 10, relative to the Maumee village school district, is received. In reply I beg leave to say that the section found on page 346 of the 97 session laws, to which you refer, is an attempt upon the part of the legislature to legalize special school districts that have been created by special laws, notwithstanding the fact that the Supreme Court has held that such legislation is unconstitutional. This section, however, contains the provision that it should not apply to special school districts which include within their boundaries any incorporated cities or villages.

I am clearly of the opinion that under Section 3883 of the Harrison School Code the incorporated village of Maumee, with the territory attached to it for school purposes, notwithstanding the fact that heretofore said territory comprised two special school districts, comes within the classification of a village school district.

Very truly yours,

Wade H. Ellis,

*Attorney General.*

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## CONSTRUCTION OF COUNTY DITCHES.

April 25, 1905.

Hon. E. P. Chamberlin, *Prosecuting Attorney, Bellefontaine, Ohio.*

Dear Sir: — Your communication dated April 18, referring to the sections of the Revised Statutes providing for the construction of county ditches, is received.

If I understand your case, the provisions of these sections have been complied with, and the action of the county commissioners has been regular in the construction of the ditch in question; but by reason of the estimate of the engineer being too low the commissioners have been unable to sell the work as provided in Section 4475.

I do not understand that because the work has been offered for sale twice and no bids received for the reason that the estimate is too low, it is a bar to further action by the county commissioners. The only provision in Section 4475 as to the time of the sale is that the county commissioners shall fix a time and cause notice to be given. You say the county commissioners have tried to sell the work twice. I see no reason why they should not offer it a third time if proper notice is given as to the time and place of sale. If in the opinion of the county commissioners no bid will be received because the estimate is too low, they have authority under Section 4459 to re-apportion the cost of construction of the entire ditch or any part thereof as may seem just and proper. The ditch laws are intended to be practical in their operation, and I suggest that you advise the county commissioners to re-apportion the cost of construction and cause new estimates to be made if it is evident the estimate already prepared is too low.

Very truly yours,

Wade H. Ellis,

*Attorney General.*

## AS TO YEARLY ALLOWANCE UNDER SECTION 1309.

May 18, 1905.

HON. PETER J. BLOSSER, *Prosecuting Attorney, Chillicothe, Ohio.*

Your communication dated May 17, relative to the $100.00 yearly allowance under Section 1309 is received. In reply I beg leave to say that the words "in any year" contained in this section are generally construed to mean a year of 365 days without regard to the calendar year. In other words, the year begins when the officer assumes the duties of the office and said officer is not entitled to receive more than $100.00 in the year beginning with that date.

Very truly yours,

W. H. MILLER,
*Ass't Attorney General.*

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## COMPENSATION TO PROSECUTING ATTORNEY FOR COLLECTING COLLATERAL INHERITANCE TAX.

June 7, 1905.

HON. T. B. MATEER, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR: — I have yours of June 6, in inquiry of the right of the Prosecuting Attorney to compensation for the collection of collateral inheritance taxes. I am of the opinion that Section 1298 of the Revised Statutes has no application to a case of this kind, and am not aware of any statute which provides any compensation for such services.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## RIGHT OF STATE TO CHANGE OF VENUE IN CRIMINAL CASE.

June 8, 1905.

HON. C. R. HORNBECK, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: — Your communication dated June 7, relative to the State's right to a change of venue in a criminal case where a fair and impartial trial cannot be had in the county where the offense is alleged to have been committed, is received. In reply I beg leave to say that on investigation I find two Ohio cases involving this question.

The first case is the State of Ohio v. Arrison, reported in the 20th Bulletin at page 475 and holds that the State is not entitled to a change of venue. The syllabus is as follows:

> "The 16th section of the 'act directing the mode of trial in criminal cases must, in subordination to the Constitution, be construed as conferring upon the *accused alone,* the privilege of applying to the court to direct his cause to be tried in an adjoining county, on being satisfied that a fair and impartial hearing cannot be had in the county in which the offense is alleged to have been committed."

The other case is the State of Ohio v. Myers, reported in the 21st Bulletin at page 57 and holds that the State is entitled to a change of venue. The second and third paragraphs of the syllabus are as follows:

> "2. The State has an *equal right* with the defendant to a change of venue, where there is no restriction of the right to the defendant by the law for such change of venue.
>
> "3. Section 7263 does not, in terms, or by implication restrict the right to have a change of venue to a defendant in a criminal case, but it bestows the same right upon both the State and the defendant."

These decisions are both by common pleas judges and seem to be the only Ohio cases touching upon this question.

Hon. Henry Stanberry, Attorney General, rendered an opinion under date of February 5, 1857, holding that the right to a change of venue is only secured to the defendant.

I find, however, in the 11th L. R. A. at page 75, a decision of the supreme court of California, holding that a California statute providing for a change of venue without defendant's consent, on application of the district attorney, was unconstitutional. The first, second and third paragraphs of the syllabus in this case are as follows:

> "1st. The right of trial by jury at common law includes the right of a prisoner to have the jury obtained from the vicinage or county where the crime is supposed to have been committed.
>
> "2nd. The provision of the Constitution that the 'right of trial by jury shall be secured to all and remain inviolate' confers upon the prisoner the common law right to have the jury selected from the county where the offense was supposed to have been committed, and the Penal Code, Section 1033 providing for a change of venue without defendant's consent on application of the district attorney, if no jury can be obtained in the county where the action is pending, is therefore unconstitutional.
>
> "3rd. An application by the district attorney for change of venue because a fair and impartial jury cannot be obtained, without showing that no jury can be obtained, does not make a case for change under Penal Code, Section 1033, although the application would be sufficient if made by the defendant."

I find one other case decided by the Supreme Court of North Dakota, reported in 65 L. R. A. at page 762. This decision was rendered May 21, 1904, and apparently is the latest and best considered decision upon this question, and holds that a change of venue may be had upon the application of the State. The syllabus is as follows:

> "1. The right of trial by jury, which is secured to all by Section 7 of the State Constitution, includes all of the substantial elements of the trial by jury as they were known to and understood by the framers of the Constitution and the people who adopted it.
>
> "2. The system of trial by jury in criminal cases, which existed in this jurisdiction for fourteen years prior to the adoption of the Constitution gave the State, as well as the defendant, a right to have the place of trial changed from the county where the offense was committed to another county, when necessary to secure a fair and impartial trial; and it was the right thus known and understood which is secured by the Constitution.

"3. At common law the right of trial by a jury of the county of the offense was a general one, not unconditional, but always subject to the exception that the indictment might be removed and the trial take place in another county, either upon the application of the prosecution or the defendant, when necessary to secure a fair and impartial trial.

"4. Rev. Codes 1899, Section 8122 which provides for a change of place of trial to another county, upon the application of the state's attorney, when a fair and impartial trial cannot be had in the original county, merely perpetuates the right as it was known when the Constitution was adopted, and also as it existed at common law, and does not violate the right of trial by jury as secured by Section 7 of the State Constitution."

Both of the Ohio cases above referred to are cited in counsel's briefs in this case. Upon examination you will find the opinion in this case delivered by Young, Chief Justice, to be a very able one.

I think it worth while to make the application for a change of venue and will gladly render you any assistance you may desire in the matter.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## BOARD OF EDUCATION OF BLAKESLEE VILLAGE SCHOOL DISTRICT.

June 10, 1905.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: — Your communication dated June 8, concerning Blakeslee Village School District, is received. In reply I beg leave to say that the incorporated village of Blakeslee becomes a school district under operation of Section 3888 of the Harrison School Code and a board of education should have been elected for the district at the last November election. By reason of the failure to elect a board of education I am of the opinion that the county commissioners will have authority to act under Section 3969 of the Harrison School Code.

Very truly yours,

W. H. MILLER,

*Attorney General.*

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## DEFENDANT IN CRIMINAL CASE ENTITLED TO TRANSCRIPT OF TESTIMONY AT EXPENSE OF COUNTY.

June 13, 1905.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: — Your communication dated June 12, asking a construction of House Bill No. 212, found on page 178, 97 O. L., is received.

You inquire in substance, whether or not a defendant, after conviction, is entitled to a transcript of the testimony for the purpose of preparing a bill of exceptions at the expense of the county. In reply I beg leave to say that the Bureau of Inspection and Supervision of Public Offices has held that a defendant is entitled to such transcript, and after a careful consideration of the section I am of the opinion that the holding is correct.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## BOARD OF EDUCATION HAS NO AUTHORITY TO APPROPRIATE MONEY FOR A LIBRARY TO BE OWNED JOINTLY WITH ANOTHER SCHOOL DISTRICT.

June 13, 1905.

HON. LEE STROUP, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR: — Your communication dated June 12, relative to the right of the Board of Education of Amherst Township, under the provisions of Section 3998-6 of the Harrison School Code, to make an appropriation of $250.00 from the contingent fund to be used jointly with the Board of Education of Union School District for the erection of a public library, is received. In reply I beg leave to say that the provisions of the above section do not authorize the appropriation of money for a joint library to be owned and controlled by two or more school districts. The language of the section is:

> "The board of education of *any school district* of the state, in which there is not a public library operated under public authority and free to all residents of such district, may appropriate annually not to exceed $250.00 annually from its contingent fund for the purchase of books, other than school books for the use and improvement of the *teachers and pupils of such school district.* The books so purchased shall constitute a school library, the *control and management* of which shall be vested *in the board of education,* which board shall have power to receive donations and bequests of money or property for such library."

This language clearly implies that the library and books shall be the exclusive property of the school district in which the appropriation is made and that the board of education shall have the control and management of the same.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## ISSUE OF BONDS BY BOARD OF EDUCATION.

June 19, 1905.

HON. CHARLES M. WILKINS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR: — Your communication dated June 14, in which you inquire as to the amount of bonds a board of education may issue under Section 3994 of the Revised Statutes, without submitting such bond issue to a vote of the people, is received.

In reply I beg leave to say that Section 3994 provides that,

> "Boards of education may, from time to time, as occasion requires, issue and sell bonds, under the restrictions and bearing a rate of interest specified in Section 3992, and shall pay such bonds and the interest thereon when due, but shall provide that no *greater amount* of such bonds shall be issued in any year than would equal the aggregate of a tax at the rate of 2 mills for the year next preceding such issue, etc."

Under this provision boards of education may issue bonds in any one year without submitting such bond issue to a vote of the electors of the district in amounts not exceeding two mills on the tax duplicate of such district.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## PAYMENT OF SERVICES OF AUDITOR AND COUNTY COMMISSIONERS UNDER SECTION 4451 R. S.

June 29, 1905.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — Your communication dated June 24, relative to the payment of the fees of the auditor and compensation of the county commissioners out of the county treasury for services rendered under Section 4451 and succeeding sections, is received.

In reply I beg leave to say that while Section 4453 expressly provides that the itemized cost bill to be paid by the petitioners shall not include the fees of the auditor and compensation of the commissioners, I find no provision that the auditor and county commissioners shall be paid out of the county treasury. I am of the opinion, however, that the county commissioners are entitled to compensation for these services under the general statute providing for their compensation. The performance of these services is a part of their official duty as county commissioners, and I presume the same rule would apply to the county auditor. The duty of making up this cost bill by the county auditor is a part of his official duty as such auditor.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## PAYMENT OF DIRECT INHERITANCE TAX.

July 6, 1905.

HON. ROBERT S. WOODRUFF, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR: — Your letter of July 3, is received. You make this statement of fact:

"David Edwards, a resident of Butler County died testate leaving a half section of land in Douglass County, Illinois. In his will he directed that this land be sold and the money divided among his children, one of whom lived in this county, and the other two in the State of Colorado. The will * * * was probated here and administration with the will annexed was granted by our probate court. The land in Illinois was sold by the administrator and the money brought here by him for distribution."

Upon these facts you inquire whether the children of the testator are required to pay a direct inheritance tax upon the money realized from the sale of said land?

The question proposed has not been passed upon by the Courts in Ohio, but under statutes similar to ours, the supreme court of the State of Pennsylvania has held substantially this; that where a testator domiciled in Pennsylvania devises land situated outside of the State to be sold to pay pecuniary legacies, the legacies will pass to the legatees as money and subject to the law of the testator's domicile, and will be subject to the collateral inheritance tax.

Miller v. Commonwealth, 111 Pa. St., 321.

In Williamson's estate in 153 Pa. St., 508, the supreme court of Pennsylvania held that the real estate of a testator lying in other states which he has directed his executors to sell, and the proceeds from which he has given to persons and objects in this State, are converted by the direction to sell, and are subject to the collateral inheritance tax.

In New York, in Bowditch v. Ayrault, 33 N. E., 1067; Foster v. Winfield, 23 N. Y., 172 and in White v. Howard, 46 N. Y., 144, it was held that a will devising the residue of testator's property to trustees with directions to convert it into money and to divide it among designated legatees, works a conversion of realty into personalty and in construing a will, the rules governing personalty are to be applied.

There is some conflict between the New York and Pennsylvania authorities on the question of an equitable conversion of realty into personalty, but under all the circumstances, I am inclined to suggest that it is at least the better view to resolve the doubt in favor of the State and to hold that the legacies are taxable as personalty. If this solution is not acceptable to the parties interested, the matter may be authoritatively determined in the court.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

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## A PERSON MOVING FROM MADISON COUNTY TO LOGAN COUNTY IS NOT ENTITLED TO RELIEF UNDER ACT TO PROVIDE RELIEF FOR WORTHY BLIND IN MADISON COUNTY.

July 8, 1905.

HON. C. R. HORNBECK, *Prosecuting Attorney, London, Ohio.*

DEAR SIR: — Your communication dated July 6, inquiring whether or not a person who several years ago was an inmate of the county infirmary of your county and afterwards by an arrangement with the infirmary directors for a certain yearly allowance for his support, moved to Logan County, and has since that time voted in Logan County, is, under section 3 of an act to provide relief for the worthy blind, a bona fide citizen of Madison County and entitled to relief under said act? In reply I beg leave to say that, in my opinion, the exercise of the right of franchise in Logan County makes him a resident of Logan County and that he is not entitled to any relief under the act to provide relief for the worthy blind in Madison County.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

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## CONSTITUTIONALITY OF BOARD OF REVIEW LAW.

July 10, 1905.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of yours of the 7th inst., regarding the act ot the General Assembly, found in 95 O. L. 483, commonly known as the board of review law. The question as to its constitutionality has been passed upon by the supreme court of this State, both in the case of State of Ohio ex rel Kemp v. Clarke et al, 68 O. S. 463, and later in a case which directly questioned its constitutionality, entitled State ex rel Taylor v. Rockwell, decided March 15, 1904, affirmed without report, 70 O. S. 440. Therefore, so

far as your letter presents any question as to the constitutionality of the act, the same is answered by the decisions above cited.

Relative to the amendment of April 23, 1904 (97 O. L. 313), the minimum salary of $3.50 per day is allowed, and the maximum of not to exceed $250.00. The salary so fixed, in my opinion, applies to the amount to be allowed to each individual and not to the entire board.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## COMPENSATION TO PROSECUTING ATTORNEYS FOR COLLECTION OF COLLATERAL INHERITANCE TAX.

July 12, 1905.

HON. T. B. MATEER, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR: — A communication was received from you sometime ago, inquiring as to what, if any, compensation the prosecuting attorney is entitled to for services rendered in the collection of collateral inheritance taxes, under Section 2731-13 of the Revised Statutes of Ohio?

Upon investigation of this question I find that Section 2731-13 provides that the prosecuting attorney shall represent the State in all proceedings in the probate court relative to the collection of the collateral inheritance tax. Section 2731-15 provides that the *fees* of all officers having duties to perform under the provisions of this act shall be paid from the county expense fund and shall be the same as allowed by law for similar services. I am of the opinion that this provision does not cover any compensation for the prosecuting attorney, but refers particularly to the probate judge, sheriff, and other officers who would be entitled to fees in similar proceedings. Section 1298 does provide for 10 per cent. allowance to the prosecuting attorney for moneys collected on fines forfeited for recognizance and costs in criminal cases, but could not, in my opinion, be construed to include payment for services under Section 2731-13.

The supreme court has laid down the rule that where duties are imposed upon public officers by law, and no express provision made for compensation, the presumption is, that the service is to be gratuitous. I am of the opinion that the statutes fail to provide any compensation to prosecuting attorneys for these services.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## DUTIES OF COUNTY SURVEYOR UNDER ACT PROVIDING FOR CLEANING AND REPAIRING PUBLIC DITCHES.

July 17, 1905.

HON. J. H. Platt, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR: — Your communication dated July 12, relative to the duties of the County Auditor under Section 3 of an Act entitled "to provide for the cleaning out and keeping in repair public ditches, etc." is received.

In reply I beg leave to say that Section 3 of said act, as amended in 97

O. L., 262, provides that "the work of cleaning out the ditch shall be advertised, sold and let, and the contract therefor performed, as provided in this chapter"; Section 4 of said act (Sectional Number 4584-4 Revised Statutes of Ohio) provides the manner in which the work of cleaning out of the ditch shall be advertised, sold and let, and the contract therefor performed. Upon examination of this section you will find that this duty devolves upon the surveyor or engineer.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## COUNTY OFFICERS NOT ENTITLED TO RETAIN FEES WHEN COMPENSATED UNDER A SPECIAL SALARY LAW.

July 22, 1905.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR: — Your communication dated July 15, relative to the right of the county officers of Brown county to retain fees made while said officers received their compensation under a special salary law, is received.

In reply I beg leave to say that said officers cannot receive compensation under a fee law and salary law for the same services, and are not entitled to retain any of the fees made while acting under the special salary law. The fact that the salary law was held unconstitutional is not material. Said officers are estopped from denying the validity of the law so long as they accepted and retained compensation under it. These fees should be turned into the county treasury.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## DIVISION OF ALLOWANCE TO TREASURER FOR COLLECTION OF DELINQUENT TAXES.

July 22, 1905.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR: — Your communication dated July 12, is received. You say that one C. W. Kerns while treasurer of Defiance County brought a number of suits for the collection of both real and personal taxes in the common please court of your county. That during the pendency of said suits his successor, J. E. Hosler took office; that during Hosler's term a number of these suits were settled and the taxes including the 5% penalty were paid. You inquire whether Mr. Hosler or Mr. Kerns is entitled to the 5% penalty. This 5% is intended as a compensation to the county treasurer for services in the collection of these taxes, and in my judgment it should be pro rated between the parties in proportion to the services rendered.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

## TAX INQUISITOR'S FEES.

August 28, 1905.

HON. C. L. TAYLOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR: — Your communication dated August 22, 1905, relative to tax inquisitor's fees, is received. In reply I beg leave to say that the Common Pleas Court of Franklin County has held in the case of the State of Ohio ex rel Prosecuting Attorney v. Gilfilan that

> "A tax inquisitor is not excluded from furnishing evidence of omitted property to be listed in the name of a decedent, and may discover the existence of such property from inventories filed in the probate court, but his compensation will be limited to a percentage on taxes collected on property which should have been returned in the lifetime of the decedent."

You say that the tax inquisitor assisted the auditor in the collection of the evidence in your case. If the omitted property was placed upon the tax duplicate by information furnished by the inquisitor, then he is entitled to his compensation.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## PAYMENT OF JURY COSTS IN A ROAD CASE.

August 28, 1905.

HON. ROBERT THOMPSON, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR: — Your communication of recent date in reference to payment of jury costs in a road case in the probate court, is received. In reply I beg leave to say that I am of the opinion that the costs of the jury in such cases are not a proper charge against the county.

Very truly yours,
W. H. MILLER,
*Ass't Attorney General.*

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## MAKING OF CERTIFICATE BY THE AUDITOR, THAT STATE LEVY IS IN PROCESS OF COLLECTION.

August 30, 1905.

HON. JOHN S. DAVIDSON, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR: — Your communication of recent date, is received. You state there is no money in the building fund in your county, but that the commissioners have made a levy, and you inquire whether or not at this time the auditor will be warranted in making a certificate that the state levy is in process of collection.

The purpose of Section 2834*b* R. S., is to prevent the creation of obligations where no provision has been made to meet them, and this section requires, in the case proposed, that before the obligation is incurred the auditor shall

certify that the levy has been made, that it has been placed upon the duplicate, and that the taxes are in process of collection. The treasurer is the collector of the taxes and, in my opinion, such taxes are not in process of collection until the duplicate has been delivered by the auditor into the hands of the treasurer of the county.

Very truly yours,
GEORGE H. JONES,
*Ass't Attorney General.*

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## EXAMINATION OF VETERINARY SURGEONS, ETC.

September 5, 1905.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR: — Your two letters dated September 2, 1905, are received. In one you inquire whether or not there is a board of examiners for veterinary surgeons, and, if so, whether or not a man in your county who has practiced the profession for twenty years is required to take an examination in order to practice his profession? Section 4412-1 of the Revised Statutes of Ohio, is as follows:

> "All persons who now, or shall hereafter, practice veterinary medicine and surgery in the State of Ohio, and have not been engaged in such practice for at least three years prior to the passage of this act, in the State of Ohio, shall be examined as to their qualifications by a state board of veterinary examiners, to be appointed as hereinafter provided."

This statute was passed May 21, 1894, and provides that all persons practicing veterinary medicine and surgery must be examined as to their qualifications excepting those who have been engaged in the practice in the State of Ohio for at least three years prior to the passage of this act. Your letter does not state whether or not the man to whom you refer has been engaged in practicing for twenty years in the state of Ohio. If he practiced veterinary medicine and surgery in the State of Ohio three years prior to May 21, 1894, he comes within the exception in this section.

In your second inquiry you ask if the county treasurer is authorized to pay interest on ditch warrants issued when the work was completed under a contract, but not paid at the time for want of funds in that particular ditch; and if interest should be paid, out of what fund should it be paid?

Section 1108 provides:

> "When *any warrant* is presented to the county treasurer for payment, and the same is not paid, for want of money belonging to that particular fund upon which the same is drawn, the treasurer shall endorse said warrant, 'not paid for want of funds,' annexing the date of its presentment, and shall sign his name thereto; and said warrant shall thereafter and thenceforth bear interest at the rate of 6 per centum per annum; and a memorandum of all such warrants shall be kept by the treasurer in a book kept for that purpose."

Under this section any warrant not paid for want of funds will draw interest.

Section 1109 provides that the treasurer shall publish notice as soon as there are sufficient funds in the treasury of the county to redeem said warrants,

and that interest shall be paid. In the absence of any provisions in these sections naming the fund out of which interest shall be paid, I am of the opinion that the interest should be paid out of the general county fund.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## DUTY OF COUNTY COMMISSIONERS TO REMOVE OR TO REPAIR PRIVATE CROSSINGS.

September 8, 1905.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — Your letter inquiring whether it is the duty of county commissioners to remove or to repair private crossings along pikes and county roads, is received. I am of the opinion that your idea, as expressed in your letter, in regard to the duties of the county commissioners, is correct.

Of course, if by the construction of any public work, the private property rights of any individual are impaired, such individual has his action for damages.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## ISSUANCE OF BONDS BY BOARD OF EDUCATION.

September 11, 1905.

HON. ROY H. WILLIAMS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR: — Your communication dated September 8, relative to the issuance of bonds by the board of education of Milan, Ohio, for the payment of an indebtedness of $2,197.40 due the treasurer of the school district for salaries advanced upon teachers' vouchers when there was no money in the tuition fund to pay the same, is received.

In reply I beg leave to say that I have conferred with Mr. Peckinbaugh, of the Bureau of Inspection and Supervision of Public Offices, and examined the report and recommendation made by him in regard to this matter. I am of the opinion that Mr. Peckinbaugh's recommendation is correct and under Sections 2834*a* and 2834*b* the board of education is authorized to issue bonds to pay this indebtedness.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CONCERNING FEES OF PROSECUTING ATTORNEYS.

September 15, 1905.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR: — Your letter of September 11, is received. You inquire whether or not a prosecuting attorney is required under Sections 1334 and 1335 to include in his return, fees or commissions that come into his possession in the collection of real estate or personal delinquent taxes?

In reply I beg leave to say that the collection of personal delinquent taxes is not a duty imposed upon the prosecuting attorney as such, and consequently fees and commissions received by him for the collection of such taxes are no part of the perquisites of his office and no return of the same is required to be made under Section 1334 of the Revised Statutes. However, any fees or commissions received by the prosecuting attorney as such for the collection of delinquent real estate taxes by direction of the Auditor of State under Section 1104, as amended April 25, 1904 (97 O. L. 404) should be accounted for under Section 1334, and this for the reason that the enforcement of the lien referred to in Section 1104 is a specific duty devolving upon the prosecuting attorney as such.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## COUNTY NOT REQUIRED TO PAY BILLS FOR PRINTING AND POSTAGE FOR NOTICES TO PERSONS DELINQUENT FOR PERSONAL TAXES.

September 19, 1905.

HON. C. H. HUSTON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR: — Your letter of September 14, is received. You inquire whether the county commissioners may legally pay for the printing of notices and for postage for the county treasurer to send notices to parties delinquent in the payment of their personal taxes?

The allowance of 5% to the county treasurer for the collection of delinquent personal taxes is presumed to cover the trouble and expense he is put to in making such collection and he is not entitled to an additional allowance for notices or postage.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## SALARIES OF JUDGES OF THE COURT OF COMMON PLEAS.

September 22, 1905.

HON. WILLIAM L. DAVID, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR: — Your letter of September 21, is received. You inquire upon what basis the salary of a judge of the court of common pleas is fixed under Section 1284a of the Revised Statutes (97 O. L. 558)?

The section referred to expressly provides that in addition to the salary allowed by Section 1284, R. S., to judges of the court of common pleas, there shall be allowed them an annual salary equal to $16.00 per thousand for each one thousand population of the county in which the judge resided at the time of his election or appointment as ascertained by the federal census next preceding his assuming the duties of his office. This provision fixes the basis for the computation of the salaries of common pleas judges; the other provisions of Section 1284*a* provide the mode of paying the salary so fixed, and in case there is more than one county in the judicial sub-division, payment is to be made by the several counties in proportion to their respective populations as ascertained

by the federal census next preceding the assumption of office by the common pleas judge.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## REGARDING PROPOSITIONS TO BE SUBMITTED TO VOTERS OF CLINTON COUNTY, OHIO.

September 25, 1905.

HON. JOSEPH T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR: — Your letter of September 19, is received. You inquire whether under Section 2825, as amended April 25, 1904, the following proposition is a single proposition, and as such may be submitted to the voters of Clinton County in the form presented, to-wit:

> "For the building of a court house and jail and the purchase of a site therefor, the total cost not to exceed $275,000, and to provide for the payment thereof by the levy of a general tax — yes."

In my opinion the form presented contains but a single proposition and may legally be submitted to the voters of Clinton County; and while it probably is not necessary to include in the proposition the cost of the improvement, yet if such cost is included it would not avoid the submission.

Section 871 of the Revised Statutes provides for the issuance of bonds by the county commissioners after it has been determined to make the improvement, and it is not necessary therefore to submit that question to the voters of the county.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## FILING AND DOCKETING OF BILLS IN DITCH CASES.

September 29, 1905.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — Your communication dated September 26, inquiring whether or not an act "to provide for the filing and docketing of vouchers or bills before being acted upon by the county commissioners or county infirmary directors" passed by the last General Assembly, applies to the payment of fees and costs in ditch cases under Section 4507 R. S., is received.

In reply I beg leave to say that the act above referred to provides that, "any bill or voucher for the expenditure of money, payable out of *any* of the funds controlled by the county commissioners or board of county infirmary directors, must be filed with the county auditor and docketed in a book kept for that purpose, at least five days," etc. Under Section 4507 R. S., all of the costs and fees in ditch cases are to be paid out of the county treasury on allowance by the county commissioners. I am therefore of the opinion, that this act requiring the filing of all bills for five days, applies to said fees and costs.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

## AMOUNT OF BONDS SCHOOL BOARD MAY ISSUE UNDER SECTION 3994 REVISED STATUTES.

September 29, 1905.

HON. GEORGE H. BAYLISS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR: — Your communication dated September 27, relative to the amount of bonds a school board may issue under Section 3994 of the Harrison School Code without submitting the bond issue to a vote, is received.

In reply I beg leave to say that this section contains the following provision:

> "But shall provide that no greater amount of such bonds shall be issued *in any year* than would equal the aggregate of a tax at the rate of *two mills* for the year next preceding such issue."

Under this provision the school board may not issue bonds in any one year in excess of two mills upon the tax duplicate for the year next preceding such issue.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RIGHT OF CORONER TO HOLD INQUEST IN CERTAIN CASES.

October 6, 1905.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — Your communication dated October 4, is received. You inquire as to the right of the coroner, under Section 1221 of the Revised Statutes of Ohio, to hold an inquest in a case where a person driving across a railroad track is run down by a train, in the presence of witnesses, and the person killed.

In the case of the State of Ohio v. Bellows, 15 C. C., p. 504, cited by you, I find that Judge Shearer, in delivering the opinion, defines "violence" as used in Section 1221 to mean force *unlawfully exercised* as distinguished from mere accident or casualty. And further over in the opinion Judge Shearer holds:

> "That where a person has come to his death by violence, as hereinbefore defined, whether in the presence of *third persons* or not, it is the duty of the coroner to hold an inquest, not only to ascertain the cause of death, but whether a *crime* has been committed, who the perpetrator is, and to secure and preserve the evidence to the end that justice may not be defeated."

In the case you submit it is a question of fact whether or not the person's death was caused by accident or casualty, or by the criminal negligence of the railroad company. The testimony of the witnesses present will be material in determining this question, by the coroner. Of course if the coroner has knowledge that the death was the result of a mere accident and not by the criminal negligence of the railroad company, an inquest would be unnecessary; but without that knowledge on the part of the coroner I am of the opinion that it would be his duty to hold the inquest.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

## ELECTION OF TOWNSHIP TREASURER AND CLERK.

October 6, 1905.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — Your letter of the 6th inst., relative to the election of a township treasurer and clerk was referred by the Attorney General to me with direction that I investigate the question and report to you thereon. I have given it such consideration as the time would permit and have further conferred with the Secretary of State who agrees with me in the following conclusion: When Smith was elected treasurer at the April election, 1903, he would have served two years in that office, which would have constituted his regular term, but he resigned in October of the same year, and the trustees of the township appointed Huber to succeed him as treasurer and you say *"for the unexpired term."* That would be, according to my opinion, conformably to Section 1451 as construed with Section 1448 R. S. In your letter you say that when the spring elections were abolished the treasurer appointed held over until the November election *1904*. This was an error, because by the so-called "Chapman Law," he would hold the full term for which he was appointed, viz: until the spring of 1905, and the additional period allowed under the "Chapman Law" to the first Monday of January 1906. It was therefore an error to elect a treasurer in 1904, but he should be elected at the coming November election, which would straighten out the terms of both clerk and treasurer as provided by Section 1448 R. S. It is therefore my conclusion that the treasurer should be elected this fall and as the clerk seems to have been properly elected in 1904, there will be no election of a successor at the coming election.

Very truly yours,
SMITH W. BENNETT,
*Special Counsel.*

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## ELECTION OF TOWNSHIP CLERK AND JUSTICE OF THE PEACE.

October 13, 1905.

HON. J. E. POWELL, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR: — Since talking to you by telephone this morning I have looked up the letter addressed to me by W. H. Williams, of your county. From his letter I understand that the office of township clerk and the office of one of the justices of the peace in Mr. Williams' township have been filled by appointment and he inquires whether or not there shall be elected at the coming November election a clerk and a justice of the peace to fill these offices.

Section 567 as amended in 97 Session Laws, p. 38, provides for the filling of a vacancy in the office of justice of the peace by appointment, and further provides for the election of some suitable person for a term of three years at the next regular election. Under this provision it would be necessary to elect a justice of the peace for the full term of three years, at the coming November election.

Section 1451 as amended on page 76 of the 97 Session Laws, provides for the appointment of a township clerk where a vacancy occurs in the office, and further provides that the appointee shall hold until his successor be elected, provided by Section 1448. Section 1448 as amended on page 187 of the 97 [illegible]on Laws, provides that a township treasurer and clerk shall not be elected [illegible] same annual election. Under this provision, if a township treasurer is

to be elected this fall the appointee to the office of township clerk will hold until the November election, 1906; but if a township treasurer will not be elected this fall then a township clerk should be elected at the coming November election for the full term of two years.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## CONSTRUCTION OF THE GOOD ROADS LAW.

October 20, 1905.

HON. J. H. PLATT, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR: — Replying to your letter of October 17, relative to the good roads law passed by the last General Assembly, vol. 97, p. 550, you ask:

> 1. Whether, under the operations of this act, the trustees have a right to levy a tax upon the property of citizens living in a village or other municipal corporation within the confines of such township to make the improvements referred to in such act; and
> 2. Whether a tax-payer living in the municipal corporation has a right to sign the petition mentioned in the first section of this act?

I am of the opinion that any tax-payer of such township has the right to sign the petition and that all of the qualified electors of such township may vote at the election held, whether they reside in the municipal corporation or outside of the limits of it, although the Section is not as clear in that respect as Section 19 of said act.

I am also of the opinion that the trustees have authority to levy the tax for such improvement upon the property of citizens living in a municipal corporation if said corporation is within the confines of such township where said improvements are to be made.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RIGHT OF APPEAL IN ACTIONS FOR RECOVERY OF MONEY ILLEGALLY DRAWN FROM COUNTY TREASURY.

October 20, 1905.

HON. WILLIAM T. DEVOR, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR: — Your letter of October 19, in regard to the right of appeal in actions brought to recover money illegally drawn from the treasury, is received.

You will notice Section 5130 R. S., provides that the issues of fact arising in actions for the recovery of money only, shall be tried by a jury unless a jury trial be waived.

As I said in a former letter to you, I am of the opinion that an action to recover money is a civil action in which the defendant would have a right to demand a jury. If this is true, there could be no appeal, because by Section 5226 R. S., referred to in your letter, an appeal cannot be taken from a judgment in a civil action rendered by the common pleas court, if the right to demand a jury in the particular case exists.

60 O S., 301, referred to by you, you will observe is a case which required findings to be made and practically a foreclosure against the land assessed. Consequently the issues in this case were to be tried by the court, and it is a kind of case in which the right to demand a jury did not exist.

I think the question to determine is, whether or not the actions that have been brought are actions for the recovery of money only. If they are such actions then, in my judgment, they are not appealable. When in my former letter I said that the cases brought to recover illegal fees were actions at law and not in equity, I was referring to the general distinction between cases appealable and those not appealable. That is to say, cases tried to the court in which the defendant has no right to demand a jury are appealable, and cases in which the defendant has a right to have a jury to pass upon the facts are not appealable.

Very truly yours,

GEORGE H. JONES,
*Ass't Attorney General.*

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## AGENT OF A FIRE INSURANCE COMPANY ORGANIZED UNDER LAWS OF ANOTHER STATE, HAVING AN OFFICE IN OHIO SUBJECT TO REGULATIONS OF INSURANCE LAWS OF OHIO.

November 15, 1905.

HON. U. S. MARTIN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR: — Your letter of November 14, is received. It is impossible to tell from your statement what kind of business the broker in Ohio does. The circuit court for this circuit has held that the business of an agent of a West Virginia fire insurance company, residing and having an office in Ohio, although not insuring property in Ohio, is subject to the inspection and regulations provided by the statutes of this state.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## DEPUTY SHERIFF MAY NOT BE APPOINTED COURT CONSTABLE.

November 20, 1905.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR: — Your letter of November 15, inquiring as to the right of a deputy sheriff to act as, and receive the compensation allowed to a court constable, is received.

In Section 553 R. S., etc., will be found the legislation on the subject of appointment, duties and compensation of court constables. Such officers may be appointed to preserve order, to discharge other duties as the court requires and when so directed by the court shall have the same power to call and impanel juries, which by law the sheriff of the county has, except in capital cases.

Section 1211 R. S., provides among other things, that it is the duty of the sheriff to attend upon the common pleas court, and the circuit court during their session, and the probate court when required, etc.

The compensation of the sheriff is fixed by law for the discharge of his

general duties, including that of attendance on the courts during their session. The object of appointing court constables is that they may discharge duties which the sheriff may not be able to perform on account of the fact that he is required to be constantly in attendance at court either in person or by deputy.

It being therefore, the duty of the sheriff and deputy, as such, to perform the services which may, under certain circumstances, be required of the court constable, leads me to the conclusion that neither the sheriff nor his deputy may lawfully be appointed as court constable.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RIGHT OF A RAILROAD COMPANY TO CROSS A PUBLIC ROAD.

November 21, 1905.

HON. N. H. MCCLURE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR: — In answer to yours of November 20, 1905, confirming the opinion expressed to you by Mr. Mauch to-day by telephone, I have to say that under Section 3284 the railroad company has the right to cross a public road with the condition that it shall, without unnecessary delay, place such road in such condition as not to impair its former usefulness. This crossing does not depend on the consent of the county commissioners or any other body.

Under Section 3283 the railroad and the county commissioners are authorized to agree upon the manner, terms and conditions upon which such crossing may be established. In case such agreement is not reached, however, the railroad company may appropriate such crossing or so much thereof as may be necessary in the same manner and upon the same terms as is provided for the appropriation of the property of individuals. Where, however, the railroad company does not appropriate such crossing it enters upon and constructs the same under the conditions and with the liabilities proposed by Section 3284. In case it violates any such conditions or avoids any such liabilities an action may be brought compelling compliance with this section under favor of Section 863. The power to make such crossing under Section 3284 is a part of the charter rights of the company, and an intent to violate that section will not be presumed and no action under Section 863, or any other section, will lie in behalf of such commissioners until some provision of Section 3284 has been violated, or until it can be shown that the railroad company does not intend to place such road in such condition as not to impair its former usefulness.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## ASSESSMENTS UNDER THE DOW LAW.

November 27, 1905.

HON. WM. T. DEVOR, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR: — Acknowledging receipt of yours of the 24th inst., presenting certain questions with regard to the operation of the Dow Law, so-called, I beg to say that Section 4364-14, Bates' Revised Statutes, being Section 6 of the Dow

Law, provides that the auditor of the county, upon satisfactory information being given him, may enter upon the duplicate any place liable to assessment or increased assessment. From this I assume that any satisfactory information that you might give to the auditor might become the basis for subjecting the place to the charge of the tax.

The second inquiry involves the consideration of Section 4364-9*a*, which provided a special method for charging such tax upon any given place wherein such business was carried on, but you will observe that that special form of proceeding was repealed by the act of May 9, 1902 (95 O. L. 463-465) and the procedure therein provided for can no longer be resorted to.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## JURISDICTION UNDER THE JUVENILE COURT ACT.

November 27, 1905.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR: — Your communication dated November 25, inquiring whether or not jurisdiction under the juvenile court act passed by the last legislature extends to probate and common pleas courts in counties where there is but one common pleas judge, is received. In reply I beg leave to say that Section 2 of this act conferring jurisdiction, seems to be open to two constructions:

> *First:* That common pleas and probate courts have jurisdiction generally throughout the state, and insolvency and superior courts have jurisdiction only in those counties wherein three or more common pleas judges regularly hold court concurrently.
>
> *Second:* That the jurisdiction of all the courts enumerated in Section 2 is limited to counties wherein three or more judges of the common pleas court regularly hold court concurrently.

In my judgment the second construction is the correct one. Section 2 of the act applies only to the jurisdiction, while Section 3, provides for the establishment of a juvenile court and contains no provision for the establishment of a juvenile court in counties other than those wherein three or more judges of the common pleas court regularly hold court concurrently.

While the history of the enactment of a law is not to be considered a canon of construction, yet, from my personal knowledge, it was the intent of the legislature in the passage of this law to limit its operation to the five largest counties in the state.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## REGARDING COUNTY DEPOSITORIES.

December 5, 1905.

HON. E. E. EUBANKS, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of your inquiry contained in yours of the 28th ult., and in reply thereto I would advise that Section 1136-1

of the Revised Statutes providing for county depositories, designates incorporated banks in preference to any other form of banks, and further provides that in any county where no such bank exists that the commissioners of said county may designate any other bank located and doing business in the county. The banks organized under Section 3881-64 and under Section 3797 R. S., are preferred as depositories over company and association banks, being mere partnerships. The statute, as you will observe, includes national banks in conjunction with those of incorporated banks organized under state laws, as those which are to be first chosen.

Section 3821-1 et seq., provides for a form of bank formerly known as banks of issue, which are not now doing business under such law.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## TERM OF SHERIFF OF HIGHLAND COUNTY.

December 4, 1905.

HON. O. N. SAMS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR: — Your communication dated December 1, relative to the length of term of the sheriff elect of your county is received. In reply I beg leave to say that the adoption of the bi-ennial election amendment authorizes the legislature to fix the terms of public officers to conform thereto, and also provides that the legislature may extend existing terms of office. No change, however, in the term of any office can be made until the legislature takes action in the matter. The sheriff elect of Highland County was elected for a term of two years, and there can be no change in the length of his term except by legislative action.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## WHETHER HOUSE BILL NO. 15 APPLIES TO ANNUAL ALLOWANCE OF PROSECUTING ATTORNEY.

December 4, 1905.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: — Your communication dated December 1, inquiring whether or not House Bill No. 15, page 25, 97 O. L., applies to the annual allowance made you as prosecuting attorney by the county commissioners, is received.

In reply I beg leave to say that the portion of section one of said law providing that a bill must be filed with the county auditor five days before allowed by the county commissioners does not apply to your annual allowance. In my opinion after the allowance is made to you by the county commissioners and the bill approved by said commissioners it should be filed with the county auditor and remain on file five days before the voucher is drawn on the county treasurer.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

## AUTHORITY OF COUNTY COMMISSIONERS TO ORDER SALE OF BONDS FOR BUILDING BRIDGES.

December 9, 1905.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR: — Your communication submitting the question as to whether or not your county commissioners would be authorized to order the sale of bonds in the sum of $10,000 for the purpose of building bridges, bonds to be issued without a vote of the people, is received. In reply I beg leave to say that Section 2825 as amended by the last legislature provides that the county commissioners shall not levy any tax or appropriate any money "for building any bridge," except in case of casualty, the expense of which will exceed $10,000, without first submitting to the voters of the county the question of the policy of building any public county bridge, etc.

Under this section as amended the county commissioners may levy a tax or appropriate money to build any bridge or bridges so long as the expense of building any one bridge does not exceed $10,000.

If the county commissioners desire to issue bonds for the building of these bridges their authority to do so is contained in Sections 871-872 of the Revised Statutes of Ohio.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## DUTIES OF CORONER OF LAWRENCE COUNTY IN HOLDING INQUEST IN MATTER OF DEATH OF MICHAEL MARTIN.

December 11, 1905.

HON. E. E. CORN, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: — Mr. Harrison, the Mine Inspector, has submitted to me the correspondence relative to the coroner of your county holding an inquest as to the cause of the death of one Michael Martin who was fatally injured while engaged in operating a coal mine in your county. I was at first inclined to agree with the view taken by you as to the authority of the coroner to hold this inquest, but upon a full examination of the Mining Laws, Section 301, I am of the opinion that it is incumbent upon the coroner to hold an inquest in this case. Section 301 is as follows:

> "Every person having charge of any mine, whenever loss of life occurs by accident, connected with the working of such mine, or by explosion, shall give notice thereof forthwith by mail or otherwise, to the Inspector of Mines, and *to the coroner of the county in which such mine is situate, and the coroner shall hold an inquest upon the body of the person or persons whose death has been caused.*"

While this Section makes it the duty of the person having charge of the mine to give notice of the accident forthwith by mail, or otherwise, to the coroner, it is not conclusive that the failure of said person to give said notice relieves the coroner of his duty to hold the inquest should he receive notice otherwise. In other words, there are two separate and distinct duties, one resting upon the person having charge of the mine to notify the coroner but the fact of his failure to perform his duty will not relieve the coroner in the performance of his.

I wish you would take the matter up with the coroner and have him make such examination as you think will comply with the law, so that the Mine Inspector's Department may have a record of the investigation as to the cause of this accident.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## TERM OF PROSECUTING ATTORNEY ELECTED AT THE LAST NOVEMBER ELECTION.

December 12, 1905.

HON. L. A. EDWARDS, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR: — Your communication dated December 11, inquiring as to the length of term of the prosecuting attorney-elect of your county, is received. In reply I beg leave to say that the adoption of the biennial election amendment in itself makes no change in the term of a prosecuting attorney elected at the last November election. The amendment authorizes the legislature, however, to fix the terms of public officers to conform thereto, and also provides that the legislature may extend existing terms.

The prosecuting attorney elected in your county was elected for a term of three years and his successor will be elected at the November election 1908, and take office on the first Monday of January, 1909, therefore no extension of term is necessary and the only legislative action required under this amendment will be to fix the term of his successor for an even number of years. The bond should be for three years.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## PERSON TO BE ELIGIBLE TO MEMBERSHIP ON BOARD OF EDUCATION MUST BE RESIDENT AND ELECTOR OF SUCH DISTRICT, ETC.

December 26, 1905.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR: — Your communication of December 20, containing four inquiries, is received.

In answer to your first inquiry, I would say that a person to be eligible to membership on a board of education of any school district, should be a resident and elector of such district.

The same answer applies to your second inquiry. A clerk should be a resident and an elector of the school district within which he is to serve.

In answer to your third inquiry, the statute makes no provision as to the place of meeting of a board of education of a school district. I presume that they are at liberty to meet at such place as will be most convenient.

The answer to your third inquiry will also apply to the fourth, as to the right of township trustees to meet at some place other than the township house.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

## AS TO RIGHT OF CORONER TO HOLD INQUEST AS TO CAUSE OF DEATH OF MICHAEL MARTIN.

December 20, 1905.

HON. E. E. CORN, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: — Your letter relative to the duty of the coroner of your county to hold an inquiry as to the cause of the death of one Michael Martin, is received.

I wrote to you because you are the legal adviser to the coroner and I owed you the courtesy of taking the matter up with you instead of the coroner.

There can be no question, if the mine was abandoned and Martin was a trespasser at the time of the accident, that the coroner is not authorized to hold an inquest. The district mine inspector, however, has filed a written report with the State Mine Inspector, which contains the statement from the owner of the mine, that he had leased the mine to Martin and that Martin paid him a royalty upon the coal mined, and that he was in lawful occupancy of the mine at the time of the accident. The report further shows that there was another man working with Martin at the time of the accident. If this is true, then it is the duty of the coroner to hold an inquest. I know nothing further of the circumstances of the accident than the report of the inspector discloses. If upon an investigation, you find these facts to be true, it is your duty to advise the coroner to hold the inquest, and should you not desire to do so, please let me know and I will institute the necessary proceedings against the coroner.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

(**Miscellaneous.**)

## RELEASE OF WM. J. WILLIAMS FROM THE OHIO HOSPITAL FOR EPILEPTICS.

January 5, 1905.

A. P. Ohlmacher, M. D., *Supt. of The Ohio Hospital for Epileptics, Gallipolis, Ohio.*

Dear Sir: — Your communication bearing date of December 22, 1904, relative to the release of Wm. J. Williams of Mahoning County, now under commitment to your institution, is received. In reply I beg leave to say that I have carefully gone over the correspondence submitted by you, together with a copy of the proceedings had in the common pleas court.

I note in your communication that the said Wm. J. Williams was committed to your institution as an epileptic. I find no commitment papers further than a medical certificate of one Calvin R. Clark, a medical witness, but from the copy of the proceedings had in the common pleas court it would seem that the said Williams was committed under provisions of Sections 7240-7245, and, in my judgment, you should, if in your opinion the said Williams is now sane, notify the prosecuting attorney of Mahoning County of that fact so that a capias may be issued and the said Williams returned to Mahoning County to answer to the offence charged against him.

Very truly yours,

W. H. Miller,

*Second Ass't Attorney Genaral.*

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## JURISDICTION OF PROBATE JUDGE UNDER SECTION 2 OF ACT TO REGULATE TREATMENT OF DEPENDENT, ETC., CHILDREN.

January 19, 1905.

Hon. John Coonrod, *Probate Judge, Fremont, Ohio.*

Dear Sir: — Your communication dated January 18, 1905, relative to the jurisdiction of probate judges under Section 2 of an act "to regulate the treatment and control of dependent, neglected and delinquent children," is received.

Section 2 of said act provides:

> "The court of common pleas, probate courts, and where established insolvency and superior courts of those counties in this State, wherein three or more judges of the common pleas court regularly hold court concurrently, shall have original jurisdiction in all cases coming within the terms of this act."

By the provisions of this section jurisdiction is limited to those counties in the State wherein three or more judges of the common pleas court regularly hold court concurrently.

Very truly yours,

Wade H. Ellis,

*Attorney General.*

## TIME AT WHICH APPLICANTS WILL BEGIN TO DRAW PAY UNDER THE ACT TO PROVIDE RELIEF FOR THE WORTHY BLIND.

January 25, 1905.

HON. HUSTON T. ROBINS, *Probate Judge, Chillicothe, Ohio.*

DEAR SIR: — Your communication dated January 18, 1905, relative to the time applicants will begin drawing pay under the act to provide relief for the worthy blind, is received. In reply I beg leave to say that this act contains no provisions in reference to the time applicants shall begin drawing pay, other than this, applicants "shall be entitled to, and receive, not more than $25.00 per capita *quarterly,*" etc. I presume under this provision they would be entitled to receive their compensation at the end of the quarter after they have received their certificates.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## "HYPES ELECTION LAW."

January 25, 1905.

HON. FRANK F. GENTSCH, *Chief Deputy Supervisor and Inspector of Elections, Cleveland, Ohio.*

DEAR SIR: — I have given consideration to your several questions relating to the Hypes Election Law and have come to the conclusion indicated by my answers to the several questions submitted.

I desire to preface these answers by pointing out that the Hypes Election Law was intended to establish a general system of supervision for elections; that to do so it abolished the various city boards of elections and created a county system; that the boards of supervisors of elections and supervisors and inspectors of elections are not city boards with added powers in the county, but county boards charged with additional duties in cities.

Section 2926*t* says: "But for all November elections the county in which such city is located shall pay the general expenses of such election other than the expenses of registration."

Section 2966-4 provides: "All proper necessary expense of such board of deputy state supervisors shall be defrayed out of the county treasury as other county expenses, and the county commissioners shall make the necessary levy to meet the same; which expenses shall, in the case of boards of supervisors and inspectors of elections, include all expenses authorized by the state supervisor and inspector and incurred in the investigation and prosecution of offenses against the laws relating to the registration of electors, the right of suffrage and the conduct of elections."

It is suggested, however, that Section 2926*d* is not in harmony with the views here expressed. While conceding that that section imposes upon the city all expenses growing out of registration, it has been suggested that it also imposes upon it all expenses arising out of the conduct of elections in the municipality and that where that section provides for the payment by the city of "all necessary expenses of the board for the purposes herein authorized" it is a mere repetition of the same words in the original section. I find that these words were used in Section 2926*d* as originally enacted in 1886 and that at that time they meant to include all the expenses of conducting elections in cities, but that since the Hypes Law was passed and this section made in *pari materia* with (2966-4)

and 2926*t* it no longer has that effect, but relates to registration alone. The legislature gives some evidence of that intention in this, that it expressly struck from this section all provisions for paying judges and clerks of elections in the city from the city treasury, and all provision for the purchase, repair and preservation of the ballot boxes. No new provision for the payment of these expenses so omitted from 2926*d* was made except as the various sections were consolidated into one act, and the language in 2966-4 re-enacted in the new law. When this language in Section 2966-4 was first used it clearly meant expenses where no city board existed, but that cannot be said of Section 2926*t*, for this section originally specifically placed upon cities the payment of all expenses connected with municipal elections, while the amended section provides that for all November elections, the county shall pay all the expenses other than registration. Inasmuch as all general elections are now November elections this must mean that all the expenses of the board are paid by the county, subject to the limitations of Section 2926*d*.

Answering your several inquiries seriatim it is my opinion:

*First.* The salary of the deputy clerk under Section 2926*d* falls upon the city just so far as it is determined that his duties are connected with registration in such city.

*Second.* The liability of the city for expenses for assistant clerks is limited in the same way and to the same degree as the salary of deputy clerk.

*Third.* While the clause "all necessary expense of the board for the purposes herein authorized" formerly related to all expenses of elections so far as they arose within the municipality it now relates exclusively to registration and special municipal elections.

*Fourth.* The city's liability for books, forms, etc., relate exclusively to registration.

*Fifth.* Expenses connected with the conduct of the office, exclusive of those particularly incident to registration, devolve upon the county.

*Sixth.* This question is answered in the foregoing.

*Seventh and Eighth.* While the certificate of the board would and should carry great weight with the city auditor, it is, nevertheless within his power to require evidence that the voucher is properly drawn upon him, and he may, for this purpose, summon witnesses to testify concerning such voucher.

A copy of this opinion is sent to the Bureau of Inspection and Accounting and to Hon. Charles W. Stage, legal counsel of Cuyahoga County and to Hon. Newton D. Baker, solicitor of the city of Cleveland.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## WHEN FEES ON INSPECTION OF OIL SHOULD BE PAID

January 30, 1905.

HON. JOHN R. MALLOY, *Inspector of Oils, Columbus, Ohio.*

DEAR SIR: — Your letter dated January 26, 1905, enclosing a communication from F. L. Baird, Oil Inspector for the First District, relative to the question as to when and where fees on inspection should be paid, is received.

That portion of Section 394 R. S. of Ohio, as quoted in Mr. Baird's letter, refers to the manner of the inspection. While Section 395 R. S., makes provision as to the duties of the Inspector, and contains this language:

"The inspectors and their deputies *are required* to test the quality of all mineral or petroleum oils, or any oil, fluid or substance which is a product of petroleum, or into which petroleum or any product of petroleum enters or is found as a constituent element, *which is offered or intended to be offered for sale for illuminating purposes in this State.*"

Under this provision, I am of the opinion that an immediate inspection is required of all oil which is offered or intended to be offered for sale in this State, without regard to the time when such oil is to be sold.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## DISCHARGE OF PRISONER FROM REFORMATORY AT EXPIRATION OF ONE YEAR WHO HAS BEEN ON PAROLE.

February 6, 1905.

HON. J. A. LEONARD, *Supt. Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR: — Your letter of January 30, enclosing letter to Mr. Thomas H. Darby, Cincinnati, Ohio, is received.

You inquire in your letter whether a person convicted of burglary since May 12, 1902, and who is on parole, is entitled to be discharged at the expiration of one year from the commencement of his sentence?

Section 7388-27 R. S., provides among other things, that the term of imprisonment of a prisoner sentenced to the Ohio State Reformatory shall be terminated by the Managers of the Ohio State Reformatory as authorized by this act, and that such imprisonment shall not exceed the maximum provided by law for the crime for which the person was convicted, nor be less than the minimum term provided by law for a felony.

Section 7388-29 authorizes the Board of Managers of the Reformatory to establish rules and regulations under which prisoners within said reformatory may be allowed to go upon parole.

I find no provision of law, under what is known as "the Ohio State Reformatory Act" requiring the Board of Managers to parole any prisoner within one year from the commencement of his sentence.

In the case of State ex rel Attorney General v. Peters, 43 O. S. 629, the court in construing the act authorizing the parole of prisoners from the penitentiary, sustained the power of the Board of Managers to establish rules and regulations under which prisoners might be allowed to go upon parole outside of the buildings and enclosures.

The authority conferred by Section 7388-29 R. S., is plenary and provides the various conditions that must exist in order to entitle a prisoner to his parole.

Section 7388-33 provides how prisoners, while on parole may be released from custody.

It was decided in Re Kline 70 O. S., page 29, that the right to parole was not a vested right in the prisoner, and is not an essential part of the prisoner's sentence and in its very nature and object it is subject to modification or repeal; and the court further said that a repeal of the legislation providing for such parole does not take away any right of the prisoner nor in any manner affect his sentence.

I am unable therefore, to understand what right the prisoner in the case proposed by you has to demand his absolute discharge from the Reformatory and from his parole.

Very truly yours,
GEORGE H. JONES,
*Ass't Attorney General.*

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## POWERS AND DUTIES OF THE COMMISSIONER OF RAILROADS AND TELEGRAPHS.

COLUMBUS, OHIO, February 24, 1905.

HON. J. C. MORRIS, *Commissioner of Railroads and Telegraphs, Columbus, Ohio.*

DEAR SIR: — In response to your request under date of February 16, 1905, for an opinion upon the powers and duties of your department arising under Sections 248, 248*a* and 258 of the Revised Statutes, I have to advise you as follows:

Sections 248 and 258 were parts of Section 5 of the original act creating your department and the power of the commissioner to subpoena witnesses, etc., now expressed by Section 258 originally related to the examination now provided for by Section 248. The subsequent enactment of Section 248*a* was to supplement Section 248 and the two sections together authorize you (1) upon complaint or otherwise, when you have reason to believe that any railroad company or any of its officers, agents or employes, has violated or is violating *any* of the laws of this state to examine into the matter, and (2) when you have reason to believe that differences have arisen between citizens of the state and any corporation acting as a common carrier within this state, to investigate that matter and report the same to the General Assembly, if in session; otherwise to the Governor. In making the examination under either of the sections referred to the powers to subpoena witnesses etc., under Section 258 may be employjed.

You have no authority to regulate or fix passenger or freight rates or switching charges; but you have under these sections authority to determine whether the law in any of these, or in any other respects, is being violated and to report such fact either to the General Assembly or governor as above indicated, and they in turn can, of course, require the Attorney General to take such action as the facts and law may justify. In this examination you are not limited to the violation of any particular law or class of laws, whether such law be of statutory or common law origin; nor does the fact that specific penalties are fixed by law prevent this inquiry. In making the examination provided for by Section 248*a* you are not limited to cases where differences have arisen between a common carrier and more than one citizen, the word "citizens" in this section being read in either the singular or plural sense.

Under Section 258 you have, in my opinion, no power to require security for costs, nor are you authorized to tax and collect costs from any parties to the hearing.

Any fees arising by virtue of the exercise of your powers under Section 258 would be payable only out of funds appropriated for that purpose by the General Assembly; and your jurisdiction in compelling the attendance of witnesses and the production of papers would seem to be no more extensive than that of a justice of the peace of the township where such hearing is held. In this respect the statute may be inadequate to accomplish the full purpose of the

legislature in establishing your department; but the general powers with respect to complaints and investigations above indicated are clearly conferred.

Respectfully submitted,

WADE H. ELLIS,
*Attorney General.*

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## WHETHER CONTRIBUTING MEMBERS OF COMPANIES OF THE OHIO NATIONAL GUARD ARE EXEMPT FROM JURY DUTY.

March 16, 1905.

GEN. A. B. CRITCHFIELD, *Adjutant General of Ohio, Columbus, Ohio.*

SIR: — You letter of March 15, received. You inquire whether:

> "Under Sections 3039 and 3055, Revised Statutes of Ohio, contributing members of companies of the Ohio National Guard are exempt from jury duty and, if so, what recourse such contributing member may have should the courts refuse to recognize his standing as such contributing member?"

Section 3039 R. S., provides for the enlistment of contributing members in the Ohio National Guard and also that such contributing members shall be subject to such * * * * services as may be ordered by the council of administration of the respective organizations. Section 3055 R. S., provides, among other things, that such contributing members shall, under the limitations therein set forth, be exempt from service as jurors. The power of a legislature to grant exemptions from the performance of duties upon juries is acknowledged by such eminent authority as Judge Cooley in his work on Constitutional Limitations; and in Virginia, Maryland, Alabama and other states, the courts of last resort have upheld statutes as constitutional which provide that contributing members of the militia shall be exempt from service as jurors.

If it is desired that this question be judicially determined in this state, when next a contributing member is summoned for service as a juror, he may refuse to serve and if he should be held in contempt, by the court, and punishment inflicted upon him, then, upon a writ of *habeas corpus* the question of his right of exemption could be fully determined.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## TEACHERS' CERTIFICATES SHOULD NOT BE SIGNED IN BLANK.

March 27, 1905.

HON. R. E. JONES, *Pres. Ohio State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR: — In response to your verbal request for an opinion upon the method of the issuance of licenses by your Board, I beg to advise you that no one authorized to sign the certificates of the successful applicants should do so until the same are fully filled out. The practice of signing such certificates in blank cannot be commended.

Very truly yours,

WADE H. ELLIS,
*Attorney General*

## AUTHORITY OF BOARD OF EMBALMING EXAMINERS TO ISSUE LICENSE TO PERSON UNDER AGE.

June 3, 1905.

HON. R. E. JONES, *Pres. State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR: — I have your favor of recent date in which you inquire as to the authority of the State Board of Embalming Examiners to issue a license to a person under the age of majority.

I have carefully examined Section 4412-16 and kindred sections of the Revised Statutes and do not find therein any language which directly or by implication would authorize the Board in refusing to issue a license to a person who is of good moral character and who has satisfactorily passed an examination in the subjects enumerated in said Section 4412-16 but who has not attained his majority.

Therefore I am of the opinion that the Board may not legally refuse to issue a license to a person who met all the requirements of Section 4412-16, solely on the ground that he has not attained the age of majority.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CONCERNING THE USE OF AUTOMATIC MAIN DOORS IN COAL MINES.

July 8, 1905.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR: — Sometime ago you requested an opinion from this department concerning the use of automatic main doors in coal mines, under Section 301 of the Mining Laws. Section 301 provides that

> "In all mines, whether they generate fire damp or not, the doors used in assisting or directing ventilation of the mine, shall be so hung or adjusted that they will shut of their own accord and cannot stand open; and all main doors shall have an attendant, whose constant duty shall be to open them for transportation and travel, and prevent them from standing open longer than is necessary for persons or cars to pass through;"

There is also contained in Section 292 of the Mining Laws this provision:

> "The inspectors shall exercise a sound discretion in the enforcement of the provisions of this act, and if in any respect (which is not provided against by, or may result from a *rigid enforcement* of any express provisions of this chapter), the inspector finds any matter, *thing or practice* in or connected with any such mine, to be dangerous or defective, so as, in his opinion, to threaten or tend to the bodily injury of any person, the inspector may give notice in writing thereof to the owner, agent or manager of the mine, and shall state in such notice the particulars in which he considers such mine, or any part thereof, or any matter, thing or practice to be dangerous or defective and require the same to be remedied."

Since receiving this request I have, in company with the chief inspector of mines, visited one of the principal coal mines of the state and have seen, in operation, the automatic doors referred to in your request. While Section 301

provides that an attendant shall be placed at all the main doors, it also contains provisions that said doors shall be so hung, or adjusted, that they will shut of their own accord and cannot stand open, and designates as the duty of the attendant to open these doors for transportation and travel. The automatic doors used are not only hung and adjusted so that they will shut of their own accord, but are so arranged that they will open of their own accord. This being true, where automatic doors are used, there exists no necessity for an attendant. The law does not intend a vain thing, and, from my personal observation, I am of the opinion that the automatic doors referred to are so hung and adjusted that they will open and close of their own accord, and that it is not necessary to place an attendant at said doors to open them. This question, however, rests in the sound discretion of the mine inspector, under the provisions above referred to in Section 292, and if, in the sound judgment of the inspector the automatic door is better adapted for the ventilation of air, and is less liable to injure occupants of the mine, he has the authority to permit their use.

Very truly yours,

GEORGE H. JONES,

*Ass't Attorney General.*

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## REVOCATION OF LICENSE OF MR. EBERHART OF THE STAR EMPLOYMENT BUREAU CO.

