An early report on this matter would be greatly appreciated as several cases are pending in which this question was raised.'

We are also referring you to your opinion No. 2100, page 1127 of the 1930 Opinions, branch one of the syllabus of which reads as follows:

'A lien for water rents arising after the recording of a bona fide mortgage may not take precedence over said mortgage upon distribution of the proceeds from a sale of the premises to satisfy such mortgage. However, under such circumstances, a municipality may still pursue the party contracting for said service in pursuance of the rules of the water works division.'"

The case of *McDowell* vs. *Barberton,* 38 Fed. 2d 786, referred to by the solicitor of Portsmouth, Ohio, holds that water rents constitute a tax and lien upon real estate and are therefore entitled to priority under the Bankruptcy Act. The court in that case said:

"But the state gave the color and standing of taxes to municipal water rents to the extent at least that it secured their collection by a possible lien upon the real estate."

However, that case does not hold that water rents are entitled to priority over other earlier recorded liens. It simply holds that they are entitled to priority over the claims of general creditors.

In Opinions of the Attorney General for 1930, Vol. II, page 1127, to which you refer, I held that a lien for water rents arising after the recording of a bona fide mortgage does not take precedence over said mortgage for the reason that there is no provision in the statutes which makes such lien superior to other liens. There being no such provision, the lien for water rents would take precedence over such liens only as attached to real estate subsequent thereto, and water rents do not become a lien until they are due. *Cuba* vs. *Druskin,* 120 N. Y. S. 381; *Mandel* vs. *Weschler,* 112 N. Y. S. 813.

My former opinion is therefore adhered to.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4207.

SALARY—SCHOOL TEACHER—ENTITLED TO SALARY WHILE SERVING AS A JUROR.

SYLLABUS:

A teacher in the public schools, under contract for a definite time, is entitled to the payment of his regular salary for the time he is absent from duty on account of his being required to serve on a jury in the absence of any rule of the board or provisions of his contract covering the matter.

COLUMBUS, OHIO, March 30, 1932.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion in answer to the following question:

"Can a local board of education allow a teacher's salary, in whole or in part, when such teacher is absent from duty on account of jury service?"

The performance of jury duty is enjoined by law on all citizens of the state who may be selected in the manner provided by law for such duty, unless, by law, they are specifically exempted from such duty. Teachers in the public schools, as such, are not exempted from serving on juries, and if they are selected and summoned for such service in the manner provided by law, they are required to serve in response to any such summons.

When a person, duly selected, and notified to attend a term or part of a term of a court of record as a juror, fails to attend at the time specified in the notice, or from day to day, the court may, in its discretion, not only impose upon him a fine but may direct the sheriff to arrest him and bring him before the court; and when he has been so brought before the court, the court may compel him to serve or may punish him for contempt of court. Sections 11419-32 and 11419-33, General Code.

When a teacher is selected and notified to serve as a juror for a time during which the school which he has been hired to teach is in session, he obviously can not comply with the summons to serve as a juror and at the same time comply with his contract to teach. His serving as a juror, however, is not of his own choosing. The law demands of him that he perform the jury service, and he must do it whether he desires to or not, regardless of his readiness and willingness to perform his duties as teacher in accordance with the terms of his contract for such teaching.

Matters relating to deductions from teachers' salaries on account of temporary absences are quite often taken care of by the terms of the contract between the board of education and the teacher. Sometimes this is done by rules of the board of education which are read into the contracts with teachers and sometimes provisions with reference thereto are specifically incorporated in the teachers' contracts. I assume the question you have submitted relates to a situation where no provision is made with reference to such deduction either by the rules of the board or the specific terms of the teacher's contract.

The rule is well established that no deductions can be made from a teacher's salary on account of temporary interruptions of the school in term time where the teacher is able and willing to conduct the school, unless it is especially provided for in the contract of employment. *Clune* vs. *School District,* 166 Wis., 452, 6 A. L. R., 736 note. See also 21 A. L. R., 741 note, *Neilson* vs. *Lincoln School District,* 125 So., 458. An exception to this rule exists where the performance of a teacher's contract is rendered impossible by act of God or of the public enemy. *Phelps* vs. *School District,* 302 Ill., 193, 134 N. E., 312.

By statute, in Ohio, teachers must be paid for all time lost when the schools in which they are employed, are closed owing to an epidemic or other public calamity. Section 7690-1, General Code. This statute is merely declaratory of the common law, and sets forth the rule followed by practically all the courts that have ever passed upon the question. This rule is based on the principle that the teacher, being ready and willing at all times to perform the services called for by his contract, should not be made to suffer by loss of his salary, for the failure on the part of the board of education to permit him to carry out the terms of his contract.