July 10, 1905.

HON. M. D. RATCHFORD, *Commissioner of Labor Statistics, Columbus, Ohio.*

DEAR SIR: — Your communication dated July 7, relative to the revocation of a license to conduct a private employment agency issued to Eberhart of the Star Employment Bureau Company of Cleveland with enclosures is received.

In reply I beg leave to say that Section 1 of the Private Employment Agency Law provides that the Commissioner may revoke, upon a full hearing, any license, whenever in his judgment the party licensed shall have violated any of the provisions of this act. The enclosures contain a transcript from the Police Court of the city of Cleveland certifying the conviction of one W. N. Rowinsky for a violation of the Private Employment Agency Law. The enclosures also contain a statement that the said Rowinsky was at the time of his arrest and conviction the managing agent of the Cleveland office of the Star Employment Bureau Company. So far as proof of the violation of the law is concerned these facts are sufficient and you are authorized, upon a full hearing to revoke the license. I herewith return enclosures.

Very truly yours,

W. H. MILLER,

*Attorney General.*

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## AS TO REVOCATION OF CERTIFICATE OF PHARMACIST FOR UNLAWFULLY SELLING COCAINE, ETC.

COLUMBUS, OHIO, July 21, 1905.

*The Ohio Board of Pharmacy, Columbus, Ohio.*

GENTLEMEN: — Your letter of July 19, is received. You inquire,

> "Whether the Ohio Board of Pharmacy may, after notice and hearing revoke a certificate that has been issued to a person as a pharmacist, who after the issuance of such certificate to him, is convicted of the offense of unlawfully selling cocaine or other poisonous drugs?"

Section 4410 of the Revised Statutes of Ohio provides that,

> "The Board may refuse to grant a certificate to any person guilty of felony or gross immorality * * * and may after notice and hearing revoke a certificate for such cause."

The offense of unlawfully selling cocaine and narcotic drugs is by the statutes of this State a misdemeanor and not a felony. Hence, if the certificate may be revoked for the above offense it must, under Section 4410 referred to, be upon the ground of "gross immorality."

The term "immorality" in its most general sense signifies conduct unprincipled, vicious, inimical to the rights or common interests of others.

The term "immorality" in its legal sense includes that which is contrary to good order or public welfare, and that which has a tendency to mischievous or pernicious consequences.

It certainly may not be successfully claimed that an applicant for a certificate, who at the time of his application is shown to be a violator of the law in the unlawful vending of poisons, would be entitled to receive a certificate under Section 4410, and if not so entitled to the certificate in the first instance, then one who has received a certificate and is guilty of the offense referred to should not be protected in his vicious conduct by allowing him to exercise the functions of a pharmacist under the protection of a certificate issued by the State Board.

A person receiving a certificate issued by the State of Ohio and registered as a pharmacist for the protection of the people and of himself, who violates the criminal statutes of the state, is certainly guilty of most vicious, wicked and unprincipled conduct, and his unlawful acts are contrary to good order and the public welfare.

I am therefore of the opinion that a certificate issued such a person as a pharmacist under Section 4410 of the Revised Statutes of Ohio, and who has been convicted of unlawfully selling cocaine or other narcotic drugs, may be revoked by the Ohio Board of Pharmacy after notice and hearing, upon the ground of gross immorality.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## RIGHT OF WARDEN TO RECLAIM PRISONER WHO HAS ESCAPED AND HAS BEEN CONVICTED OF PETTY OFFENSE IN STATE.

July 28, 1905,

HON. ORRIN B. GOULD, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR: — You ask what are your powers and duties in regard to reclaiming a prisoner who has escaped from the enclosure of the Ohio Penitentiary, and who has been arrested, tried and sentenced within the State of Ohio for some petty offense while so outside of the Ohio Penitentiary?

A prisoner who has regularly been committed to the Ohio Penitentiary is in the custody of the law whether such prisoner is within the walls of the penitentiary or has temporarily escaped therefrom, and the State of Ohio and you as warden of the penitentiary, are entitled to the custody of such prisoner wherever he may be found within the State of Ohio.

More than this, Section 7239 of the Revised Statutes of Ohio provides that,

"It shall be the duty of all sheriffs, coroners and constables to arrest any convict who escapes from the penitentiary and forthwith convey him to the penitentiary and deliver him to the warden thereof" etc.

The prisoner referred to, having been arrested and convicted of a petty offense while outside of the penitentiary would be subject to undergo such sentence at the close of his term of imprisonment in the penitentiary, but you, as warden of the penitentiary, are entitled to the custody of such prisoner until the full expiration of his term of imprisonment which he was serving at the time of his escape from the penitentiary.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## COLLECTION AND DISPOSITION OF FINE FOR VIOLATION OF PURE FOOD STATUTE.

August 7, 1905.

HON. HORACE ANKENEY, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR: — In response to yours of August 1, I have to say that Section 6802 provides that all fines shall be paid into the county treasury except where some special provision is made.

Under Section (409-10) it is provided that fines collected under prosecutions begun or caused to be begun by the Dairy and Food Commissioner shall be paid by the court to the Commissioner and by him paid into the State Treasury.

In the case cited by you, it appears that a violation of one of the pure food statutes was punished by a fine in a case brought without the co-operation or knowledge of your department. In such case the disposition of the fine is governed by Section 6802, and should be paid by the justice of the peace to the treasurer of the county where the prosecution is had.

As to the stenographer's fees in this case, you of course are not liable, and I presume that the stenographer will have to look to the party employing him.

Very truly yours,

WADE H. ELLIS,
*Attorney General.*

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## AUTHORITY OF STATE BOARD OF DENTAL EXAMINERS TO LICENSE AND REGISTER GRADUATES OF DENTAL COLLEGES LOCATED IN OHIO, WITHOUT EXAMINATION.

August 24, 1905.

DR. H. C. BROWN, *Secretary of the State Board of Dental Examiners, Columbus, Ohio.*

DEAR SIR: — Complying with your request for an opinion from this department with respect to the authority of the State Board of Dental Examiners to license and register graduates of dental colleges located in Ohio without an examination, I beg to say to you that the authority of the board, in these respects, is provided generally by Section 4404 of the Revised Statutes of Ohio, and more particularly by two sentences of that section, reading as follows:

> "The board shall excuse from examination all graduates of dental colleges of this state up to and including the June, 1905, session of the board; also any person or all persons who has or have been the proprietor or proprietors of a dental office or place of performing dental work in this state continuously since January 1, 1903. Such person or persons shall be licensed and registered upon application and paying such license fee as is herein provided."

The language of the first sentence of the quotation is ambiguous and susceptible of interpretations differing widely in effect. The second sentence of the quotation provides explicitly and without qualification that "all such persons," viz: "all graduates of dental colleges of this state up to and including the June 1905 session of the board" and certain other persons "shall be licensed and registered upon application and paying such license fee as is herein required." I am inclined to the belief that the legislature intended, by the passage of this section of the statute, to provide that the board would not be authorized to excuse from examination graduates of Ohio dental colleges after its June 1905 session, and that only those who had graduated from an Ohio dental college prior to said session of the board, and had made proper application to it for license and registration, could be licensed and registered without examination. But the second sentence of the quotation provides explicitly, and without qualification that "all such persons" whom I take to be such persons as were enumerated and described in the preceding sentence, viz: — all graduates of dental colleges in this state up to, and including the June 1905 session of the board, and any person or all persons who has or have been the proprietor or proprietors of a dental office or place of performing dental work in this state continuously since January 1, 1903, shall be licensed and registered upon application and paying such license fee as is required by the statute.

In the event of any conflict in the application of the meaning of these two sentences, the one which is most explicit and unambiguous, should determine any question arising. I am therefore of the opinion that there is no limitation of time imposed upon graduates of Ohio dental colleges who graduated prior to the June 1905 session of the board, within which they must make application for license and registration without examination, and that it is therefore the duty of the board to license and register any such graduate upon application, and the payment of the fee required by statute, regardless of the time in which such application is made.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## CONSTRUCTION OF ACT TO PROVIDE RELIEF FOR WORTHY BLIND

September 11, 1905.

HON. A. L. SWEET, *Probate Judge, Van Wert, Ohio.*

DEAR SIR: — Your communication dated September 1, 1905, is received. Your construction of the act to provide relief for the worthy blind, passed by the last legislature, is correct. This law makes no provision for relief to others than those having no property or means with which to support themselves, and it is not intended that inmates of benevolent institutions of the state, although blind, are to receive support under this act. It is only intended for those who are not able to support themselves and have no means of support. In this instance the state is supporting the person.

You also inquire as to whether or not partial relief can be granted under this act where the applicant has some means of support, but not sufficient. Section 3 of this act provides that the applicant shall be entitled to, and receive, not more than $25.00 quarterly. Under this provision the probate judge can allow any sum not exceeding $25.00, as in his judgment, is necessary.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## OSTEOPATHS REQUIRED TO FURNISH DEATH CERTIFICATE.

September 25, 1905.

FRANK WINDERS, M. D., *Secretary State Board of Medical Examination and Registration, Columbus, Ohio.*

DEAR SIR: — Your letter in which you inquire whether Osteopaths have the right and are required to furnish death certificates has been received.

In my opinion it is the duty of persons practicing osteopathy, who have been qualified under the laws of this state, to furnish death certificates under Section 6396 of the Revised Statutes of Ohio.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## PRIVATE EMPLOYMENT AGENCY.

September 29, 1905.

HON. D. M. RATCHFORD, *Commissioner Bureau of Labor Statistics, Columbus, Ohio.*

DEAR SIR: — You have submitted to this department recently a letter together with two circulars received by you from H. J. McNeal of Cleveland, Ohio, and you inquire whether or not the information contained in the letter and circulars referred to brings the business in which Mr. McNeal is engaged within the law regulating private employment agencies.

Basing my judgment upon the information furnished, I am of the opinion that it does not come within the private employment agency law.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## REGARDING ALLOWANCE TO CLERK OF COURT FOR MAKING DUPLICATE DOCKET.

October 4, 1905.

MR. F. R. AMBROSE, *Clerk of Courts, Hillsboro, Ohio.*

DEAR SIR: — Although it is not within my province as Attorney General to answer inquiries made by county officers excepting prosecuting attorneys, as the inquiry made by you in yours of the 2nd inst., is in reference to the construction of the guide issued by the Bureau of Inspection and Supervision of Public

Offices, I yield to your request and cite you to the case of *Commissioners of Butler Co. v. Welliver,* in which case the circuit court of that county approved an allowance to the clerk of the court of $15.00 for making up a duplicate of the trial docket and from which the printed bar docket was made. I look upon this decision as a distinct affirmance of the right of the clerk to receive compensation for such services.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## RELIEF OF WORTHY BLIND.

October 18, 1905.

HON. GEORGE H. PONTIUS, *Probate Judge, Circleville, Ohio.*

DEAR SIR: — Your communication dated October 5, relative to the right of an inmate of a local institution in your county called "The Home and Hospital" to the benefits of the worthy blind act, is received.

You say that this institution receives old ladies upon the payment of $300.00 or more, as their circumstances admit, whereby they become life members and the institution supports them, and that there is in this institution an old lady who is totally blind and is without money or property. You inquire whether or not she is entitled to relief under this act?

Section 2 of the act provides that, "all male persons over the age of 21 years and all female persons over the age of 18 years, who are declared blind in the manner hereinafter set forth, *and have no property or means with which to support themselves,* shall be entitled to, and receive, etc."

Under this section, if the inmate to whom you refer has paid $300.00 for admission into this institution, and the institution thereby obligated itself to support her for the remainder of her life, she would, in my judgment, have *"means"* with which to support herself and would not be entitled to any allowance under the worthy blind act.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## REGARDING BI-ENNIAL ELECTION AMENDMENT.

December 5, 1905.

HON. WILLIAM H. LUEDERS, *Judge of Police Court, Cincinnati, Ohio.*

DEAR SIR: — Your communication dated December 1, inquiring the effect of the adoption of the bi-ennial election amendment upon the length of the existing term of office of the city auditor, police court clerk and judge of the police court of Cincinnati, is received.

As I understand the situation from your letter, the successors to Mr. Perkins, Mr. Kirbert and yourself would be elected at the November election, 1906, had not the bi-ennial election amendment been adopted providing that municipal officers shall be elected in the odd numbered years. The adoption of this amendment authorizes the legislature to fix the terms of public officers to conform thereto, and also provides that the legislature shall have power to extend existing terms.

Therefore legislative action is necessary to affect any change in the length of the existing terms of your offices.

It is probable that when the legislature takes action under the amendment, your terms will be extended to expire on the first Monday in January, 1908.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## REGARDING LENGTH OF TERM OF PROBATE JUDGES ELECTED NOVEMBER, 1905.

December 7, 1905.

HON. F. P. MARTIN, *Probate Judge, Logan, Ohio.*

DEAR SIR: — Your letter dated December 5, inquiring as to the length of term of office of probate judges elected at the November election, 1905, is received.

In reply I beg leave to say that the judges elected on November 7, 1905, were elected for a term of three years. The adoption of the bi-ennial election amendment authorizes the legislature to fix the terms of public officers to conform thereto, and also provides that the legislature may extend existing terms.

The amendment further provides that the term of office of a probate judge shall be four years. The terms of all probate judges elected at the November election, 1905 (said election being held before the adoption of the amendment) will expire on the 9th day of February, 1909, and their successors will be elected at the November election, 1908, for a term of four years. Therefore no legislative action is necessary to conform the term of office of a probate judge to the election amendment.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## AS TO ELIGIBILITY TO PAROLE UNDER SECTION 7388-9 R. S.

December 12, 1905.

*To the Board of Managers of the Ohio Penitentiary, Columbus, Ohio.*

GENTLEMEN: — Your request for an opinion as to the eligibility to parole, under Section 7388-9 of the Revised Statutes, of an inmate of the Ohio Penitentiary who has been indicted for three separate and distinct felonies and given a sentence of ten years under each indictment, but the sentences to be served concurrently, is received.

In reply I beg leave to say that Section 7388-9 provides that,

> "Said board of managers shall have power to establish rules and regulations under which any prisoner, who is now or hereafter may be imprisoned under a sentence other than for murder in the first or second degree, who may have served a minimum term provided by law for the crime for which he was convicted, and *who has not previously been convicted of felony and served a term in a penal institution* * * * may be allowed to go upon parole outside of the buildings, enclosures, etc."

By a strict literal construction of the words "and who has not previously been convicted of a felony and served a term in a penal institution," might bring the case you suggest within the requirements for parole, for the reason that the prisoner has not previously been convicted of felony and served a term in a penal institution, yet the evident purpose of this law is to extend the privilege of a parole to those inmates of the Ohio Penitentiary who have been guilty of but one felony.

The prosecuting attorney's statement in this case certifies that Homer B. Morrison was convicted at the May term of the court of common pleas of Williams County for the crime of assault with intent to rob and sentenced for ten years and under this sentence he seeks a parole.

The records of the Penitentiary show that Homer Morrison is also confined in the penitentiary for two other felonies, to-wit, burglary and larceny, arson and the burning of a dwelling house. Therefore a parole under one sentence would be ineffectual by reason of the other two. In other words, it would seem that three applications for parole would be necessary.

In my opinion, under Section 7388-9, and the rules and regulations prescribed by the Board of Managers of the Ohio Penitentiary, the prisoner in the case submitted by you, is not eligible to parole.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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## DOES THE BIENNIAL ELECTION AMENDMENT ADOPTED AT THE LAST NOVEMBER ELECTION GOVERN THE TERM OF PROBATE JUDGE ELECTED AT SAME ELECTION?

December 21, 1905.

HON. W. E. PARDEE, *Probate Judge, Akron, Ohio.*

DEAR SIR: — Your letter dated December 18, relative to the issuance of your commission as probate judge, is received.

Since talking the matter over with you I have given the question as to whether or not your commission should be for three or four years very careful consideration. The biennial election amendment fixes the term of office of a probate judge at four years and there can be no question that the term of office of a probate judge who is elected *after* the adoption of the amendment would hold office for four years. The question to be determined in your case however, is, does the biennial election amendment which was adopted at the last November election govern the term of the probate judge elected at the same election? My judgment is that it does not for the reason that the amendment cannot be considered to be adopted until after the election is over, therefore the election held on the 7th of November last was not held under the biennial election amendment. If it were, then the entire election would be void for the reason that state and county officers, under the amendment, are to be elected in the even years, and if the amendment were to govern the term of the probate judge elected at the November election it would also govern the time of holding the election.

The fact is, the law in existence at the time of holding the November election fixes the term of office of probate judge at three years and that law was effective and in operation until after the adoption of the biennial election amend-

ment. The biennial election amendment could not be said to be adopted until after the election was held, therefore the law fixing the term of office of probate judge at three years governs the term of the probate judge elected at said election.

The biennial election amendment authorizes the legislature to extend existing terms to conform thereto. I construe the words "existing terms" to mean terms in existence at the time legislative action is taken. The incoming legislature is authorized to extend the terms of office of any of the probate judges in order to conform the term to the election amendment.

In your case no legislative action will be required for the reason that your term already conforms to the amendment. Your commission should be for three years. You will take office on the 9th of February, 1906. Your term of office will expire on the 9th of February, 1909, and your successor will be elected at the November election, 1908, which is in an even year and conforms to the biennial election amendment.

Very truly yours,
WADE H. ELLIS,
*Attorney General.*

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## WHETHER IN POWER OF PRESENT GOVERNOR TO RE-APPOINT SUPERINTENDENTS AND CLERKS IN EMPLOYMENT OFFICES

December 26, 1905.

HON. JAMES S. RICHARDSON, *Sup't. Free Public Employment Bureau, Cincinnati, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of your communication presenting the question as to whether it is within the power of the present Governor to re-appoint the superintendent and clerks in the different employment offices for a period of two years.

I have given this question my careful consideration and I refer you to the act of April 14, 1904 (97 O. L., 101, 102, 103) defining the powers of the governor in that regard.

In Section 307 of the Revised Statutes the provision is made that the Commissioner of Labor Statistics shall be appointed by the governor by and with the advice and consent of the senate, etc.

Section 308, among other things, provides, that the governor and *Commissioner of Labor Statistics* shall appoint one superintendent for each of the five districts into which the state is divided, to discharge the duties therein set forth.

Section 308*a* of the act in question provides that the tenure of office for all superintendents of such free public employment offices shall be two years from the date of the appointment.

It is made apparent by consideration of the foregoing sections of the Revised Statutes that the power to appoint the superintendents does not abide in the governor alone, but shall be exercised by the governor and commissioner of labor statistics. It has been many times sustained, that where the power of appointment is conferred upon two persons, the exercise of the appointing power will not be valid unless both act, unless some provision is otherwise contained in the act. There is no provision in the act in question conferring this power upon the governor alone.

I therefore express the opinion, upon the question, as presented in your letter, that the governor has not the power to make the appointments.

Very truly yours,

WADE H. ELLIS,

*Attorney General.*

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PRESIDENT OF COUNCIL WHILE ACTING AS MAYOR POSSESSES ALL POWERS OF MAYOR AS SUCH.

December 26, 1905.

MR. WALTER J. SEARS, *Chillicothe, Ohio.*

DEAR SIR: — I beg to acknowledge the receipt of yours of the 2nd inst., and in answer thereto would say that pursuant to Section 132 of the New Municipal Code the president of council, while acting as mayor, possesses all and singular the powers conferred upon the mayor, as fully as the mayor possessed a· The section in question provides further that,

> "In case of the death, resignation or removal of the mayor, president of council shall become the mayor and serve for the u pired term and until his successor is elected and qualified."

While the first part of Section 132 anly deals with a temporary ( or absence on the part of the mayor and confers the powers of mayor president of council *pro tempore,* the above quoted portion of the sect the power of the mayor, in the contingency mentioned, upon the preside council during the unexpired term of the mayor and until his successor is e. and qualified.

*Second.* Your second question relates to the power of the city council to investigate any of the departments of the municipal government.

I call your attention to Section 225 of the Municipal Code, which in substance makes it the duty of the mayor of the city to have a general supervision over each department and the officers provided for therein, and where he has reason to believe that the head of any department or officer has been guilty, in the performance of his official duty, of bribery, malfeasance, misfeasance, nonfeasance or misconduct in office or any gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the council written charges against the head of such department or officer setting forth in detail a statement of such alleged bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness.

The section in question provides for the service of a copy of the charges upon the head of such department or officer against whom such charges are made, and provides the necessary procedure for hearing the same before the council. Provision is fully made for permitting the accused the right to appear in person and by counsel and examine witnesses and answer the charges made against him.

It is further provided that it shall require the votes of two-thirds of all the members elected to council to remove such officer, and the judgment or action of council thereon shall be final. Full power is given to the council to issue subpoenaes or compulsory process to compel the attendance of persons and the production of books and papers before it and to give testimony relative to the charges so made. The procedure should be provided by ordinance of council for exercising and enforcing this provision.

This power on behalf of the mayor and city council to make and investigate charges, and remove officers, if found guilty of the charges made against them, has been repeatedly sustained by the supreme court of this state, and full and ample authority is thereby given to investigate any branch or department of the city government or any officer connected therewith. It is unnecessary in connection with this opinion to refer you to the adjudicated cases wherein this power has been sustained. I beg to remain,

Very truly yours,

WADE H. ELLIS,

*Attorney General.*