In such cases, however, the teacher's failure to teach has not been caused by his own act or omission. A different question is presented when a teacher is

absent on account of his own illness. The general rule of law in such cases is, that in the absence of any provision in his contract with reference to the matter, he can not recover for time lost on account of his own illness. A school board may, and usually does cover this question by rules of the board or by specific provisions of the contract of hire. The general rule on this question is not followed in Ohio. The rule in Ohio is set forth in an opinion found in Opinions of the Attorney General for 1918, at page 659, as follows:

> "Where a board of education employs a teacher for a fixed term at a definite salary and there is nothing in the contract or in the rules of the board on the question of absence on account of sickness and such teacher is compelled to be out of school with a contagious disease, and subsequently resumes teaching work for the board, the teacher is entitled to be paid for the time so necessarily lost on account of such sickness."

The opinion referred to above, is quite exhaustive, and the Attorney General in preparing the opinion appears to have given the subject thorough consideration. It consists of ten pages and cites many authorities. See also Opinions of the Attorney General for 1919, pages 338 and 1134.

The theory upon which this holding is based is that a contract for personal services for a stated time at a fixed compensation for the entire time, whether to be paid in installments or not, is an entire contract, and that it is a contract to do acts which in the ordinary course of events may be done. It follows that nothing but an act of God or of a public enemy or the interdiction of the law as a direct and sole cause of the failure or a provision of the contract will excuse performance. (R. C. L., Vol. 24, page 619. Cyc. Vol. 35, page 1099.) In the course of the 1918 opinion referred to above, the Attorney General said:

> "It was no fault of the teacher that he became ill with a contagious disease any more than it would be his fault if the schoolhouse would burn down or if the same should be destroyed by a storm or any other casualty which might exist and which is considered an act of God and excuse part performance. I believe the legislature intended that such teacher should be paid as long as the contract was not rescinded by the board. The teaching profession is one in which the employment begins and ends at definite periods and if a teacher is not to be paid during temporary illness—in other words, if temporary illness is excuse sufficient to warrant a board in breaking the contract as to payment—then it would be sufficient to warrant the breaking of the contract as to teaching. The latter proposition surely would not be claimed; that is, it would not be claimed that because a teacher was temporarily ill for a few days that such teacher should, on that account, be permitted to break the contract and compel the board to get another teacher for the remainder of the term. The contract being an entire one, the teacher is held the same as the board would be and therefore if the contract cannot be broken by the teacher, its terms as to payment cannot be broken by the board."

The above reasons given by the Attorney General, which forbid a board of education from deducting from a teacher's salary on account of temporary absence occasioned by the illness of the teacher are equally applicable, in my opinion, where the teacher is temporarily absent on account of being compelled to serve

on a jury. His absence in either case is not of his own choosing and is not such as would justify the board of education in canceling his contract on account of such absence.

I am therefore of the opinion, in specific answer to your question that, a teacher in the public schools, under contract for a definite time, is entitled to the payment of his regular salary for the time he is absent from duty on account of his being required to serve on a jury.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4208.

APPROVAL, NOTES OF ORANGE VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$10,000.00.

COLUMBUS, OHIO, March 30, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

4209.

TREASURER OF STATE—PUBLIC FUNDS—UNAUTHORIZED TO EXPEND SUCH FOR FORGERY INSURANCE—OPINION NO. 4054, 1932, DISCUSSED AND AFFIRMED.

SYLLABUS:

Opinion No. 4054, concerning authority of Treasurer of State to insure against loss by forgery of state warrants, reconsidered and affirmed.

COLUMBUS, OHIO, March 30, 1932.

HON. HOWARD L. BEVIS, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, with which you enclose copy of opinion No. 4054, and call my attention to certain items set forth in the Appropriation Act, enacted by the 89th General Assembly, as follows:

> "The appropriation act for the current biennium, page 14, carries an appropriation to the Secretary of State, under H-7, Insurance, of $8,500.00 for 1931 and $8,800.00 for 1932. The same act, on page 20, carries an appropriation to the Treasurer of State, under H-7, Insurance, of $8,395.00 for 1931 and $2,165.28 for 1932. This act also on page 84, appropriates to the Department of Industrial Relations, under H-7, Insurance, $2,108.00 for 1931, and $973.00 for 1932."

You further call my attention to the language appearing in the second paragraph on page four, of said opinion, which language is as follows: