Note from the Attorney General's Office:

1913 Op. Att'y Gen. No. 13-401 was overruled in part by 1981 Op. Att'y Gen. No. 81-098.

1913 Op. Att'y Gen. No. 13-65 was questioned by 1999 Op. Att'y Gen. No. 99-046.

1913 Op. Att'y Gen. No. 13-25 was overruled by 1966 Op. Att'y Gen. No. 66-104.

1913 Op. Att'y Gen. No. 13-13 was questioned by 1987 Op. Att'y Gen. No. 87-107.

(To the Governor)

8.

GOVERNOR—POWER TO EMPLOY PRIVATE COUNSEL WHEN ATTORNEY GENERAL ADVISES AGAINST HIS RIGHT TO PREVAIL IN AN ACTION.

When the attorney general, having advised the governor of his opinion against the right of said officer in an action brought against him, it becomes impossible for the attorney general to act as his counsel in such case. The governor may employ private counsel and may compensate the latter out of the contingent fund provided for the governor's office.

COLUMBUS, OHIO, January 7, 1913.

HON. JUDSON HARMON, *Governor of Ohio, Columbus, Ohio.*

DEAR GOVERNOR HARMON:—You inquire of me verbally as to whether you are warranted, under the law, in paying Judge Okey his fee as attorney for you as governor in the case of the State, ex rel., Charles E. Chittenden vs. Judson Harmon, Governor, in the supreme court, out of the appropriation for "contingent expenses for the executive department," the facts in reference to the employment being as follows:

Upon the institution of the suit I called upon you to advise that inasmuch as I was of opinion that the relator in the case was entitled to the relief prayed for in the petition, and inasmuch as I had given an opinion to that effect previously to yourself as governor, I could not with propriety, either to myself or in fairness to you, or to the court, act as your counsel, and, therefore, suggested that it would be proper for you to employ counsel to represent the defendant; payment to be made either out of your contingent fund or to be made by this department; said payment to be made from the former source if the law warranted it.

Section 3 of the appropriation act, to be found in Vol. 102 O. L., page 412, provides as follows:

> "No bills for clerk hire, for furniture or carpets, or for newspapers shall be paid out of appropriation for contingent expenses; no bills for furniture or carpets shall be paid out of the appropriations made for current expenses of benevolent, penal or educational institutions."

This seems to be the only limitation in reference to the appropriation bills.

On December 4, 1912, in an opinion to Hon. Charles C. Weybrecht, adjutant general of Ohio, this department held that where the attorney general could not act on behalf of any department in a case wherein such department was entitled to have counsel, it was lawful for such department to employ counsel and compensate him out of appropriate fund. In the case referred to, the attorney gen-

eral was designated by both parties to the controversy as an arbitrator, and being such arbitrator it was my opinion that I could not even assign counsel to represent General Weybrecht, much less compensate him.

No authority, I believe, is necessary to disclose the soundness of the proposition that where the legal department in either the state or county cannot properly act, the party for which he cannot properly act is entitled to employ counsel.

In the matter at hand it was eminently proper for you to refuse the commission. Such was your own judgment, and in that this department fully concurred. In causing the question to be submitted to the court you were performing your duty legally, and as the chief executive of this state. In my judgment there is no doubt whatever of your right to compensate Judge Okey out of your contingent fund.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

39.

GOVERNOR——POWER TO REMOVE MAYOR FOR MISCONDUCT—WHAT CONSTITUTES MISCONDUCT.

Under section 4268, General Code, in accordance with the proceedings therein provided, the governor may remove a mayor for misconduct in office. Such misconduct, however, must be "pari materia" with the causes of removal, specified in said section, to wit: "Bribery, gross neglect of duty, gross immorality, or habitual drunkenness," within the comprehension of this statute.

A mayor, who is charged with using profane language toward a street commissioner; attempting to remove said commissioner without right or authority; ruling out of order the motion of council to strike the suspension of said commissioner from the minutes; refusing to put before council the motion of appeal from such ruling; employing threats of intimidation toward one of the members of council, arising out of his dispute with said commissioner, cannot be considered to be guilty of such misconduct as would justify proceedings under this statute.

COLUMBUS, OHIO, January 23, 1913.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR COX:—Your letter, transmitting papers, charges and specifications filed against John W. Stiger as mayor of the village of Bradner, Ohio, by one John H. Denny, is at hand and has been considered.

Six specifications are made as follows:

"1. Gross immorality in speaking of Mr. Denny, as marshal and street commissioner, and saying to him, 'You are a damn cur—I did not think he (meaning Denny) was such a damn cur and coward.'

"2. Misconduct in office in attempting to remove said Denny from the office of street commissioner without any right or authority to do so.

"3. In ruling that a certain motion made before the council to strike the suspension of Denny from the minutes as being out of order.

"4. Using certain language to the council which is not characterized as being misconduct or immorality.

"5. Refusal of the mayor while presiding over the council to put to

the council a motion of an appeal from his ruling that a certain motion was out of order and in refusing to allow said council to vote on such appeal.

"6. Misconduct in office and gross neglect of duty in certain remarks to the effect that he would have nothing to do with Denny as marshal; that he would file additional charges; that he sought to intimidate the council by threatening one of the members that he would see that he would not be president for the ensuing year, etc."

The complaint and specifications appear to be signed by only one person, to wit, John H. Denny through his counsel, Benjamin F. James. Accompanying the specifications are exhibits, the same being a transcript of the minutes of the meeting of the council of the village of Bradner.

Assuming as true all that is charged in the complaint or contained in the specifications or that which appears in the minutes of the council, the acts complained of relate substantially and solely to Mr. Denny the marshal. This appears particularly true in the transcript of the minutes of the meeting of council. The mayor appears, in respect to the minutes of council, to have properly performed his duty in all respects except as claimed in relation to Mr. Denny and perhaps in relation to the council as respects the said Denny. It appears that the complaint was based on the proposition that the marshal would not make an arrest of certain persons charged with violating the liquor laws of the state. There is nothing to show but that the mayor was attempting to do his duty, whether his methods were legal or otherwise.

Section 4268 of the General Code, in respect to the removal of mayor by the governor is as follows:

"In case of misconduct in office, bribery, any gross neglect of duty, gross immorality, or habitual drunkenness of any mayor, upon notice and after affording such mayor a full and fair opportunity to be heard in his defense, the governor of the state shall remove him from office. 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 such statement to be served upon the mayor not less than ten days before the hearing of the matter. Pending such investigation by the governor, he may suspend the mayor for a period of thirty days."

"Misconduct in office means misconduct in an official capacity; and not a personal misconduct during the term in which the officer is in office." —*Graham vs. Stein,* 18 *O. C. C.* 770.

"It is misconduct in office for an officer knowingly to disobey and violate a statute imposing a duty upon him, from a spirit of willful and improper opposition to the law, although he may derive no benefit whatsoever from such misconduct."—*State vs. Blair,* 50 *Bull.* 11.

"If an officer has committed a criminal offense for which he may be indicted and punished, but such offense does not involve his official conduct, such officer should not be removed until he has been indicted, tried and convicted of such criminal offense."—*State vs. Chapman,* 11 *O.* 430.

"Misconduct includes wantonness and violations of the law."—*State ex rel. vs. Roll,* 7 *W. L. J.* 121.

To my mind the only possible head under which the specifications could be claimed to come is that of "misconduct in office," because, clearly, there is nothing

in the charges coming under the head of "bribery," gross neglect of duty," "gross immorality" or "habitual drunkenness."

Now, do the charges, even if true, show misconduct in office? The charges rather disclose on their face a dispute between the mayor on the one hand and the marshal on the other. True, the council exonerated the marshal. This does not preclude the idea that the mayor may have had an honest conviction that he was right, and for that matter, the mayor may have been right, although in personally abusing the marshal he was unquestionably in error, if the charges be true, and such conduct, if continued, would, in my judgment, afford good ground for the charge "misconduct in office."

The removal of an officer is a matter of considerable seriousness. This is disclosed by the character of the causes which are grounds for removal. Misconduct in office in relation to its seriousness must be considered in *pari materia* with bribery, a word of great heinousness; gross neglect of duty, a term of serious import; gross immorality, a phrase denoting immorality of the most unpardonable kind, and habitual drunkenness, giving the idea of continuation of an offense. So that misconduct in office is usually such misconduct as arouses a feeling of indignation at the hands of the public. In my judgment, as a matter of law, considerable weight is to be attached to the fact that there is no evidence that the general public about Bradner have made any complaint of the conduct of the mayor. If they did, it would not be conclusive, but its absence here is noticeable. The complaint is filed by the one person affected. The council itself has not complained. The fact that the mayor put all the motions and questions arising before council, except those in relation to the marshal, is suggestive. The mayor was doubtless right in the matter of parliamentary law in declining to entertain a motion to strike from the minutes the action in reference to the suspension of the street commissioner; but right or wrong, the fact is not of sufficient moment to move the governor to action.

On the whole, as a matter of law, I do not believe you are called upon at the present time to put on file in your office the written statement of Mr. Denny. I would suggest, however, that you retain the same and wait to see whether or not there is any repetition of the things complained of.

Respectfully submitted,

TIMOTHY S. HOGAN,

Attorney General.

86.

STATE TAX COMMISSION—APPOINTMENT OF MEMBERS BY GOVERNOR—NECESSITY FOR CONFIRMATION BY SENATE.

Section 5445, *General Code, provides for the appointment of three tax commissioners, the terms of whom terminate respectively on the second Monday of February,* 1911, 1912 *and* 1913; *and under this statute, in February,* 1911, *and annually thereafter there shall be appointed one commissioner for a term of three years from the second Monday in February of such year. The statute also provides that no appointee shall be qualified to act until after his appointment has been confirmed by the senate, unless appointed during recess or adjournment.*

The language providing for confirmation by the senate must be construed to demand a similar procedure as that set out by section 12, *General Code, providing for confirmation of appointments made in time of session and in time of adjournment of the senate.*

Section 1475-1, *General Code, is a later statute and provides that after February,* 1913, *the tax commissioners shall be appointed biennially for a term of six years from the time of appointment. This latter statute must be construed to amend section* 5445, *General Code, only insofar as its terms are inconsistent with the former statute. The provisions of the former statute, therefore, as to appointment confirmation must still be allowed to control.*

COLUMBUS, OHIO, February 6, 1913.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have verbally requested my opinion as to whether or not appointments of members of the state tax commission of Ohio by the governor require the confirmation of the senate.

The state tax commission was created by an act passed May 10, 1910, and said act was given the Code numbers from 5445 to 5542-24, inclusive, section 1 of said act being given the Code number, section 5445.

In an act passed May 31, 1911, and approved June 2, 1911, sections 5446 to 5542-8, inclusive and sections 5542-10 to 5542-24, inclusive, were repealed, leaving, however, in force and effect section 5445, being section 1 of the act of May 10, 1910.

The first section of the act of May 31, 1911, which was given the Code number 1465-1, modified the first section of the act of May 10, 1910, which as before stated bears the Code number 5445.

Section 5445 of the General Code, being section 1 of the act of May 10, 1910, and which was not repealed by the act of May 31, 1911, reads as follows:

> "A tax commission is hereby created, to be known as the tax commission of Ohio, to be composed of three commissioners, electors of the state, not more than two of whom at any time shall be of the same political party. On or before July 1, 1910, the governor shall appoint such commissioners as follows: The term of one of such appointee, who shall belong to the same political party as one of the other members appointed on such commission, if there be two appointees from the same political party, shall terminate on the second Monday of February, 1911; the term of the second such appointee shall terminate on the second Monday of February, 1912; the term of the third such appointee shall terminate on the second Monday of February, 1913. In February, 1911, and annually thereafter, in the month of February, there shall be appointed in the same

manner, one commissioner for the term of three years, from the second Monday of February of such year. Each commissioner so appointed shall hold his office until a successor is appointed and qualified. Any vacancy on the commission shall be filled by appointment of the governor for the unexpired term. No appointee shall be qualified to act until after his appointment has been confirmed by the senate, unless appointed during recess or adjournment of senate."

Section 1465-1, General Code, reads as follows:

"Between the first day and the second Monday of February, 1913, and biennally thereafter, the governor shall appoint one member of the tax commission of Ohio for the term of six years from the second Monday of February of such year."

An examination of section 5445, *supra,* discloses that it is the section which creates the tax commission of Ohio in the first sentence thereof. Thereafter it is stipulated when the three commissioners shall be appointed and the term for which they shall be appointed. It is then provided that: "In February, 1911, and annually thereafter, in the month of February, there shall be appointed in the same manner, one commissioner for the term of *three* years, from the second Monday of February of such year."

Section 1465-1, *supra,* modified the above quoted language and provides that from February, 1913, the terms of the commissioners to be appointed thereafter shall be *six* years.

Section 1465-1 did not repeal by implication section 5445 as the said two sections can easily be read together and are, therefore, not in conflict with each other. It is a well known principle of law that repeals by implication are not favored, and that when two sections can be reconciled both sections shall stand. I, therefore, conclude that section 5445, General Code, is in full force and effect, except as modified by section 1465-1, which modification takes place in February, 1913.

Section 5445, General Code, provides:

First. That the commissioner appointed shall hold his office until his successor is appointed and qualified.

Second. That any vacancy shall be filled by appointment of the governor for the unexpired term, and then stipulates the following:

"No appointee shall be qualified to act until after his appointment has been confirmed by the senate, unless appointed during recess or adjournment of senate."

There are two classes of appointments that are made by the governor. One is the appointments that are made by him absolutely, and the second are those appointments which are made by him with the advice and consent of the senate.

The language of section 5445 that no appointee shall be qualified to act until after his appointment has been confirmed by the senate convinces me that such appointments are made in the same way as are those appointments which are stipulated in so many words to be made with the advice and consent of the senate.

Section 12 of the General Code provides as follows:

"When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint

a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

Since in my judgment the provisions of section 5445, General Code, in reference to the appointment by the governor are of the same effect as if it were clearly provided that the appointment should be made "with the advice and consent of the senate" I am of the opinion that an interim appointment made by the governor must fall within the provisions of section 12, General Code, above quoted, and that if the vacancy occurs when the senate is not in session and no appointment has been made and confirmed in anticipation of such vacancy the governor shall fill the vacancy and report the appointment to the next session of the senate, and if the senate advise and consent thereto such appointee shall hold the office for the full term, otherwise a new appointment shall be made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

98.

PROBATE JUDGE—TERM OF OFFICE FOUR YEARS—APPOINTMENT BY GOVERNOR TO FILL VACANCY WHEN JUDGE-ELECT FAILS TO QUALIFY BY REASON OF VIOLATION OF CORRUPT PRACTICES ACT.

The courts of this state, having decided that the term of an office which has been fixed by the constitution, may not be decreased or diminished by the legislature, and since the term of a probate judge has been so fixed at four years, such officer cannot remain in office after the expiration of four years from the date of his taking office. When, therefore, a person elected to such office is refused a certificate of election, because of a violation of the corrupt practices act, under section 27, article 2, of the constitution, which provides that the filling of a vacancy, not otherwise provided for by the constitution, shall be accomplished as directed by law, and under section 142, General Code, which provides that when the office of a probate judge becomes vacant, by reason of the expiration of term of the incumbent, and the failure to provide therefor at the preceding election, such vacancy shall be filled by appointment by the governor.

The governor may appoint a person to fill the position of such probate judge, which appointee shall hold office until a successor is properly elected for the unexpired term at the first general election for the office which is vacant, that occurs more than thirty days after such appointment, as is provided by section 142, General Code.

COLUMBUS, OHIO, February 25, 1913.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I have your favor of February 22nd, wherein you request my opinion as to whether or not there is a vacancy in the office of probate

judge in Jefferson county, Ohio, and if there is such a vacancy, how the same shall be filled. In reply thereto I beg to advise that under article 17, section 2 of the constitution of Ohio, the term of the judges of the probate court is fixed at four years. Section 1580 of the General Code of Ohio provides:

> "Quadrennially, one probate judge shall be elected in each county, who shall hold his office for a term of four years, commencing on the ninth day of February next following his election."

The term of the outgoing probate judge commenced on the ninth day of February, 1909. The first question to be determined: When did his term expire, and should he hold office until his successor is elected and qualified? This question is disposed of by the case of the State ex rel. Attorney General vs. Brewster, 44 O. S., 589, the syllabus whereof is as follows:

> "1. Where the term of an office is fixed and limited by the constitution, there is no power in the general assembly to extend the term or tenure of such office beyond the time so limited."

So that it appears that the time of the last incumbent expired on the ninth day of February, 1913, and that such incumbent had no right *de jure* to hold over until his successor was elected and qualified.

The next question that arises is, how is the vacancy to be filled? Section 13 of article IV of the constitution of Ohio provides:

> "In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy, shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

This section does not apply because the office of no judge had become vacant before the expiration of the regular term for which he was elected.

Section 27 of article II provides as follows:

> "The election and appointment of all officers, *and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law;* * * *"

There being no method provided by the constitution for filling a vacancy in the office of probate judge, the last quoted section, to wit, section 27, unquestionably applies, and we are then to ascertain whether the method of filling the vacancy in question is directed by law.

Section 27 of article 2 provides as follows:

> "If the office of a judge becomes vacant by reason of the expiration of the term of the incumbent, and a failure to provide therefor at the preceding election, such vacancy shall be filled by appointment by the governor. This person so appointed shall hold the office until a successor is elected and qualified. Such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after such appointment."

Now, the Jefferson county case presents the case of the office of a judge becoming vacant by reason of the expiration of the term of the incumbent, and the only question left is, "Was there a failure to provide therefor at the preceding election?" At the election held in November, 1912, there was various candidates for the office of probate judge in Jefferson county, Ohio. John G. Belknap appears to have received the required number of votes entitling him to proper certificate from the board of deputy state supervisors of elections, but the latter board, acting upon the advice of their superior officer and this department, declined, and still declines, to issue his certificate of election, for the reason that, as claimed, the said John G. Belknap failed to file a true statement of his expense account with the election board as provided by the Kimble corrupt practices act. Now, the said John G. Belknap, being without such certificate of election, is not entitled to assume the duties of the office as required by section 138 of the General Code, which is as follows:

> "A judge of a court of record, state officer, county officer, militia officer and justice of the peace, shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office."

Section 140 of the General Code provides:

> "When the result of the election of any such officer is officially known to the deputy state supervisors of elections of the proper county, and upon payment to them of the fee prescribed in the preceding section, they shall immediately forward by mail to the secretary of state a certificate of such officer together with the fee so paid. * * *"

Mr. Belknap, probate judge-elect, is without the last mentioned certificate, and is without the commission from the governor.

The question now presents itself whether in view of the fact that the people of Jefferson county elected a man to the office of probate judge who is ineligible to perform any of the duties pertaining to his office by reason of the absence of the legal certificate of his election or appointment and the absence of his commission, there has been a failure to provide at the preceding election for a successor to the incumbent whose term expired. What would be the result if a man had been elected to the office of probate judge and died prior to the ninth day of February, 1913, would there have been a failure to provide at the preceding election? I think that in contemplation of the spirit of section 142 of the General Code there would. Or, if an alien had been elected there would have been a legal failure to provide, and to my mind the same result follows when one is elected who is ineligible for any purpose. Such person is, in contemplation of law, not entitled to office. In other words there was a failure to elect a man legally entitled to the office. The essence of the section in question is the authority conferred upon the governor to fill a vacancy in the office of the judge by reason of the expiration of the term of the incumbent.

My opinion, in conclusion, is that there is a vacancy at the present time in the office of the probate judge of Jefferson county, Ohio, and that it is the duty of the governor to fill such vacancy by appointment, such appointment to last until a successor is elected and qualified. Under the statutes "such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after such appointment."

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

99.

NATIONAL GUARD—GOVERNOR MAY ORGANIZE TO MAKE IT CORRESPOND WITH UNITED STATES ARMY SO FAR AS PRACTICABLE.

Under sections 5190 *and* 5191, *General Code, the governor may change the tactical organization of the national guard or a part thereof from time to time to make it correspond with that prescribed for the regular and volunteer armies of the United States. When, however, the numbers of the national guard are insufficient to constitute a division, as the same exists in the United States armies, the governor can only provide for its organization insofar as it is practicable to make it similar to that of the United States.*

COLUMBUS, OHIO, February 26, 1913.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR SIR:—You have verbally requested my construction of sections 5190 and 5191 of the General Code of Ohio, in their application to the following state of facts:

The national guard of Ohio as at present organized consists of two brigades of infantry, four troops of cavalry, three batteries of light artillery, one battalion of engineers, one battalion of signal corps, two field hospitals, and two ambulance corps. These units, as I understand it, fall far short of the number necessary to constitute a division as provided for in the organization of the United States army, a division consisting of the following: three brigades of infantry, two regiments of cavalry, two regiments of light artillery, one battalion of engineers, one battalion of signal corps, four field hospitals and four ambulance companies. It will be thus seen that the Ohio organization only comes up to the requirement for a division in two particulars, namely: the battallion of engineers and the battalion of signal corps, and, as stated before, falls far short of the necessary number of units to compose a division.

Sections 5190 and 5191 of the General Code provide as follows:

> "The national guard shall be organized in a like manner as is prescribed for the regular and volunteer armies of the United States. The governor may change the tactical organization of the national guard or a part thereof from time to time to make it correspond with that prescribed for the regular and volunteer armies of the United States. In time of peace the governor shall fix the maximum strength of organizations within the minimum and maximum limits prescribed by the president of the United States. (Section 5190.)
>
> "When practicable the governor shall organize the national guard into a division, brigades, regiments and battalions with such staff officers and non-commissioned staff officers as may be necessary for each of the several commands. (Section 5191.)"

Under the above quoted sections, it seems to me the question of the organization and reorganization of the national guard is a matter to be determined by you as commander-in-chief; the only limitation upon your complete authority as to this being that it shall be organized in like manner as is prescribed for the regular and volunteer armies of the United States, and that you may change the tactical organization from time to time to make it correspond with that prescribed for the United States regular and volunteer armies. These two sections must be taken together,

and when practicable, under section 5191, the organization should be into a division, brigades, regiments, etc.; but it seems clear that if it is not *practicable,* that is, if in the national guard as now constituted there are not enough units to constitute a division, it would not only be impracticable but would be impossible for you, or anyone else, to create what does not exist.

Therefore, under said section 5191, it is my opinion that it is your power and you have the duty, in providing for the organization of the national guard, to do so in whatever manner may be practicable and efficient with regard to the number of units in existence. In short, if there are enough units to constitute one or more effective brigades, with a complete brigade organization, under said sections, you would have full power to provide for such organization; and in the future, if the national guard were increased to a point where the organization of a division were possible, then, it could be so organized by and order from you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

610.

THE MONEY RECEIVED FROM THE TREASURER OF THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS IS TO BE PAID IN TO THE GENERAL REVENUE FUND OF THE STATE.

Where the governor has received from the treasurer of the national home for disabled volunteer soldiers the sum of $28,400.00, *being the amount due the state on account of aid to state or territorial homes, the treasurer of state is authorized to receive such money from the governor on the pay in warrant of the auditor of state and to credit the same to the general revenue fund of the state.*

COLUMBUS, OHIO, November 8, 1913.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—The treasurer of state has handed to me a letter addressed to you by Major Moses Harris, general treasurer of the national home for disabled volunteer soldiers, apparently accompanying a check on the treasury of the United States to your order as governor for $28,400.00, "being amount found due the state of Ohio on account of aid to state or territorial homes, for the quarter ending September 30, 1913." The letter is dated October 28, 1913.

The treasurer of state informs me that the check has been tendered by you to him, and that he is in doubt as to his authority to accept it.

The members of the board of administration inform me that they have relied upon the use of this money for the maintenance of the Ohio soldiers' and sailors' home at Sandusky and that unless it can be used the board will be at a loss as to how to manage the finances of that institution.

The question is suggested as to whether or not if the money is to be paid into the treasury of the state it can be drawn upon by the board of administration in the absence of an appropriation, the legislature having failed to pass any appropriation which would make this money so available.

I am informed also that in the past the invariable custom has been for the governor to receive the checks due the state from the federal appropriation and to cover them into the state treasury, and have the legislature make annual ap-

propriations thereof. So that the question would not have arisen at this time but for the failure of the legislature to make the necessary appropriation.

The money comes to the state or to its officers by virtue of an appropriation made by congress for this purpose. A typical current appropriation of this kind is found in 35 Statutes at Large, 1012, being that made by the 60th congress at its second session in 1908. It is as follows:

> "State or territorial homes for disabled soldiers and sailors: For continuing aid to state or territorial homes for the support of disabled volunteer soldiers, in conformity with the act approved August twenty-seventh, eighteen hundred and eighty-eight, including all classes of soldiers admissible to the national home for disabled volunteer soldiers, one million one hundred and fifty thousand dollars: *Provided,* That no part of this appropriation shall be apportioned to any state or territorial home that maintains a bar or canteen where intoxicating liquors are sold: *Provided further,* That for any sum or sums collected in any manner from inmates of such state or territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any state or territorial home into which the wives or widows of soldiers are admitted and maintained."

The act referred to is found in 25 Statutes At Large, 450, and in full is as follows:

> "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That all *states* or territories which have established, or which shall hereafter establish, state homes for disabled soldiers and sailors of the United States who served in the war of the rebellion, or in any previous war, who are disabled by age, disease or otherwise, and by reason of such disability are incapable of earning a living, provided such disability was not incurred in service against the United States, *shall be paid* for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of one hundred dollars per annum. The number of such persons for whose care any state or territory shall receive the said payment under this act shall be ascertained by the board of managers of the national home for disabled volunteer soldiers, under such regulations as it may prescribe, but the said state or territorial homes shall be exclusively under the control of the respective state or territorial authorities, and the board of managers shall not have nor assume any management or control of said state or territorial homes. The board of managers of the national home shall, however, have power to have the said state or territorial homes inspected at such times as it may consider necessary, and shall report the result of such inspections to congress in its annual report.
>
> "Sec. 2. That the sum of two hundred and fifty thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the treasury not otherwise appropriated, to carry out the provisions of this act, and payments to the state or territories under it shall be made quarterly by the said board of managers for the national home for disabled volunteers to the officers of the respective states or territories entitled, duly authorized to receive such payments, and shall be accounted for as of the appropriations for the support of the national home for disabled volunteer soldiers.
>
> "Approved August 27, 1888."

The intent of congress is clear. The appropriation is for the purpose of paying the state so much for each soldier; it is not directly in aid of any particular institution maintained by the state, and so far as the act of congress is concerned the state is at liberty to do what it pleases with the very moneys which are paid over to the state in pursuance of this act.

From this it follows that this is not a trust fund, but it is a general revenue of the state. That being the case, and your authority as governor to receive the money on behalf of the state, as required by the act, being assumed, it would be, and is your duty under section 24 of the General Code of Ohio immediately to pay it into the state treasury, where, under section 270 of the General Code, it is to be credited to the general revenue fund.

I am, therefore, of the opinion that the treasurer of state is authorized to receive from you, on the warrant of the auditor of state, the money represented by the check referred to in the letter handed to me, and to credit the same to the general revenue fund of the state.

Article II, section 22 of the constitution of Ohio, provides that:

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

Even if the money in question were a special or trust fund, I believe this section would apply to and govern its disbursement, once it were legally in the state treasury. Being a part of the general revenue fund, however, there can be no question as to the application of the section of the constitution just quoted.

From the time when the state first received such moneys they have been treated in the manner already outlined, being paid into the state treasury and disbursed therefrom only on appropriations. Such a long continued legislative interpretation of the constitution and of its own duties and those of the executive departments having to do with the internal management of this fund, could not lightly be disturbed even if the question were doubtful. Inasmuch, however, as the question is devoid of any element of doubt, I am of the opinion that the money represented by the check to which the letter refers, when paid into the state treasury may not lawfully be withdrawn therefrom, save in pursuance of an appropriation made by the general assembly.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the Lieutenant Governor)

338.

REPAIRING OF SCHOOL BUILDING DAMAGED BY FLOODS—DAMAGE, QUESTION OF FACT—SNYDER ACT—REPAIR AFTER CONDEMNATION BY CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES.

When a school building fit for occupancy prior to the flood has been damaged by the flood as to render the same unfit for use, the provisions of the Snyder emergency act, exempting from the general limitations of the law upon levies and borrowing powers may be resorted to.

The question of damage is one of fact, the answer to which may be assisted by the reports of the chief inspector of workshops and factories.

Under section 7630-1, General Code, a school building condemned by the chief inspector of workshops and factories may be rebuilt or repaired. The money may be borrowed therefor, regardless of the Smith law limitations.

COLUMBUS, OHIO, June 18, 1913.

HON. HUGH L. NICHOLS, *Lieutenant Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 12th, in which you state that in a certain village a very old and virtually unsafe school building was damaged by the floods of March and April, 1913, although the condition of the building, aside from its dampness, is not visibly different from that in which it was prior to these floods. The state authorities have not condemned the building for use, but it is felt that if an inspection were now made it would be condemned.

You request my opinion as to whether or not the so-called Snyder emergency law, authorizing the borrowing of money and the levying of taxes outside of the limitations of the general law for the restoration and replacement of property destroyed or injured by the aforementioned floods, can be used to borrow money and construct a new building in place of the old building; the desire to do so arising from the fact that under what you speak of as the "Longworth act" the tax limits of the district are such as to preclude the expenditure of money for this purpose under the general laws of the state.

At the outset I desire to correct what was evidently a misapprehension on your part. The "Longworth act," being section 3939, et seq., General Code, has no application whatever in school districts; it relates solely to municipal corporations and townships. There is no limit whatever upon the bonded indebtedness of a school district. I take it you have in mind the so-called Smith one per cent. law, which, while it does not limit the bonded indebtedness of a school district directly, does have a practical effect thereon, in that it limits the amount or rate of taxes which may be levied for any and all purposes, including the retirement of bonds and the payment of interest thereon. I shall discuss the question upon this assumption.

The so-called Snyder law authorizes the replacement of property damaged by the floods which you mention, and for that purpose empowers the board of education, as to school property, to issue bonds and to provide for the payment of the same by special tax levy, which may be made outside of all of the limitations of the Smith law. The only question which would arise under the facts submitted by you is as to whether or not, in view of the fact that the building,

after the flood, was not in very much worse condition than it was before the flood, it can be said to have been "damaged," within the meaning of the Snyder act.

This, of course, would be a mixed question of fact and law. It may be that the building was so near the border line of unfitness for use, prior to the flood, that the damages to it, which would necessarily occur if water to the depth of nine feet or more stood in it for an appreciable length of time, would cause it actually to become unfit for use. This might easily be the fact, and in such case the damages, though slight, would, in my opinion, authorize proceedings to be had under the Snyder law. If, on the other hand, the unfitness of the building for use does not result from the flood, but the building is really no more unfit for use since the flood than it was before the flood, I should think that a contrary result would follow, as in such case it could not be said that the damages to the building had resulted from the flood.

The question here is one of fact, and I should be of the opinion that the findings of the district inspector of workshops and factories ought to be entitled to some weight. If, a reasonable time prior to the flood, the chief inspector, acting upon the report of the district inspector, had approved the use of the building for school purposes, that would, in my judgment, constitute a sufficiently conclusive finding to the effect that the building was actually, at the time, fit for use as a school building. If an inspection were now made and the finding should be that the building is not fit for use as a school building, I should be of the opinion that such a finding would be conclusive. And if the change in the position of the department of workshops and factories could be said to have resulted from the action of the waters, comparatively slight though that may have been, I would be of the opinion that the case would be a proper one for proceedings under the Snyder act.

In connection with the question which you present, I beg leave to call attention to the provisions of senate bill 264, passed by the late session of the general assembly, and made an emergency law, so it is at present in effect. This act provides as follows:

"AN ACT

"To supplement section 7630, General Code, by the enactment of a section to be known and designated as section 7630-1, and to amend section 5649-4 of the General Code for the purpose of facilitating the replacement of school houses condemned or destroyed by fire or other casualty.

"*Be it enacted by the General Assembly of the State of Ohio*:

"Section 1. That section 7630 of the General Code be supplemented by the enactment of a section to be known and designated as section 7630-1 as follows; and that section 5649-4 of the General Code be amended so as to read as follows:

"Sec. 7630-1. If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of educa-

tion may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law.

"Sec. 5649-4. For the emergencies mentioned in section forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act. * * *"

If the chief inspector of workshops and factories should, by order, prohibit the use of the old building for school purposes, this statute might be employed for the relief of the situation. The advantage of its employment would be that it would obviate the embarrassing question which might arise under the Snyder act, while, at the same time, it affords an equal exemption from the limitations of the Smith law. The disadvantage of proceeding under section 7630-1 is that it necessitates submitting the question of expenditure to a vote of the people, entailing some expense and delay. The election, however, may be called at any time, and need not await the holding of a regular election.

In any event, I should advise that the attention of the department of workshops and factories be directed to the building, and the advice of the chief inspector obtained. If he condemns the present edifice for use, then section 7630-1 can clearly be followed; and a much clearer case can be made for proceeding under the Snyder act.

I regret that I feel unable to give you an unequivocal answer to the question which you submit, especially as concerns the application of the Snyder emergency act. I have, however, tried to lay down the principles by which the action of the board of education may be determined when the facts are ascertained with exactness.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the General Assembly)

38.

EMERGENCY BILL—SECTION OF AN ACT DECLARING A BILL TO BE AN EMERGENCY MEASURE MUST BE SEPARATELY VOTED UPON.

Inasmuch as section 1-d of the amendment to article 2 of the constitution expressly declares that the reasons for the necessity of declaring a bill an emergency must be set forth in a separate section of the law, which section shall be passed upon by a "yea" and "nay" vote, upon a separate roll call thereon, a bill providing lobbying regulations, which in a section thereof, is declared to be an emergency measure for the reasons therein stated, but which section did not receive a separate roll call was not legally passed.

COLUMBUS, OHIO, January 20, 1913.

HON. J. H. LOWRY, *House of Representatives, Columbus, Ohio.*

MY DEAR SIR:—You have today requested my opinion as to the legality of the passage by the senate on January 16th, of senate bill No. 11, entitled:

> "A bill to provide for the registration of persons employed to advocate or oppose legislative measures, and to regulate the method of such advocacy or opposition."

You state that this bill was passed by the unanimous vote of the senate upon the bill as a whole, and that no separate vote was taken upon section 14 of the bill which is as follows:

> "Section 14. This act is hereby declared to be an emergency act and that its enactment is necessary for the immediate preservation of the public safety. The necessity therefor lies in the fact that the public welfare and safety require that the deliberations of the present general assembly shall be free from interference, and its members, in the performance of their duties, protected from solicitation by persons representing interests that are undisclosed and principals who are unknown."

Section 14 defines the act as an emergency measure and states the reason for its going into effect immediately so as to remove it from the necessity of referendum. I wish to call your attention to section 1-d of the amendment to article II of the constitution of Ohio adopted by the electors of this state at the election held on September 3, 1912. This amendment is as follows:

> "Such emergency laws, upon a yea and nay vote, must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote upon a separate roll call thereon."

This section is so clear as to admit no controversy as to its requirement in regard to the passage of emergency acts. Such emergency laws must receive the vote of two-thirds of all the members elected to each house of the general assembly, upon a yea and nay vote. The reasons for the necessity of the law must be set forth in one of the sections of the law, and the section containing this reason

must be passed upon a yea and nay vote and *upon a separate roll call.* Section 14 of the act complies with the constitutional requirement in that it sets forth the reason for its necessity, but the requirement that this section containing such reason, namely section 14, can only be passed upon separate roll call and a yea and nay vote thereon was not met in the passage of this bill, herefore the bill was not legally passed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

41.

RESOLUTION AUTHORIZING CLERK OF HOUSE OF REPRESENTATIVES TO DISTRIBUTE COPIES OF JOURNAL FOR MEMBERS OF THE GENERAL ASSEMBLY, VALID.

In view of section 768, General Code, providing for the distribution of six hundred copies of the house journal among the members of the house of representatives a resolution of the house authorizing a clerk to cause to be mailed, not to exceed five copies of such journal to such names and addresses as may be furnished him by each member, is not subject to objection.

COLUMBUS, OHIO, January 21, 1913.

HON. JOHN R. CASSIDY, *Clerk, House of Representatives, Columbus, Ohio.*

DEAR SIR:—Under date of January 18th you submitted house bill No. 24 passed by the house of representatives on January 15, 1913, and you inquire whether there exists any legal reason why you should not comply with the requirements of the resolution both as to postage and numbers.

The resolution in question reads as follows:

80th General Assembly H. R. No. 24.
Regular Session
Mr. Sweeney.

"WHEREAS, section 768 of the General Code provides for the distribution of six hundred (600) copies of the house journal among the members of the house of representatives during time said house is in session, therefore,

"Be It Resolved, That the clerk of the house of representatives be, and is hereby authorized to cause to be mailed during the session of the house not to exceed five copies of such journal to such names and addresses as may be furnished by him to each member; the cost of mailing the same to be paid out of the contingent fund of the house."

Section 768, General Code, provides as follows:

"Each day one copy of such pamphlet shall be placed on the desk of each member of the senate and house of representatives, one copy shall be

sent to each state department, two hundred copies shall be distributed by the members of the senate, under the direction of the clerk thereof, and six hundred copies shall be distributed by the members of the house of representatives under the direction of the clerk of the house of representatives. The proper number of sheets for the permanent copies of such journals shall be printed, retained and bound with the indexes therefor, as provided by law."

We assume that the house journal referred to in the resolution in question refers to the daily pamphlet referred to in section 767 of the General Code. Since section 768 of the General Code provides that six hundred copies of such pamphlet shall be distributed by the members of the house of representatives under the direction of the clerk of the house of representatives I can see no legal reason why you should not comply with the requirements of such resolution, providing, of course, that no more than six hundred copies are so distributed. You cannot, of course, exceed the six hundred copies provided for in section 768, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

42.

LOBBY BILL DOES NOT INCLUDE PERSON GATHERING AND SELLING INFORMATION RELATING TO MATTERS PENDING BEFORE THE GENERAL ASSEMBLY, NOR INDIVIDUAL, ASSOCIATION, OR CORPORATION PURCHASING SUCH INFORMATION, NOR TO UNEMPLOYED INDIVIDUALS.

The terms of the act to provide for registration of persons employed to advocate or oppose legislative measures, do not include an individual engaged in the business of gathering and selling information relating to matters pending, or which may come before the general assembly, providing such individual is not also employed by any person, association or corporation, purchasing such information for the purpose of influencing legislation; nor does such act include individuals, associations or corporations purchasing such information.

The act is intended to apply to persons employed or persons employing others for the purpose of influencing legislation and in no way operates upon an individual acting solely on his own initiative as a citizen, without receiving compensation for his services.

COLUMBUS, OHIO, January 24, 1913.

HON. CARL D. FRIEBOLIN, *Member Ohio Senate, Columbus, Ohio.*

DEAR SIR:—In your letter of January 22nd you ask my opinion on three qnestions concerning the act passed by the general assembly on January 21, 1913, entitled "An act to provide for registration of persons employed to advocate or oppose legislative measures, and to regulate the method of such advocacy or opposition."

Your first question is as follows:

"Is an individual engaged in the business of gathering and selling information relating to matters pending, or which may come before the

general assembly, exempt from the provisions of this bill; provided, of course, that the individual so engaged in the business of furnishing or selling information is not also employed by any person, associations or corporations purchasing such information for the purpose of influencing legislation?"

Section 1 of the act is as follows:

"Any person, firm, corporation or association, or any officer or employe of a corporation or association acting for or on behalf of such corporation or association, who or which directly or indirectly employ any person or persons, firm, corporation or association to promote, advocate, amend or oppose in any manner any matter pending or that might legally come before the general assembly or either house thereof, or a committee of the general assembly or either house thereof, shall within one week from the date of such employment furnish in a signed statement to the secretary of state the following information, to wit:

"1. If an individual, his full name, place of residence and place of business.

"2. If a firm, its correct firm name, place of business, and the full name and place of residence of each partner.

"3. If a corporation or association, its full name, the location of its principal place of business, whether a corporation or voluntary association, whether a domestic or foreign corporation, and the names and the places of residence of each of its officers.

"4. The nature and kind of his, their, or its business, occupation or employment.

"5. The full name, place of residence and occupation of each person, firm, corporation or association so employed, together with the full period of employment.

"6. The exact subject matter pending or that might legally come before the general assembly or either house thereof or before any committee thereof with respect to which such person, firm, corporation or association is so employed.

"7. When any change, modification or addition to such employment or the subject matter of the employment is made, the employer shall within one week of such change, modification or addition furnish in writing full information regarding the same to the secretary of state.

"The secretary of state shall immediately enter all such information, appropriately indexed so as to show all employers, employes and the subject-matter of such employment, in a separate book to be kept for that purpose in the office of the secretary of state, which book at all times shall be open to public inspection. Upon the payment of the fee hereinafter provided for, the secretary of state shall issue to each person or to the representative of any firm, corporation or association, so employed, a certificate showing the name of the person to whom the certificate is issued, the name or names of his employers, the particular matter in respect to which such person is so employed, and the duration of the employment. A new certificate shall be required and issued upon any change, modification or addition being made to such employment. Such certificate shall be prima facie evidence during the period of the employment therein recited, but not to exceed two years, of compliance with this section by the employer and employe named in said certificate. Provided, that nothing in this section shall apply to a bona fide newspaper, journal or magazine,

or a bona fide news bureau or association which in turn furnishes such information solely to bona fide newspapers, journals or magazines, in employing correspondents to furnish information or news for publication only."

It seems apparent to me from the language used in the first paragraph of this section, and from the information required to be given by item 6 in the statement furnished the secretary of state, that the act applies whenever a person, firm, corporation or association is *employed* directly or indirectly to promote, advocate, amend or oppose in any manner any matter pending or that might legally come before the general assembly or either house thereof, or a committee of the general assembly or either house thereof; and therefore for the reason that in the case specified by you the individual is not employed, by any one, directly or indirectly to promote, advocate, amend or oppose in any manner any matter pending or that might legally come before the general assembly, but simply gathers and sells information relating to matters pending or which may come before the general assembly, he would not come under the provisions of the act.

Your second question is as follows:

"2. Are individuals, associations or corporations purchasing information as above described exempt from the provisions of this bill?"

I find nothing in the act that seems to or would prevent individuals, associations or corporations from purchasing information relating to matters pending or which might come before the general assembly, unless such individuals, associations or corporations sought by so doing, to directly or indirectly promote, advocate, amend or oppose a matter pending or that might legally come before the general assembly as provided in the act.

Your third question is as follows:

"3. Is an individual not employed by any person, firm or corporation to influence legislation, exempt from the provisions if he is acting solely in his capacity as an individual without reference to the interests of such person, firm or corporation, if he attempts to influence legislation pending in, or which may come before the general assembly?"

There is no attempt made in this bill to interfere with or restrict the rights of a citizen to express his approval or disapproval of any legislative measure, provided he is acting simply in his individual capacity. In other words, there is no attempt made by it to throttle free speech, and if an individual, acting solely upon his own initiative, and without being employed directly or indirectly by a person, firm, association or corporation, and who has not been promised or does not expect to receive directly or indirectly any compensation for his services, attempts to influence legislation, in other words, if he acts solely for himself and neither directly or indirectly for another, then I do not think he would be subject to this act.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

67.

LOBBYISTS—MANUFACTURING INDUSTRY—REGISTER OF LOBBYIST MAY STATE SUBJECT-MATTER GENERALLY—FEE OF SECRETARY OF STATE FOR REGISTRATION.

Under paragraph 6, section 1, of the act providing for regulations of lobbying, it is sufficient that the person registers as to the particular subject-matter of legislation in regard to which he is employed, and it is not necessary for him to specify each bill. Such registration, however, would not cover legislation, indirectly or remotely, affecting such subject-matter.

When any change, modification, or addition to the particular subject-matter is made, the full information must be furnished regarding the same and a new certificate issued, which must specify the new matter.

The secretary of state is entitled to a fee of $3.00 for the issuance of each necessary certificate, whether original or additional.

COLUMBUS, OHIO, January 28, 1913.

HON. W. A. GREENLUND, *Member of the Ohio Senate, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of January 27th in which you make the following request for my opinion:

> "The question has arisen in regard to the interpretation of the act providing for the registration of lobbyists. A particular question which has been raised is as to whether or not the secretary of an organization has the right to register and appear at the hearing on any bills which may affect the organization which he represents.
>
> "A secretary has registered and wanted the privilege of appearing before the committee on any bills which might affect the manufacturing industry.
>
> "Will you please advise whether or not he will have to register for the hearing of each bill or whether registering once will suffice?
>
> "This further question has been raised regarding the fee to be paid at the time of registration. Has the secretary of state the authority to charge and collect a $3.00 fee for each subject on which a lobbyist appears?"

Paragraph 6 of section 1 of the act, specifying the information that must be given by and concerning a person registering as required by the law, is as follows:

> "The exact subject-matter pending or that might legally come before the general assembly or either house thereof or before any committee thereof with respect to which such person, firm, corporation or association is so employed."

Subsection 7 of section 1 provides:

> "When any change, modification or addition to such employment or the subject-matter of the employment is made, the employer shall within one week of such change, modification or addition furnish in writing full information regarding the same to the secretary of state."

The last paragraph of section 1 provides:

"Upon the payment of the fee, * * * the secretary of state shall issue to each person * * * a certificate showing the name of the person, to whom the certificate is issued, the name or names of his employers, the particular matter in respect to which such person is so employed, and the duration of the employment. A new certificate shall be required and issued upon any change, modification or addition being made to such employment. * * *"

Section 8 provides:

"The secretary of state shall charge and collect, and be entitled to receive from the employer the sum of three dollars for each certificate necessary under the provisions of this act. The secretary of state shall neither receive nor file any such statement or issue any such certificate unless the fee herein prescribed has been paid."

From the above provisions of the act, and especially the language of subsection 6 of section 7, I take it that all that is necessary when a person desires to register is to give the particular subject-matter of legislation in regard to which he is employed, and that it is not necessary to specify each bill. For instance, as in the matter specified by you, I think a person could be properly employed to advocate or oppose any legislation which would affect the manufacturing industry. Of course, it would be a broad classification, but still the subject-matter though broad, is well understood, and one registration should cover all legislation directly affecting that matter; but it should not be held that it covers legislation indirectly or remotely affecting such subject-matter. For instance, if a person were employed with reference to legislation affecting the manufacturing industry and subsequently he wished to appear with reference to legislation affecting insurance, then a new certificate would be required, though it might be contended that the subject of insurance in a way affected the manufacturing industry. In other words, the legislation upon which a person is entitled to appear must be legislation directly affecting the subject-matter stated in the registration.

The language of the act seems to be clear that when any change, modification or addition to the particular subject-matter specified is made, the full information must be furnished regarding the same, and a new certificate issued which must specify the new, or additional, or changed subject-matter.

And section 8 seems to be explicit that the secretary of state is entitled to a fee for the issuance of each necessary certificate, and therefore when a change is made and a new certificate is necessary, an additional fee must be paid.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

103.

CONSTITUTIONAL LAW—CUTTING OF WEEDS BY LAND OWNER—COMPENSATION OF ROAD SUPERINTENDENT.

House bill, No. 198, General Code, providing that the superintendent of roads shall allow a land owner or tenant to destroy weeds along the road abutting on his property, and for compensation to the road superintendent for services performed by that official, presents no evidence of unconstitutionality.

COLUMBUS, OHIO, February 18, 1913.

HON. G. G. O. PENCE, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 11th, which is as follows:

"Please give in writing your answer as to the constitutionality of house bill No. 198, herewith submitted."

The purpose of house bill No. 198 is to amend section 7148 of the General Code so that the same shall read as follows:

"Sec. 7148. The superintendent of such roads shall allow a land owner or tenant to destroy such brush, briers, burrs, vines, thistles or other noxious weeds, growing or being on such roads along the lands abutting thereon, owned or occupied by such land owner or tenant. * * * Such land owner or tenant shall do the work or cause it to be done before the first day of the month in which it is required to be done as specified in section seventy-one hundred and forty-six. In case such owner or tenant fails to comply with sections 7146 and 7148, the superintendent of roads or turnpikes shall be allowed and paid, for such services performed by him, by the proper authority, and such compensation shall be charged on the tax duplicate against said land owner."

Under section 7148 as at present constituted the land owner or tenant may destroy certain noxious weeds and receive credit on his road tax, while the proposed amendment would allow township road superintendents to receive such reasonable compensation as might be allowed by the proper authority, such compensation to be charged on the tax duplicate against the owner.

It is a well established principle of law that acts of the legislature are presumed to be constitutional and valid, and the courts will not declare them unconstitutional unless it is clearly made to appear that they are so. I see no reason for holding house bill No. 198 unconstitutional. In my judgment it comes within the police power of the state, being a measure for the preservation of the public health, convenience and welfare.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

128.

PUBLIC OFFICER—SUPERINTENDENT OF GIRLS' INDUSTRIAL HOME AND WOMEN'S REFORMATORY ARE PUBLIC OFFICERS—WOMAN MAY NOT BE—CONSTITUTIONAL LAW.

Under article 15, section 4 of the constitution, a person may not be elected or appointed to an office in this state unless he possess the qualifications of an elector. Inasmuch, therefore, as the superintendency of the girls' industrial home or the women's reformatory at Marysville, constitutes a public office, a woman may not hold such position.

COLUMBUS, OHIO, March 21, 1913.

HON. WILLIAM E. HAAS, *Ohio Senate, Columbus, Ohio.*

MY DEAR SIR:—Your communication dated March 14th, received, in which you request my opinion as to the constitutionality of the law now on the statute books providing for the appointment of a woman superintendent or matron of the girls' industrial home and the woman's reformatory at Marysville, and in reply to your inquiry I desire to say that as to the matron of the girls' industrial home the general assembly of Ohio on the 21st day of May, 1911, passed an act which is now section 2103-1 of the General Code, which provides as follows:

> "That the office of superintendent of girls' industrial home is hereby abolished. The board of trustees shall appoint *a chief matron who shall have executive charge of said institution* with all the powers and duties now or hereafter given by law to or imposed on superintendents of public institutions, in so far as the same are applicable. Such chief matron shall receive an annual salary of not less than twelve hundred nor more than two thousand dollars, as may be determined by the board."

In order to properly construe said section as to its constitutionality it is necessary first to decide whether or not the creation of chief matron constitutes the creation of an office under the law and the decisions of the courts of this state. Article 15, section 4 of the constitution of the state of Ohio provides as follows:

> "No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."

Section 1 of article V of the constitution specifically defines an elector as follows:

> "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections."

The question, then, which is decisive of your inquiry is, did the act in controversy create an office, and did it attempt to create the party filling the same by appointment an office, or if this position be an office within the meaning of the clause of the constitution above referred to, then it is clear that it can only be

filled by an elector—a male citizen of the age of twenty-one years who shall have been a resident of the state one year, etc., as specified in the constitution of Ohio. The first question, then, is, what is an office.

We have had numerous decisions in our state upon this question. In the case of Stae, ex rel., Attorney General vs. Kennon, et al., 7 O. S. 547, it was held that a statute which provides for the creation of a board authorizing it to appoint commissioners of the state house and directors of the penitentiary of the state, and fill all vacancies which might occur in the offices of directors or state house commissioners, and authorizing such board, or a majority, to remove any director of the penitentiary for causes specified, or which might by the board of directors be deemed sufficient, created offices.

Webster defines the word "office" to signify "a particular charge or trust conferred by public authority for a public purpose;" and Platt, J., 20 Johns, 492, defines it to be

> "An employment on behalf of the government, in any station or public trust, not merely transient, occasional or incidental."

And it was held in the same case that compensation or emoluments are not a necessary element in the constitution of an office. Chief Justice Marshall, in 2nd Broc., 103, says that if a duty be a continuous one, defined by rule, prescribed by government and not by contract, it is an office. Again in the case of State, ex rel., Attorney General vs. Wilson, 29 O. S. 347, it was held:

> "The place of medical superintendent of a hospital for the insane, under the act of March 27, 1876 (Ohio Laws 80), is an 'office within the meaning of section 4, article 15, of the constitution, which ordains that, 'No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector.'"

I cannot arrive at any other legal conclusion under the authorities above quoted than that *the act referred to creates an office.* Then, the next question is, is it constitutional in view of the fact that the office created shall be filled by the appointment of a chief matron who shall have executive charge of the said institution with all the powers and duties now or hereafter given by law to or imposed on superintendents of public institutions in so far as the same are applicable.

Century Dictionary defines the word "matron" as follows:

> "In a special sense a head nurse in a hospital; the female head or superintendent of any institution."

In view of the fact that it cannot be doubted that the matron which this act provides for the appointment of is an officer under the rulings or decisions of the court of last resort of our state, it follows that the person to fill such position must be an elector, under the provisions of our constitution above referred to, or the act is unconstitutional. We cannot but conclude from the language of the decisions above quoted that the act in question attempts to invest the board of trustees with the power to appoint a female as chief matron with the powers and duties of an office such as is required by the constitution to be filled solely by an elector.

It is a general rule of construction that legislative acts are always to be upheld unless clearly in violation of the constitution, but when so the courts are

required to declare them void. Therefore under that well established rule of construction and the decisions of the court and the constitutional provisions first as to the offices, and second that they must be filled by an elector, I am of the legal opinion that said section, namely 2103-1 of the General Code providing for the appointment of a woman superintendent or matron of the girls' industrial home is absolutely void.

The next question you ask is as to the constitutionality of the law providing for the appointment of a chief matron to manage the woman's reformatory to be erected at Marysville, Ohio. The law providing for the establishment of a reformatory for women and to provide for the management thereof was passed May 15, 1911, and is now sections 2148-1 to 2148-11, inclusive, of the General Code (102 O. L. 207), and the 4th section of said act, referred to in your letter, is section 2148-4, which reads, in part, as follows:

> "* * * The board of trustees may select and designate a chief matron to manage the institution and promote the welfare of the inmates thereof," etc.

And upon the same principle of law as above quoted in relation to the chief matron of the girls' industrial home, I am of the opinion that said law is for the same reason unconstitutional and void in so far as that section is concerned.

In addition to what I have given as my reasons for rendering my opinion that said respective sections of the General Code, above referred to, are unconstitutional and void, I desire to say that there is another reason which goes to strengthen my belief in the correctness of my opinion, namely the constitutional convention in 1912 adopted proposal No. 36, which was to amend section 4 of article 15 of the constitution of Ohio to read as follows:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; provided that women who are citizens may be appointed, as notaries public, or as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both."

The intent of this amendment was to permit the appointment of women as superintendents and members of the boards of those institutions of the state or any of its subdivisions where the interests and care of women and children were involved, although they were not electors under the laws of the state. Said proposal was submitted to the electors of Ohio at the election held on September 3, 1912, and resulted in the rejection of said amendment, thereby retaining the said section as found in the constitution of our state adopted in 1852. There can be no question that said proposed amendment as adopted by the constitutional convention for the very purpose of so amending the constitution as to make women eligible to such positions as the legislature in the enactment of both of the sections referred to by you in your communication attempted to do.

In conclusion I might say that I am compelled to give the opinion above expressed because I am sure that it is the law, although there may be great necessity, and it may be of great value, to have women fill such positions in order to attend to the wants of and watch over the many unfortunate victims of crime incarcerated in the girls' industrial home or that will be incarcerated in the women's reformatory which is to be erected. I have no doubt that ladies of high character have or may have been appointed to the positions attempted to be created under

the two respective acts, and that under their guidance the condition of the inmates might be greatly improved, if not entirely changed, and as a result thereof the public would be the gainer, but if the electors of Ohio were guilty of a great oversight in rejecting the said constitutional amendment above referred to and thereby made it impossible for the legislature to enact a law making provision for women filling such positions, I am nevertheless compelled to abide the decision of the electorate of Ohio and render the above opinion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

129.

CLERK OF SUPREME COURT—BILL PROVIDING FOR APPOINTMENT OF, UNCONSTITUTIONAL.

Article 4, section 6, of the constitution, provides that the general assembly may provide for the election of clerks of court other than clerk of common pleas, for the term of three years.

Article 17, of the amendment to the constitution adopted in 1905, changed the terms of various state officers, but is silent as to the office of clerk of the supreme court. Under the constitution, therefore, a clerk of the supreme court may be provided for only by an election and for a term of three years.

House bill No. 73, therefore, providing for the appointment of a clerk of said court to hold his office during good behavior is unconstitutional and void.

COLUMBUS, OHIO, March 22, 1913.

HON. WARREN J. DUFFY, *Member of the House of Representatives, of the 80th General Assembly of Ohio, Columbus, Ohio.*

DEAR SIR:—You inquire of me as to the constitutionality of house bill 73 recently enacted by the general assembly of Ohio amending section 1500 of the General Code, and providing that:

> "The supreme court shall appoint a clerk of said court, who shall hold his office during good behavior. The term of the clerk first appointed hereunder shall commence on the first Monday in February, 1915. Any person elected clerk of the supreme court prior to the enactment of this amendment shall hold said office for the full term for which he was elected and until his successor is appointed and has duly qualified."

In reply thereto I beg to advise section 16 of article IV of the constitution of Ohio provides as follows:

> "There shall be elected in each county, by the electors thereof, one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be clerk of all other courts of record held therein; but, the general assembly may provide, by law, for the election of a clerk, with a like term of office, for each or any other of the courts of record, and may authorize the judge of the probate court to perform

the duties of clerk for his court, under such regulations as may be directed by law. Clerks of courts shall be removable for such cause and in such manner as shall be prescribed by law."

The provisions of the constitution just referred to are of the constitution of 1851. At that time the clerk of the court of common pleas of Franklin county was by virtue of his office the clerk of the supreme court when the court was sitting in Franklin county. Not until 1865 did the legislature take advantage of the provisions of section 16 of article 4, aforesaid, authorizing it to provide by law for the election of a clerk with a like term of office, i. e. three years for the supreme court.

On March 29, 1865 (see year book, vol. 62, page 69) an act was passed to provide for the election and qualification of the clerk of the supreme court of Ohio and prescribing the duties and fixing the compensation of such clerk. This act provided for the election of the clerk of the supreme court triennially.

The act of 1865 remained unchanged until the year 1906, when the legislature passed an act purporting to "conform the term of office of the various state and county officers to the constitutional provisions relating to biennial elections (see year book 98, page 272). This last act continued the existing term of the office of the clerk of the supreme court to the first Monday of February following the expiration of the current term, and further provided that,

"At any election for state and county officers hereafter held, successors to all such officers whose term will expire during the odd numbered year next succeeding the holding of such election, shall be elected, for terms to commence at such time during said odd numbered year as is provided by law, and to continue for the following periods respectively: clerk of the supreme court, two years."

Terms of office for other officers were provided for, no state officer being therein mentioned except the clerk of the supreme court; certain other state officers being provided for by the 17th amendment to the constitution which was adopted in 1905. When the 17th amendment to the constitution was adopted the proposers of the amendment unquestionably had overlooked the fact that the office of the clerk of the supreme court was a constitutional office, they regarded it as a statutory office, and must have entertained the view that the office of the clerk of the supreme court was primarily created by the act of 1865, when in fact the act of 1865 received its authority from section 16 of article 4 of the constitution, aforesaid. Article 17 of the amendment to the constitution adopted in 1905 fixed the terms of the various state officers, but is silent as to the office of the clerk of the supreme court; consequently the only constitutional provision in reference to the office of the clerk of the supreme court is section 16 of article 4 of the constitution of 1851. Under it there is warrant given to the legislature to provide by law for the election of a clerk of the supreme court with a like term of office as therein provided for a clerk of the court of common pleas, to wit, for a term of three years.

I am, therefore, of the opinion that the bill to which you refer, i. e., house bill 73, recently adopted is unconstitutional and void.

Very respectfully submitted,

TIMOTHY S. HOGAN,

Attorney General.

170.

PUBLIC OFFICER—WOMAN MAY NOT BE MEMBER OF BOARD OF EXAMINATION AND REGISTRATION OF NURSES—MAY BE SECRETARY TO BOARD—CONSTITUTIONAL LAW.

Under article 15, *section* 4 *of the constitution, a person may not be elected or appointed to any office in this state unless he possesses the qualifications of an elector, as set out in article* 5, *section* 1. *Inasmuch as H. B.* 105, *clothes members of the board for the examination and registration of nurses with the power to license the nursing occupation, the members of such board are endowed with the power to exercise a part of the sovereignty of the state, and are, therefore, public officers.*

The above constitutional restrictions, therefore, will not permit a woman to serve as a member of such board.

The fact that the secretary treasurer of such board as contemplated in this act must give a bond and is required to prosecute the law relating to the practice of nursing, nor the further fact that such incumbent is empowered to administer oaths, do not constitute such position a public office and the incumbent therefore may be a woman.

COLUMBUS, OHIO, April 9, 1913.

HON. H. L. SCHAEFER, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—On April 9th you handed me copy of house bill No. 105 printed as reported by committee on public health, being entitled "A bill to provide for the examination and registration of nurses in Ohio," and call my attention to section 1 of said bill, which provides that the governor shall appoint a state board of examiners of nurses, consisting of five members, each of whom shall be a graduate of a training school for nurses. Said section 1 further provides that one of the members shall be designated to hold office for one year, two for two years and two for three years, and upon the expiration of the term of any person so appointed a successor shall be appointed in the same manner, to hold office for three years. Said section further provides that each member of the board of examiners shall receive five dollars for each day actually engaged in the work of the board and their necessary expenses. Said section further provides that the board shall organize by electing a president, a secretary who shall also act as treasurer and an inspector of training schools, each to serve for a term of one year. It further provides that the secretary-treasurer shall give bond to the state of Ohio for the faithful discharge of *her* duties. It empowers the president and secretary-treasurer to administer oaths.

Section 7 of the bill further places the duty upon the secretary-treasurer to enforce the provisions of the law relating to the practice of nursing and requires *her* to investigate the matter upon knowledge or notice of a violation of such law and file complaint with the prosecutor.

The entire bill is offered so as to require that the profession of nursing shall be registered in this state. It empowers the board to issue certificates of registration under the provisions of the bill and also suspend and revoke certificates of registration.

Your question is as to whether or not the governor would be authorized to appoint women as members of the state board of examiners of nurses. This question is to be solved by the determination of whether or not members of such a board would be holding an office by reason of appointment to such board.

Article XV, section 4 of the constitution of Ohio provides as follows:

"No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."

Article V, section 1, defines an "elector" as follows:

"Every white male citizen of the United States, of the age of twenty-one years, who have been a resident of the state one year next preceding the election, and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections."

It is clear, therefore, that should the appointment as a member of the state board of examiners of nurses be considered as an appointment to an office a woman cannot be appointed to such position. One of the best definitions as to what constitutes an office to be found in the Ohio reports is that found in the second syllabus of the case of State ex rel. vs. Jennings et al., 57 Ohio State 415, as follows:

"To constitute a public office, against the incumbent of which *quo warranto* will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe subject to the direction and control of some one else."

The power to license occupation in a state is a governmental power and is the exercise of a part of the sovereignty of the state, and the exercise of such power by such a board as the one in question would be the exercising by such board of certain independent public duties and would, therefore, as I view it, constitute those exercising such powers officers within the meaning of the constitutional provisions. It is to be noted from an examination of the bill in question that the entire power of granting, suspending and revoking certificates of registration is lodged with the board, and, therefore, must be exercised by those who are in law designated as officers.

In reference to the secretary-treasurer which position the bill contemplates shall be held by a woman the proposition is not quite so clear. The first section of the bill provides that said board shall organize "by electing a president, a secretary who shall also act as treasurer, and an inspector of training schools, each to serve for a term of one year."

I do not at this time pass upon the question as to whether such language contemplates that not only the president but the secretary-treasurer and inspector shall be chosen from among the members of the board. Assuming, however, that it is not contemplated that the secretary-treasurer shall necessarily be chosen from among the members of the board. It would appear that such secretary-treasurer is required to give bond in the sum of one thousand dollars to the state of Ohio for the faithful discharge of her duties, and is given the power to administer oaths. She is further entrusted with the registration fee, and also is given the duty of enforcing the provisions of law relating to the practice of nursing in this state.

I do not think that the requirement that a bond be given by the secretary-treasurer to the state of Ohio would of necessity determine whether or not holding such position would be considered as holding an office, nor the fact that such

secretary-treasurer is given the duty of seeing that the law relating to the practice of nursing is enforced. The only other power specifically given to said secretary-treasurer in the bill is the power to administer oaths.

In the case of Warwick vs. State of Ohio 25, Ohio State 21, the syllabus reads as follows:

> "1. The deputy clerk of the probate court has authority to administer oaths to parties making applications for marriage licenses, touching the merits of such applications, and perjury may be assigned upon such oaths.
>
> "2. Section 4 of article 15 of the state constitution, which provides that 'no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector,' does not apply to the office of deputy clerk of the probate court, and therefore a female is eligible to that office, and may lawfully discharge its duties."

Since the supreme court of this state has given it as its opinion that the right of a woman to administer an oath would not of itself constitute the position that she held an office, I am constrained to the opinion that the power of administering oaths by the secretary-treasurer under the bill in question would not be sufficient to constitute such position an office within this state.

I would, therefore, hold:

First. That the position of member of board of state examiners of nurses would be an office and could not, therefore, under the constitutional provision be held by a woman, and

Second. That should it be the intention of the legislature that the secretary-treasurer was not to be appointed from among the members of the board the position of such secretary-treasurer could be held by a woman.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

178.

VILLAGE BOARD OF EDUCATION MAY FILL VACANCY ONLY FOR UNEXPIRED TIME—INCUMBENT HOLDS UNTIL SUCCESSOR ELECTED AND QUALIFIED.

Under section 4748, General Code, the vacancy in a board of education may be filled by the remaining members for the unexpired term only. Where, however, provision is not made for the election of a successor at the regular election for such officers, the incumbent will hold over until a successor is elected and qualified.

COLUMBUS, OHIO, April 8, 1913.

HON. C. J. SMITH, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department for opinion a letter received by you from one John Neimeyer, of Trenton, Ohio, dated February 26th, wherein Mr. Niemeyer says that he is writing you in regard to the Trenton school board and requests you to refer the matter to me as to whether or not the actions of the members of the board of education of said school board are legal. He states:

> "The terms of O. S., J. B. and G A. expired January 1, 1912. About

October, 1911, one would resign and at next meeting the others would reappoint him for a long term. Kept this proceeding up until all were appointed to a long term."

Upon further inquiry from Mr. Neimeyer of the facts he, under date of March 24th, states as follows:

"Following are the facts regarding the school board of the village of Trenton, Butler county, Ohio. On the first day of January, 1912, the terms of O. S., Pres. and J. B., Clerk, expired as members of the board—about six weeks or two months prior to that date they resigned and immediately had themselves appointed for the long term. (See State Examiner Fowler's report of February, 1912). Was this action legal?"

Upon examination of the report made by J. C. Fowler, state examiner on the Trenton village school district, filed in the office of the auditor of state May 3, 1912, we find the following:

"Fifth. In regard to members of the board perpetuating themselves in office, we note the following:

George Alspach's term would expire December 31, 1911. He resigned November 20, 1911, and eight days thereafter he was appointed to fill a four-year vacancy.

"J. K. Brill's term would expire December 31, 1911. He resigned May 3, 1911, and seven days thereafter he was appointed to fill a vacancy of two and one-half years.

"C. O. Smith's term would expire December 31, 1911. He resigned June 6, 1911, and thirteen days thereafter he was appointed to fill a vacancy of two and one-half years.

"Messrs. Brill and Schmidt being present testified under oath that they did not resign and then accept appointment for the purpose of extending their time in office."

The question, therefore, arises as to whether or not it is legal for members of a village board of education to resign prior to the expiration of the term for which they were elected and be re-elected by the board of education to fill the vacancies created by their own resignation for a term extending beyond the expiration of the original term for which they were elected.

I am not advised as to when the Trenton village school district was created, but assume that it was so created prior to the election of the members referred to in the report by Examiner Fowler, and that when the three members referred to in such report were elected they were each elected for a period of four years.

Section 4708, General Code, provides:

"In village school districts, the board of education shall consist of five members elected at large at the same time as municipal officers are elected and in the same manner."

Section 4745, General Code, provides:

"The terms of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office four years and until his successor is elected and qualified."

Section 4748, General Code, provides in part:

> "A vacancy in any board of education may be caused by * * * resignation * * *. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

It would appear, therefore, by virtue of section 4748, General Code, that a vacancy had been caused by the resignation of the members in question. The board was therefore authorized by a majority vote to fill such vacancy for the *unexpired* term. The filling of the vacancy for a period longer than the unexpired term was beyond the authority of the board to do, consequently, it must be considered that the persons appointed although they are the same parties who had formerly resigned, were appointed only for the unexpired term. Had at the election held in November, 1911, any persons been voted for as members of the school board such persons so elected would have assumed their office on the first Monday in January, 1912, in accordance with section 4745, General Code. If there were no such members elected in November, 1911, to succeed the members whose terms would expire on the day preceding the first Monday in January, 1912, the members then holding would continue to hold for the reason that no successor was elected and qualified. Such members would, therefore, be entitled to hold until the members of the school board elected in November, 1913, had qualified and assumed their office on the first Monday in January, 1914.

I am, therefore, of the opinion that while the election by the school board of members who resigned to fill the vacancies caused by their own resignations for a term beyond the expiration of the term for which they were originally elected was illegal, yet since as I assume no members of the school board were elected at the election in November, 1911, they would, under the provisions of section 4745, General Code, continue to hold their office until their respective successors were elected and qualified and assumed their office on the first Monday in January, 1914.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

183.

ROADS AND HIGHWAYS—CONSTITUTIONAL LAW—LAW PROVIDING FOR DISTRIBUTION OF AUTOMOBILE REGISTRATION FEES EQUALLY AMONG COUNTIES.

Although as a general rule of law, the imposition of taxes must be confined to the taxing district receiving the benefit of the levy, yet, the improvement, maintenance and repair of public highways being very largely for a state purpose, and intended for a prominent public use, the legislature is vested with a wide discretion as to the method of distributing public revenues for such purpose.

The law, therefore, providing that the revenues derived from the registration of automobiles shall be distributed equally among the counties of the state for the purpose of maintaining, protecting and policing and patroling public roads of the county would not seem to be unconstitutional.

COLUMBUS, OHIO, April 18, 1913.

HON. IRVIN F. SNYDER, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your request for an opinion as to the constitutionality of

section 6309 of the General Code, as amended yesterday on the floor of the house, being a section of the proposed motor vehicle license law. The amended section is as follows:

> "The revenues derived by registration fees provided for in this chapter shall be applied by the secretary of state toward defraying the expenses incident to carrying out and enforcing the provisions of this chapter, and any surplus thereof shall be paid by him *quarterly,* into the *different county treasuries of the state through the proper county auditors, making an equal division thereof among all the counties of the state.* All such money coming into the *county* treasury shall be a separate fund for the repair, maintenance, protection, policing and patroling of the *improved* public roads and highways *or mail routes of such county, and be expended under the direction of the county commissioners of such county."*

Section 6309 of the General Code, was as follows:

> "The revenues derived by registration fees provided for in this chapter shall be applied by the secretary of state toward defraying the expenses incident to carrying out and enforcing the provisions of this chapter, and any surplus thereof shall be paid by him, monthly, into the state treasury. All such moneys coming into the state treasury shall be a separate fund for the improvement, maintenance and repair of the public roads and highways of this state, *and be apportioned as the state highway fund is apportioned.*

In order to understand the meaning of the italicized portion of original section 6309, it is necessary to refer to section 1222 of the General Code, being section 48 of the highway department law, passed by the last session of the general assembly. I quote this section:

> "Moneys appropriated by the state for the purpose of carrying out the provisions of this chapter, shall not be used in any manner or for any purpose, except as provided herein. Moneys so appropriated shall be *equally* divided among the counties of the state, except such moneys as are appropriated for the use of the department and for surveys, plans and estimates of inter-county highways."

In connection with this section, section 1218, which applies to the repair of improved roads, should be read. I will not quote this section, but content myself with stating that in order to qualify for an apportionment, under favor of section 1222, of repair funds the county commissioners of any county would be required to make a levy equal to the amount apportioned. Otherwise, under another section of the highway department law, the county would lose its apportionment and the amount thereof would be distributed equally among the other counties of the state.

Of course, it was necessary to appropriate the proceeds of the license fees paid into the state treasury under original section 6309, and this was customarily done from session to session by appropriating the receipts and balances of the state highway department under the automobile license act.

I have considered but one constitutional question, which I gather from your statement to be the one which is in the mind of the committee. That question is as follows:

"Is the proposed section unconstitutional because of the *equal* distribution of the funds to the counties?"

I have not chosen to give fundamental consideration to this question because, to my mind, the proposed section would be no more unconstitutional, so to speak, in this respect than original section 6309, read in connection with the other sections above quoted, was. Both the sections provide for an equal distribution of automobile license moneys to the counties and for the making of the repairs, i. e., expenditure of money through the agency of the county commissioners. To be sure, the new section refers to "protection, policing and patroling," which the county commissioners at the present time, under existing laws, have no authority to do. For that matter, however, there is no state agency really which has been created for this purpose by legislation so far enacted. So that these words, being of no present application, cannot affect the question either way.

Without further discussion, I may say that I am of the opinion that the mere fact that the state-raised revenue derived under the proposed law will be *equally* distributed among the counties would not make the law unconstitutional; and at the very least would not subject it to this criticism in any higher degree than the present automobile license law might be subjected to the same criticism.

On the general proposition upon which a constitutional criticism of this sort, if made, would be based, and its application to the subject matter of highways and roads, see generally Cooley on Taxation, Volume 1, page 212, et seq. The principle here laid down is that, whereas there is a general rule to the effect that the purpose for which taxes are levied must pertain to the district in which they are levied, yet, the improvement, maintenance and repair of public highways and roads is a matter having such a variety of interest, both local and state-wide, that the legislative authority is vested with wide discretion in determining the manner of the distribution of the proceeds of taxes levied for such purposes.

Other constitutional questions might possibly arise concerning this section, but in the very limited time which I have had for the consideration of the matter I have not been able to imagine any other questions of this sort.

Very truly yours,
TIMOTHY S. HOGAN.
Attorney General.

184.

MUNICIPAL ELECTIONS ARE GENERAL AND REGULAR ELECTIONS FOR PURPOSE OF VOTING ON INITIATIVE AND REFERENDUM PETITIONS.

Inasmuch as municipal and township elections are held at specific periods generally throughout the state, they are to be deemed regular and general elections within the meaning of article 2, section 10 of the constitution, providing for the submission to the electors of the state of laws with reference to which referendum petitions have been filed.

COLUMBUS, OHIO, April 4, 1913.

HON. MAURICE BERNSTEIN, *Member Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Under date of February 6th, you inquire as follows:

"I have had several inquiries as to when the next general election in Ohio will take place. As you know, the law provides petitions on laws

passed by this assembly must be submitted to the voters at the next general election. The question is as to whether the municipal election of 1913 will be a general election, or whether said referendum petitions must wait until the state election, which occurs in 1914?"

The question as to the meaning of the words "next general election" which you raise, is, we take it, under article II, section 10 of the constitution as recently amended wherein it states that "The second aforestated power reserved by the people is designated the referendum" and provides that when a petition signed by six per centum of the electors of the state shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state the said secretary of state shall submit to the electors of the state for their approval or rejection of such law at the *next succeeding regular or general election in any year* occurring subsequent to sixty days after the filing of such petition. It is to be noted that the election described in section 10 of article II is the next succeeding regular or general election in any year. The word "general" is used in contradistinction to "local" and the word "regular" is used in contradistinction to "special." The election which will take place in 1913 while it is simply an election for municipal and township officers is nevertheless a regular election throughout the state and is also generally held throughout the state, in that the election is held on the same day in each political subdivision of the state. I am therefore of the opinion that the municipal and township elections to be held on the first Tuesday after the first Monday in November, 1913, will be within the provisions of said article II, section 10, in that it will be a *regular* or *general election,* and the secretary of state should submit to the electors of the state for their approval or rejection the law, section or item in reference to which a referendum petition has been filed at such November (1913) lection providing such petition is filed within the time specified in such section.

Yours truly.
TIMOTHY S. HOGAN,
Attorney General.

185.

POWER OF MAYOR TO CLOSE SALOONS IN CASE OF A FLOOD EMERGENCY.

Under section 4261, *General Code, a mayor is empowered to suspend business in all of the saloons of a municipality in case of tumult, riot, mob or considered action with intent to commit a felony. This section would authorize the closing of saloons in a municipality by a mayor in the event of a flood to prevent the action of organized bands of looters and disturbers but such action must extend equally to all parties engaged in such business within the municipal corporation.*

COLUMBUS, OHIO, April 15, 1913.

HON. JACOB J. WISE, *Member Ohio Senate, Columbus, Ohio.*

DEAR SIR:—You request my opinion upon the following question:

"May a mayor close all the saloons of a city in case of a flood emergency?"

The only section which I have been able to find in any way applicable to the

question which you ask is section 4261 of the General Code, which is in full as follows:

> "When in any municipal corporation there is, in the opinion of the mayor thereof, a tumult, riot, mob, or body of men acting together with intent to commit a felony or to do or offer to do violence to persons or property, or by force and violence to wreck property and resist the laws of this state, or there is reasonable apprehension thereof, he shall issue his proclamation requiring the keepers of all saloons, or places where intoxicating liquors are sold at retail as a beverage, to close such places of business and to keep them closed during the continuance of such above described disturbance, when the mayor shall withdraw his proclamation."

The mere occurrence of a flood and consequent damage to property and incidental disorder does not of itself authorize the mayor to issue such a proclamation as is referred to in this section. The situation must present, at the very least, cause for reasonable apprehension of the gathering of a body of men acting together with intent to commit felony or to do violence to persons or property, or by force to wreck property and resist the laws of the state. I can conceive of such a situation arising out of a disaster like that which has overwhelmed a great number of localities in this state within the past few weeks. The existence of organized bands of looters would be sufficient cause in my judgment for the exercise of the power.

It is to be observed that the mayor cannot close some of the saloons in a municipal corporation under this section without closing all of them. I am informed by the public press that in this city the mayor attempted to exercise his power in this way, and that it was ultimately agreed that his act was invalid.

I should be of the opinion that in order that the mayor might lawfully exercise his proclamation under the above quoted section, the emergency must effect the municipality as a whole, and the order must be directed to all of the saloons therein.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

201.

SNYDER ACT—LIMITATIONS UPON AMOUNT OF BOND ISSUE—TIME LIMIT—PROCEDURE.

The contemplated Snyder act, being house bill No. 640, whilst placing a limitation upon the amount of notes and certificates of indebtedness which may be issued by a municipality thereunder, places no limitations whatever upon the amount of bonds which may be issued. The only limitation upon bonds issued under said act is the limitation upon the amount of bonds which may be retired in any one year. Said act provides an eighteen month limitation upon the running of notes, but places no time limit upon the running of bonds.

The procedure of the issuance of bonds therein provided for is that outlined in the general law respecting the issuance of bonds, except that their issuance may be exempted from the initiative and referendum requirements by reciting facts respecting an emergency; and that publication and notice must be made once a week for two consecutive weeks by a newspaper published in the county and also that said bonds need not be offered to the sinking fund trustees for the commissioners or to any other taker and that they also may be sold at popular subscription.

COLUMBUS, OHIO, April 23, 1913.

HON. EARL ERTEL, *Member House of Representatives, Loveland, Ohio.*

DEAR SIR:—I have your request of April 23rd for an opinion as to the construction of the so-called Snyder act, being house bill No. 640, passed at the present session of the general assembly and now in effect. Your questions are as follows:

"1. In what amount can bonds be issued under this act by a municipality?

"2. What is the time limit on the running of said bonds?

"3. Also I would be pleased to have you suggest very briefly the procedure to be followed in issuing such bonds?"

Answering your first question, I am of the opinion that there is no limitation upon the amount of bonds which can be issued by a municipality under favor of this act. The act, in section 3 thereof, which I do not quote, provides for the issuance of two distinct kinds of evidences of indebtedness for the purposes mentioned therein, viz. notes, i. e., certificates of indebtedness and bonds. The distinction between these two forms of securities is too well known to require elaborate discussion.

Section 4 of the act does impose limitation, both as to amount and as to the time for which they may run, upon *notes or certificates* of indebtedness which may be issued. This section, however, has no relation whatever to *bonds.*

Section 5 of the act relates to this form of security, and that section contains no limitation whatever upon the amount of bonds which may be issued nor upon the length of time for which they may run, except that there is a limitation upon the amount which may be made payable in any one year. The words "made payable" as therein used are not to be understood as equivalent in meaning to the word "issued." This phrase means that in issuing bonds the authorities issuing them must not provide that the final redemption of more than the amount therein referred to shall take place in any one year. If the amount (an amount equal to one-tenth of one per cent. of the 1912 duplicate of the taxing district) is insufficient for the needs of the borrowing corporation or sub-division, the only requirement is that

the bonds be issued in series, some of them falling due in one year and some in another. The purpose of this limitation is evidently to prevent the corporation or subdivision from paying off its obligations too soon, and thus placing an inordinately great burden upon the taxpayers of any one year.

As to your first question, then, there is no limit upon the amount of bonds which may be issued under this act by a municipality.

As to your second question there is no time limit on the running of such bonds. The eighteen months' limitation to which you refer in your inquiry relates to notes and not to bonds.

The procedure of issuing bonds under this law is as follows:

The resolution or ordinance providing for their issuance may be passed and become effective immediately without publication or suspension for referendum purposes, but must recite the facts respecting the emergency, and otherwise bring the proceedings within the terms of the act. (Section 3.) The bonds may then be sold after publication and notice once a week for two consecutive weeks in one newspaper published and of general circulation in any county in which a part of the municipality is located. On the expiration of the two weeks' period they may be sold directly to bidders without necessity of being offered to the sinking fund trustees or the commissioners or to any other taker. If the council wishes they may be sold at popular subscription.

The bonds must be executed as other bonds of the corporation are executed, except that on their face they must recite the purpose for which they are issued, and that they are issued under authority of this act.

In all other respects the provisions of the general law respecting the issuance of bonds apply, and it will be necessary for the municipality to vary its ordinary procedure only in the particulars which I have specified.

When the issuance of the bonds is provided for, and even before their sale, the contracts may be let, the money being regarded as in the appropriate fund for that purpose.

I trust that the information I have given you will be sufficient for your needs.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

212.

TOWNSHIP TRUSTEES—COMPROMISE NOT PERMITTED IN ABSENCE OF DISPUTE OF CLAIM OR VALUABLE CONSIDERATION.

The power conferred by Section 3244, General Code, upon township trustees to sue and be sued, carries with it the authority to compromise a suit. Such compromise, however, may not be entered into without a valuable consideration or unless there exists a bona fide dispute as to the township rights with reference to the claim.

COLUMBUS, OHIO, April 1, 1913.

HON. C. P. VENUS, *Member of the House of Representatives, Columbus, Ohio.*

DEAR SIR:—Under date of March 19th you request my opinion as follows:

"The Ohio Trust Company of Huron county, Ohio, was depository for the funds of Norwalk, township, said county, and while such depository said trust company became insolvent, and the township had on deposit $6,000.00.

"The township sued the sureties on the bond of said depository, and recovered a judgment which carried with it interest due the township on said deposit.

"I would be pleased to have your legal opinion as to the authority of the township officers to compromise said case now pending against the sureties of said trust company as such depository, by the payment of the principal without any interest."

Section 3244 of the General Code is as follows:

"Each civil township lawfully laid off and designated, is declared to be, and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It shall be capable of suing and being sued, pleading and being impleaded, and of receiving and holding real estate by devise or deed, or personal property for the benefit of the township for any useful purpose. The trustees of the township shall hold such property in trust for the township for the purpose specified in the devise, bequest, or deed of gift. They may also receive any conveyance of real estate to the township when necessary to secure or pay a debt or claim due the township, and may sell and convey real estate so received, and the proceeds of such sale shall be applied to the fund to which such debt or claim belonged."

It is well settled that authority imparted to a public officer to sue and be sued implies the power to compromise an action brought by or against the official. *Compromise* is defined in 8 Cyc., 501, as follows:

"A compromise is an agreement between two or more parties as a settlement of matters in dispute."

On page 504 of the same authority it is said:

"A compromise and settlement must, like all other contracts, be supported by a sufficient consideration or it cannot be enforced."

And on page 505 it is said:

"The rule is well settled that an agreement of compromise is supported by a sufficient consideration where it is in settlement of a claim which is unliquidated, where it is in settlement of a claim which is disputed, or where it is in settlement of a claim which is doubtful."

On page 509 it is stated:

"The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether the matter in dispute was really doubtful, but whether or not the parties *bona fide* considered it so, and that the compromise of a disputed claim made *bona fide* is upon a sufficient consideration, without regard as to whether the claim be in suit or not."

From your statement of the facts, it is not clear that the matter of claim against the surety is really in dispute. You do state that the case is pending, and the assumption would seem to be justified that an appeal had been made. The question,

therefore, whether or not the township trustees are empowered to compromise the claim by the remission of the interest due in accordance with the judgment recovered is one of fact. If there in reality exists a bona fide dispute as to the right to recover, or if some other substantial consideration for the release of interest exists, the claim readily might be settled by the acceptance of the principal without the interest. If such is not the case, however, and it is clear in the minds of all the parties that the township is legally entitled to the judgment with interest, no compromise can be made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

213.

BANKS AND BANKING—BANK AND TRUST COMPANIES MAY NOT ENGAGE IN REAL ESTATE BROKERAGE BUSINESS.

The purposes for which savings banks and trust companies may hold real estate, by virtue of sections 9774 and 9762, General Code, are enumerated in section 9753, General Code.

The power to purchase leases and hold real estate for the mere purpose of conducting a real estate or brokerage business is not therein included and is, therefore, not possessed by such institutions.

COLUMBUS, OHIO, April 24, 1913.

HON. W. A. GREENLUND, *Member Ohio Senate, Columbus, Ohio.*

DEAR SIR:—On March 3, 1913, you made the following request for my opinion:

> "Will you please advise me whether or not in your opinion savings banks and trust companies have the right under their charters to engage actively in the real estate brokerage business."

The following sections of the General Code govern savings banks and trust companies in the matter of their dealing in real estate:

The provision as to trust companies, is section 9774, which is as follows:

> "A trust company may purchase, lease, hold and convey real estate, exclusive of trust property, for the purpose and in the manner provided by this chapter as to commercial banks, and subject to like restrictions."

The provision as to savings banks is section 9762, which is as follows:

> "A savings bank may purchase, lease, hold and convey real estate for the purposes and in the manner hereinbefore provided as to commercial banks, and subject to like restrictions and limitations."

You will note that the requirement as to trust companies and also as to savings banks gives authority to these companies to purchase, lease, hold and convey real estate only in the manner provided for commercial banks and subject to the same restrictions. Therefore, the provision as to commercial banks must be read as if

it applied directly to trust companies and savings banks. This provision governing the dealing, of commercial banks, in real estate is section 9753, which is as follows:

"A commercial bank may purchase, lease, hold and convey real estate only as follows:

"a. Real estate whereon is erected or may be erected a building or buildings useful for the convenient transaction of its business, and from portions of which, not required for its use, a revenue may be derived; but the cost of such building or buildings and the real estate whereon they are erected in no case shall exceed sixty per cent. of its paid-in capital and surplus;

"b. Such as is mortgaged or conveyed to it in good faith by way of security for loans made by or money due to such corporation;

"c. Such as has been purchased by it at sales upon foreclosure of mortgages owned by it, or on judgments or decrees obtained or rendered for debts due to it, or in settlements effected to secure such debts. All real property referred to in this paragraph shall be sold by such corporation within five years after it is vested therein, unless upon application by the board of directors, the superintendent of banks extends the time within which such sales shall be made;

"d. Such corporation also shall have power by lease to acquire a suitable building for the convenient transaction of its business, and from portions of which, not needed for its own use, a revenue may be derived."

Therefore, savings banks and trust companies can only purchase, lease and hold real estate as provided in the above section, and they would be without authority to engage actively in the real estate or brokerage business, that is buying and selling real estate for profit.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

230.

ROADS AND HIGHWAYS—POWERS OF COUNTY COMMISSIONERS IN APPLICATION FOR AND RECEIPT OF STATE AID BENEFIT FOR YEARS 1912 AND 1913—EFFECT OF FLOOD DESTRUCTION.

Under section 1185, *General Code, when the county commissioners have not applied for state aid funds for* 1912, *prior to May* 1*st of that year and the township trustees have not made such application prior to April* 1*st, the state highway commissioners may expend the allowance for the construction, maintenance and improvement of inter-county highways within the county, except that no part of the* $444,000 *appropriated by the legislature may be used for repairs unless there are at least two hundred miles of improved road in the county.*

Under section 1225, *General Code, only such highways may be kept in repair by the use of state aid money as were improved or constructed under the state aid act and such inter-county highways in which no state aid money has been expended, where they have been permanently improved with construction equal to that specified by the state highway commission for the material used, providing such roads have been taken over by the state on application of the county commissioners.*

By applying prior to May 1, 1913, *the county may receive its share of the* 1913 *state aid for repairs, if the commissioners appropriate an amount at least double that received from the state and the trustees of the township or township in which the roads to be repaired are situated appropriate an amount equal to that received.*

COLUMBUS, OHIO, April 18, 1913.

HON. R. B. CAMERON, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion upon the following statement of facts:

> "Great damage was done by the recent floods to the highways and bridges in Defiance county and by reason thereof, it will be necessary for the county commissioners to issue bonds in the sum of $100,000.00 approximately, to build and repair bridges. On account of the additional burden that will thereby be placed upon the taxpayers of the county, it is desired to use the state aid money allotted to said county for the years 1912 and 1913, for the purpose of repairing the roads which have been damaged as aforesaid, without requiring the county to expend an equal amount.
>
> "The county auditor states in a letter addressed to the governor, which is before me, that the amount now in the road fund of the county is $8,000.00, and that about $6,000.00 will come into said fund from the June collection of taxes.
>
> "In addition to the foregoing facts, I have been informed by the state highway commissioner that no application was made by the county commissioners or by the trustees of any township in Defiance county, for the state aid money appropriated to said county for the year 1912, and that there is in such fund, the sum of $7,500.00."

I respectfully direct your attention to section 1185 of the General Code, which provides:

> "The commissioners of a county may make application to the state

highway commissioner for aid from an appropriation by the state for the construction, improvement, maintenance, or repair of highways. Such application shall be filed prior to May 1 of the year in which such appropriation may be made or become available. If the county commissioners have not made use of the apportionment to such county, in the year in which it is available, then the township trustees may make application prior to the first day of April of the succeeding year. And if the township trustees do not make use of the appropriation prior to the first day of July next succeeding, then the state highway commissioner shall have full power and authority to enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof of said county, either by contract, force account; or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof from the said apportionment of the appropriation to said county so unused as aforesaid. Any part of the apportionment to a county remaining unexpended shall remain to the credit of such county and be available for the succeeding year as herein provided."

It was the duty of the county commissioners of Defiance county, under the above quoted statute, to have made application for the 1912 funds, on or before May 1, 1912, and as they failed to do so, the trustees of any township of the county, on or before April 1, 1913, could have applied for and receive said money. Inasmuch as the trustees did not do this, the state highway commissioner has full power to expend the same for the construction, maintenance, improvement or repair of any of the inter-county highways of the county without the contribution of an equal amount by the county, except that no part of the $440,000.00 specifically appropriated by the legislature for 1912 (102 O. L. 401), may be used for repairs unless there are at least two hundred miles of improved road in the county. The consent of the state highway commissioner, however, must be obtained before the 1912 state aid money can be used for repairs.

The use of the 1913 state aid money, for repairs, is governed by section 1225 of the General Code, which provides:

"Highways improved or constructed under the provisions of any act providing for aid by the state shall be kept in repair and maintained by the state highway commissioner. The expense of such repair and maintenance shall be divided and payable twenty-five per cent. thereof by the state, fifty per cent. thereof by the county and twenty-five per cent. thereof by the township or townships. The state's share being payable from moneys appropriated by the general assembly for the purpose; the county and township shares from their respective road or road repair funds.

"It is hereby provided that the state highway commissioner may enter into a contract with an individual, firm or corporation who shall give sufficient surety bond for the faithful performance of this contract, or with the county commissioners of any county, the township trustees of any township in which such state highway is situate, for the repair and maintenance of such highway according to the plans and specifications provided by the state highway commissioner, or for the furnishing of the material or the labor necessary for such repair and maintenance, or the state highway commissioner may furnish the material or labor or both and directly supervise the repair and maintenance from his office, the work being done under any conditions or contract being subject at all times to inspection and supervision of the state highway commissioner. Inter-county high-

ways in which no state aid money has been expended, if permanently improved with construction equal to that specified by the state highway commissioner for the material used, may be taken over by the state on application of the county commissioners and shall henceforth be maintained as prescribed herein for other designated highways. County roads and state roads not taken over by the state shall be maintained by the county, and township roads by the township, the cost of such maintenance being paid from their respective road levies for the purpose."

Under the last quoted section, only such highways may be repaired by the use of state aid money as were (1) "improved or constructed under the provisions of any act providing for aid by the state;" or, (2) "inter-county highways in which no state aid money has been expended, if permanently improved with construction equal to that specified by the state highway commissioner for the material used," providing such roads have been taken over by the state on application of the county commissioners.

On application of the county commissioners made prior to May 1st, the county may receive its share of the 1913 state aid appropriation, for repairs, if the county commissioners appropriate an amount at least double that received from the state, and the trustees of any township or townships in which the roads to be repaired are situated, appropriate an amount equal to that received from the state.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

236.

OFFICES INCOMPATIBLE—MEMBER GENERAL ASSEMBLY AND HOLDER OF CITY OFFICE.

Under article 2, section 4 of the constitution, a member of the general assembly may not during his term, hold a city office and postpone receipt of vouchers therefor until the end of his term, even though holding himself in readiness for service in the general assembly at call.

COLUMBUS, OHIO, May 7, 1913.

HON. CARL D. FRIEBOLIN, *Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 30th, asking my opinion on the following question:

"A member of the general assembly, having served in the regular session of 1911, is elected to a city office the next year, 1912. He receives his vouchers as a member of the legislature of 1912, but does not wish to cash them now, having always held himself in readiness for special session. The question is: Shall he present his vouchers for 1912?"

Section 4 of article 2 of the constitution provides:

"No person holding office under the authority of the United States or any lucrative office under the authority of this state shall be eligible to or

have a seat in the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public or officers of the militia."

This constitutional provision is one of several safeguards thrown about the legislative department to prevent undue influence in performing the solemn and important governmental function of legislating for the state. There is a direct prohibition against a person holding office either under the authority of the United States, or a lucrative office under the authority of this state, being eligible to the general assembly. The section provides certain exceptions to this sweeping prohibition, namely: Township officers, justices of the peace, notaries public and officers of the militia. The holding of any and all other offices renders one both ineligible to, as well as causing the forfeiture of their seat in the general assembly. The well known maxim "Expressio unius exclusio alterius est" applies—a doctrine that has been so frequently interpreted by our supreme court, and the principles so often applied as to not need citation of authority.

So, to my mind, there is no question but that a person holding a city office to which he has been elected is ineligible to, or to have a seat in the general assembly.

Where the holding of two offices at the same time is forbidden by the constitution, an incompatibility is created similar in its effect to that of the common law, and the acceptance of a second office of the kind prohibited *ipso facto* absolutely vacates the first. 77 Va. 503; Dixon vs. People, 17 Ill. 191; Mechem on Public Offices, Sec. 429; People vs. Green, 40 N. Y. 394.

It is my view, therefore, that when the person was elected to and accepted a city office he ceased to be a member of the general assembly, and lost all right to obtain the emoluments attached thereto.

The reasoning apparent from an examination of the case of State, ex rel., vs. Mason, 61 O. S. 62, indicates that had the clerk in that case have been an officer instead of merely an employe the court would have arrived at a different conclusion.

It is my opinion that the party referred to in the question is not entitled to draw pay for any time after he accepted and entered upon the duties of the city office.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

264.

ROAD NOT EXTENDING THROUGH MUNICIPALITY CONTINUOUSLY MAY NOT BE IMPROVED AS A DISTRICT ROAD.

Under section 7108, General Code, a road not extending continuously through the corporate limits of a municipality may not be improved by the commissioners of a road district.

COLUMBUS, OHIO, April 17, 1913.

HON. D. W. CRISWELL, *Member of House of Representatives, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 24th, requesting my opinion upon the following:

"Under the statute providing for special road districts for highway improvement, Franklin, Tuscarawas, Keene and Jackson townships in Coshocton county, Ohio, formed a special district for the purposes set forth in the statute. There has been some eighteen miles of highway improved.

"Within this district are two municipalities, viz.: Coshocton (population 10,000) and Roscoe (population 700).

"These two municipalities, while subject to the tax, cannot, according to the decision of the road commissioners of this district, have any road improvement within their incorporated limits, finding their decision on section 7108 of the General Code.

"Coshocton has not asked, nor does not want any improvements made under the provisions of this law but Roscoe, with a small tax duplicate finds they cannot improve their highways by an additional tax for such a purpose. The several roads leading into Roscoe are improved as shown by the accompanying map.

"The continuity of such improvement is broken at the village limits and thus the traffic through this village to Coshocton, the county seat, is greatly interfered with by bad roads in Roscoe.

"I would be pleased to have your department render an opinion upon the ruling of the road commissioners of this district on section 7108."

Section 7108 of the General Code, provides:

"If a majority of the votes cast at such election is in favor of improvement of the public roads of such district by general taxation, the road commissioners shall each year designate and determine what roads in their opinion should be improved in said year, the extent of such improvement in each township, at what points the improvement shall begin, and how much improvement shall be completed annually. No public highway within the corporate limits of a city or village in such road district shall be improved unless such road extends through such road district continuously."

You will observe that before any roads in a road district can be improved within a municipality, they must extend *through* the district continuously; that is to say, such roads must extend from one side or boundary of the district, to another side or boundary thereof, without interruption or break in their continuity.

I am unable to determine from the plat furnished with your letter, whether the roads sought to be improved within the village of Roscoe come within the requirements of section 7108, as above defined, but unless they do, the funds of the district may not be used to improve them.

The commissioners of the district are in possession of all the facts, and I am not prepared to say, from the information at hand, that their ruling is erroneous.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

351.

STATE SENATOR DOES NOT VACATE OFFICE BY REMOVAL FROM DISTRICT.

Under article 2, section 2 of the constitution, senators are required to have resided in their respective districts and counties one year next preceding their election. Inasmuch, however, as there is no constitutional or statutory provision requiring a state senator to live in such district during his incumbency in office, his removal therefrom, subsequent to his election, will not operate to vacate such office.

COLUMBUS, OHIO, June 11, 1913.

HON. WM. A. WEYGANDT, *State Senator, Ravenna, Ohio.*

DEAR SIR:—Under date of May 26th, you request my opinion as follows:

> "Can a duly elected and qualified senator subsequently reside outside of the senatorial district and hold office legally as state senator?"

In the 29th volume of Cyc., page 1377, the following is said:

> "Residence within the district over which the jurisdiction of the office extends is often also made a necessary qualification by statute. In the absence of such an express provision, however, there would seem to be no reason for holding that residence within the district is necessary to eligibility, provided the other qualifications mentioned in the statute are present. But a provision of statute requiring residence must be observed."

The only Ohio authority on the subject of your question which I have been able to find is section 3, article 2, of the constitution, which is as follows:

> "Senators and representatives shall have resided in their respective counties or districts, one year next preceding their election, unless they shall have been absent on the public business of the United States, or of this state."

So far as I have been able to find, the courts of this state in no way passed upon your question.

The case of People ex rel. vs. Markham, 96, Cal., page 262, however, bears a direct relation to your question. The syllabus of that case is as follows:

> "Constitutional Law—Qualification of State Senator—Change of District After Election—Under section 4 of article 4 of the constitution, providing that 'no person shall be a member of the senate or assembly who has not been a citizen and inhabitant of the state three years, and of the district for which he shall be chosen one year, next before his election,' a citizen and resident of the state for three years who was duly elected state senator at the election held in 1890 for the fortieth district, composed of the counties of San Bernardino and San Diego, and who was at that time a qualified citizen and inhabitant of San Bernardino county, of which he remained a resident, was not deprived of his office because of the redistricting of the state by the legislature in 1891, whereby the county of San Diego alone was made to constitute the fortieth district."

In this case the court distinguishes case of State vs. Cheate, 11 Ohio St., 511, the syllabus of which case is as follows:

> "The legislature may change the boundaries of a county, and when such change places an associate judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the county for which he was appointed, he forfeits his office.
>
> "A person who attempts to exercise the office of associate judge in a county wherein he does not reside, is guilty of intrusion and usurpation.
>
> "The legislature may fill a vacancy that has happened, or that is certain to happen, before the meeting of the next general assembly."

In the later case, however, it was expressly provided in the constitution, section 3, as it existed at that time, that the incumbent of the office in question should during his continuance in office reside in the county for which he was elected.

In the Ohio case the change of boundaries placed the judge in question outside of the district for which he was obliged to act as judge, by virtue of his office. The Ohio case is authority for the proposition that a change in boundary which results in placing an officer outside of his district, is equivalent to a removal from the district by the officer himself.

Granting this principle, the California case may be considered on all fours with the question you present. In that case the constitutional provision required residence in the district for a certain period prior to the election of a senator, but said nothing with relation to his residence within such district after his election, and the court held that change of boundary, leaving the officer's residence outside of his district, did not disqualify him from holding office.

That the matter is one dependent upon constitutional or statutory regulations is apparent from the fact that the legislature, with reference to councilmen, has taken pains to provide that removal from the ward of a city or from a village, shall disqualify. Sections 4207 and 4218, General Code. And also by the fact that the constitution in section 12, of article 4, at the present time, expressly provides that judges of the court of common pleas shall, while in office, reside in the county for which they are elected.

In accordance with the above authorities, therefore, since there is no existing constitutional or statutory provision requiring a senator to reside in his district during his continuance in office, I conclude that a senator may subsequent to his his election reside outside of the senatorial district and still legally hold his office.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

360.

WAGES MUST BE PAID NOT LESS THAN TWICE A MONTH—PAYMENT OF DAILY OR WEEKLY WAGES NOT INTERFERED WITH.

Under the provisions of house bill No. 132, every employer who employes five or more persons regularly must pay them their wages on or before the first day and on or before the fifteenth day of each month.

Payment of daily or weekly wages is not interfered with by the provisions of this act.

COLUMBUS, OHIO, July 9, 1913.

HON. CARL D. FRIEBOLIN, *Member of the 80th General Assembly, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your communication dated June 13, 1913, in which you recite the following statement of facts:

> "The first half of section one (1) of senate bill No. 133, entitled: 'An act to provide for the payment of wages at least twice in each calendar month' (approved April 12, 1913,) provides that employers 'shall on or before the first day of each month pay all their employes engaged in the performance of either manual or clerical labor, the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and shall on or before the fifteenth day of each month pay such employes the wages earned by them during the last half of the preceding calendar month.'
>
> "For illustration say an employer who pays every other week has the following pay days in June and July, namely: June 14th and 28th, July 12th and 26. On each of said pay days he pays for the two weeks preceding the pay day week, which pay day week's wages are held back. For example: on pay day July 12th he will pay wages for the weeks June 23rd to 28th inclusive and June 30th to July 5th, inclusive; holding back July 7th to July 12th, inclusive. On July 26th pay day, he will pay for the weeks July 7th to 12th inclusive and July 14th to 19th, inclusive, holding back July 21st and 26th, inclusive.
>
> "Nevertheless, said employer, as required by said act, would not on or before the 15th day of July pay his employes the wages earned by them during the last half of the preceding calendar month, and likewise on or before the 1st of July would not be paying his employes the wages earned by them during the first half of June."

and you request my opinion as to whether or not such an employer is complying with the provisions of section 1 of senate bill 132, passed March 25, 1913, and approved April 12, 1913.

In reply to your inquiry I desire to say that under the rules of construction in Ohio there can be no question but that the employer paying as cited in your statement of fact would not be complying with the provisions of section 1 of said act. That section provides that every employer who employs five or more regular employes in the state of Ohio,

> "shall on or before the *first day of each month* pay all their employes engaged in the performance of either manual or clerical labor the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and shall *on or before the fifteenth day of each*

month pay such employes the wages earned by them during the last half of the preceding calendar month."

Under that part of section 1 just quoted there can be no question of what the intent of the general assembly was, for it places the first day of each month and the 15th day of each month as mandatory pay days, and specifically sets forth what wages must be paid on each such pay day, and it provides in the latter part of said section as follows:

"Provided nothing herein contained shall be construed to interfere with the daily or weekly payment of wages."

And, while an employer paying in the manner set forth in the illustration in your letter may be doing better for his employe than by strict compliance with the provisions of section 1 of said act, nevertheless such employer would not, in my opinion, be following the provisions of the said act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

377.

POSITION OF TEACHER IN PUBLIC SCHOOL NOT AN OFFICE—MEMBER OF GENERAL ASSEMBLY MAY BE EMPLOYED AS TEACHER IN PUBLIC SCHOOL.

The position of teacher in public schools is not considered a public office, consequently there is no inhibition against a member of the general assembly being employed as a teacher in the public schools.

COLUMBUS, OHIO, July 14, 1913.

HON. GEORGE S. CRAWFORD, *Member House of Representatives, Graysville, Ohio.*

DEAR SIR:—Under date of July 12th you request my opinion whether a member of the general assembly can be employed as teacher of common schools when not engaged in session at Columbus.

Section 4, of article 2 of the constitution provides as follows:

"No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in, the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

The question which arises therefore is whether or not the position of school teacher can be considered as an "office."

Section 4752, General Code, provides in part that:

"Upon a motion to adopt a resolution * * * to employe a * * * teacher * * * the clerk of the board shall publicly call the roll of the members composing the board and enter on the record the names of those voting 'aye' and the names of those voting 'no.'"

It will be seen, therefore, that the legislature considers the position of a teacher as a mere employment by the board of education. Measured by all of the definitions of "office" it is clear that the position of teacher is not an office; consequently there being an inhibition either statutory or constitutional against a member of the general assembly holding a lucrative *employment* such a member can be employed as a teacher of common schools when not engaged in session at Columbus.

This case is clearly distinguishable from the case of State vs. Gard 29 O. C. C. R. 426. In that case it was held that the election of one who is a teacher to the office of councilman of a city would contravene the provisions of section 120 of the Municipal Code (now section 4207, General Code) for the reason that such section 4207 provides in part as follows:

> "Each member of council shall be an elector of the city, shall not hold any other public office or *employment* except that of notary public or member of the state militia, and shall not be interested in any contract with the city."

While the position of teacher is not an office, yet it is a public employment.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

416.

DEPUTY UNITED STATES MARSHAL AN OFFICER OF THE UNITED STATES—MEMBER OF GENERAL ASSEMBLY OF OHIO MAY NOT SERVE AS DEPUTY UNITED STATES MARSHAL.

Since section 4 of article 2 of the constitution of Ohio provides that no person holding an office under the United States shall be eligible to or have a seat in the general assembly, a member of the general assembly cannot serve as deputy United States marshal and retain his seat as a member of the general assembly, as a deputy United States marshal is an office of the United States.

COLUMBUS, OHIO, July 29, 1913.

HON. LAWRENCE BRENNAN, *Member House of Representatives, 2705 East 55th St., Cleveland, Ohio.*

DEAR SIR:—Under date of July 15th you request my opinion as to whether or not you being a duly elected and qualified member of the house of representatives of the general assembly of Ohio may accept an appointment as deputy United States marshal without interfering with your position as such representative, providing you report for duty as representative whenever the legislature convenes.

Section 4 of article 2 of the constitution of Ohio provides:

> "No person *holding office under the authority of the United States,* or any lucrative office under the authority of this state, shall be eligible to, *or have a seat in,* the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

The question, therefore, is whether or not one holding the position of deputy United States marshal is holding an office under the authority of the United States.

The constitution provides that such a person shall not have a *seat in* the general assembly.

Therefore, the acceptance of an office under the authority of the United States by a member of the general assembly would forfeit his rights as a member of the general assembly. While it is true that section 6 of article 2 provides that each house shall be the judge of the qualifications of its members, yet in the case of State ex rel. Leland vs. Mason, 61 O. S. 513 it was held:

> "A member of the general assembly, who has accepted an appointment to a federal judgeship thereby, by force of section 4 of article 2 of the constitution, becomes ineligible to a seat in the general assembly and ceases to be a member of that body, and is not entitled to payment of salary thereafter."

The question, therefore, narrows itself down whether the position of deputy United States marshal is an *office* under the authority of the United States.

Mechem on public offices, section 38, cited with approval in the case of State vs. Meyers, 56 O. S. 340 at page 349 states:

> "Whether deputies appointed by public officers are to be regarded as public officers themselves, depends upon the circumstances and method of their appointments. Where such appointment is provided for by law, and *a fortieri* where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bonds for the performance of their duties, the deputies are usually regarded as public officers. * * * So a deputy marshal is an officer of the United States, and deputy sheriffs are recognized by the statutes of most states as independent public officers. * * *"

The case cited under such section of Mechem in support of the proposition that a deputy United States marshal is an officer is the case of United States vs. Tinklepaugh 3 Blatchford (G. C.) 425. In that case, which was a criminal case the defendant was charged with obstructing, resisting and opposing an officer of the United States in serving or attempting to serve a warrant, and the court on page 429 states as follows:

> "The question, then, is: were Myer and Horton officers of the United States, authorized to serve the warrant? They were deputies of the marshal. It is so charged in the indictment. As such deputies they were authorized to serve the warrant without any special appointment. But it is said that, although they may have been authorized to execute the warrant, they were merely agents or servants of the marshal, and were not, within the meaning of the law, *officers* of the United States. A little consideration of the laws of congress will show that a deputy marshal is an *officer* of the United States, authorized to serve process; and, if he be such officer, so authorized, resistance to him is prohibited by the act of congress in question.
>
> "The marshal has power, as there shall be occasion, to appoint one or more deputies, who are removable from *office* by the judge of the district court or the circuit court sitting in the district, at the pleasure of either. (Act of September 24, 1789, I. U. S. Stat. at Large 87, section 27.) If a deputy marshal can be removed from *office*, he is an *officer* before he is so removed, for, he cannot be removed from *office* unless he is an *officer;* and as he has power to serve process he is an *officer* of the United States em-

powered to serve process. Upon the death of the marshal, his deputies continue in *office,* unless otherwise specially removed, until another marshal is appointed and sworn. (Act of September 24, 1789, I. U. S. Stat. at Large 87, section 28.) Every marshal or his deputy, when removed from *office,* has power, notwithstanding his removal, to execute all such precepts as are in his hands at the time of such removal. Id. 88, section 28.) Marshals and their deputies have the same powers, in executing the laws of the United States, that sheriffs and their deputies in the several states have, in executing the laws of the several states. (Act of February 28, 1795, section 1 U. S. Stat. at Large, 425.) When a witness is material on the trial of a criminal case, a judge is authorized to issue a warrant, directed to the marshal or other *officer* authorized to execute criminal and civil process, to arrest such witness and carry him before such judge. (Act of August 8, 1846, section 7, 9 U. S. Stat. at Large 74.) These several laws show that deputy marshals are *officers* of the United States, authorized to serve process."

The United States court having held that a United States deputy marshal is an officer of the United States I am of the opinion that should you accept a United States marshalship you would under the case of State ex rel. Leland vs. Mason *supra* cease to be a member of the general assembly and would not be entitled to payment of salary thereafter.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

558.

BY FORCE OF SECTION 16 ARTICLE 2 OF THE CONSTITUTION AN ACT OF THE LEGISLATURE IN CONFORMITY WITH THIS PROVISION PURPORTING TO AMEND PRIOR STATUTES HAS THE FORCE OF A NEW ENACTMENT.

1. *By force of section* 16 *of article* 2 *of the state constitution an act of the legislature in conformity with this provision purporting to amend prior statutes has the force and effect of a new enactment, and is effective as law although the statutes it purports to amend are repealed by an earlier act passed in pari materia with it.*

2. *The reference to the "state board of agriculture" in the act regulating the sale of feed stuffs (H. B.* 393; 103 *O. L.* 515*) is a mistake that may be corrected by construction by reading therein instead the "agricultural commission" the board intended by the act. As thus corrected, this act as the later enactment is effective and repealed by implication sections* 64 *to* 69 *inclusive and sections* 71 *and* 72 *of senate bill* 178 *as enacted* (103 *O. L.* 318, 319) *relating to the same subject matter.*

COLUMBUS, OHIO, October 14, 1913.

HON. STEPHEN M. YOUNG, *Member House of Representatives, Cleveland, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of June 10, 1913, in which you call my attention to apparent conflict in certain provisions of senate bill 178 (103 O. L. 304) with those of house bill 393 (103 O. L. 515).

More specifically the discrepancy in these laws, as appointed by you, arises

from the fact that senate bill 178 as enacted, by sections 64 to 72, inclusive, thereof, makes certain provisions regulating the sale of feed stuffs, and by section 124 thereof, repeals sections 1129 to 1138, inclusive, of the General Code, relating to the same subject matter, while house bill 393 as enacted amends sections 1129 to 1134 inclusive, and sections 1136, 1137 and 1138 of the General Code, and by the amendment thereof makes provisions with reference to the subject matter of the act, to wit, the sale of feed stuffs, in some respects materially different from those made by the sections of senate bill 178 relating to the same subject matter. In view of this apparent conflict you ask my opinion as to the effect to be given to these enactments in question. More particularly, you inquire, first, whether it was competent for the legislature in the enactment of house bill 393 to amend the sections of the General Code which had been repealed by senate bill 178; second, whether senate bill 178 as enacted, will be rendered nugatory in part by the enactment of house bill 393; third, whether effect must be given to both sections 66 of the senate bill and 1131 General Code of the house bill requiring a person engaged in the sale of feed stuffs to obtain a license from the agricultural commission, and the state board of agriculture, respectively.

Briefly stated, the history of these two enactments is as follows:

Senate bill 178 was passed by the senate March 18, 1913, and by the house, with certain amendments thereto, on April 15, 1913. On the same day the house amendments were concurred in by the senate. The bill as enacted was signed by the presiding officers of the senate and house on April 28, approved by the governor May 3, and deposited in the office of the secretary of state on May 7. House bill 393 was passed by the house March 19, 1913, and by the senate with certain amendments thereto, on April 11. These amendments were concurred in by the house on April 15, and the bill as enacted signed by the presiding officers of the house and senate on April 28, and approved by the governor May 7. The law as enacted was filed with the secretary of state on May 8.

Senate bill 178 as enacted (103 O. L., 304) is an act creating the agricultural commission of Ohio and prescribing its organization, power and duties. This act confers on the agricultural commission certain powers and duties previously conferred upon and exercised by other officers and boards, including the state board of agriculture. Prior to the act in question, just noted, the power and duty of enforcing the statutory law with reference to the sale of feed stuffs (sections 1129 to 1138 G. C.) was vested in the state board of agriculture. By section 11 of the act just noted it is provided that on and after the fifteenth day of July, 1913, this board, among others, should have no further legal existence; and further by this act, the sections of the General Code creating this board and prescribing its regulations, powers and duties, were expressly repealed. Now sections 64 to 72 of this act, inclusive, make certain provisions as to the sale of feed stuffs, and certain of these sections, to wit, sections 65, 66 and 72, confer powers and impose duties on the agricultural commission with reference to the matter of the sale of feed stuffs. House bill 393 as enacted (103 O. L. 515) by sections 1129 to 1134 inclusive, and sections 1136, 1137 and 1138 G. C., as therein amended, and by section 1136-*a*, G. C., as therein enacted, likewise makes certain provisions regulating the sale of feed stuffs, and certain sections of the act, to wit, sections 1130, 1131, 1133, 1137 and 1138, confer certain powers and impose certain duties upon the state board of agriculture.

Aside from the sections of the respective acts in question conferring powers and imposing duties upon the agricultural commission and the state board of agriculture, respectively, it is noted that the provisions of senate bill 178 regulating the sale of feed stuffs, correspond quite closely, as to subject matter, with the provisions of house bill 393. Your inquiry does not invite any discussion by me as to which

provisions in the sections above noted in these respective enactments are in harmony, or as to which are in conflict and in the view I take of the questions presented, such discussion is not necessary.

It is clear that the provisions of house bill 393, insofar as they purport to confer power and duties on and with reference to the state board of agriculture are wholly ineffectual. With this exception, however, this act (103 O. L. 515) must be given effect as the law on the subject matter, to wit, the sale of feed stuffs. This latter conclusion follows from the fact that this act covers the whole subject matter and purports to revise the statutory law pertaining thereto. In the case of Goff vs. Gates 87 O. S. 142, 149 the court says:

> "It is a well known rule of construction that where a statute purports to revise the whole subject matter of a former act and thereby evidences the fact that it is intended as a substitute for the former, although it contains no express words to that effect it operates as a repeal of the former law."

On a consideration of both of these acts in question, I am of the opinion that it was the legislative intention to confer all power, duties and authority with reference to the sale of feed stuffs on the agricultural commission of Ohio provided for by the senate bill. This follows not only from the fact that the state board of agriculture has been abolished but also from the consideration that by section 11 of the senate bill it is expressly provided that the agricultural commission shall succeed to and be possessed of the rights, authority and powers of the state board of agriculture. And it seems quite clear that insofar as the state board of agriculture is referred to in house bill 393 it is the agricultural commission which is intended. The reference therein to the state board of agriculture is in legal intendment a mistake or misnomer to be corrected by construction. In the case of State ex rel. vs. Archibald 52 O. S. 9, the court says:

> "That courts have power to correct errors and mistakes in statutes, cannot be doubted; but such errors and mistakes must be manifest beyond doubt, either on the face of the act or when read in connection with other statutes in *pari materia*. When it thus appears beyond doubt that a statute, when read literally as printed, is impossible of execution, or will defeat the plain object of its enactment, or is senseless, or leads to absurd results or consequences, a court is authorized to regard such defects as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake, by carrying out the clear purpose and manifest intention of the legislature."

In view of the fact that the state board of agriculture has been abolished, the provisions of house bill 393, with reference to the state board of agriculture are senseless and absurd, and impossible of execution; while on the other hand it is clear from the provisions of the senate bill as enacted in *pari materia* with the house bill as enacted that it is the legislative intent to invest the agricultural commission with the powers and duties incident to the enforcement of the law as to the sale of feed stuffs. I am of the opinion therefore that the words "agricultural commission" should by construction be read into house bill 393, instead of the words "state board of agriculture" and that so read effect is to be given to the provisions of the house bill as the effective law on the subject.

It follows that a person engaged in the sale of feed stuffs is required to obtain but one license, and that from the agricultural commission, for which he is required to pay the sum of twenty-five dollars and no more.

I note your query as to whether it was competent for the legislature in the enactment of house bill 393 to amend sections of the General Code which had been repealed by the enactment of senate bill 178, I do not think that the situation presented any difficulty.

By force of constitutional provision (section 16 article 2) the act of the legislature in passing house bill 393, had the force and effect of a new enactment (15 O. S. 573, 602) it follows that the act (103 O. L. 515) is valid and effective notwithstanding the sections of the General Code it purports to amend were repealed by the senate bill as enacted.

Attorney General vs. Stryker 141 Mich., 437.

Golonbieski vs. State 101 Wis. 333.

In conclusion I note that the subject matter of section 70 of the senate bill to wit: feed stuff adulterants is not covered by any corresponding section or provision in the house bill, and of course, the provisions of said section 70 is the effective law on the matters covered by it. As to the other sections of the senate bill covering the subject of feed stuffs it will be noticed that, save that the words "agricultural commission" are used instead of the words "state board of agriculture," their language is identical with the corresponding sections of the General Code which the house bill purports to amend, and as sections of the house bill cover completely the subject matter in the corresponding sections of the senate bill and are evidently intended as substitutes for corresponding sections of previous legislation, it follows that the sections of the house bill stand as the effective law on the particular subjects covered by them and the corresponding sections of the senate bill are repealed by implication.

Thorniley vs. 81 O. S. 108, 118.

Goff vs. Gates, supra.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

580.

THE PRACTICE OF EMPLOYES SIGNING "PAYMASTERS' ORDERS" DOES NOT VIOLATE THE PROVISION OF 103 OHIO LAWS 154, AN ACT PROVIDING FOR THE PAYMENT OF WAGES TWICE A MONTH AND PROVIDING THAT NO ASSIGNMENT OF FUTURE WAGES SHALL BE VALID.

The practice represented by employes signing "paymasters' orders" directing their employers to apply a part of their earnings to the payment of the premium on their insurance is not avoided by the provisions of 103 *Ohio Laws, page* 154, *an act to provide the payment of wages twice a month and also providing that no assignment of future wages shall be valid.*

COLUMBUS, OHIO, November 5, 1913.

HON. HERMAN FELLINGER, *Member House of Representatives, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 5th, requesting my opinion upon the effect, if any, of an act entitled, "To provide for the payment of wages at least twice in each calendar month" (103 O. L. 154), upon the use of what is commonly called paymasters' orders for the payment of insurance premiums out of periodical wages.

You enclose for my examination, in connection with this question form No. 1603 of the Standard Accident Insurance Co., and forms Nos. 968, 2339 and 2489 of the Continental Casualty Co.

The act in question, in so far as it applies to the subject at hand, provides as follows:

"No assignment of future wages * * * shall be valid."

Form No. 1603 of the Standard Accident Insurance Company contains the following order, directed to the paymaster:

"Agreement for $_____ H. O. No. _____
"Acc. Pol. No. _____ Sick Pol. No. _____
"To. _____ _____

"For valuable consideration, I have agreed to pay to the Standard Accident Insurance Company, of Detroit, Michigan, the amount of money herein stated, from my wages earned during the several periods respectively specified, and to leave the amount thereof with you, to be transmitted to the Standard Accident Insurance Company, or its duly authorized agents, and to that end, I hereby request you to make such payments for me, and in my behalf, $_____ from wages earned in the month of _____ 19____ * * *

"These payments cover the premiums on a policy issued to me by said Standard Accident Insurance Company, bearing even number and date herewith; the first payment applying on the first insurance period of two months from date hereof, the second payment to the second insurance period of two months more; the third payment to the third insurance period of three months more; and the fourth payment to the fourth insurance period of five months more. * * *"

Form No. 968 of the Continental Casualty Company provides as follows:

"Paymaster's order for $_____ No. _____
"To the paymaster of _____.

"Please pay for me to the Continental Casualty Company the sum of _____ dollars and charge the same against my pay account for services rendered or to be rendered by me.

"This order is given to provide for the payment of premium, on policy of insurance for which I have this day made application, and you are authorized and requested to pay the said sum in installments from my wages as follows:

"$_____ from my wages for month of _____ 19____ * * *"

Form No. 2239 of the Continental Casualty Company contains the following provision:

"Order for $_____ on paymaster of _____ No._____.

"Please pay for me to the Continental Casualty Company the sum of _____ dollars and charge the same against my pay account for services rendered or to be rendered by me.

"This order is given to provide for the payment of premium on a policy of insurance for which I have this day made application, and you are authorized and requested to pay the said sum in installments as follows:

"First installment of $_____ to be paid from my wages for month of _____ 19____. * * *"

Form No. 2489 of the Continental Casualty Company contains the following provision:

"I have this day made application to the Continental Casualty Company (hereinafter called the company) for a policy of insurance. This order is given to provide for the payment of the premium thereon which you are authorized and requested to deduct from my wages in installments as hereinafter provided, pay to the company for me, and charge against my pay account for services rendered to or to be rendered to my employer on whom this order is drawn.

"These installments are to be deducted and paid without notice, one from the wages of each of the months hereinafter named. If my wages are paid to me more often than once a month, then each installment instead of being deducted and paid from the whole month's wages is to be deducted and paid from that part of the month's wages first payable to me. If for any reason whatever you fail to make deduction and payment of any of said installments you are further authorized and requested at the option of the company to deduct and pay the defaulted installment from my wages for any subsequent period."

There are other stipulations in these various contracts which are made a part of the insurance contract by adoption and reference. Such adoption and reference, in my opinion, however, does not have the effect of giving to the insurance company any vested contractual right to pay any specified amount of wages as such. In other words, the paymaster is made the agent of the assured for the payment of his premium, and this agency does not give the company any right to the wages as such, but merely the right to demand and receive payment of the premium in the installments specified, which said right is personal as against the assured.

These things being true, the order to the paymaster does not, in my judgment, amount to a technical "assignment." An assignment is an act whereby the owner of a chose in action transfers to a third party an absolute or pro tanto right to the thing itself.

I am, therefore, of the opinion that the practice represented by these orders, and the orders themselves, are not avoided by the act referred to.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

670.

APPOINTMENT OF HUMANE OFFICER—PROBATE JUDGE WITHOUT AUTHORITY TO APPOINT SUCH OFFICER—POWER OF JUDGE TO APPROVE SUCH APPOINTMENT.

A probate judge has no power under the act found in 103 *O. L.* 864, *to appoint a humane officer. The probate judge may approve the appointment of a humane officer, and that is the extent of his power.*

COLUMBUS, OHIO, December 29, 1913.

HON. WILLIAM A. WEYGANDT, *Member of Ohio Senate, Ravenna, Ohio.*

DEAR SIR:—Under date of October 4, 1913, you inquire:

> "I have been asked by a probate judge whether he has the power under the new statutes to name a humane officer. He states that he understood he had the power, but he cannot find any authorization for it in the law. I find that he has power to appoint probation officers, and must approve the naming of humane officers outside of corporations. Is that correct, and is that the extent of his authority?"

The humane society is covered by sections 10062 to 10084, General Code.

Section 10070, General Code, provides for appointment of agents of the humane society, commonly known as humane officers. Said section reads:

> "Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."

Such appointment is to be approved by the probate judge if the society exists outside of a city or village, by virtue of section 10071, General Code, which reads:

> "All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

Section 10072, General Code, provides the manner in which the salary of such officer shall be fixed and paid.

The foregoing sections were not amended at the recent session of the legislature.

By virtue of section 1662, General Code, as amended in 103 Ohio Laws 874, the officer who acts as judge of the juvenile court may appoint probation officers. Said section provides in part:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be women, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be first, second and third assistants. * * *"

These probation officers are not humane officers.

The new statutes to which you refer are no doubt found in the act of 103 Ohio Law 864, et seq., pertaining to the board of state charities and the juvenile court, and other charitable institutions.

I find no authority in this act which permits the probate judge to appoint the humane officer.

The judge of the juvenile court may appoint probation officers, and the probate judge may approve the appointment of a humane officer, and that is the extent of his power.

Respectfully,
TIMOTHY S. HOGAN.
Attorney General.

671.

COUNTY SEALER OF WEIGHTS AND MEASURES—DEPUTY COUNTY SEALER OF WEIGHTS AND MEASURES—CIVIL SERVICE.

The county auditor is the county sealer of weights and measures by virtue of section 2615, General Code. The deputy county sealer of weights and measures was not protected by the civil service act prior to January 1, 1914.

COLUMBUS, OHIO, December 29, 1913.

HON. C. P. VENUS, *Member of the House of Representatives, Norwalk, Ohio.*

DEAR SIR:—Under date of September 29, 1913, you inquire of this department:

"Are county sealers of weights and measures now holding office, protected by the civil service law, or does this protection go into effect January 1, 1914?"

An answer to your inquiry has been held in abeyance until an opinion could be rendered to the state civil service commission covering various phases of the new civil service law.

Prior to the enactment of the civil service act of 103 Ohio Laws 698, there was no civil service law for county positions or offices.

By virtue of section 2 of the civil service law, section 486-2, General Code, appointments are not to be made under the new law until January 1, 1914. The deputy county sealer of weights and measures was not protected by the civil service act prior to January 1, 1914. The county auditor is the county sealer of weights and measures by virtue of section 2615, General Code.

The meaning of the word "incumbents" as used in the new civil service law, and when persons are to be considered as incumbents has been considered in an opinion to the state civil service commission. We would suggest that you confer

with this commission as to any further inquiries about the new civil service law, as this department has deemed it advisable to address all opinions as to the civil service law to this commission.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

(To the Secretary of State)

18.

BOARD OF ELECTIONS—MAY COMPENSATE PRINTING COMPANY FOR CHANGE MADE IN PLANS AND SPECIFICATIONS BY ORAL AUTHORIZATION, WHEN MISTAKE OF LAW MADE IN GOOD FAITH, CAUSES FAILURE OF PLANS TO COMPLY WITH AMENDED STATUTE—CONTRACTS.

When a deputy state board of election, through inadvertance, fails to apprehend the requirements of an amendment to the statutes, submits plans and specifications, contract for which is duly awarded, which plans fail to specify an additional requirement of such amendment, and compliance with the law requires that the printing company be authorized to provide such additional printing of registration lists without the submission of further plans and bids and the company consents to perform such additional work upon such oral authorization, held:

That inasmuch as there was no indication of any intent to violate or ignore the provisions of the statute and as emergency requires such action to be taken, the proceedings being entirely in good faith, the board should compensate such company for the additional work so performed.

COLUMBUS, OHIO, August 12, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Since rendering to you the opinion, on July 12, 1912, in reference to the claim of The Britton Printing Company of Cleveland, Ohio, against the board of deputy state supervisors and inspectors of elections of said city, additional facts have been submitted to this department, which require a further consideration of the question.

It is urged on behalf of The Britton Printing Company, that the specifications upon which its bid was made, were drawn in accordance with the terms of section 4917, General Code, as said section existed prior to the amendment thereof, as shown in 102 Ohio Laws, 181, and as approved on May 29, 1912.

It is contended on behalf of the printing company as follows:

> "The first intimation The Britton Printing Company had of any greater requirements in connection with the execution of the work was when the board demanded a sufficient number of 'press proofs' to enable the board to place two copies at each polling place. It was at that time The Britton Printing Company informed the board that such requirements were not within the specifications upon which the bid was based, and that they would be unable to do the work demanded at the price bid. They were instructed to go ahead and comply with the requirements, and were informed that adjustment would be made on the basis of the work done."

The specifications called for proof copies, as follows:

> "Two proof copies of the first and second days and two proof copies of the last two days must be furnished as soon as possible after receiving copy."

Under the amendatory act of section 4917, General Code, the requirements for printed lists of registered voters is greater than in the former provisions of said section.

Section 4917, General Code, prior to the amendment, provided:

"The board of deputy state supervisors shall immediately cause at least three copies of such list for each precinct in such city respectively to be printed on broadside sheets of thick paper and in plain type, two of which lists they shall cause to be securely posted at the polling place in such precinct three days or more before the November election each year and also before every other election. The third copy from each precinct shall be retained by the board of deputy state supervisors, and each year bound together in a volume and preserved in its office. They shall cause at least fifty additional copies of such list respectively to be printed in pamphlet form for immediate distribution."

As amended in 102 Ohio Laws 181, said section 4917, reads:

"The board of deputy state supervisors shall immediately cause a number of copies of such list for each precinct in such city respectively to be printed on broadside sheets of thick paper and in plain type, two of which lists they shall cause to be securely posted at the polling place of such precinct, within five days after they receive such lists from the registrars, and one of which shall be delivered to the controlling committee of each political party or authorized committee of each set of candidates nominated by petition. Each list printed shall include all the names theretofore received, and when a new list is posted, the preceding list may be removed. After the close of any registration of electors held prior to any primary or special election, the new names shall be underscored.

"A copy of the complete registration prior to a November election from each precinct shall be retained by the board of deputy state supervisors, and each year, after the close of the annual registration, bound together in a volume and preserved in its office. They shall cause at least fifty additional copies of such list respectively to be printed in pamphlet form for immediate distribution."

The time for receiving the lists from the registrars is provided for in section 4916, General Code, as amended in 102 Ohio Laws 181, which reads:

"On the day following each registration day, unless such day be Sunday or a registration day, in which event on the next succeeding day, each year, the registrars of each election precinct shall make and deliver to the board of deputy state supervisors at its office in such city a true list of the names of all the electors registered by them in their respective precincts on the preceding day or days, arranged in alphabetical order of their surnames, followed by their full Christian names and residences, and having the registry number of each prefixed."

Then follows provisions as to the heading and certificate of said lists and copy thereof.

Under the original section it was only necessary to have the list of registered voters printed and posted at the polling places three days or more before the election. This list consisted of all the registered voters in the precinct.

Under the amendatory act a printed list of the registered voters must be made and posted after each registration day, except when two registration days are held on consecutive days, and then after the last of said consecutive days. Each new

list must include all voters theretofore registered. That is, the printed list after the second day's registration must include those registered on the second day as well as those registered on the first day.

Specification No. 1 calls for the printed lists which are to be posted at the polling places, as follows:

> "For each election precinct in the city of Cleveland ten (10) copies of the list of registered voters in said precinct, printed in small pica type with headings and footings, on sheets 22x28 inches; the paper to be used to be white book paper eighty (80) pounds to the ream."

A fair construction of this specification would mean the printing of the total registered vote of each precinct. It does not call for the printing of such list after each registration day or days, as provided in the amendatory act of May 29, 1911.

The specifications further provide that the printed lists provided for in specification No. 1 should be delivered before 8 o'clock a. m. of October 25, 1911. This would indicate that the specifications were not drawn in compliance with the provisions of the amendatory act.

The specifications call for:

> "Two proof copies of the first and second days and two proof copies of the last two days must be furnished as soon as possible after receiving copy."

It is urged that the printing company was required to furnish a sufficient number of "press proofs" to enable the board to place two copies at each polling place. The facts submitted are not sufficient to enable this department to determine whether the furnishing of "press proofs" is different from the requirements of the specifications to furnish "two proof copies." This must be determined from the facts. It is not shown what, if any, extra work was done by The Britton Printing Company. They were bound by the specifications upon which their bid was based. As held in the opinion of July 12, 1912, they cannot be allowed extra compensation for work which was covered by the specifications and their bid.

In order that this department may pass upon the legal question involved, it will be assumed that The Britton Priting Company was required by the board of deputy supervisors to perform more work than was covered by the specifications and bid.

The date of the specifications does not appear. The bid, however, was submitted on September 1, 1911, and the specifications were, no doubt, submitted in August preceding. The act in question was amended on May 29, 1911, three months before the bid was submitted. The board evidently overlooked the requirements of the amendatory act, at the time the specifications were drawn. It appears by the letter of The Britton Printing Company that on or before October 10, 1911, a request was made for the delivery of registration names after each registration day. The company then objected to the furnishing of the names in that manner.

Section 5050, General Code, provides the manner in which the contract for printing must be let, as follows:

> "The printing provided for in this chapter, except poll books and tally sheets, shall be let by the board of deputy state supervisors to the lowest responsible bidder in the county, upon ten days' notice published not more

than three times in two leading newspapers of opposite politics published in such county. In case of special elections, the board may give notice by mail, addressed to all the printing offices within the county instead of publishing such notice.

Section 4917, General Code, is not found in the same chapter as section 5050, supra. But the original act, as found in 97 Ohio Laws 181, et seq., as shown on page 229, read, "The printing as provided for in this act" instead of "in this chapter" as now found in section 5050, General Code. The provision of section 4917, General Code, as to the printing of the registered voters, were found in the act of 97 Ohio Laws 185, et seq. The provisions of section 5050, General Code, then covered the printing provided for in section 4917, General Code, and in my opinion it still covers such printing.

The contract for the printing in question should be let at competitive bidding. It was in compliance with this provision that the board asked for bids. After the bids were received and the contract awarded, it was discovered that the specifications did not comply with the requirements of the amended act as to printing the list of voters after each registration day or days. It does not appear when this discovery was made. It is evident, however, that it was made at a time when it was too late to secure other bids.

A contract had been entered into in accordance with the specifications, and instead of asking for new bids the board of elections requested the company with whom the contract had been entered into, to do the extra work. It would not have been practicable at that time to have asked for bids for the additional work to be done. In that event The Britton Printing Company would have occupied a position of decided advantage.

In the case of Mueller vs. Board of Education, 11 Nisi Prius, N. S. 113, it is held:

> "Failure of a board of education to advertise for 'extras,' which have become necessary for the completion of a high school building under a contract theretofore awarded, renders void a contract for the supplying of such extras, unless an urgent necessity existed for completion of the work without the delay incident to advertising for the submission of bids.
>
> "Whether failure to comply with a statutory requirement with reference to public work may be excused by 'urgent necessity' for an early completion of the work must be determined from the circumstances of the particular case."

This decision was based upon the provisions of section 7623, General Code, which specifically excepted cases of "urgent necessity" from the requirement for competitive bidding. The statutes providing for the printing of election supplies do not make any such exception.

The case presented is one in which, I believe, strict rules of law should not be applied. There is no indication of any intent to violate or ignore the provisions of the statutes. An attempt was made to comply with the statutes as to competitive bidding. Through a mistake, evidently caused by overlooking a recent amendment of the statute, the contract for the printing did not include all the printing required. In order to comply with the provisions of section 4917, General Code, as to the posting of the list of registered voters after each registration day, the board of elections was compelled to require the additional work without asking for bids therefor.

The Britton Printing Company complied with this request and performed the

extra work. Under such circumstances the company should receive a reasonable compensation for the extra work. And I am of the opinion that the board of deputy state supervisors and inspectors of elections will be authorized to allow a reasonable compensation for the extra work, if any, that was performed by The Britton Printing Company, under the circumstances as herein set forth. This conclusion is based upon the assumption that the mistake was not discovered in time to ask for new bids as required by the statutes.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

44.

FOREIGN CORPORATIONS—BUSINESS WHICH MAY BE ENGAGED IN IN OHIO.

Under sections 178 *and* 179, *General Code, a foreign corporation for profit may not transact business in this state until it procures from the secretary of state, a certificate that it has complied with the requirements of law to authorize it to do business in this state and that the business of such corporation is such as may be transacted in this state by corporations organized under the laws of this state. Under these statutes a foreign corporation may not be permitted, in this state, to act under a purpose clause which reads: "*(1) *To act as agent, trustee or attorney in fact;" "*(2) *To contract for the services of attorneys-at-law for the prosecution or defense of any matter or proceeding before any court of law or chancery, or other tribunal; to collect, adjust and settle claims on commercial or other accounts and for damages for breach of contract or personal injuries, or any demand of any nature whatever;" "*(3) *To enter into contracts with attorneys-at-law, physicians, dentists, merchants, professional and business men of all kinds for mutual services;" "*(4) *To buy, own and sell shares of capital stock in incorporated companies, including its own stock;" "*(5) *To engage in and transact any and every business which a corporation organized under the general incorporation laws of Michigan may lawfully transact."*

Such corporation may operate under the purpose clause reading: "To furnish commercial reports of, to investigate and furnish information upon any and all matters as required," "to buy, own and sell patent rights, bonds, mortgages and other securities;" "to buy and forward goods and merchandise of every description and to engage in the mail-order business."

COLUMBUS, OHIO, October 30, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 22nd, requesting my opinion as to whether a foreign corporation desiring to engage in business in Ohio may exercise in this state all or any portion of the following corporate powers:

> "To act as agent, trustee or attorney in fact; to contract for the services of attorney-at-law for the prosecution or defense of any matter or proceeding before any court of law or chancery, or other tribunal; to collect, adjust and settle claims on commercial or other accounts, and for damages for breach of contract or personal injuries, or any demand of any

nature whatever; to furnish commercial reports, so-called; to investigate and furnish information upon any and all matters as required; to buy, own and sell shares of capital stock in incorporated companies, including its own stock; to buy, own and sell patent rights, bonds, mortgages, notes and other securities; to enter into contracts with attorneys-at-law, physicians, dentists, merchants, professional and business men of all kinds for mutual service; to buy and forward goods and merchandise of every description and to engage in the mail-order business, and to engage in and transact any and every business which a corporation organized under the general incorporation laws of Michigan may lawfully transact."

Correspondence accompanying the letter discloses that the company is desirous of engaging in as many of these different lines of business as may be permissible under the laws of the state of Ohio, if such laws permit the entrance of the corporation into the state for any purpose whatsoever.

The inquiry as submitted, therefore, involves an interpretation of section 178 of the General Code, which, in part, is as follows:

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation *to be transacted in this state,* is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or *if more than one kind of business, by two or more corporations* so incorporated for such kinds of business exclusively. * * *"

In connection with this section, section 179 must also be considered. It provides, in part, as follows:

"Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of capital stock of the corporation, *the business in which it proposes to engage within this state;* and the name of a person designated as provided by law, upon whom process against the corporation may be served within this state. * * *"

As I understand the meaning of these two related sections, they permit a foreign corporation to enter the state for the transaction of some of its authorized businesses only. That is to say, if the foreign corporation desires to do in Ohio a business permitted by the laws of its own state, it may secure a certificate under these sections from the secretary of state authorizing it to transact that business, although under its charter of incorporation it may possess, in the state of its origin, the power to transact other business not permitted under the laws of Ohio. As already stated, I understand it to be the purpose of the corporation, the application of which has given rise to your question, to exercise in Ohio such corporate powers of those above enumerated, as may be lawfully exercised by it in this state.

Clearly, the corporation could not be permitted in Ohio to transact all of the different businesses enumerated in the above clause, which, I take it, is taken from its charter. The following activities of the corporation are not such as

"May be lawfully carried on by a corporation, or organized under the

laws of this state for such or similar business, or * * * by two or more corporations so incorporated for such kinds of business exclusively * * *"

"1. To act as agent, trustee or attorney in fact." This recital is not sufficiently definite to afford evidence of the kind of business proposed to be carried on, and would not be permissible in the articles of incorporation of an Ohio company.

"2. To contract for the services of attorney-at-law for the prosecution or defense of any matter or proceeding before any court of law or chancery, or other tribunal; to collect, adjust and settle claims on commercial or other accounts, and for damages for breach of contract or personal injuries, or any demand of any nature whatever." This clause, without some qualification might be regarded as describing the doing of a "professional business," as determined in State, ex rel., Physicians' Defense Company vs. Laylin, 73 O. S. 90, which I have commented upon in other opinions to you. The doing of such "professional business" is prohibited to Ohio corporations by section 8623 of the General Code, and upon the authority of the above cited case, cannot be undertaken by a foreign corporation in this state.

"3. To enter into contracts with attorneys-at-law, physicians, dentists, merchants, professional and business men of all kinds for mutual services." This clause is subject to the same objections as the last one commented upon.

"4. To buy, own and sell shares of capital stock in incorporated companies, including its own stock." As you have been heretofore advised, an Ohio corporation may not be authorized to exercise the full ownership of shares of stock of other corporations or of its own shares of stock, and by virtue of section 178, above quoted, a foreign corporation may not be admitted to transact such business in Ohio.

"5. And to engage in and transact any and every business which a corporation organized under the general incorporation laws of Michigan may lawfully transact." A foreign corporation may not be permitted to enter Ohio to transact all business that may be transacted under the laws of another state. The express language of section 178, supra, is sufficient authority for this statement.

In my opinion, a corporation may lawfully transact in Ohio the business described by the following purpose clauses constituting a portion of the above paragraph, not condemned by the application of rules which I have mentioned:

"To furnish commercial reports, so-called; to investigate and furnish information upon any and all matters as required; to buy, own and sell patent rights, bonds, mortgages, notes and other securities" (this phrase "other securities" does not refer to the shares of capital stock of incorporated companies which seems to be reasonably clear by the construction of this clause in connection with that which immediately precedes it in the original); "to buy and forward goods and merchandise of every description and to engage in the mail-order business."

I might also add that as to the second and third clauses to which objection has been made in particular and perhaps in lesser degree to the other clauses objected to, if some disclaimer or qualification were added to the language of the articles of incorporation so as to make it clear that the things which cannot be done under the laws of Ohio were not intended to be engaged in, the application as to such matters might be accepted. That is to say, it is my opinion that a corporation cannot be admitted into Ohio for the purpose of doing all of the things which might be done under the language to which objection has been made. It does not, however, follow that some of the things which might be done thereunder cannot lawfully be undertaken by a corporation in Ohio. Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

53.

ARTICLES OF INCORPORATION—INSURANCE—MUTUAL PROTECTIVE ASSOCIATION—GUERNSEY COUNTY SLAVISH SOCIETY.

A purposed corporation, whose purpose clause provides for "promoting friendship, charity and benevolence, and to assist its members in sickness or distress and aid the families of deceased members, by voluntary contributions, under regulations and by-laws to be adopted," is not such a mutual protective company as comes within the terms of section 9427, General Code, as such is not the doing of business on the assessment plan for stipulated sums of money.

Such business constitutes an insurance business, however, and may not, therefore, be carried on in Ohio, except by a corporation which complies with the statutes of this state. Such a corporation is not included within the terms of section 5409, General Code, which provides for certain exceptions from the requirements of the statutes providing for a mutual protective association, nor does such business come within the exceptions specified by section 9491, General Code, from the fraternal benefits society requirements. Inasmuch, therefore, as such a company does not come within any of the exceptions to the rule requiring insurance companies to comply with the insurance laws of this state, and as it cannot be incorporated as a mutual protective company, it necessarily follows that it constitutes none of the corporations referred to in any of the paragraphs of section 176, General Code, which provides a schedule of fees for the secretary of state for filing the articles of incorporation of such companies as may be lawfully organized under the laws of this state.

COLUMBUS, OHIO, January 31, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 3, 1913, requesting my opinion as to the legality of the articles of incorporation of The Guernsey County Slavish Society, a proposed corporation, not for profit, for the following purpose:

> "Promoting friendship, charity and benevolence, and to assist its members in sickness or distress, and aid the families of deceased members, by voluntary contributions, under regulations and by-laws to be adopted."

I note the fact that a check for $25.00 is attached to these articles as a filing fee, and your request for advice as to whether or not the company is one described in paragraph 5 of section 176, General Code; I also note the specific request for an opinion as to whether or not this company constitutes a mutual protective company as described by section 9427, General Code.

Unless this company does constitute a mutual protective company as suggested by the section last named it cannot be admitted to do business in Ohio for reasons already recounted to you in other opinions. That section authorizes the formation of companies or associations,

> "To transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the member may direct, in the manner provided in the by-laws."

I am of the opinion that the method of doing business as disclosed by the purpose clause above quoted is not in conformity to section 9427, General Code. The acceptance of voluntary contributions under regulations and by-laws is not the same thing as the doing of life insurance business on the assessment plan for the payment of stipulated sums of money, yet the assistance of members in sickness and distress and in the aiding of families of members in case of death are activities which substantially amount to the business of insurance, and which, therefore, may not be carried on in Ohio except by a corporation formed under one of the statutes of this state.

I deem it proper here to state that the various opinions of this department relating to the organization of mutual associations for purposes substantially amounting to insurance are not to be read in an absolute and general sense. Section 9459, General Code, for example, provides with clearness certain exceptions to the provisions of the preceding chapter from which the inference may be drawn that there are certain companies which otherwise would have to be organized under section 9427, General Code, and be governed by the succeeding sections which are withdrawn from the application thereof. Such associations are "any association of religious or secret societies * * * any class of mechanics, express, telegraph or railroad employes or ex-union soldiers, formed for the mutual benefit of the members thereof and their families or blood relatives exclusively or for purely charitable purposes."

Similarly, in section 9491, General Code, are found certain exceptions from the fraternal benefit society act passed in 1911. The corporation under consideration at present, however, is not limited as to membership by any express provisions in the articles of incorporations. Even the name of the society indicates merely a limitation ascertained by the race of the members and a territorial limitation to a certain county. Neither of these limitations is sufficient to bring the association within either of the saving qualities above referred to.

I am, therefore, of the opinion not only that the Guernsey County Slavish Society is not, properly speaking, a mutual protective company, such as may be organized under section 9427, General Code, but also that it is not an association which by the force of the statutes last above cited may be permitted to engage in the activities defined in its proposed articles of incorporation without complying with the insurance laws of this state.

Inasmuch as the society cannot lawfully be incorporated for the purposes mentioned in its articles of incorporation it necessarily follows that it constitutes none of the corporations referred to in any of the paragraphs of section 176, General Code, as that section merely provides a schedule of fees to be accepted by the secretary of state for filing the articles of incorporations of such companies as may lawfully be organized under the laws of this state.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

102.

FOREIGN CORPORATION—TRUSTEE FOR OHIO CORPORATION—QUALIFICATION UNDER OHIO LAWS—DEPOSIT OF SECURITIES—TAXATION OF BONDS DEPOSITED.

The statutes of Ohio recognize the right of a foreign trust company to act as trustee of an Ohio corporation, and such service would not constitute such "doing of business in this state" as is contemplated by section 178, *General Code, requiring the payment of an initial or an annual fee based upon the property owned and business transacted in Ohio by it, and measured by its authorized capital stock.*

Such a corporation is, however, subject to sections 9778, 9779 *and* 9780, *General Code, requiring the deposit of securities with the treasurer of state as a condition precedent to its action as trustee of a mortgage security loan to an Ohio corporation.*

The bonds so deposited have their situs in Ohio and are subject to tax therein. Such securities in the form of bonds of the United States or any district or territory thereof, however, are not subject to state tax. Bonds of any state or any municipality, issued subsequent to January 1, 1913, *are subject to taxation under article* 12, *section* 2 *of the constitution.*

COLUMBUS, OHIO, February 20, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 6, 1913, which I hasten to answer at the earliest opportunity. In it you request my opinion upon the following questions:

> "1st. May a foreign trust company act as trustee for an Ohio corporation?
>
> "2nd. Is the service proposed in the first paragraph of the letter of the Detroit Trust Company such a 'doing business in this state' as is contemplated by section 178 of the General Code?
>
> "3rd. If, for the purpose set forth—executing a trust—you determine that a foreign corporation must qualify under the laws of Ohio, then must it qualify in this department, or in the department of banks and banking?
>
> "4th. In case it is held that such a foreign trust company is required to deposit securities with the treasurer of state in order to accept the trust in question, would such securities be subject to taxation in Ohio?"

Answering your first question I beg to state that there is no doubt that a foreign trust company may act as trustee of an Ohio corporation. No statute of this state prohibits such a course, and there is no principle of public policy which is opposed to it; in fact, by inference from statutes which will be hereinafter quoted, it necessarily follows that the state has recognized the right of foreign trust companies to accept such trusts.

Answering your second question I beg to state that in my opinion the acceptance of a trust by a foreign corporation for the purpose of securing an issue of bonds by an Ohio corporation upon property partly located in Ohio, does not constitute "doing business in this state" as is contemplated by section 178 of the General Code.

(See opinion of attorney general to the secretary of state under date of May 4, 1906, annual report, page 49, and Judson on Taxation, sections 175, et seq.)

Therefore, a foreign trust company performing such services is not required

to take out a certificate of compliance with the laws of Ohio in the office of the secretary of state, nor to pay an initial fee or an annual fee based upon the property owned and business transacted by it in Ohio, and measured by its total authorized capital stock.

Answering your third question I am of the opinion that while, as already stated, the execution of a trust covering Ohio property by a foreign trust company does not subject such company to the general corporation franchise tax laws of this state, such an act is subject to the regulatory power of the state under section 9778 to 9780, inclusive, and similar sections of the General Code. These sections were enacted in 1908 as a part of the Thomas banking act and in full are as follows:

> "Sec. 9778. No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock.
>
> "Sec. 9779. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided.
>
> "Sec. 9780. No such corporation, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust, deed or mortgage upon, or accept any trust concerning property located wholly or in part in this state without complying with the provisions of this and the two preceding sections. Any trust, deed or mortgage given or taken in violation of the provisions thereof shall be null and void."

The language here employed is explicit, and its effect cannot be doubted. The requirement is that no mortgage executed to a foreign trust company covering Ohio property is valid unless a foreign trust company has made the required deposit of securities with the treasurer of state.

Answering your fourth question it is, of course, apparent that if the securities deposited be bonds of the United States or any district or territory thereof, they are not taxable for the reason that the state has no power to tax such securities.

If however, the securities deposited under the sections last above quoted are bonds of another state than Ohio, or bonds of a municipality of another state or of a municipality of Ohio issued after (but not prior to) January 1, 1913 (see article 12, section 2 of the constitution, as amended in 1912), or first mortgage bonds of a railroad corporation as authorized under section 9778, the securities

themselves, if properly located within this state, are subject to its taxing power; so that if the laws of this state provide for the taxation of such bonds so held on deposit by the treasurer of state they may be and should be taxed.

It was held in the case of Assurance Co. vs. Halliday, 126 Fed. 257, 110 Fed. 259, that bonds and stock deposited by a foreign fire insurance company with the superintendent of insurance under section 9565, General Code, have a taxable situs in Ohio and may be taxed here.

Upon the authority of this decision I am constrained to hold that bonds and other securities deposited by a foreign trust company in Ohio to secure the performance of a trust accepted by it relating to property situated in Ohio, as required by section 9778, General Code, are taxable in this state.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

118.

ARTICLES OF INCORPORATION—BENEFICIAL SHARES COMPANY—PURPOSE OF LOANING TO SHAREHOLDERS TO EXTENT OF AMOUNT SUBSCRIBED, LAWFUL.

COLUMBUS, OHIO, January 30, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 20th, requesting my opinion as to the legality of the purpose clause of The Beneficial Shares Company a proposed corporation for profit. The clause in question is as follows:

> "Said corporation is formed for the purpose of extending the business credit of its shareholders, by the granting of loans to the extent of the sum paid in by such shareholders for their stock, without collateral security, such loans to be made upon notes signed by such shareholder and two other shareholders in said company; with power and authority to maintain and conduct an office and place of business suitable to the said purposes and doing all things necessary and incident thereto authorized by the laws of the state of Ohio."

I confess that the business described by this clause is novel and that the question presented is unusual. The business partakes in a measure of the character of that transacted by a building and loan association and is somewhat similar in other respects to the business authorized to be transacted by other kinds of companies which require special incorporation and are subject by law to special regulations. Nevertheless, I have been unable to reach the conclusion that the corporation is one of those for which a special form of organization is required by law, so that within the rule which has been laid down in other opinions addressed to your department it might not be incorporated under the general laws of the state.

The sole question, therefore, is as to whether or not the purpose, as defined in the foregoing clause, is one for which individuals lawfully may associate themselves within the meaning of section 8623, General Code.

On this point I have reached the conclusion that although the business is, as already described, an unusual one, and although it would seem that such business ought not to be undertaken save under the sanction of some special regula-

tions and supervision by the state, yet it is not unlawful. In the absence of statutory enactment I know of no reason of public policy which would preclude the association of individuals for the purpose defined.

I am, therefore, of the opinion that you may lawfully file and record the articles of incorporation tendered to you by The Beneficial Shares Company.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

152.

OFFICES COMPATIBLE—ASSISTANT SECRETARY OF STATE AND CLERK OF BOARD OF COMMISSIONERS FOR ERECTION OF LIMA STATE HOSPITAL.

Inasmuch as the duties connected with the office of assistant secretary of state and clerk of the board of commissioners for the erection of a state hospital, act in no way as a check upon one another or are in no way subordinate to one another, and as it is physically possible for one person to discharge the duties of both, a single individual may serve as incumbent of both offices at the same time.

COLUMBUS, OHIO, April 2, 1913.

HON. J. H. SECREST, *Assistant Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 20th, in which you request me to confirm in a written opinion the oral opinion rendered you on the 9th day of January, 1911, in which I officially advised you that it was lawful for you to serve as assistant secretary of state, and at the same time serve as clerk of the board of commissioners for the erection of the Lima state hospital, and receive from the state the salaries attached to both positions.

I herewith give you the following written opinion, which will confirm my verbal opinion given you on the date mentioned in your communication.

There is no constitutional or statutory inhibition making the two positions held by you incompatible. Under the most substantial rule, laid down in the case of State, ex rel., Attorney General vs. Frank Gebert, 12 O. C. C. n. s., by our supreme court, without report, it was held that:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

The two positions held by you, namely: Assistant secretary of state and clerk of the commission for the erection of the Lima state hospital, do not become incompatible under either of the two reasons set forth in the above rule; neither is subordinate to or in any way a check upon the other; nor is it physically impossible for you to discharge the duties of both positions.

I am, therefore, of the opinion that I was on January 9, 1911, when I gave you my verbal opinion, that you could hold both positions and receive the salaries attached to each office; and you may take this opinion as confirming said verbal opinion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

165.

DEPUTY STATE SUPERVISORS OF ELECTIONS—MAY NOT EMPLOY LEGAL COUNSEL—DUTY OF ATTORNEY GENERAL.

Inasmuch as members of the board of deputy state supervisors of elections have been stated by the courts to be state officers, the attorney general, under section 333, General Code, is required to serve as legal adviser for such board. A contract by such board, therefore, for legal service with a city solicitor is null and void and recovery may not be had for such services, when a city solicitor has been employed by the board to conduct a mandamus suit in behalf of its clerk.

COLUMBUS, OHIO, April 3, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry under date of February 15, 1913, enclosing a letter from Mr. J. C. Crisp, deputy clerk state supervisors and inspectors of elections for Lorain county, Ohio, requesting an opinion on the question asked in that letter. Mr. Crisp states:

> "The city auditor of Lorain refused payment of voucher issued by this board to pay a portion of the salary of the deputy clerk.
>
> "The board took no action until there were seven months' salary due, and on November 14th, passed a resolution employing F. M. Stevens, attorney, who at the time was prosecuting attorney, his term expiring December 31st, to mandamus the auditor of the city of Lorain to issue voucher in favor of the said deputy clerk for the salary due. The case was heard before Judge Washburn, after being delayed several times at the request of the city solicitor of Lorain, final decision having been rendered early in January in favor of the board.
>
> "Mr. Stevens rendered a bill for services and advised the board that in his opinion the payment for same should be made from county funds by the county commissioner the same as other bills contracted by the board are paid. The new prosecuting attorney, Mr. Adams, and the commissioners seem to be unable to determine the validity of the charge.
>
> "Will you please advise this board from what funds, in your opinion, the attorney's fees should be charged."

Attention is called to the following sections of the General Code which provide for the election machinery of the state.

Section 4786 provides for the office of state supervisor, and state supervisor and inspector.

Sections 4788 and 4789 provide for a board of deputy state supervisors and inspectors of elections in certain counties and for their appointment.

These provisions apply to the board of deputy state supervisors and inspectors of elections for Lorain county.

As stated in State of Ohio, ex rel., vs. Board of County Commissioners of Cuyahoga Co., 8 Nisi Prius, 148-150:

> "From an examination of the election laws of this state it seems apparent that the legislature intended that the conduct of elections should belong to the state and be under the control of state officers."

The court further points out the fact that the secretary of state is the principal election officer, and the deputy state supervisors, as subordinate officers for carrying out the agencies of the state, conduct all elections. The deputies do not act in an independent capacity. They are responsible to their principal, the state supervisor and inspector of elections.

Section 333, General Code, provides:

> "The attorney general shall be the chief law officer of the state and all its departments. No state officer, board or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law * * *."

In view of the foregoing it is my opinion that the deputy state supervisors of elections of Lorain county were without authority to employ an attorney-at-law since they were without power to act in any independent matter as expressly authorized by statute or except under the orders of their principal, the state supervisor and inspector of elections, and since section 333, supra, prohibits any state officer, board or head of a department or institution of the state from employing or to be represented by other counsel or attorney-at-law than the attorney general, the employment of Mr. Stevens was illegal.

I am not unmindful of the case of State vs. Boyden, reported in the 18 C. C., at page 82, wherein it was held that the board of elections of Cincinnati was authorized to employ an attorney-at-law in a matter in which they were interested, but that case was decided upon the authority of Yaple vs. Morgan, 2 C. C. 406 (subsequently affirmed without report by the supreme court), but at the time of the decision in the case of Yaple vs. Morgan, supra, there was no statute prohibiting state officers, boards or heads of departments or institutions of the state from employing counsel. The statute was amended so as to include such prohibition April 19, 1898, 93 O. L. 127.

In view of the statutes as we find them, while this department is not reaching out for more work, still it is my opinion that all matters wherein legal counsel or assistance is needed by the board of deputy state supervisors and inspectors of elections, the same must be obtained through their chief, the state supervisor and inspector of elections.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

198.

ARTICLES OF INCORPORATION—INSURANCE BUSINESS—MUTUAL PROTECTIVE ASSOCIATION—ASSESSMENT PLAN NOT POSSIBLE WHEN ASSESSMENT DEFINITE AND BENEFITS INDEFINITE.

In this state, mutual protective associations may not be organized where, in an attempted pursuance of the assessment plan, the assessment is made certain and the benefits made contingent and uncertain. The assessments may be uncertain and indefinite, but the benefits must be certain and definite.

COLUMBUS, OHIO, April 21, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith the proposed articles of incorporation of The First Magyar Young Men's Insurance Society of Lorain, Ohio, which have been submitted to me for consideration and action as provided by law, without having approved the same. My reasons for withholding approval are similar to those expressed by me in the matter of the articles of incorporation of The First Greek Catholic Russian Union of St. George in the state of Ohio, an opinion concerning which was handed you on October 26, 1912.

Repeating the reason, without discussion, I may say that I cannot approve the articles now submitted to me because they authorize the transaction of an insurance business upon a basis purporting to be the assessment plan but upon which the amount of each assessment is definite and the amount of benefits payable, apparently, is contingent and unascertained. While it is true that under the statute, section 9427, General Code, a mutual protective association may not bind itself unequivocally for the payment of stipulated sums as death benefits without the reservation that the benefit payable shall be made, so to speak, out of the assessments, yet, it is clearly the intention of the statute and related sections, which I refrain from citing, that the insurance contract shall be for a stipulated death benefit, and that the assessments made, whatever the limits upon the amounts, shall be contingent and uncertain.

In short, the law does not authorize the incorporation of an association for the purpose specified in these articles of incorporation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

249.

ARTICLES OF AGREEMENT OF CONSOLIDATION OF THE LORAIN, ASHLAND AND SOUTHERN RAILROAD COMPANY AND THE ASHLAND AND WESTERN RAILWAY COMPANY—AUTHORIZATION TO ISSUE BONDS INSTEAD OF PREFERRED STOCK DOES NOT JUSTIFY CLASSIFICATION OF SUCH BONDS AS CAPITAL.

The fact that under section 8801, *General Code, a railroad company in process of consolidation with other companies may issue bonds instead of preferred stock, does not entitle bonds so issued to be designated as capital, and since the fifth article of the proposed agreement of consolidation includes such indebtedness within its statement of capital stock, the same is misleading and should be corrected.*

COLUMBUS, OHIO, May 13, 1913.

HON CHAS. H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of even date herewith, transmitting the proposed articles of agreement of consolidation of The Lorain, Ashland & Southern Railroad Company and The Ashland & Western Railway Company, under the proposed name of The Lorain, Ashland & Southern Railroad Company; and requesting my opinion as to legality of said proposed articles of agreement, and particularly of paragraph five thereof; and also as to the amount of fees it is the duty of the secretary of state to collect for filing the proposed articles of agreement.

The articles, in their entirety, are very lengthy, and in the limited time which has been afforded to me for their consideration I have not attempted to consider all of their provisions, but only those which bear upon the subject-matter of the fifth article, to which you particularly refer, The following recitals and provisions have attracted my attention in this connection:

"WHEREAS, The public service commission of Ohio, by its two several orders, numbered 383, the first bearing date December 5, 1912, and the second December 28, 1912, authorized said The Lorain, Ashland & Southern Rail-Road Company, in addition to the two hundred and fifty thousand ($250,000.00) dollars par value of its stock now issued and outstanding to issue capital stock and first and second mortgage bonds, as follows, to wit:

"'ORDERED, That said The Lorain, Ashland & Southern Railroad Company be, and it hereby is authorized to issue, transfer and deliver to The West Virginia & Ohio Construction Company, its capital stock of the par value of one million five hundred and fifty thousand dollars ($1,550,-000.00), its first mortgage five per cent. fifty year bonds of the par value of one million five hundred thousand dollars ($1,500,000.00), and its second mortgage five per cent. fifty year bonds of the par value of one million two hundred thousand dollars ($1,200,000.00), it being the opinion and finding of the commission that the issue of said capital stock and said bonds is reasonably required for the proper purposes of said corporation.'

* * * * * * * * * * * * *

"Fifth. The *capital* of the consolidated and merged company, the new corporation, organized by virtue of and in pursuance of these presents, shall be at the date of the approval thereof, by the stockholders of the constituent companies thereof, and when these presents shall have been duly

filed and recorded according to law, four million, five hundred thousand ($4,500,000.00) dollars, the amount and character thereof as authorized by the public service commission of Ohio, by its two several orders, numbered 383, and bearing date December 5 and December 28, 1912, respectively, and as hereby fixed, as follows, to wit:

"(a). *Capital stock* which shall be issued as general common stock of an aggregate face value of one million eight hundred thousand ($1,800,000.00) dollars.

(b). *Indebtedness* secured by *mortgages,* which shall be first and second liens upon the properties, real and personal, rights and franchises of the company organized hereby, of an aggregate face value of two million seven hundred thousand ($2,700,000.00) dollars, *represented* by first and second morfgage *bonds* to the amounts and of the character as follows:"

The consolidation of railroad companies is provided for and governed by section 9028, General Code, which is in part as follows:

"Consolidation shall be made under the conditions and restrictions following:

"1. The directors of the several companies may enter into a joint agreement, under the corporate seal of each company, for the consolidation of the companies, prescribing the terms, and conditions thereof, the mode of carrying into effect, the name of the new company, the number of directors and other officers thereof, their places of residence, *the amount of the capital stock of the new company agreed upon, the number of shares thereof, the amount of each share,* and the manner of converting the capital stock of each constituent company into that of the new company, with such other details as they deem necessary to perfect the new organization and consolidation of the companies."

The authority of the secretary of state to charge and collect fees for filing articles of agreement of this sort is prescribed by section 176, General Code, by paragraph three thereof, which is as follows:

"The secretary of state shall charge and collect the following fees for official services:

* * * * * * * * *

"3. For filing articles of agreements of consolidation of corporations having a capital stock, one-tenth of one per cent. upon the authorized capital stock of the new corporation, created by such articles of agreement of consolidation, but not less than ten dollars in any case; but no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation. * * *"

The order of the public service commission of Ohio, referred to in the preamble, and in the fifth article, as above quoted, was evidently issued under sections 614-53 to 614-55, inclusive, General Code.

Whether the power of the commission to authorize the issuance of bonds can be exercised in derogation of sections 8793 and 8794, General Code, which impose a limitation upon the borrowing power of railroad corporations, is an interesting question, which is suggested by the facts apparent upon the face of the certificate. Inasmuch, however, as the commission has already acted, I do not deem it appropriate to consider the question which has arisen in my mind, except to remark that

it seems a little extraordinary that a corporation having a capital stock of $250,000.00 should, without increasing that capital stock, receive authority to borrow money to the extent of $2,700,000.00—more than ten times its original capital. This may be accounted for, however, upon the assumption that the $250,000.00 represented issued and outstanding capital stock as distinguished from authorized capital stock.

It is clear, however, from the recitals of the preamble and the reference thereto in the fifth article of the agreement of consolidation, that the $2,700,000.00 which the consolidated company is to have authority to borrow is that which the former company, of the same name, was authorized by the order of the public service commission to borrow.

By providing for the incurring of this indebtedness the consolidated company would appear to be violating the provisions of sections 8793 and 8794, General Code, were it not for the provisions of sections 8802 and 8803, General Code. I do not quote these sections as they are lengthy. Suffice it to state that they authorize railroad companies formed by consolidation to issue bonds in excess of the capital stock, at such rates of interest as may be agreed upon by the respective parties, I find no special difficulty, therefore, to arise out of the fact that the borrowing power of the proposed consolidated corporation is to be exerted, as to amount, in excess of the amount of the authorized capital stock.

Section 8801, General Code, which is in pari materia with the other two sections just referred to, provides that the bonds which may be issued under special power by a railroad company, in process of consolidation with other companies, may be so issued "instead of issuing preferred stock." I call attention to this provision because it has occurred to me that it may have inspired the draftsman of the articles of agreement to refer to the indebtedness represented by bonds to be issued as a kind of "capital."

In my opinion the mere fact that the bonds of a consolidated company, or of a company which is about to consolidate with another, or has so consolidated, may be issued in lieu of preferred stock, does not have the effect of constituting such bonds a part of the "capital" of the consolidated company within the meaning of the word as used in section 9028, supra. It may be that by virture of this section a corporation authorized to issue a certain amount of preferred stock may exercise that power by issuing bonds instead of preferred stock; it does not follow, however, that a corporation authorized to issue bonds by virtue of one of the articles of the agreement of consolidation thereby acquires what is technically known as "capital stock," to the extent of that authority.

The fifth article of the proposed agreement of consolidation is misleading, in that it speaks of "the capital of the consolidated and merged company" as including its "capital stock" and its "indebtedness." Without quibbling as to exact definitions, I am clearly of the opinion that for the purpose of an agreement of consolidation the authorized indebtedness of a company is not a part of its authorized capital stock.

Section 9028, General Code, requires that the amount of the capital stock of the company agreed upon, the number of shares thereof and the amount of each share be specified in the articles of agreement. The fifth article, which relates to this subject-matter, does not with certainty designate the amount of the capital stock, nor does it expressly stipulate the number of the shares thereof, and the par value of each. For this reason, it is, in my opinion, insufficient in law to effect a valid consolidation; and the articles, as a whole, should not be accepted and filed by you until the necessary corrections are made.

I confess that it seems to me that by liberal interpretation of the proposed articles the intent of the contracting parties may be ascertained with a fair degree

of certainty. I believe that the intent was to form a corporation with a "capital stock" of $1,800,000.00, upon the basis of which the fee would be, of course, $1,-800.00. The reference to the indebtedness of the corporation as "capital," however, is not entirely consistent with this interpretation, and inasmuch as the articles are defective, in that they do not specify the par value of the shares and the number thereof, I am of the opinion that while the necessary corrections therein are being made, the misleading and inconsistent use of the word "capital," as found in the first line of the fifth article, should be eliminated therefrom.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

254.

ARTICLES OF INCORPORATION—FARMERS LIGHTNING PROTECTED INSURANCE COMPANY—MUTUAL PROTECTIVE ASSOCIATION—MAY NOT INSURE EXTRA HAZARDOUS PROPERTY.

Since the proposed articles of incorporation of The Farmers Lightning Protected Insurance Company provide for the insurance of agricultural societies' buildings, which buildings under common usage are classed as extra hazardous, such articles must be disapproved by virtue of the prohibition against such companies insuring extra hazardous property in section 9593, General Code.

COLUMBUS, OHIO, May 16, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith proposed articles of incorporation of "The Farmers Lightning Protected Insurance Company" without my approval.

These articles, under another name, however, have already been once disapproved by me and I regret that I am obliged to again pass unfavorably upon them.

The purpose for which the company is formed is stated in the articles as follows:

> "Of enabling its members to insure each other against loss or damage, by fire or lightning, and to enforce any contract, not inconsistent with the insurance laws of Ohio, which may be by them entered into, by which those entering therein shall agree to be specifically assessed for incidental purposes, and for the payment of losses, which may occur to its members. Its territory for insurance shall be the state of Ohio and the property that may be insured by this company, which shall be properly equipped with lightning rods, may embrace school houses, churches, agricultural societies' buildings, dwelling houses, barns, accompanying out buildings and their contents, farm machinery and implements, vehicles, automobiles, farm produce, wool and other products, live stock and poultry, household goods, wearing apparel, provisions, musical instruments, libraries and other articles being upon farms as farm property."

So far as purely formal requirements are concerned, this clause is consistent with the statutes referred to in my previous letter in the same matter. The clause

seems to me, however, to violate the provision of section 9593 of the General Code, which applies to companies of this kind and provides in part as follows:

> "Such associations may only insure farm buildings, detached dwellings, school houses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture, and other property not classed as extra hazardous. * * * Provided that an association whose membership is restricted to persons engaged in any particular trade or occupation and its insurance confined to any particular kind or description of property may insure property classed as extra hazardous."

Two of the kinds of property which the company seeks authority to insure have invited my attention with reference to the question as to whether or not they represent "property classes as extra hazardous," viz.: "Agricultural societies' buildings" and "automobiles."

I am unable to find any judicial interpretation of the phrase now under discussion. It seems to be a term, the meaning of which is technical and the use of which is limited to the insurance business. That being the case, I consulted the superintendent of insurance, who informed me that the term "classed as extra hazardous" really lacked an exact definition in the fire insurance business, although it is by no means infrequently used in a broad and somewhat loose sense.

The superintendent was of the opinion that automobiles would not be classed as extra hazardous, but that agricultural societies' buildings would be so classed. The reason assigned for such a conclusion was that such buildings, on account of their lack of tenancy and care during long periods of time, their situation, lacking fire protection, and the generally inflammable type of construction exemplified in them, were in point of fact, treated by the fire insurance companies generally, as not only an extra hazardous risk but even a forbidden one.

The customs and usages of the fire insurance business being as represented to be and the term in question being one which is to be defined as I have pointed out by such customs and usages, I am of the opinion that agricultural societies' buildings constitute property "classed as extra hazardous" within the meaning of section 9593 of the General Code. For this reason I have found myself unable to indorse my approval upon the articles of incorporation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

334.

INDIANA CORPORATION FORMED FOR HOLDING REAL ESTATE IN TRUST HAVING A CAPITAL STOCK DIVISIBLE INTO SHARES CANNOT DO BUSINESS IN OHIO WITHOUT COMPLIANCE WITH SECTIONS 178, 182 AND 183, GENERAL CODE.

An Indiana corporation formed for the purpose of holding real estate in trust, whose capital stock is divisible into shares cannot do business in this state without compliance with sections 178, 182 *and* 183, *General Code. If such company has a business office in this state exercising therein management over any of its concerns, it is to be considered doing business in this state. Since its capital stock is divisible into shares and it has the power to declare a dividend, it must be deemed a corporation for profit, notwithstanding an extraneous agreement to the effect that the corporation shall profit in no way from its business.*

COLUMBUS, OHIO, June 26, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 29th, setting forth a copy of a letter addressed to you by Mr. W. F. North, attorney-at-law, Cincinnati, Ohio, which, in full, is as follows:

> "A corporation organized under the laws of the state of Indiana has the following among its articles of association.
>
> "'Article II. The capital stock of this association shall be $1,500.00, to be divided in fifteen shares of $100.00 each.
>
> "'Article III. The object of this association shall be the buying, holding and selling of real estate.
>
> "'Article V. The principal office of this association shall be in the city of Indianapolis, Marion county, Indiana.
>
> "'Article VI. The term of existence of this corporation shall be fifty years.'
>
> "The corporation in question was in fact organized for the express purpose of taking, holding and conveying real estate in a purely trust capacity, largely as a matter of convenience for the actual owners of the real estate who are individuals.
>
> "Under an agreement in writing between the individual owners and the corporation the manner and purpose of the holding of this real estate by the corporation is fully set forth, and it is further agreed that the corporation shall profit in no way whatever from such holding, either by way of any fees, charge or compensation of any kind.
>
> "I should like advice from your department as to whether or not this corporation is one coming under sections 178 and 183, General Code, requiring non-resident corporations for profit to obtain a certificate showing it to be entitled to do business in this state. An early response will be greatly appreciated."

You request my opinion upon the question submitted by Mr. North. The letter does not clearly state the exact nature of the company's proposed operations in Ohio. If the company were actually to have a business office in this state, and here to exercise management over any of its concerns, I should be of the opinion that it would be liable for compliance with section 178 of the General Code, which is as follows:

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

And in the event of its non-compliance with this section, its agents actually soliciting business in this state would be subject to the penalties of section 182, General Code, which is as follows:

"Whoever solicits or transacts business in this state for a foreign corporation which is subject to the provisions of the preceding four sections, before it has complied with the provisions of such sections, shall be fined not less than ten dollars nor more than five hundred dollars, or imprisoned not less than ten days nor more than six months, or both. Upon direction of the attorney general, the prosecuting attorney shall prosecute any person charged with a violation of the provision of such sections."

In that event, also, the corporation, if it owned property in Ohio, would be liable, in my opinion, for compliance with section 183, General Code, which provides as follows:

"Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

"1. The number of shares of authorized capital stock of the corporation and the par value of each share.

"2. The name and location of the office or offices of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

"3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

"4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio."

In the event, however, that the concerns of the company are all managed from its principal office and that its sole activity consisted of owning property situated here, the purchase and sale of such property being consummated in the state of Indiana, I would be of the opinion that the company need not comply with either of these provisions. As to section 178, and succeeding sections, it is sufficient to remark that under such circumstances there would be no representative of the company transacting business in Ohio. As to section 183, I may state that the courts

have repeatedly held that the mere ownership of property on the part of a foreign corporation does not constitute "doing business in the state in which the property is located," even though the ownership of the property be among the principal activities of the corporation. Judson on Taxation, section 176; citing, in particular, United States vs. American Bell Telephone Company, 29 Fed. 17, a case arising under these sections.

On account of the failure of Mr. North's letter to specify more particularly the manner in which the company expects to do business I have been obliged to answer in the alternative.

It occurs to me that Mr. North may have in mind the question as to whether or not the company is a corporation "for profit." In other opinions, addressed to you, I have tried to define the distinction between such a corporation and one not for profit under the laws of this state. In my opinion the same principles apply to foreign corporations. The question whether or not a corporation is one for profit is to be solved by consideration of the charter powers of the corporation. If it has the power to distribute dividends to its stockholders it is to be regarded as a corporation for profit. Furthermore, if the articles of incorporation of the company or its charter fail to specify whether or not it is a corporation for profit, but do require or authorize the division of its capital stock into shares, I am of the opinion that the necessary implication would be that the corporation had power to distribute dividends on such shares.

In any event, the precise manner in which the corporation elects to use its powers in doing business would be immaterial. I do not find any authorities directly in point upon the question, and while there is some authority for holding that that is not "business" which is not carried on with a view to gain, such definitions, however, will be found to have been framed with a view to the meaning of specific statutes. In this state the meanings of the words "for profit" and "not for profit," as applied to domestic corporations, have received a certain technical definition. That definition, in my opinion, is to be given to the same terms when used with reference to a foreign corporation.

Of course, as I have already remarked in another connection, the question as to whether or not the making of a particular contract constitutes "doing business" is a separate one from that as to whether or not the corporation is "for profit." Nevertheless, I am of the opinion that the making of a contract which contains an express stipulation to the effect that the corporation is not to profit in any way from the transaction amounts to the doing of business within the meaning of the statute, if the subject-matter of the contract is located in Ohio, and the transaction is consummated by the officers of the corporation in this state.

Still another question is suggested by the latter, namely: as to whether or not it is permissible to admit to Ohio a corporation formed for the purpose of dealing in real estate, whose articles of incorporation authorize it to continue in existence for a period of fifty years, in the face of the fact that a corporation cannot be organized under the laws of this state for a similar purpose, having an existence of longer than twenty-five years.

With respect to this possible question, I beg to state that section 178, which, of the two sections above quoted, alone imposes any limitation upon the issuance of a certificate growing out of the kind of business to be transacted in this state, provides that if "the business of such corporation to be transacted in this state is such as may be lawfully carried on by a corporation organized under the laws of this state" the certificate may be issued. In my opinion there is a clear distinction between an inquiry into the kind of business to be transacted and one into the period of time during which that business may be transacted. The legislature not having provided, expressly or by inference, that the secretary of state may not

admit a corporation for a longer period of time than a domestic corporation would be permitted to live, I am of the opinion that such authority cannot be constructed by inference.

If the question last raised would ever become material it would be after the foreign corporation had existed in this state and here transacted business for a period of twenty-four years. Even in such event, in the absence of any statutory provision, I should be of the opinion that the corporation could not be ousted from its privileges.

I am of the opinion, therefore, as to the last question above suggested, that the duration of a corporation fixed by its articles of incorporation should not be an obstruction to its admission to do business in Ohio.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

356.

ARTICLES OF INCORPORATION—INSURANCE AGAINST BURGLARY AND ROBBERY.

The articles of incorporation of The Ohio Mutual Liability and Casualty Company, returned to the secretary of state unapproved, for the reason that paragraph 2 of section 9510, General Code, and related sections, do not authorize companies formed thereunder to insure against loss by theft.

Companies insuring against burglary and robbery must incorporate under sections 9634 to 9642, General Code, inclusive. These sections especially provide for such insurance.

COLUMBUS, OHIO, June 25, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith the proposed articles of incorporation of The Ohio Mutual Liability and Casualty Company, unapproved by me for the reason that paragraph 2 of section 9510, and related sections, do not authorize companies formed thereunder to insure against loss by theft.

Insurance against burglary and robbery is especially provided for by sections 9634 to 9642, inclusive; and upon familiar principles of law the power to make such insurance cannot be by implication conferred upon a company incorporated under another section. From another angle of view "loss or damage resulting from accident to property" does not embrace loss of property by theft.

In all other respects the articles of incorporation of the proposed company comply fully with the law.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

376.

CHURCH ORGANIZED UNDER SPECIAL CHARTER—CHANGE IN NUMBER OF TRUSTEES—PROCEDURE TO BE FOLLOWED.

When a church that is organized under special charter wishes to change the number of its trustees, it must first divest itself of its special charter and conform to the special provisions of the statutes. After such act it will continue to be a body corporate, made up of members of good standing. These members can, at a meeting called for that purpose, adopt a code of regulations, which code of regulations may provide for any number of trustees and fix their term of office.

The proper procedure to be followed by this corporation would be for it, at a regular meeting, or one called for that purpose to accept all of the provisions of the general laws or such of the provisions as it may wish to avail itself of, and file a certificate of such action with the secretary of state, under section 3882, General Code.

COLUMBUS, OHIO, June 30, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 5th, enclosing a letter addressed to you by Oliver H. Miller, attorney at law, and requesting my opinion upon the question which he submits. The question is raised by the following statement of fact:

> "The First Presbyterian Society, of Springfield, Ohio, was incorporated by a special act of the legislature of 1829, and the society continued to exist as a corporation under its original charter for over 20 years.
>
> "In 1849 the legislature passed an act changing the name of the society to 'the president and trustees of the First Presbyterian church of the city of Springfield,' and directing the election of five trustees, one of whom should be the president, instead of the president and five trustees; two classes of trustees were provided for for the purpose of the first election under the amendment to the charter; and the date of the first election was fixed for a day certain.
>
> "The election was not held upon the day fixed in the amendatory act, but no meeting was held for that purpose until May 31, 1852; at that time the constitution of 1851 and the acts passed in pursuance thereof were in force. One of these acts was the act of May 1, 1852, 50 O. L., 274, entitled, 'An act to provide for the creation and regulation of incorporated companies in the state of Ohio,' which seems to be the parent of our present general incorporation laws.
>
> "The last section of this act, being section 82, on page 296 of the session laws, seems to have been passed with reference to cases like the one of the president and trustees of the First Presbyterian church of Springfield, Ohio. It provided, in part, as follows:
>
> "'Whenever any company, association or society, heretofore * * * incorporated, shall have failed to elect its officers at the time designated, it shall be lawful for such company, association or society, to call a meeting and elect its officers, who shall hold their respective offices until the time specified for the annual, * * * election.'
>
> "In electing the new officers on May 13, 1852, the corporation acted under this section. This is apparent because the section is expressly referred to in the minutes of the meeting.

"No other acts have been done by the corporation since this date inconsistent with the terms of its original charter. May the number of trustees be increased from five to seven? If so, what proceeding is necessary?

"Section 66 and the succeeding sections of the same act provide for the organization of religious and other societies not for profit, and among the other provisions authorized is the election of such number of trustees or directors, not fewer than a certain minimum number, as the corporation might desire to have.

"Section 71 of the same act provided for the acceptance of the provisions of the general incorporation act by previously existing corporations organized under special acts of the legislature. It provided as follows:

"'All companies now incorporated in this state, and actually doing business, may accept any of the provisions of this act, and when so accepted, and a certified copy of the acceptance filed with the secretary to state, that portion of their charters inconsistent with the provisions of this act, is hereby repealed.'"

This was the only way under the general laws then in force that a corporation organized by a special act of the legislature might accept the general laws of the state and avail itself of any of the provisions thereof.

The first question which arises, then is this: The corporation not having acted as required in section 71 of the original act, but having limited its action under the general incorporation laws to availing itself of the authority contained in section 82 thereof, could it have availed itself of the privilege conferred upon other religious societies by section 66 of the general laws, i. e., the privilege of electing as many trustees as they might choose?

In my opinion, the answer to this question is in the negative. Action under section 82 by a corporation incorporated under a special act could not be construed as an acceptance of the remaining provisions of the general laws, because this section was intended particularly for the benefit of certain specially incorporated companies, and was not intended as an amendment to their charters any more extensive than its own terms would require. In order to become subject to the general laws at the time when the act of 1852 was passed it would have been required to comply with section 71 and to file a formal certificate of acceptance with the secretary of state.

The next question which arises is as to whether or not any action which the church had taken since the date last mentioned might have made it subject to the general laws and may have resulted in an implied amendment to its original charter.

Section 8736 of the General Code, which was passed originally in 83 O. L., 201, provided in part that:

"Corporations created before the adoption of the present constitution, which take any action under or in pursuance of this title, shall thereafter and thereby be deemed to have consented, and shall be held to be a corporation, and to have and exercise all and singular its franchises under the present constitution and the laws passed in pursuance thereof, and not otherwise;"

This section also contained a proviso that fire insurance companies subjecting themselves to the police regulations of the state shall not be deemed to have acted under the title. While this proviso is confined to insurance companies, I am of the opinion that its reason applies to all corporations, and that a corporation

which merely subjects itself to the visitorial power of the state and its policy with respect to all of its corporation whether organized under general or special laws, and exerted either by way of taxation or of regulation, cannot be regarded as "taking action under" the general incorporation laws of the state. While I do not find that the point has been definitely decided in Ohio, I am clearly of the opinion that the "taking of action" which the section contemplates is the exercising of some *power* conferred upon the corporation of the same class by the general laws of the state, which power was not conferred upon the particular corporation by its special charter.

I have assumed that the church society in question never did exert any such power, but has confined its corporate activities exclusively to the scope of its original charter. I may be erroneous in making this assumption, as the letter submitted with your inquiry does not fully justify it. If I am in error and if the corporation has acted under the general laws so as to become subject to them, then, of course, further discussion would be unnecessary.

Upon the assumption that I have made, however, I would have to conclude that insofar as nothing has been done up to the present time by the church it is still subject to its original charter and that only with respect to the matters and things set forth therein. One of these things is the restriction upon the number of trustees. So long as the original charter of the corporation continues to constitute its organic law that corporation can have but five, and so long as this situation exists, there is no way to change the number of such trustees.

The present general laws of the state provide for the election of trustees of corporations not for profit as follows: (Sec. 8664, G. C.)

> "* * * A majority of the directors of a corporation for profit *and such a number of the trustees as the regulations of a corporation not for profit may provide, shall form a board.*"

Section 8665 provides a special method of increasing the number of directors, but is silent as to the trustees of a corporation not for profit. No other provision of the General Code in any way affects the number of trustees of a corporation not for profit. The reference in section 8664 to the regulations of a corporation not for profit is not the only provision of the code relating to such trustees, however. Section 8656 provides that:

> "Except as otherwise provided, a majority of subscribers to articles of incorporation not for profit, may elect not less than five trustees for such corporation, to hold their offices until the next annual meeting, or until their successors are elected and qualified."

Section 8656 provides, *inter alia,* that the number of years of the terms of the trustees of such corporation shall not exceed the number of trustees. However, the number of trustees is not fixed by law, but as provided in section 8664 it may be fixed by regulation.

Other provisions concerning the regulation of corporations are found in sections 8701 et seq. I need not quote these provisions as they do not directly relate to the present question. None of these sections expressly authorize the number of trustees to be fixed by regulation, but section 8644, supra, is sufficient for this purpose.

Section 8703 provides that regulations may be adopted or changed at a meeting of the members of a corporation not for profit, notice of which must be given in a certain manner.

The *membership* of a corporation not for profit organized under the general

laws is fixed as to church and religious societies by section 8654 of the General Code as follows:

> "When the incorporators of such a corporation now or hereafter formed, are or become members of a church, religious, secret or benevolent society, and have signed or sign articles to incorporate either thereof, any person who is or becomes a member of such church, religious, secret or benevolent society, in good standing, thereby shall be a member of such corporation, with the right to vote at all of its meetings for the election of officers or for any other purpose."

I have quoted all of this section for the purpose of making clear the practicability of a suggestion I am about to make. If the First Presbyterian church of Springfield desires to change the number of its trustees, it must in some way divest itself of its ancient special charter and accept the provisions of the general laws; after taking such an action it will continue to be a body corporate made up of those who are in good standing as members of the church. These members can, at a meeting called for that purpose, notice whereof is duly given, adopt a code of regulations, which code of regulations may provide for seven or any other number of trustees and fix their terms of office. Thus the end proposed will be accomplished.

As to the method of complying with the general laws, it might be held that if the society simply proceeds as I have outlined, without any other formalities, this would constitute "an action under" their corporate title and would of itself constitute the corporation one organized under the general laws.

The safer proceeding, however, and one which would raise no question whatever as to its regularity would be for the corporation at a regular meeting, or one called for that purpose, to accept all of the provisions of the general laws, or such of the provisions as I have quoted as of which it desires to avail itself and file a certificate of such action with the secretary of state under section 71 of the original corporation act which I have already referred to, which has now become section 8732 of the General Code. In this way the corporation could preserve as much of its original charter as it might desire to preserve and yet might amend the same by accepting portions of the general laws of the state.

I trust that the advice which I have given you will be of service to the society which has raised this question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

378.

ELECTIONS—COUNTY TO PAY EXPENSES OF—APPORTIONMENT OF EXPENSES AMONG POLITICAL DIVISIONS.

Under the provisions of section 5052, *General Code, expenses of general and special elections shall be paid by the county.*

Section 5053, *General Code, provides that the board of elections shall certify to the auditor the expenses of elections held in odd years. The auditor shall apportion the expenses among the election precincts and deduct the amount from the semi-annual settlement.*

COLUMBUS, OHIO, July 23, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In reply to the question propounded to you by the clerk of the board of elections of Hamilton, Ohio, as to the duty of such board in certifying expenses where the city council of Hamilton refuses to make an appropriation for the coming six months, I desire to say:

Section 5052, General Code, provides that the payment of expenses for general and special elections shall be paid by the county, as other expenses, while section 5053, General Code, provides that the expenses of elections in the odd numbered years shall be ascertained by the board of elections, apportioned to the several political divisions and certified to the auditor, who withholds the amount thereof from the sum due such political division on the next semi-annual settlement.

I think this latter section in plain terms and without explanation answers the query presented and points out the duty of the board of elections, under the circumstances mentioned, which seemingly can have no effect, as the money applicable to election expenses never reaches the city treasury, under the provisions of section 5053, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

422.

HOME PROCURING ASSOCIATION MAY NOT INCORPORATE UNDER THE LAWS OF OHIO.

Where an association is formed for the purpose of buying for its members building lots in cities, towns or places in close proximity thereto, and of building thereon dwelling houses for said members on a payment combining plan that eliminates from the cost of said houses and lots, both profit and interest so far as the association is concerned, such an association may not be incorporated under the laws of Ohio.

COLUMBUS, OHIO, July 23, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 15th, enclosing proposed articles of incorporation of The Home Procuring Association, and requesting my opinion as to the legality thereof and as to the proper fee to be collected by your department, for filing the same, if legal. The articles of incorporation, insofar as the provisions thereof are material in connection with the questions, are as follows:

"These Articles of Incorporation of The Home Procuring Association:

WITNESSETH, That we, the undersigned, all citizens of the state of Ohio, desiring to form a corporation, benevolent in its nature, not mutual and not for profit, under the general corporation laws of said state, do hereby certify:

"1. That the name of said corporation is to be The Home Procuring Association.

* * * * * * * * * * * * *

"3. That said corporation is formed for the purpose of buying for its members building lots in cities or places in close proximity thereto and of building thereon dwelling houses for said members on a payment combining plan that eliminates from the cost of said houses and lots both profit and interest so far as the association is concerned, the plan being such that All Members of said association are enabled To Procure and Own Homes."

If it could be said to be legal to form a corporation not for profit for a purpose like that described in the foregoing articles of incorporation, the corporation thus formed would certainly not be "benevolent in its nature" and "not mutual," as the prologue of the articles describing the proposed corporation. A corporation is not "benevolent" the benefits of which are to be limited to the members of the corporation. A corporation is "mutual" if it is formed for the benefit of its members and if, in addition thereto, the members are to share mutually and ratably in the obligations, liabilities and losses of the corporation. It is at least fairly inferable from the purpose clause of the proposed articles of incorporation that the company which it is designed to incorporate is to possess these characteristics in its practical operation.

The reasons for the general conclusions of law above expressed have been defined in other opinions to your department.

It is clear, then, that if the corporation is properly organized as "not for profit" it is a "mutual corporation not organized strictly for benevolent or charitable purposes and having no capital stock," for filing the articles of which a fee of $25.00 is required to be paid, by paragraph 4 of section 176, General Code.

I am of the opinion, however, that the proposed corporation cannot be organized "not for profit," as will be apparent from what I am about to state. I am not certain that I have correctly apprehended the nature of the proposed business, and for that reason I have also expressed an opinion upon the question of the fee. If I do correctly understand the design of the incorporators, however, it is that the proposed corporation is to have a membership, doubtless selected under regulations and by-laws to be adopted, and that the result of the joint investment of the members is to be the financial benefit of the members. That is to say, the several members of the corporation are to contribute to its assets, with a view to reaping direct financial benefit from its operation. To be sure, the corporation itself is not to derive profits from the use of this fund, but inasmuch as any profits which a corporation might reap would, after the satisfaction of any creditors, belong to its members, this recital of the proposed articles of incorporation can have no great bearing upon the solution of the question as to whether or not the real purpose of the incorporators is to conduct a business "for profit." The statutes of this state expressly authorize the formation of certain particular kinds of mutual profit sharing corporations, such as mutual insurance companies and building and loan associations. This corporation, however, cannot be classified as belonging to any one of these kinds of authorized organizations.

In other opinions to your department I have more elaborately discussed my

reasons for being of the opinion that a corporation, the object of which is to *save* money for its members by combining their investments and securing more favorable terms therefor, or otherwise, is no less a corporation "for profit" than one the object of which is to *make* money for its members, so that its profits may be ratably distributed to them.

This general principle applies to the above articles of incorporation. Indeed the suspicion arises that the business in which the company proposes to engage is substantially that of a building and loan association. If that be the case, its formation under the general statutes would be prohibited upon principles laid down in State vs. Livestock Company, 38 O. S., 347.

I may be mistaken in my surmise as to the method of doing business which is designed by the incorporators of this company, but if it is that suggested in the foregoing general discussion it follows, for the reasons therein set forth, that a simple corporation, not for profit, may not lawfully be formed for the purpose therein stated, and that a corporation for profit may not be lawfully formed for said purpose under the general laws of the state; but such business may only be carried on by a building and loan association organized under the special statutes applicable to such associations.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

476.

JUSTICE OF THE PEACE TO BE ELECTED IN ODD NUMBERED YEARS.

All justices of the peace must be elected in the odd numbered years, unless provision is made for a special election in some particular township or precinct, as provided by sections 1712 *and* 1713, *General Code.*

COLUMBUS, OHIO, September 4, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 26, 1913, in which you inquire:

> "Please advise me if justices of the peace should be elected at the next general election.
>
> "I am having various inquiries on this matter, and would be pleased to have your early consideration of the same."

Section 1, of article XVII, of the constitution, provides:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

From this, it being now conceded that a justice of the peace must come within the time of "other elective officers," it follows that justices of the peace must be elected in the odd numbered years.

Section 1715, reads:

"At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election."

From a consideration of this section and the foregoing constitutional provision, I think it clear that all justices must be elected in the odd numbered years, unless provision is made for a special election in some particular township or precinct, as may be provided under sections 1712 and 1713, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

499.

FRATERNAL BENEFIT ASSOCIATION INCORPORATED PRIOR TO THE PASSAGE OF SECTION 9474, GENERAL CODE, MAY DETERMINE IN ITS CONSTITUTION, THE METHOD OF MAKING AMENDMENTS TO ITS ARTICLES OF INCORPORATION.

Section 9474, General Code, clearly authorizes a fraternal benefit association, incorporated prior to the passage of this statute, to determine in its constitution the method of making amendments to its articles of incorporation, in so far as the internal operations of the association are concerned. Such amendments may be filed with the secretary of state, when properly adopted according to the constitution of the organization. Copies of these amendments should be filed in the office of the superintendent of banks.

COLUMBUS, OHIO, September 17, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Without formally requesting my opinion thereon you have transmitted to me a letter addressed to you by Mr. Harry L. Doud, supreme attorney for the Order of United Commercial Travelers of America, enclosing a draft of a proposed certificate of amendment of the articles of incorporation of said order, which said amendment appears, by the certificate, to have been adopted by the supreme council of the order, and not by the members thereof as such.

It appears from Mr. Doud's letter that the Order of United Commercial Travelers of America was incorporated on September 25, 1890, by the filing of articles of incorporation in the office of the secretary of state. Subsequently to this act of organization, and while the order was engaged, as it still is, in the transaction of its business and activities in this state and elsewhere, the general assembly enacted the first of a series of statutes for the organization, government and regulation of that particular type of association or company, variously known as "fraternal beneficiary associations" and "fraternal benefit societies." The Order of United Commercial Travelers of America is assumed by Mr. Doud, and I have no doubt correctly, to be a fraternal benefit society within the meaning of the present statutes on the subject, which constitute sections 9462 to 9509, inclusive, General Code; it is stated in this connection that the order has been licensed by the superintendent of insurance as a fraternal benefit society, and that the license has been renewed from year to year, and is now in effect.

Mr. Doud, calling attention specifically to the provisions of section 9474, Gen-

eral Code, asks the following questions, upon which I assume you desire my advice:

> "1. May the articles of incorporation of the Order of United Commercial Travelers of America be amended by the action of its supreme council, that being the method provided for in the constitution thereof, but this method being inconsistent with the method prescribed by the general corporation laws of the state for the amendment of articles of incorporation of associations formed under said laws, not for profit?
>
> "2. Should a certificate of amendment to the articles of incorporation of the Order of United Commercial Travelers of America be filed in the office of the secretary of state only; in the office of the superintendent of insurance only, or in both offices?"

Mr. Doud also asks you to state whether or not the form of certificate enclosed in his letter is satisfactory to you. The conclusion which I have reached on the other two questions, above stated, however, will make it unnecessary for me to consider the sufficiency of the certificate of amendment, from the point of view of the secretary of state.

Said section 9474, General Code, referred to by Mr. Doud, provides in part as follows:

> "No society already organized shall be required to incorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein, or in its constitution and laws, and all such amendments shall be filed with the superintendent of insurance and *shall become operative upon such filing,* unless a later *time* be provided in such amendments or in its articles of incorporation, constitution or laws."

This section comprises the same subject-matter as that formerly found in the 13th section of the original fraternal beneficiary association act, 97 O. L. 426, which subsequently became section 3631-23, Revised Statutes and section 9482, General Code. The precise language of that section in this connection is as follows:

> "Such an association may amend its articles of association from time to time in the manner provided *herein,* or in its constitution or laws. All such amendments shall be filed with the superintendent of insurance and become operative upon the filing, unless a later time be provided in the amendments, or in its articles of association, constitution or laws."

There is a single substantial difference between these two sections, arising out of the use of the word "herein," which evidently refers to the act of the general assembly in old section 9482, as against the use of the word "therein," which evidently refers to the provisions of the articles of incorporation of the society, as used in present section 9474, General Code. It is sufficient, however, for the present purposes, to state that at the time the original "fraternal beneficiary society" act was passed, the general assembly evinced an evident intention to confer upon the existing and theretofore incorporated associations the power, presumably exclusive, of amending their articles of incorporation in the special method therein provided; and that, in revising the law upon the subject-matter, it retained substantially the same provisions.

The effect of this legislative action, in my opinion, was to amend what may, for convenience and with some accuracy, be termed the "charters" of the theretofore organized associations of this class, in this particular; whereas these associations had been subject to the general law of the state providing for the amendment of articles of incorporation of all corporations not for profit, the application of that general law to the existing associations, by virtue of this legislation, was ended, and the organic law of each of them was changed with respect to the subject-matter of the amendment of their articles of incorporation.

The general assembly, in so acting, was exercising a specially reserved legislative power, namely: That to "alter or repeal a general law for the formation of corporations," and to "alter, revoke or repeal" a special privilege or immunity. See article XIII, section 2, and article I, section 2, constitution of 1851. So that, although the provisions of the general law, under which the associations organized prior to the passage of the amendatory legislation above referred to, became, upon familiar principles, a part of the organic law of each one of them, these amendments, clearly intended to apply to such associations, had the effect of altering that organic law.

As a conclusion from these considerations, it follows that the provisions of the general law relating to amendments of articles of incorporation need not be taken into account at all in connection with Mr. Doud's question. That is to say, if it clearly appears that section 9474, General Code, and its predecessors, constitute a provision for the amendment of articles of incorporation, of associations of the designated class, this provision may, with propriety, be regarded as exclusive. There is every reason for so regarding it. It is impossible, in my judgment, to read section 9474 consistently with the provisions of the general law relating to the method of making amendments, except upon the hypothesis that a corporation subject to the provisions of section 9474 may choose to act either under that section or under the general law. This hypothesis is, in my judgment, untenable. In the first place, the principle that a special provision inconsistent with a general provision is to be regarded as an exception to the latter applies here. Again, when there is a grant of power in a statute, the same is construed, by the application of the rule that the expression of one thing is the exclusion of all others. Section 9474, then, constituting a grant of corporate power to act in a certain way, implies the denial of such power to accomplish the same end by acting in any other manner.

In the third place there is the provision of section 8737, General Code, which is as follows:

> "This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern unless it clearly appears that the provision is cumulative."

It does not, in my judgment, "clearly appear" that the provision of section 9474 is cumulative to that provided by the general law. On the contrary, I have stated reasons for regarding the method provided by the section as exclusive.

Finally, while on this point, and for the purpose of illustration, I may say that I regard the language, "All such amendments shall be filed with the superintendent of insurance and become operative upon the filing" as necessarily inconsistent with the provisions of the general corporation law which require amendments to articles of incorporation to be filed with the secretary of state, and that by no process of interpretation can this positive requirement be regarded as cumulative. This being clear as to a portion of the statute the principle becomes operative as to the whole statute.

Answering Mr. Doud's question specifically, I am of the opinion that section 9474, General Code, clearly authorizes a fraternal benefit society, incorporated prior to the passage of the statute, to determine by its constitution the method of making amendments to its articles of incorporation, insofar as the internal operation of the association is concerned. The word "laws," as used in the immediate context in section 9474, offers no difficulty when the section is compared with old section 9482. Consideration of both sections leads to the conclusion that the word is synonymous with "by-laws," or laws of the society, i. e., of its own adoption or enactment, and is not equivalent to "the laws of the state under which it was organized."

Furthermore, if the word "laws" be given the second of the two suggested meanings, then, the clause of which it is a part is absolutely inconsistent with what immediately follows, in that, under the general laws of the state, as already pointed out, amendments to articles of incorporation must be filed with the secretary of state, whereas the section requires such amendments to be filed with the superintendent of insurance, and makes them operative upon such filing, unless otherwise provided, etc.

It must be acknowledged, in passing, however, that the word "manner," as used in the first of the two clauses now under consideration, might refer merely to the internal operation of the society. Nevertheless, it seems clear to me that the general assembly actually intended to designate the by-laws of the association, and not the laws of the state, in speaking of "its constitution and laws."

For the foregoing reasons, then, I am of the opinion that if the constitution of the Order of United Commercial Travelers of America provides that amendments to the articles of incorporation, before being filed with the proper state authorities, be adopted by the supreme council, and not otherwise, such amendments, so far as the internal operation of the association is concerned, may be so filed, when adopted in this manner.

Answering Mr. Doud's second question, I am clearly of the opinion that the certificate of amendment, a copy of which he encloses, should be filed in the office of the superintendent of insurance, and in that department only. As already stated, I cannot reach any other conclusion, in the light of the precise language used in section 9474, from which it is evident that the general assembly intended that the act of filing amendments to articles of incorporation, of societies "already organized," with the superintendent of insurance should make such amendments operative.

I herewith return for your files the correspondence submitted to me.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

506.

ARTICLES OF INCORPORATION OF THE ROUMANIAN-AMERICAN LEAGUE NOT TO BE FILED UNLESS REVISED.

In order to authorize the secretary of state to accept the articles of incorporation of the Roumanian-American League, an institution formed for the purpose of mutual assistance and benefit socially, financially and cultural, it must be determined either that the association is not to have a lodge system with ritualistic form of work and representative for, of government, or that the death benefits to be provided for shall not exceed $100.00, *or the disability benefits more than* $150.00, *to any one person in any one year, and that certificates are not to be issued. These things must be stated in the articles of incorporation in order to authorize the secretary of state to accept such articles for filing.*

COLUMBUS, OHIO, September 19, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I enclose herewith the proposed articles of incorporation of The Roumanian-American League, submitted to me for my consideration and approval. I am unable to approve these articles of incorporation in their present form. The purpose clause thereof is as follows:

> "Third. Said corporation is formed for the purpose of mutual assistance and benefit socially, financially and cultural. It is to be the principal and ruling organization over subordinate organizations, not for profit. To aid and assist financially the distressed and wanting families of deceased members or those disabled; to promote the educational, intellectual and social improvement of its members and render them eligible for useful citizenship. To acquire and to hold real estate to be used for the erection of society halls or buildings for like social uses and for the sole benefit of its members."

The third sentence of this clause, taken in connection with the use of the words "mutual assistance and benefit," in the first sentence thereof, seems to evidence an intention to conduct the activities referred to in section 9427, General Code, the application of which to societies exempted from some of the remaining provisions of the same chapter is fully discussed in an opinion, of even date herewith, in the matter of the articles of incorporation of The Employes Protective Association of the Haven Malleable Castings Company, of Cincinnati, Ohio.

I need only to add to this opinion, in order to make it applicable to the articles of incorporation of The Roumanian-American League, the statement that, from the legislative history involved, I am clearly of the opinion that a corporation organized under the general laws of the state as a supreme or governing body of subordinate lodges or societies, with power to engage in the activity of aiding and assisting the families of deceased members of the general organization, must conform such portion of its articles of incorporation as purports to grant power to do this to the provisions of section 9427, General Code.

There is one particular, however, in which the articles of incorporation of The Roumanian-American League are deficient, which is peculiar to these articles. This corporation, being the controlling or ruling body, with jurisdiction over subordinate and local lodges, would, of course, naturally fall within the class of organizations subject to the "fraternal benefit society" act, were it not for the pro-

visions of section 9491, referred to in the other opinion. The particular language of that section which exempts this association, if at all, from the operation of that act, is as follows:

> "Nothing contained in this act shall be construed to affect or apply to * * * domestic lodges, orders or associations, of a purely religious, charitable and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or disability benefits of more than one hundred and fifty dollars to any one person in any one year; provided always, that any such * * * domestic lodge, order or society which issues to any person a certificate providing for the payment of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this act * * *"

One of the "provisions of this act," as referred to in the section just quoted from, is section 9473, General Code, which is very lengthy and need not be quoted here in full. Suffice it to state that it requires that a fraternal benefit society, as defined by the act, being, "any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 (G. C., 9466) hereof" be organized by the filing of articles of incorporation in a specified form with the superintendent of insurance instead of the secretary of state.

These provisions, therefore, differ from those with respect to the class of corporations to which The Employes Protective Association of the Haven Malleable Castings Company, of Cincinnati, Ohio, belongs. Accordingly, the remarks made in the opinion referred to, as to the method of incorporation of such societies, do not apply here. Instead, I am of the opinion that a corporation purporting to be, as is The Roumanian-American League, "the principal and ruling organization over subordinate organizations, not for profit" must either negative the definition of section 9466, General Code, on the face of its articles of incorporation or bring itself within the purview of the exemption of section 9491, General Code. That is to say, it must be explicitly stated in the articles, either that the association is not to have a lodge system, with ritualistic form of work and representative form of government, or that the death benefits to be provided for shall not exceed $100, nor the disability benefits more than $150, to any one person, in any one year, and that certificates are not to be issued. These things must be stated in the articles of incorporation, in order to authorize the secretary of state to accept such articles for filing.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

507.

ARTICLES OF INCORPORATION OF EMPLOYES PROTECTIVE ASSOCIATION OF THE HAVEN MALLEABLE CASTINGS COMPANY OF CINCINNATI, OHIO, SHOULD COMPLY WITH SECTION 9427, GENERAL CODE, BEFORE THE SECRETARY OF STATE SHOULD RECEIVE THEM FOR FILING.

Articles of incorporation of the employes protective association of the Haven Malleable Castings Company of Cincinnati, Ohio, an association formed for the purpose of securing to the iron moulders of the Haven Malleable Castings Company, mutual protection and relief for themselves and their families in case of sickness, disability or death, should not be filed until they comply with the provisions of section 9427, General Code, which provides for the organization of companies or associations for the purpose of transacting relief and accident insurance on the assessment plan for the mutual protection and relief of the community.

COLUMBUS, OHIO, September 19, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In your letter of September 2nd, receipt whereof is acknowledged, you submit to me for my consideration and action, if required by law, the proposed articles of incorporation of The Employes' Protective Association of the Haven Malleable Castings Company, of Cincinnati, Ohio. The purpose clause thereof is as follows:

> "The purpose for which said corporation is formed, is to secure to iron molders of the Haven Malleable Castings Company, of Cincinnati, Ohio, of which the membership shall be exclusively composed, mutual protection and relief, for themselves and their families exclusively, in case of sickness, disability or death."

The filing fee tendered therewith is two dollars. That this is proper is evidenced by paragraph five of section 176, General Code, which expressly provides that the secretary of state shall charge and collect "for filing articles of incorporation * * * of * * * associations composed exclusively of any class of mechanics * * * or other employes, and formed exclusively for the mutual protection and relief of members thereof and their families, two dollars."

An association of this sort is not affected by the fraternal benefit act. Section 9491 thereof provides that:

> "Nothing in this act shall be construed to affect or apply to * * * domestic societies which limit their membership to the employes of a * * * designated firm, business house or corporation * * *; provided always, that any such domestic order or society which has more than five hundred members, and provides for death or disability benefits * * * shall not be by the provisions of this section, but shall comply with all the requirements of this act.
>
> "The superintendent of insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this act."

Under this provision I am of the opinion that a corporation may be organized other than under the fraternal benefit society act, but may, by fulfilling the con-

ditions specified in the section quoted, and elsewhere in the related sections, subsequently become subject to that act; the superintendent of insurance being vested with authority at any time to determine in the first instance whether or not the society has become so subject to said act. That is to say, upon the incorporation of a society it is not required by its articles to negative the proviso of section 9491, General Code.

Section 9459 is a part of the provisions of law relating to the organization and government of what are known as mutual protective associations. It exempts from certain provisions of the chapter of which it is a part, viz: sections 9430 to 9458, both inclusive, "any class of mechanics * * * formed for the mutual benefit of the members thereof and their families or blood relatives exclusively."

The section in question, however, does not exempt the associations mentioned therein from the requirements of any of the remaining sections of the chapter. One of these sections is section 9427, General Code, which provides as follows:

> "A company or association may be organized to transact the business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of the deceased members of such company or association, as the member may direct, in the manner provided by law."

In State vs. Pioneer Livestock Company, 38 O. S. 347, it was held that corporations may not be organized under the general corporation laws of the state providing for the incorporation of companies for profit and not for profit for the purpose of conducting an insurance business, but that, in order to obtain corporate authority to transact such business, or to carry on such activities, individuals desiring to form a corporation must associate themselves in accordance with the provisions of the specific statutes relating to insurance companies as such.

Now, the phraseology of the purpose clause of the articles of incorporation submitted to me is not exactly consistent with section 9427, General Code. The inconsistencies lie in the fact that the proposed articles do not specifically state that the business of the association is to be conducted on the assessment plan; in the fact that the protection and relief to be afforded to its members is not, by explicit provision, to be by way of the payment of stipulated sums of money, in the event of the death of a member; and in the fact that the relief which the proposed association is to extend is to be given to the families of the members exclusively, whereas the statute provides that beneficiaries may be "the families, heirs, executors, administrators or assigns of the deceased members * * * as the members may direct." In the face of this inconsistency between the statute and the articles, and the decision to which I have referred, I have felt impelled to consider the question as to whether or not an association of this sort is subject to the rule of the decision.

Several perplexing factors enter into the question involved. In the first place, section 9459, General Code, as already pointed out, does not exempt the class of associations referred to therein from all the provisions of the chapter, but by specific mention restricts the force of its exemption to certain sections of the chapter, thus giving rise to the inference that the associations mentioned therein are subject to the remaining sections thereof. If this be a proper inference, then, no association of employes, nor other association mentioned in the section under consideration, could be formed for the purpose of transacting business in any other way than the precise method described by section 9427, General Code.

But if this hypothesis be adopted another difficulty presents itself. Section

9459, General Code, extends whatever exemption it offers to certain associations and "classes" when "formed for the mutual benefit of the members thereof and their families or blood relatives exclusively." There is here a direct conflict between the language of this section and the language of section 9427, in that the former speaks of societies organized for the relief of members, their families and blood relatives *exclusively,* while the latter seems to require that a death benefit be payable as well to administrators, executors and assigns. So that if the suggested construction be given to section 9459, it would never be lawful for any association formed for mutual protection and relief to limit its death benefits to families and blood relatives, and, hence, there could not be any such thing as a society such as is described by the section. The proposition is thus reduced to an absurdity, and it must be acknowledged that the existence of this absurdity indicates the view that the general assembly did not contemplate that societies of mechanics, etc.—in short, the societies mentioned in section 9459, General Code, should be organized exclusively under section 9427, General Code, or, on the other hand, that it is lawful for an association organized under section 9427 to provide in its articles of incorporation that death benefits shall be payable to a class of beneficiaries more restricted than that defined in the statute.

If the legislative intention evinced in the enactment of these two sections was the first one imagined, then, of course, the rule in State vs. Livestock Company, supra, does not apply to the formation of associations composed of mechanics, etc.; if, on the other hand, the other intention be imputed to the legislature, then, such associations, though permitted to restrict the class of beneficiaries, and indeed required to do so, in order to claim the benefit of the exemption of section 9459, General Code, would nevertheless be required to conform their articles of incorporation otherwise than with respect to the class of beneficiaries to the provisions of section 9427.

The legislative history of the two sections in question must, I think, be consulted in order to reach a decision as to the choice between the two hypothetical legislative intentions. I konw of no better guide to statutory interpretation, in a case of this sort, then the one suggested. The statutes are themselves ambiguous on their face, and well recognized canons of statutory interpretation permit recourse to the state of the pre-existing law, with a view to discovering what evil was intended to be remedied by its amendment and, hence, to shedding light upon the meaning of the statutes as amended.

Section 9427, General Code, was originally passed April 20, 1872, 60 Ohio Laws, 82. Section 1 of this act provided as follows:

> "Any number of persons, not less than five, may associate themselves together as provided in the first section of the act entitled 'an act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1852, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such associations."

Section 3 of the same act provided that the persons thus incorporated should have general corporate powers, and, in addition, "power to receive money, either by voluntary donation or contribution, or to collect the same by assessment on its members; and to distribute, invest and appropriate the same in such manner as such association may deem proper * * *."

It will be observed that these two sections, together, are substantially similar to the first two sentences of section 9427, General Code, except that the class of beneficiaries in case of the death of a member is limited to the "families or heirs of the deceased members."

The substance of the act just cited was incorporated in sections 3630 and 3631 of the Revised Statutes of 1880.

Thereafter, to wit: April 12, 1880, the general assembly passed an act, found in 77 Ohio Laws, 178, in form supplementary to sections 3630 and 3631, and consisting in the original of sections 3630-a to 3630-f, inclusive, amended section 3631, and a section designated as "section 8" of the act.

Sections 3630-a to 3630-f were regulatory in scope and required corporations "organized in pursuance of sections 3236 and 3238 of the act to revise and consolidate the general statutes of Ohio * * * or any other law of this state, for the purpose of doing business under the provisions of section 3630 of said act, or for the purpose of doing such business as is contemplated by said section" to file annual statements with the superintendent of insurance, for the purpose of submitting to the regulatory power of his department. (Section 3630-a.)

I pause here to point out that section 3236, Revised Statutes, expressly referred to in original section 3630-a thereof, expressly provided, inter alia, for the formation of "any association of five or more persons * * * not for profit," and as the principal or ruling organization over subordinate organizations, associated, not for profit, which, as is apparent at a glance, appropriately describes one of the kind of associations referred to in present section 9459.

It was further provided in these regulatory provisions that no corporation or association organized under the laws of any other state should be permitted to do business in Ohio without obtaining a certificate of compliance from the superintendent of insurance. (Section 3630-e.)

Section 8 of the original act was as follows:

> "This act shall not apply to any association of religious or secret societies or to any class of mechanics, express, telegraph or railroad employes, formed for the mutual benefit of the members thereof *and their families* exclusively."

It will be noticed that the words "or heirs," found in section 1 of original section 3630, are not found in the foregoing "section 8." It will also be observed that this "section 8" is the predecessor of present section 9459, General Code.

It will also be observed that the thing which was "not to apply" to the classes of associations mentioned in original "section 8" was "this act," i. e. sections 3630-a et seq, Revised Statutes.

At this stage of the legislation it seems clear to me that the decision in State vs. Livestock Association, supra, as applied to the statutes which I have cited, might result in the conclusion that the classes of associations referred to in "section 8," supra, if incorporated, would have to be organized in conformity to the provisions of section 3630.

Now, section 3630, of course, was not in reality an "organization" provision. Corporations organized under it were nevertheless organized under the general laws of the state, but the powers which they might have were those defined in section 3630, *or something less.* That is to say, an association might be organized under the general corporation laws of the state for the purpose of mutual protection and relief of its members and their families, and if coming within the class designated by said "section 8," would not be subject to the regulatory provisions of sections 3630-a et seq., Revised Statutes; but, though coming within the class of those designated by that section, if such an association should attempt to issue death benefits payable to the *heirs* of a deceased member, in distinction to the family of such member, then, the exemption would not apply. The implication, then, is that a corporation or association might be organized under the general

laws of the state for the mutual protection and relief of its members and their families, in case of death, without extending the death benefits to the heirs.

See, in general, the case of State ex rel. vs. Central Ohio Mutual Relief Association, 29 O. S. 399, decided under the original statutes and prior to the passage of sections 3630-a et seq., Revised Statutes.

After the passage of the sections last above referred to and hereinbefore discussed is was held, in State ex rel. vs. Moore, 38 O. S. 7, that a company of another state could not be admitted to do business in Ohio, by virtue of the provisions of section 3630-e, which paid death benefits other than to the restricted class of beneficiaries provided for by section 3630. The second branch of the syllabus sheds light upon the meaning of original sections 3630-a et seq., as follows:

> "The supplementary act of April 12, 1880, (70 O. L. 178) does not enlarge the class of companies provided for in said section (3630) but merely prescribes the regulations under which *such* companies, whether domestic or foreign, may do business in the state, and subjects them to additional supervision."

In other words, the supreme court held in this case that the act found in 77 Ohio Laws, 178, was merely a regulation of associations organized for the purpose of doing business contemplated by section 3630, and no other business.

Undoubtedly, this decision led to the subsequent amendments of the statutes, involved, found in 83 Ohio Laws, 61, and 88 Ohio Laws 251. These amendments need not be specifically set out here. Suffice it to say that the phrase "to transact the business of life or accident or life and accident insurance on the assessment plan" and the words "executors, administrators or assigns" were, among other things, added to original section 3630, Revised Statutes, now section 9427, General Code. The purpose of the legislature in so amending section 3630 was to make it possible for foreign insurance companies not calling themselves "mutual protection associations," but rather "assessment insurance companies," to be admitted to the state. Similarly, the legislature entertained the purpose of permitting the admission of foreign companies whose business contemplates the payment of death benefits to persons other than the families and heirs.

In amending section 3630, Revised Statutes, however, the general assembly did not see fit to amend original "section 8" of the act found in 77 Ohio Laws, 178. It had received the section number "3631-a" in the Revised Statutes, and has since become section 9459, General Code. Nevertheless, the conflict between the provisions of the two sections, with respect to the class of beneficiaries, has already been explained, and the legislative history of section 9427 merely makes plainer what already appears, namely: that the legislature contemplates the possibility of the formation of a company for the purpose of mutual protection and relief of its members, under section 3630, Revised Statutes, now section 9427, General Code, the payment of whose death benefits, however, should be to a class of persons more restricted than that defined therein. In other words, while the death benefits could not be made payable to a larger class of beneficiaries, they might lawfully be made payable to a smaller class thereof than the statute defines. And when the legislature, in deference doubtless to the wishes of foreign companies, amended section 3630, Revised. Statutes, it did so for the purpose of making it possible for such foreign companies to enter the state, and it did not contemplate that all domestic companies, or even all foreign companies, should be organized with *all* the powers defined in section 3630. So it was not necessary, in order that a corporation be organized under section 3630, that it should do the business of life or life and acci-

dent insurance on the assessment plan as a technical "business," nor that it pay its death benefits to all the classes of beneficiaries to which a company organized under that section might be authorized to pay such benefits. A company organized for mutual protection and relief and disclaiming the intention of doing business on the assessment plan has a business, and a company declaring its intention to pay its death benefits to a class of beneficiaries more restricted than that referred to in section 3630 might, nevertheless, be regarded as one organized under that section.

These considerations, then, explain the verbal differences between present sections 9427 and 9459, General Code. They remove all obstacles to the operation of the doctrine announced in State vs. Livestock Association, supra, which I believe applies, with all its force, to the organization of mutual protection societies of whatever kind. This was the opinion of my distinguished predecessor, Hon. James Lawrence, who advised the then secretary of state, in an opinion found in "Opinions of the Attorney General of Ohio, 1813-1888," volume 3, page 504, that:

> "In my opinion all corporations formed for the purpose specified in section 3630, Revised Statutes, must be organized under and in pursuance thereof, and are governed by that section and the sections supplementary thereto, except that said supplementary sections do not apply to any association of religious or secret societies, or to any class of mechanics, express, telegraph or railroad employes formed for the mutual benefit of the members thereof and their families exclusively. This exception in respect to the class of associations last named, it will be seen, extends only to the provisions relating to their conduct and management. Corporations of the *excepted* class must nevertheless be organized and created under the authority of section 3630, *and possess all the powers thereby conferred.*"

This opinion was rendered February 25, 1885. There has been no subsequent legislation in any way changing the principles upon which it was founded.

I concur substantially in Judge Lawrence's opinion and I am satisfied that it applies to the statutes as they exist today.

As a conclusion from these principles, it follows that a corporation, formed for the mutual protection and relief of the members thereof and their families, the membership of which is exclusively confined to the employes of a designated firm, which employes are and constitute a class of mechanics, though exempted by the statutes above quoted from the provisions of the fraternal benefit society act, and though further exempted by the provisions of section 9459, General Code, from the regulatory statutes pertaining to mutual protective societies in general, nevertheless, must be organized in conformity to section 9427, General Code. To say that they must be so organized means that they may possess no powers inconsistent with that section and must show by their articles of incorporation that the business or acivity in which the association proposes to engage is one consistent with the provisions thereof.

The conclusion just stated assumes that the decision in State vs. Pioneer Livestock Company, supra, applies to companies or associations organized for the mutual protection and relief of their members. It might be objected at this point that the precise holding in that case was that a corporation may not lawfully be organized under the laws of this state for the purpose of conducting an *insurance business,* except under the sections pertaining to insurance companies as such and that the business of mutual protection and relief of the members of an association is not an "insurance business" in the technical sense, so that the decision has no application in such cases. That is to say, it might be asserted that, while it is unlawful by virtue of this decision to permit the organization of a corporation for

the purpose of conducting an insurance business under the general corporation laws of the state, it is not necessarily unlawful to permit the organization of a corporation for the purpose of carrying on activities which do not amount to the insurance business; so that, unless it be established that the purpose for which the employes' protective association, etc., the articles of incorporation of which are now under consideration, is formed amounts technically to the doing of an *insurance business,* it may be organized with such powers as its incorporators please to confer upon it, provided they are lawful otherwise, and need not be conformed, with respect to its purposes, to the provisions of section 9427, General Code.

An argument of this sort would, I apprehend, depend for its validity upon a strict construction of the decision in State ex rel. vs. Pioneer Livestock Company, on the one hand, and a liberal interpretation of the decision in State ex rel. vs. Railroad Company, 68 O. S. 9, on the other hand. In the case last cited, it is held, in the language of the syllabus, as follows:

> "1. An association established by a railway company, composed of some or all of its employes and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employes who apply for membership in said fund and are admitted, the railway company to take charge of and be responsible for the funds, make up deficiencies in the same, supply facilities for conducting the business and pay the operating expenses, supply surgical attendance for injuries received in its service, and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from the wages retained by the company, is not an insurance company or association; and in agreeing to perform, and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business.
>
> "2. The said acts of the railway company are within the implied powers of a railway corporation and are not *ultra vires.*
>
> "3. Nor are they contrary to public policy."

It may be pointed out as to this decision that the kind of business or activity conducted by the railroad company, and which was involved in the case, differs essentially from the kind of business proposed to be conducted by the association, the articles of incorporation of which are presented to you, in that, for example, the railroad company, as such, was to bear all contingent expenses of the relief department maintained by it, and was to guarantee the integrity of the relief fund, in the sense that it would make up deficiencies therein whenever the necessity might arise. In other words, the relief department was not an independent *business concern*, but the railroad, as such, was the undertaker of the activities comprised within the scope of its relief department . That this point was not without weight in the mind of the court is apparent from consideration of what is said by Judge Price in delivering its opinion, at pages 32 to 34, inclusive, of the report to which you are referred. I forbear to quote his remarks on this point, but it may be stated, as a fair summary thereof, that the right of the railroad company to maintain the relief department in quesion was sustained, at least partly, on the ground that the peculiar manner of conducting said department deprived the activity of the character of a *business,* and, as against the attorney general's compaint, that the company was conducting an "insurance business."

The distinction here lies in the fact that, whatever be the exact definition of the phrase "insurance business," the status of an association dependent upon its own means of raising revenue for the payment of the benefits which it holds out to those

desiring to become its members is entirely different from that of the relief department of a railroad, behind which the assets of the railroad company are placed, so as to insure its successful operation.

On the other hand, there are points of similarity between the facts passed upon in State vs. Railway Company and the facts presented by the proposed articles of incorporation of the association now under consideration. The decision in the case cited was not upon the ground which I have discussed, alone, but upon the further and broader ground stated at page 37 of the opinion, in the language of Justice Clark of the supreme court of Pennsylvania, in Commonwealth vs. Equitable Beneficial Association,, 137 Pa. St. 412-419. I forbear to quote the exact language of the opinion and syllabus in that case; but it appears from careful reading thereof that it was the holding of the Pennsylvania court, approved by our own supreme court, that an association formed for the purpose of accumulating a fund to be used in the aid or relief of the members of the association and their families, in the misfortunes of sickness, injury, or death, does not, in the pursuit of that purpose, make contracts, which amount technically to contracts of insurance. The court distinguishes between "indemnity" and "security against loss," as motives, so to speak, for entering into the relation of member or policy holder of an association, on the one hand, and "protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death," as such motive, on the other hand. I confess that the disinction appears somewhat ephemeral to me. Nevertheless, it has become adjudicated law, not only in this state, but in many other states, as evidenced by the decisions cited in State ex rel. vs. Railway Co., supra.

This being the case, then, it must be admitted that an association, formed for the purpose of the mutual protection and relief of its members and their familes, in case of sickness, accident or death, without further stipulation, is not an association formed for the purpose of doing an insurance business; so that, if the principle of the case of Sate ex rel. vs. Pioneer Livestock Co. be limited strictly to its application to *insurance* companies, as such, it would have to be held inapplicable to the question now under discussion.

But the considerations already discussed lie on the surface merely of the cases involved. When the supreme court of this state applied the reasoning of the Pennsylvania decision above cited, in holding that the relief department of the Pennsylvania railroad was not doing an insurance business, it, in fact, held that membership, under rules providing for the payment of *stipulated death benefits to designated beneficiaries,* did not create a contract of insurance. For, as will be apparent from a careful examination of the facts in State vs. Railway Company, as stated in the opinion of the court, pages 28 to 32, inclusive, this was the precise nature of the plan of operation of the relief department therein involved. That is to say, in the language of the third regulation of the relief department, found quoted on page 32 of the report of the case,

> "The object of this department is the establishment and management of a fund * * * for the payment of *definite* amounts to employes contributing to the fund * * * when they are disabled by accident or sickness, and in the event of their death, to the relatives *or other beneficiaries specified in the application.*"

That is to say, a member of the relief department had, by virtue of his membership therein, precisely the same rights as would arise out of a policy of life and accident insurance, so far as the right to receive a stipulated sum by way of benefits was concerned, and so far, further, as the right to designate beneficiaries was concerned.

Yet, the court held that the activities of the relief department did not constitute the "insurance business." Ignoring for the moment the other grounds upon which the decision was based, one of which has already been discussed, and another of which will hereinafter be pointed out, and having regard to this one feature only, it seems to me that the conclusion can logically be drawn therefrom that the business of accumulating a fund for the mutual protection and relief of the members of a voluntary society or association, and designated beneficiaries in case of death, does not amount to an insurance business.

The importance of this point will be understood when the legislative history of present section 9427, General Code, as hereinbefore outlined by me, is taken into consideration. Let it be noted that in its original form, section 3630, Revised Statutes, the predecessor of present section 9427, General Code, provided for the organization of associations under the general laws of the state "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members."

At that time there was in the section no mention of the "business of life or life and accident insurance on the assessment plan," such as is now found in the section.

I am clearly convinced that the application of the reasoning of our supreme court, in the case of State ex rel. vs. Railway Company, to original section 3630, Revised Statutes, would result necessarily in the holding that the business to be done by associations authorized to be incorporated under section 3630, Revised Statutes, in its original form, was not the insurance business.

Now, the case of State ex rel. vs. Railway Company might be distinguished upon a ground different from that already stated, viz: that as a part of the contract resulting from membership in the relief department the member agreed that in the event of injury or death he, or his beneficiary, was to have either the benefits provided by the relief department or his right of action against the company arising out of such injury or death (page 31 of the report). That is to say, one of the elements of the contract of membership was the waiver of the unaccrued right of action *ex delicto,* and the creation of the right of election between that right of section when it should arise and the right to the benefits provided.

This element, of itself, might be regarded as sufficient to distinguish the business of the relief department from the technical "insurance business." I have preferred, however, to take the court at its word with respect to one of the grounds upon which the case in 68 O. S. 9 was decided. At least, there is presented by the decision the following dilemma: either the ground of the decision must be found in the peculiar relation of the railroad company to the activities of the relief department, and in the waiver and election which constituted an element in the contract of membership in such department, just commented upon; in which event the case is to be regarded as completely inapplicable to the question at hand; or the decision must be regarded as establishing the principle that a mutual protection association, formed for the relief and benefit of its members and the payment of stipulated sums to them, and in case of death to their families or designated beneficiaries, is not in any sense an "insurance company;" in which event it would have to be held that original section 3630, Revised Statutes, providing for the organization of mutual protection associations, did not provide for the organization of a kind of insurance company.

If the first horn of the dilemma be accepted, then, the case of State vs. Railroad Company is no obstacle to the exact application of the decision in State ex rel. vs. Livestock Association.

If the second horn of the dilemma be accepted, then, the further question arises as to whether or not the principle involved in State ex rel. vs. Livestock Association is limited to insurance companies as such.

On this point I am clearly of the opinion that the decision is not limited in its application to the technical business of insurance as such. The syllabus in the case is as follows:

> "Section 3235, chapter 1, title 2, Revised Statutes, which reads: 'corporations may be formed in the manner provided in this chapter, for any purpose for which individuals may lawfully associate themselves together, except for dealing in real estate or carrying on professional business' must be construed as not authorizing the incorporation of insurance companies, *as the organization of such companies is specially provided for in chapters X and XI of same title.*"

It was said by Judge McIlvaine, in the opinion, page 348, that:

> "The defendant claims the right to insure the owners of horses and cattle against loss by theft or death, under its articles of incorporation and by virtue of section 3235 of Revised Statutes, which provides: 'corporations may be formed in the manner provided in this chapter, for any purpose for which individuals may lawfully associate themselves together, except for dealing in real estate or carrying on professional business; and if the organization is for profit it must have a capital stock.'
>
> "Undoubtedly the broad terms of this section would be sufficient warrant for the exercise by defendant of the franchises and privileges claimed; but, on the other hand, it is claimed that section 3235 must be construed in connection with chapters 10 and 11, title 2 of Revised Statutes, wherein, it is claimed that the whole subject of insurance by incorporated companies in this state is regulated, and that defendant is not within the provisions or protection of either of these chapters.
>
> "We agree with the attorney general in the opinion that the whole subject of insurance by companies incorporated under the laws of this state is regulated by these chapters, and that no insurance company can be incorporated under the general provisions of section 3235. The special provisions made in these chapters in relation to the organization of insurance incorporations withdraws such corporations from the general provisions in section 3235, which relate to corporations generally."

It seems very clear to me that while the court is speaking, because of the facts before it, of the "subject of insurance by incorporated companies in this state," the reason for the decision applies to all companies for the organization of which provision is made in the later chapters of the corporation code. In other words, the court was merely applying the express provisions of section 8737, General Code, at that time section 3269, Revised Statutes, which is as follows:

> "This chapter does not apply when special provision is made in subsequent chapters of this title, but the special provision shall govern, unless it clearly appears that the provision is cumulative."

The holding of the court (although the section is not mentioned) was, in effect, that the non-application of the preceding sections extended to what is at present section 8623, General Code, as well as to other sections in the general corporation laws. The resultant principle, it seems to me, is that wherever the general assembly has, by particular provisions, authorized the formation of corporations or associations for designated purposes, and prescribed their corporate powers, it is unlawful for individuals to associate themselves under section 8623, General Code, for

a purpose essentially like the designated purpose but with powers, in essential respects, different from those prescribed by the particular provisions. In other words, while the court was speaking merely of the "subject of insurance," it might just as well have spoken of the subject of railroads, that of street and interurban railroads, that of turnpike or plank road operation, that of the operation of telegraph and telephone lines, that of banking, that of agricultural societies, that of educational societies; in short, any of the subjects, the formation of corporations to deal with which is specifically regulated by any of the special chapters of the corporation code.

Now, it seems to me that the true principle involved in the decision is very succinctly stated in section 8737, above quoted; so that, in every instance, the question arises as to whether or not the special provisions found later in the code are cumulative to the general provisions, or exclusive of them. In the case now under consideration I can reach no conclusion other than that the special provisions respecting mutual protection associations are exclusive of the general provisions of section 8623, General Code. To hold otherwise would be to hold that the legislature of the state enacted a vain and meaningless law when it passed original section 3630, Revised Statutes, and the acts amendatory thereto; for if any kind of a mutual protection association could, after the enactment of those laws, have been organized under section 8623, General Code, then, there was no conceivable reason for ever passing them. The legislature must be presumed to have contemplated a real and substantial act of legislation. The only conclusion which will effectuate such an intention is that which holds that section 9427, General Code, is one of the "special provisions" referred to in section 8737, which is not "cumulative" to the provisions of section 8623, General Code.

From all these considerations, then, I am of the opinion that whether or not the purpose for which the employes' protective association, etc., the articles of incorporation of which are submitted to me, is formed be regarded as contemplating the carrying on of a technical "insurance business," it is one of the purposes within the purview of section 9427, General Code, so that its articles of incorporation must conform thereto.

I have already referred to certain inconsistencies between section 9427, General Code, and the purpose clause of the employes' protective association, etc., now under consideration. One of these inconsistencies is, in my judgment, immaterial. That is to say, it is not necessary, in order that the association may conform its business to the statute, that the beneficiaries of its death benefits be all of the classes referred to in the statute. I am of the opinion, therefore, that the restrictions in the articles to the families of the members, as a class of beneficiaries, is lawful.

I also pointed out that it is not expressly stated in the articles that the method of business shall be what is known as the "assessment plan." The legislative history of the sections already commented upon makes it a very doubtful question as to whether or not an association of the kind typified by the proposed articles in question must make this declaration. For a discussion of the nature of what is known as the "assessment plan" see State ex rel. vs. Insurance Company, 58 O. S. 1. It is essential to the conduct of business upon this plan that, in theory at least, specific losses be met by assessment on the members, within the limits defined by the rules of the association. It is not essential that actual payments, on account of assessments, be deferred until the assessment is actually called. That is to say, the organization having the right, as it does under section 9427, to receive donations and voluntary contributions, may extend to its members the privilege of paying specified sums, weekly, to apply on assessments when made.

Nor is the method of doing business on the assessment plan necessarily inconsistent with accumulation of a fund. Section 9427 expressly authorizes this, in the following manner:

"The company also may receive money, either by voluntary donation or contribution, or collected by assessments on its own members, and may *accumulate, invest,* distribute and appropriate such money in such manner as it deems proper. All accumulations and accretions thereon shall be held and used as the property of the members and in the interest of the members. * * *"

While the provisions which I have been discussing were, as already pointed out, incorporated in the section by legislation subsequent to its original enactment, thus giving rise to the only doubtful question involved, I am of the opinion that the section as a whole is not susceptible to any interpretation other than that the manner in which the "purpose of mutual protection and relief of its members" is to be achieved is by the application, in theory at least, of what is known as the "assessment plan." That is to say, I am willing to concede that when the new language was inserted at the beginning of the section, to wit: "to transact the business of life or accident and life insurance on the assessment plan," the general assembly may have had in mind the description of a different class of corporations from that described by the earlier form of the section, viz: for the purpose of mutual protection and relief of its members. But, obviously, the subsequent sentences of the section, those already quoted, as well as one not yet quoted, viz:

"No company or association shall issue a certificate for a greater amount than it is able to pay from the proceeds of one assessment."

were intended to refer to associations formed "for the mutual protection and relief of their members," etc., as well as to companies formed "to transact the business of life * * * insurance on the assessment plan," if those two be separate classes.

I am led to this conclusion by consideration of the fact that any other would render the meaning of the section, and particularly the last sentences thereof, hopelessly involved and ambiguous. Support is also lent to the conclusion by the fact hereinafter to be commented upon, that a mutual protection and relief society must nevertheless agree to pay "stipulated sums" in the event of death. If the obligation to pay such stipulated sums is a "mutual" one, as the section clearly implies; and if, also, the protection and relief to be afforded to the members themselves in case of accident or sickness, etc., is to be "mutual," in the exact sense, then, the beneficiaries in case of death, or the individual members in case of accident, should be vested with some enforceable right as against the remaining members, or, more accurately, as against the association itself.

If, then, the corporation is to deny itself the power to make assessment, it has left under the section only the power to "receive money by voluntary donation or contribution." It is obvious that there could be no "mutual" obligation to pay, a "stipulated sum" in the event of the death of one member, as against the association or the remaining members, if the assets of the association were to be collected by voluntary contribution only. Such a contract might be entered into, but it would lack the element of *mutuality*. The "stipulation" as to a sum of money to be paid in the event of death would be unenforceable.

From all these considerations, I am of the opinion that an association, formed, as the one whose articles of incorporation are presented to me, for the "*mutual* protection and relief of its members," etc., must specifically claim in its articles of incorporation the right, at least, to make assessments on its members. I would not hold that the association must recite that it proposes to do a technical assessment insurance business; and perhaps once that it is certain that the company is governed by section 9427, General Code, the power to assess follows without specified recital. But I am clearly of the opinion that it is at least preferable that

the association recite in its articles of incorporation, either that it is to possess the powers mentioned in section 9427, General Code, referring to the section as such, or that it is to have, among other things, the power to collect funds for the payment of death benefits "by assessment on its members."

There is another inconsistency between the articles and the statute, which I regard as necessary fatal to the former. Whatever be the nature of the manner in which an association of this sort is to receive support from its members, it is clear, I think, that death benefits must be by way of "stipulated sums," that is to say, a mutual protection association cannot receive authority to grant merely general relief to the families of members in case of the death of such members. The relief must be by way of a "stipulated sum."

For the reasons suggested, I return the proposed articles of incorporation of the employes' protective association of the Haven Malleable Castings Company, of Cincinnati, Ohio, and advise you not to file the same until they are made to conform to section 9427, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

509.

ARTICLES OF INCORPORATION OF THE NATIONAL METAL TRAFFIC ASSOCIATION SHOULD NOT BE FILED BY THE SECRETARY OF STATE.

A corporation may not lawfully be formed for the purpose of maintaining supervision over the traffic and transportation work of the American metal-trades interests, in all its branches, including the representation of such interests in matters and proceedings before the interstate commerce commission, state railroad commission, and state and federal courts, and the performance of any and all duties necessary, incidental and appertaining thereto.

COLUMBUS, OHIO, September 17, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of September 12th, requesting my opinion as to the legality of the purpose for which The National Metal-Trades Traffic Association was formed, as evidenced by the proposed articles of incorporation of said association, enclosed therewith, and particularly by the following article, thereof, to wit:

> "Third. Said corporation is formed for the purpose of maintaining supervision over the traffic and tranportation work of the American metal-trades interests, in all its branches, including the representation of such interests in matters and proceedings before the interstate commerce commission, state railroad commission, and state and federal courts, and the performance of any and all duties necessary, incidental and appertaining thereto."

It is provided by Section 8623, General Code, that,

> "*Except for carrying on professional business,* a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

The italicized portion of the above quoted section has been construed in State, ex rel., vs. Laylin, 73 O. S. 90, as precluding the formation of a corporation for the conduct of a business which amounts to the practice of the profession of law. Tests for determining whether or not the proposed business activity amounts to the practice of this profession are suggested by the court in the decision cited, but it occurs to me that the above quoted articles of incorporation so clearly evince an intention to engage in the practice of this profession that the application of these tests, designed for use in doubtful cases only, is scarcely necessary. The representation of interests in matters and proceedings before the state and federal courts is a function peculiarly pertaining to the practice of law as a profession; and it matters not that the interests to be represented are limited to any particular designated kind.

I am, therefore, of the opinion that a corporation may not lawfully be formed for the purpose stated in the articles of incorporation of The National Metal-Trades Traffic Association, and that the said articles, therefore, may not lawfully be received and filed by you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

554.

THE CHASE-HACKLEY PIANO CO., A CORPORATION ORGANIZED UNDER THE LAWS OF MICHIGAN IS NOT REQUIRED TO COMPLY WITH THE PROVISIONS OF SECTION 183, ET SEQ., GENERAL CODE.

The Chase-Hackley Piano Co., a corporation organized under the laws of Michigan, is not required, in order to do business in Ohio in the manner described in its application filed with the secretary of state, to comply with the provisions of section 183, *et seq., General Code.*

COLUMBUS, OHIO, October 10, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 17th, enclosing application of the Chase-Hackley Piano Company, a corporation organized under the laws of the state of Michigan, for a certificate entitling it to transact business in Ohio, and requesting my opinion upon the question as to whether or not this corporation is required to comply with section 178, et seq., or section 183, et seq., General Code, in order to do in this state the things described in the application.

The application in question states the business or objects of the corporation, which it purposes to engage in or carry on in the state of Ohio, as follows:

> "Consigning and wholesaling only and collecting in when necessary to take over dealers' accounts, in connection with, and as part and parcel of,

the manufacture and marketing of pianos and other musical instruments in accordance with the articles of incorporation, copy whereof is hereto attached.

"Said consigning and wholesaling and collecting will at all times be done by the corporation at and from its office in the city of Muskegon in the state of Michigan, by and through the mail and traveling agents and salesmen, and not otherwise. The corporation will at no time have or own any merchandise or property situate in the state of Ohio except and unless the same be temporarily from time to time in case the corporation must and does retake property theretofore consigned or wholesaled by it in part payment of a sum or sums due to the corporation and unpaid, or for default of payment, pursuant to conditional sale, contract or chattel mortgage or like security. The corporation will at no time have or keep an office or place of business unless, and except as, the office and place of business of the person named in the fourth paragraph hereof for service of process be such office or place of business."

The corporation itself is organized for the following stated purpose, quoted from its articles of incorporation:

"The purposes of this corporation are as follows: The manufacture and sale of pianos and other musical instruments and the purchase and sale of musical merchandise."

Section 178, General Code, provides as follows:

"Before a corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

Under this section it was held, in Toledo Commercial Company vs. The Glen Manufacturing Company, 55 O. S. 217, that the same does not apply to a foreign corporation whose business within the state consists merely of selling through traveling agents and delivering goods manufactured outside of the state. The ground upon which the decision is based is illustrated by the following excerpt from the opinion of Spear, J., on page 221:

"The holdings are numerous that it is the right of persons and of corporations residing in one state to contract and sell their commodities in another, unrestrained except where restraint is justified under the police power. This rule does not deny the right of any state to impose conditions upon the power of foreign corporations to establish themselves within its boundaries for the performance generally of their business, involving the exercise of corporate franchises and powers, but does hold that the

selling through traveling agents and delivering of goods manufactured outside of the state, does not fall directly within the purview of their corporate powers. The pertinent provision of the federal constitution is that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states' and that instrument gives to congress power 'to regulate commerce * * * among the several states.' The distinction to be noted is that the sale and delivery of merchandise is a right possessed in common by all the citizens of the state; the ex-exercise of corporate franchises and powers, is not—it is a special privilege conferred only on corporations. And the sale and delivery in one state of goods manufactured in another state, by a citizen of that state, is interstate commerce. Amid a score of authorities it is sufficient to cite Cooper Manufacturing Co. vs. Ferguson, 113 U. S. 727; Robbins vs. Shelby County, etc., 120 U. S. 489; Horn Silver Mining Co., vs. New York, 143 U. S. 314; Brennan vs. Titusville, 153 U. S. 289, and Coit vs. Sutton, 102 Mich. 324. The decisions of the supreme court of the United States are controlling. They forbid the exercise by the legislature of the power claimed by the plaintiff-in-error, and hence its construction of the statute cannot be maintained, because it would result in a conflict upon a question, as to which question the authority of the general government is paramount to the government of the states."

The above stated objects of the Chase-Hackley Piano Company come squarely within the rule laid down in the case from which quotation has just been made. I am, therefore, of the opinion that in order to engage in or carry on the business or objects therein described, the corporation would not be required to comply with section 178, General Code.

As to section 183, et seq., General Code, it may be stated that section 188 thereof expressly excludes from the operation of this group of statutes "foreign corporations entirely non-resident soliciting business or making sales in this state by correspondence or by traveling salesmen." I am therefore of the opinion that the corporation is not required, in order to do as intended, in the manner described in the application filed with you, to comply with the provisions of section 183, et seq., General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

574.

UNDER THE CORRUPT PRACTICES ACT PERSONS MAY BE EMPLOYED FOR THE DISTRIBUTION OF POSTERS, ETC., BY EITHER THE CANDIDATE OR THE COMMITTEE.

Under the provisions of section 5175-26, *General Code, persons may be employed for the distribution of posters by either the candidate or the committee. The expenditure is limited by the provisions of* 5125-29 *and following sections. The fact that a person is a committeeman does not prevent his being paid for any service that one is permitted to perform under the corrupt practices act.*

COLUMBUS, OHIO, October 20, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a communication addressed to you, which has been referred for answer to this department, and which reads as follows:

> "Does the preparation, printing and publication of posters, lithographs, banners, notices and literary material, reading matter, cards and pamphlets permit of the employment of persons for the distribution of same by candidates or committees? 'Can a committeeman be compensated for the duties he performs except for reasonable traveling expenses?'"

Section 5175-26, General Code, as amended by the last legislature, reads as follows:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect to any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at their reasonable, bona fide and customary value; * * * The preparation, printing and publication of posters, lithographs, banners, notices and literary material, reading matter, cards and pamphlets; * * * the preparation and circulation of letters, pamphlets and literature bearing on election. * * * Compensation of such clerks and agents as shall be required to manage the necessary and reasonable business of the election * * *; the reasonable traveling expenses of the committeemen, agents, clerks and speakers; * * *.
>
> "Any payment, contribution or expenditure or agreement or offer to pay, contribute or expend any money or thing of value for any purpose whatsoever except as herein provided is hereby declared to be corrupt practice and invalidates the election of any person guilty thereof. (103 O. L. 579.)"

If I understand the questions propounded they are as follows:

> "*First.* Does the phrase, 'preparation, printing and publication of posters, etc.,' permit of the employment of persons by candidates or committees for distribution of the same?
>
> "*Second.* Can a committeeman be compensated for the duties he performs other than for 'reasonable traveling expenses?'"

I have heretofore held, in construing the corrupt practices act that unless the thing or service is expressly contained in the enumerated list of permitted matters and things found in section 1575-26, or could be fairly implied therein, any expenditure for any such matter or service would be a corrupt practice.

Answering your first question, the permission of the statute is for not only the preparation and printing but also the publication of posters, etc.

"Publication" is defined by the Century dictionary as:

> "The act of publishing or bringing to public notice; notification to the people at large by speech, writing or printing. The act of offering a book, map, piece of music or the like to the public for sale or gratuitous distribution."

To my mind it is permissible to pay one person for the preparation, another for the printing, and still another for the publication of the posters, etc., enumerated in the section, or one person could be paid for the entire work of preparation, printing and publishing. So long as the payment was at the reasonable, bona fide and customary value for the same it would not be a violation of the act no matter to whom said payment might be made.

I am of the opinion, therefore, that section 5175-26 permits the employment of persons for the distribution of posters, etc., by either the candidates or the committees. It is to be noted, however, that this, like all expenditures, is limited by the provisions of section 5175-29 and following sections.

In answer to your second question I can only repeat that expenditures in connection with an election are limited to the matters and things enumerated in section 5275-26. The fact that a person may be a committeeman does not prevent his being paid for any service that any one is permitted to perform under the act, but he can only be paid for the particular matters and things enumerated, and for them at their reasonable, bona fide and customary value. While the section specifically enumerates "the reasonable traveling expenses of the committeemen" this is not a limitation of all the matters and things for which a committeeman may be compensated, but it is not permitted under the guise of paying him for matters and things that are allowed by the statute, to give him extra compensation for duties or services rendered which are wholly without the list of enumerated matters and things in section 5175-26.

Trusting that this answers your inquiries, I am,

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

591.

THE PROPOSED ARTICLES OF INCORPORATION OF THE FIREMEN'S RELIEF ASSOCIATION OF NORWOOD, OHIO, SHOULD BE MADE TO COMPLY WITH SECTION 10176, GENERAL CODE.

The firemen's relief association of Norwood, Ohio, is an association formed to provide a fund for the relief of the active firemen of Norwood fire department who may become sick or injured through any accident not caused by any illegal or unlawful act of his own, and also a fund in case of death of any member for the relief of his widow, children or heirs, and the articles of incorporation of this association may not be filed. Such firemen's relief association must be formed under sections 10176 *et seq., General Code.*

COLUMBUS, OHIO, November 7, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 30th, transmitting, for my approval and advice as to the proper filing fee therefor, the proposed articles of incorporation of The Firemen's Relief Association of Norwood, Ohio.

The declared purpose of the association is as follows:

> "to provide a fund for the relief of the active firemen of the Norwood fire department who may become sick or injured from any accident not caused by any illegal or unlawful act of his own, to be known as the 'benevolent fund.'
>
> "Also a fund in case of death of any member for the relief of his widow, children or heirs to be known as the 'inheritance fund.'"

The formation of such associations is authorized by sections 10176 to 10178, inclusive, General Code. True, none of these sections contain express statement that associations may be formed for any given purpose, but, assuming the existence or formation of such associations, proceed to set forth regulations as to the election of trustees and officers, and the making of periodical assessments upon members, and to confer upon such associations certain incidental powers.

The confusion which seems to exist in these sections appears to have arisen out of the codification of 1880. Originally, the act relating to firemen's relief associations contained the following provision:

> "* * * from and after the passage of this act, it shall be lawful for any number of active firemen, not less than ten, being members of any regular fire company, or hose or hook and ladder company, in this state, to associate themselves together as a firemen's general relief association, having for its principal object the relief of firemen disabled while on duty, with the power also of donating as it may deem proper under such rules as may be established, to poor, sick firemen, and to the widows and orphans of deceased firemen."

This was the act of March 13, 1861, 58 Ohio Laws 37, entitled "an act supplementary to an 'act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1852."

The old act was repealed by subsection 492, of section 7437 of the code of

1880. The codifiers as that time attempted to, and presumably did, incorporate the entire substance of this act in sections 3850 to 3852, inclusive, Revised Statutes, which are found without change in sections 10176 to 10178, General Code, supra.

It follows, as a conclusion from what has been said that the right to form corporations of this sort still exists as a separate right, except that the method of forming them is to be regulated by the general incorporation laws of the state, instead of by the special provisions formerly in force.

This right also seems to exist as a separate and distinct means of providing for firemen's relief, in addition to the provisions of sections 4600 to 4615, General Code, which provide for the formation of municipal firemen's pension funds by action of council.

In other words, should council fail to provide for the formation of a pension fund, the members of the fire department, nevertheless, have the right to incorporate a relief association, under the sections above referred to.

Such associations are not governed by any of the laws of the state relating to mutual protection associations and the like.

Therefore, in my opinion, if the purpose of the proposed association conform to the provisions of section 10176 they are lawful. They do not, however, so conform, in that the articles of incorporation purport to confer upon the association authority to extend relief to firemen injured "from any accident not caused by any illegal or unlawful act of his own," while section 10176 limits the extent of the relief to that on account of disability while on duty.

Again, the death benefit under the proposed articles of incorporation may be paid to the "heirs" of the deceased members, whereas the section limits the payment of such benefits to "the widows and orphans thereof."

I am, therefore, of the opinion that the proposed articles of incorporation may not lawfully be filed by you, being of the opinion that firemen's relief associations must be formed under sections 10176 et seq., General Code, or not at all.

The reasons for this opinion have been fully discussed in other communications to your department.

Of course, if the promoters of the association desire to organize a mutual benefit association, under section 9427, General Code, this may be done.

This conclusion renders it perhaps unnecessary for me to consider the question relative to the fee. I shall do so, however, upon the assumption that the articles of incorporation may be presented to you in proper form.

The fees which the secretary of state must charge and collect are specified in section 176, General Code. In the schedule of fees therein containd, no express mention is found of associations of this character. Obviously, the fee charged must be either that prescribed by subsection 4, or that prescribed by subsection 5 thereof. The subsections are, in full, as follows:

> "4. For filing articles of incorporation of a mutual life insurance corporation having no capital stock, or of other mutual corporations not organized strictly for benevolent or charitable purposes and having no capital stock, twenty-five dollars, except as hereinafter provided.
>
> "5. For filing articles of incorporation formed for religious, benevolent or literary purposes; or of corporations not organized for profit and not mutual in their character, or of religious or secret societies; or societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, and formed exclusively for the mutual protection and relief of members thereof and their families, two dollars."

In my opinion the association is "mutual" within the meaning of subsection 4, and unless included within the exceptions found in subsection 5 the association must pay a filing fee of $25.00. I am of the opinion, however, that the phrase "other employes," as used in subsection 5, has a meaning sufficiently broad to include employes of a fire department. It is true that the word "other" used in this context must be read "other like;" so that the class of employes designated is limited to such employes as are similar to mechanics, express, telegraph and railroad employes. I believe, however, that the test of similarity here is furnished by the hazardous nature of the occupation; and that firemen's relief associations are within the intendment of the exception.

I would, therefore, be of the opinion, if the purpose clause of the articles of incorporation were proper, that the filing fee to be charged would be two dollars.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

593.

THE ARTICLES OF INCORPORATION OF THE "SOCIETY ST. ANTONIO DI PADOVO" SHOULD NOT BE FILED BY THE SECRETARY OF STATE.

The articles of incorporation of the "society of St. Antonio Di Padovo" should not be filed by the secretary of state for the reason that a society of this character must conform its articles of incorporation to the provisions of section 9427, General Code.

COLUMBUS, OHIO, November 3, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The proposed articles of incorporation of the society of St. Antonio Di Padovo enclosed in your letter of October 30th, receipt whereof is acknowledged, differ from those of other similar societies concerning which opinions have recently been rendered to you only in the fact that the purpose clause thereof does not employ the technical terms "mutual benefit and protection" but instead uses the following language:

> "To assist its members in sickness or distress, and aid the families of deceased members, by voluntary contributions under regulations and by-laws to be adopted."

You inform me that the company tenders the sum of $25.00 as a filing fee, this being the sum required to be paid for the filing of articles of incorporation of mutual societies.

On the language of the articles of incorporation alone the question as to whether or not the enterprise witnessed thereby is a mutual one is not free from doubt. I incline to the belief, however, that it is such an enterprise and that in view of the tender of the sum of $25.00 by the incorporators it may safely be assumed that the intention is to conduct a business which is in the proper sense "mutual."

This being the case, then, the opinion already expressed would apply, viz.:

that a society of this character must conform its articles of incorporation to the provisions of section 9427, General Code. In the opinion in the matter of the employes' protective association of the Haven Malleable Iron Works I pointed out what were in my opinion the essential requirements of this section.

Applying the reasons therein stated to the enclosed articles of incorporation, I am of the opinion that they should not be filed by you.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

614.

THE JUDGE-ELECT OF THE MUNICIPAL COURT OF THE CITY OF MIDDLETOWN, OHIO, MAY ASSUME HIS OFFICE WITHOUT FIRST SECURING A COMMISSION FROM THE GOVERNOR.

The judge-elect of a municipal court of the city of Middletown, Ohio, may discharge the duties pertaining to his office without first securing a commission from the governor.

COLUMBUS, OHIO, November 21, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of November 21st requesting my opinion as to whether or not the judge-elect of the municipal court of the city of Middletown, Ohio, must secure a commission from the governor of the state under section 138, General Code, before entering upon the discharge of his duties as such judge.

You enclose with your letter a copy of the charter of the city of Middletown and call my attention to section 1, article 5 of said charter, which said section purports to establish a court in the city of Middletown to be known as the "municipal court," and which shall be a court of record.

Section 138, General Code, referred to by you, provides in part:

> "A judge of a court of record, * * * shall be ineligible to perform any duty pertaining to his office until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office."

In my opinion, section 138, General Code, applies to and governs officers whose election is provided for by a law of the state, and such officers only. Assuming, therefore, the validity of so much of the charter of the city of Middletown, which deals with the subject of the municipal court, and assuming, further, the de jure existence of the court as such and the right of the judge-elect, at the proper time, to assume and discharge the duties pertaining to the office, I am, nevertheless, of the opinion that he may do so without securing a commission from the governor, and, of course, without paying to the secretary of state for the issuance of such commission the fees provided for by section 139, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

658.

ARTICLES OF INCORPORATION—NOT SPECIFIC.

The articles of incorporation of the Glenville training school for nurses, should be returned to the incorporators, with the request that they be made more specific. Articles should not be filed by the secretary of state until they are made more specific.

COLUMBUS, OHIO, November 20, 1913.

HON. CHARLES H. GRAVES, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 13th, requesting my opinion as to the legality of the purpose clause of the Glenville training school for nurses, a proposed corporation not for profit. Said purpose clause is as follows:

> "Said corporation is formed for the purpose of fostering and encouraging the union of graduates for mutual help and protection.
>
> "To advance the standing and best interests of trained nurses, to cooperate in sustaining the rules of the directory, to place the profession of nursing on the highest plain attainable, and to uphold our code of ethics.
>
> "To create, establish, and to further the interests of the Glenville training school for nurses by giving our hearty support to all efforts to make it the foremost among such institutions."

You also request my opinion as to the correct filing fee for said articles of incorporation, in case they may lawfully be filed by you.

The creation and establishment of a training school for nurses is an enterprise which, in my judgment, may lawfully be undertaken by a corporation not for profit. So also is the encouragement and fostering of the standards of a given profession, such as that of nursing.

There are certain peculiarities present in these articles, however, which in my judgment makes it advisable for you to refuse to file them until certain questions are satisfactorily cleared up. In the first place, the corporation desires, primarily, authority to foster and encourage the union of graduate nurses for mutual help and protection. That is to say, this purpose is stated first, as if it were the paramount one in the minds of the incorporators. If this is the case, then, the articles should specify the nature of the mutual help and protection which is to be given to graduate nurses, and whether such help and protection is to be extended to those not members of the organization, or not. In case the design of the incorporators is to conduct what is technically known as a mutual protection business, then, the articles must be rejected for failure to comply with section 9427, General Code. If the design of the incorporators is not such, then, it should be more clearly stated than it is. Again, if the mutual help and protection which is to be accorded to graduate nurses is to be limited to the members of the society, whether financial or not, then, the filing fee, under the statute with which you are familiar, would be twenty-five dollars; otherwise, the corporation would probably not be technically a mutual one, and would be liable only to a filing fee of two dollars.

In the second place, the creation and establishment of a training school seems to be stated as an object separate and distinct from that of fostering and encouraging the union of graduates, etc. This being the case, the suspicion at once arises that a multiplicity of purposes is contemplated by the incorporators, which, of

course, cannot be sanctioned, under the rule laid down in State ex rel. vs. Taylor, 55 O. S. 67.

Again, the articles are of singular import, in that they seem to authorize the creation and establishment of a training school, but not the conduct and maintenance thereof.

For all of these reasons, while I cannot say that the incorporators intend an unlawful enterprise, yet, I am unable to arrive at the conclusion that their purpose is lawful. I suggest that the articles be returned to the incorporators, with the request that they be made more specific, so that you may be fully advised as to exactly what is desired to be done under the corporate charter. Until this is done I would advise against the acceptance and filing of the articles.

I would also be unable to advise you as to the proper filing fee for the articles, the exact nature of the company not being apparent from the language used.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Auditor of State.)

74.

SHERIFF—EXPENSE OF PURSUING PRISONER OUT OF STATE WITHOUT EXTRADITION PAPERS NOT ALLOWED.

The statutes of Ohio, when a warrant is issued to the sheriff, authorize him only to pursue and arrest the accused in any county of this state. The sheriff, therefore, may not be allowed expenses incurred in pursuing a prisoner for whom he has a warrant outside of this state, in the absence of a requisition from the governor or from the president of the United States.

COLUMBUS, OHIO, January 28, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of January 23rd is at hand in which you make the following inquiry:

> "The cost bill contains an item of fees for the sheriff of Ross county for serving the warrant to arrest the defendant at Braddock, Pa., and a charge of 525 miles at eight cents per mile, amounting to $42.00 is made. You are requested to furnish this department with your opinion as to the legality of the mileage charge.
>
> "There were no requisition papers issued by the governor of Ohio but the prisoner was arrested upon the warrant from the common pleas court of Ross county"

Section 13597, General Code, provides as follows:

> "A warrant may be issued, in term time or in vacation of the court, on an indictment found, and when directed to the sheriff of the county where such indictment was found or presentment made, he may pursue and arrest the accused in any county and commit him to the jail or hold him to bail, as provided in this title."

The authority found here is to pursue and arrest the accused *in any county,* and as the territorial jurisdiction of the court issuing the warrant is limited to the state, the word county must be held to refer to any county within this state and not outside of it.

This conclusion is fortified by section 13500 and 13501, the first of which provides for the issuing of warrants by magistrates, and the second for the form thereof in which will be found this language, "or if he has fled that you pursue after him into any other county in this state," and further by section 2491 of the General Code which reads:

> "When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

From this it will be seen that if the sheriff had a warrant from the governor to go to Pennsylvania to make the arrest he would be entitled to expenses, or so much thereof as to the commissioners might seem just, but not to mileage as such.

I am of the opinion that inasmuch as the warrant held by the sheriff did not give him authority to go outside the state to make the arrest, and as expenses and not mileage is the compensation for an arrest on an extradition warrant, that the sheriff is not entitled to the mileage charged, and it is not a proper charge against the state as part of the costs in the case mentioned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

158.

INTOXICATING LIQUORS—AUDITOR MAY NOT ALLOW REFUNDER WHEN RETAIL LIQUOR BUSINESS SUSPENDED ON ACCOUNT OF FLOODS—DOW-AIKEN TAX.

Statutory provisions permitting an allowance of a refunder of a tax, are to be construed strictly. Section 6074 of the General Code provides the only permission for refunds of payments made under Dow-Aiken tax provisions and refunds may be allowed, therefore, only in strict accordance with its terms. Under this statute, only two classes or persons may obtain a refunder, to wit: (a) one who voluntarily discontinues such business after he has been assessed and paid the full amount, in which event he may receive a proportionate refund for the balance of the year, subject to the provision that at least $200.00 must be retained by the auditor; (b) one who has been compelled to discontinue business by reason of a local option election or a residence election, in which case the total proportionate amount may be refunded.

When business is interrupted, therefore, on account of floods, the dealer can obtain a refunder only by voluntarily discontinuing business, and the auditor is obliged to retain $200.00. If such dealer again desires to commence business he can only do so by paying the tax required from all commencing in the business, without regard to the $200.00 retained by the auditor.

COLUMBUS, OHIO, April 3, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In your communication of February 17th you ask an opinion upon the following question:

> "In the city of *Cincinnati,* Ohio, a number of dealers in intoxicating liquor were compelled by the high water in the Ohio river, to temporarily discontinue their business. May the county auditor, under such circumstances, issue a refunder to such dealers, the amount of the same to be computed upon the basis of the number of days which such dealers were not conducting such business, or should the auditor issue refunders under section 6074, General Code, based upon the time remaining in the tax year and when such dealers again commence the business, charge them under section 6073 with assessment proportionate in amount to the remainder of the assessment year."

Attention is respectfully called to the following sections:

"Section 6071. Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquor there shall be assessed yearly, and paid into the county treasury, as hereinafter provided, by each person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of one thousand dollars."

"Section 6073. When such business is commenced after the fourth Monday in May in any year, such assessment shall be proportionate in amount to the remainder of the assessment year, except that it shall not be less than two hundred dollars, and such assessment shall attach and operate as a lien as provided in the next preceding section and be payable upon the date of such commencement.

"Section 6074. When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order for a proportionate amount of such assessment so paid, but the amount of such assessment so retained shall not be less than two hundred dollars unless such discontinuance of business has been caused by an election under a local option law or a lawful finding of a mayor or judge on a petition filed in a residence district as provided in this chapter, in which case the proportionate amount of such tax shall be refunded in full."

It is evident from a cursory reading of section 6071 that the tax spoken of is a *yearly* tax upon the business, and the provision of 6072 which makes the tax payable, one-half on or before the 20th day of June and one-half on or before the 20th day of December, is merely a matter of convenience.

Were there no provision for a refunder none could be had, as it is almost elementary that when a tax has been paid and there is no provision made for a refunder, there is no power to refund such tax lodged in the executive or administrative officers of the state or municipality. The supreme court of New York in the case of People vs. Roberts, 157 N. Y. 677, lays down the above principle, and the same court in a case reported in 130 N. Y. 699 holds that if a power to refund is given by law it must be strictly followed.

So the only provision and authority for a refund of the Dow-Aiken tax must be found in section 6074. Under this section two classes of persons may obtain a refunder—one class, one who voluntarily "discontinues such business" after he has been "assessed and has paid the full amount of such assessment," and the other, one who has been compelled to discontinue business by reason of an election under a local option law or a lawful finding of a mayor or judge on petition filed in a residence district, as provided by law.

In the case of a voluntary discontinuance, provision is made that at least $200.00 must be retained; while in the case of what may be termed an involuntary discontinuance a proportionate amount of the tax must be refunded.

In the question submitted by the auditor it is said that "a number of dealers in intoxicating liquors were compelled by the high water in the Ohio river to *temporarily* discontinue their business * * *."

While it may be claimed that it is inequitable to retain a tax upon a business which, by reason of circumstances over which the person in the business has no control, he must temporarily discontinue, still if an injustice results from the law

it is the part of the legislature to provide a remedy, and not of this department which must construe the law as it appears on the statute books.

In such places where the business of trafficking in intoxicating liquors are temporarily closed on Sundays, election days and possibly at times to convenience the proprietors thereof, no one would be heard to insist that for the days thus temporarily closed a refunder pro rata of the tax could be demanded.

It is my opinion, from all the foregoing, that no refunder can be given to such dealers who temporarily discontinue their business, the amount to be paid upon the basis of the number of days which such dealers were not conducting such business. Refunders should issue only under the provisions of section 6074, General Code, and if the auditor is satisfied, that any person entitled to a refunder under the provisions of this section, has actually discontinued such business he may issue a refunder for the amount of the tax which would be coming to such person upon such discontinuance for the balance of the year. Should the same person again desire to go into the business he would occupy the same position as if he had not been in business theretofore, and if the business was commenced after the fourth Monday in any year, then under the provisions of section 6073 he would pay in an assessment proportionate in amount to the remainder of the assessment year, except that it shall not be less than $200.00.

In response to the inquiry propounded in the latter part of your letter, wherein you state, "if the latter procedure is the correct one under the law, in case one such dealer commenced the business originally at a time shortly before he was compelled to discontinue such business in the manner above described so that the provision of section 6074, General Code, that the amount of said assessment so retained shall, in no case be less than $200.00 would apply, would the auditor be required to retain in the treasury $200.00 of the original assessment and upon recommencing such business would the dealer be required to pay the full assessment for the remainder of the year," would say that while this holding seems to work an injustice in particular cases, yet to my mind the law is very plain, and one commencing such business after having recently discontinued it, occupies no better position by reason of having been in the business theretofore. He comes in as a new man, and while it may result in the particular place paying more than the $1,000.00 tax by reason of the necessity of retaining not less than $200.00 in the one instance, and paying in not less than $200.00 in the other instance, I cannot come to any other conclusion but that the statute would require this to be done.

As stated above the matter is one that the legislature has not seen fit to make any provision for, and it is without the power of this department to read into the law something that the legislature has either overlooked or for which it has not seen fit to make provision.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

160.

TAXES AND TAXATION—ACT PROVIDING FOR LICENSE TAX ON AUTOMOBILE NOT INVALIDATED BY REQUIREMENT THAT SAME BE PAID INTO THE STATE TREASURY, NOR BY FACT THAT TAX PROVIDES INCIDENTAL REVENUE.

The imposition of a license proper by the state comprehends only such return as is necessary to administer the license. The state is empowered, however, to impose a combined license and excise tax if it so desires, and the fact that revenue is obtained in excess of the amount required to administer a license does not invalidate the statute. The legislative act, therefore, requiring that all funds received from licenses of automobiles, should be paid into the state treasury, thereby requiring the legislature to make a special appropriation for the purpose of administering a license, is not unconstitutional.

COLUMBUS, OHIO, March 25, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 20th, requesting my opinion upon certain questions which have been raised concerning a proposed amendment to section 24 of the General Code, the bill to accomplish which, in its present form, provides in effect that all collections made by any state department, other statutes to the contrary notwithsanding, shall be paid monthly into the state treasury. Your questions are as follows:

"1. Would the passage of senate bill No. 224, hereto attached, amended in line 3, to read 'week' instead of 'month' endanger the constitutionality of the law, providing an annual tax on automobiles?

"2. Do you consider the automobile license law constitutional, without of passage of the attached law?

"3. Does the mere method of handling funds affect the constitutionality of the automobile license law?

"4. Would the appropriation of funds to pay the operating expenses of the automobile department affect the constitutionality of the law?"

Referring to your first question, I may say that the present automobile license law provides in section 6309 thereof, in effect, that the revenues derived from automobile license fees shall be applied by the secretary of state to the expenses of the administration of the law, and the surplus, if any, shall be paid monthly into the state treasury, there to constitute a fund for the improvement, maintenance and repair of public highways.

Assuming the constitutionality of section 6309, General Code, in its present form, I am unable to understand how it could be regarded as unconstitutional if the periodical payments into the state treasury were required to be weekly instead of monthly. This would, of course, be the effect of the proposed amendment to the bill amending section 24 of the Code. Such a provision might result in rendering the department of automobile licenses not self-sustaining, and might require the general revenue fund of the state to be drawn upon for the purpose of bearing a portion or all of the current expenses of that department, while giving to the highway fund the benefit of the entire revenue of the department. I do not believe that this would render the law unconstitutional. Of course, it must be admitted that the automobile license law is, so to speak, a joint exercise of the police power and

the taxing power of the state. Being such, it must be measured by standards applicable to both of these kinds of legislation. There is a principle which applies to the exercise of the police power by the exaction of licenses which is to effect that under this power the amount of license fees must be so computed as by a fair approximation to defray the cost of administering the license law and exorting the regulatory power, so that if the purpose to create an excess of income over expenditure and thus to contribute to the general revenue can be discovered the police power is transcended. In Mays vs. Cincinnati, 1 O. S. 268, will be found a lucid discussion of this prinicple, as applied to the exercise by a municipal corporation of the power to license occupation. It is there held that inasmuch as municipal corporations do not possess the general taxing power, except to the extent of making levies upon the property made subject to taxation by the law of the state, a license ordinance evidently designated to create general revenue must be held to constitute an attempt to exert the taxing power, and is therefore void.

This case, however, does not apply to an instance of state legislation. It has become perfectly well settled that the state has power to levy occupation, privilege or excise taxes. In fact, the familiar instance of the initial fee payable by corporations filing articles of incorporation in the office of the secretary of state may be cited; such fees have been held to constitute taxes upon the privilege of being a corporation. Ashley vs. Ryan, 49 O. S. 504; 153 U. S. 436. Clearly, however, the holding that this exaction constituted a tax was not based upon the essential nature of the power exerted by the state, but rather because of the fact that an incidental revenue was created. See pages 525 and 526 of the opinion in Ashley vs. Ryan. The primary object of authorizing the creation of corporations has nothing whatever to do with the subject of taxation, and the relation of the state to the corporation which it creates through the continued exercise of its visitorial power is that of police regulation rather than taxation.

It is clear, therefore, that in this state a privilege created by the state may be taxed by the exaction a fee which enhances the general revenue of the state, while at the same time the state may be regulating the use of the privilege through its police power.

I have cited the corporation fee cases because of another bearing which they have upon the question now under consideration. It is customary in this state to provide that the proceeds of license fees, inspection fees, etc., if paid into the state treasury shall be credited to a fund for the use of the board or officer issuing the license, making the inspection, etc. The corporation fee cases seem to me to establish the conclusion that such a provision is not essential to the constitutionality of such a law. The moneys received by the secretary of state from initial fees of corporations were not to be paid out for the use of his department, but directly enhanced the general revenues of the state. Therefore, the constitutionality of such a law having been under review in the cases cited, I am of the opinion that it is now the established law of this state that it is not essential to the constitutionality of the license law that the revenues derived from license fees be devoted to the maintenance of the license department.

For all the above reasons I am of the opinion that your first question should be answered in the negative.

It is also apparent from what I have stated that I would have to answer your second question in the affirmative.

Your third question has been fully discussed in answering your first question.

Your fourth question I would answer in the negative, for the same reason that I have answered your first question in the negative. That is to say, it does not seem to affect the constitutionality of the law providing for the incorporation of companies that the fees derived therefrom are not devoted especially to the depart-

ment of the secretary of state; therefore, in my judgment, it would not affect the constitutionality of the automobile law if the fees derived from the issuance of automobile licenses were paid into the state treasury to the credit of the general revenue fund, or any other fund, and the automobile department in the office of the secretary of state were supported by appropriations made from the general revenue fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

251.

TRUSTEES OF OHIO SOLDIERS' AND SAILORS' HOME—HOLDING OF OFFICE VALID, THOUGH ACT PROVIDING FOR SAME NOT YET EFFECTIVE.

Although the act providing for trustees for the Ohio soldiers' and sailors' home has been repealed, and although such act was omitted accidentally from the control given the board of administration, and although the new act providing for the appointment of such trustees is not yet effective, nevertheless since the act of the legislature to provide for such board is conclusive of the legislative intent to maintain such government, the old board should hold over until the governor appoints a new board, under authority of the new act.

COLUMBUS, OHIO, May 14, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 22nd, in which you inquire:

> "We are advised that the present general assembly enacted a law bearing upon the government of the Ohio soldiers' and sailors' orphans' home at Xenia, and that the governor signed the act on Friday, April 18th. The act provides that a board of trustees shall be appointed by the governor. The governor has not yet appointed a board, and the old board which has been acting for the past two years under a statute which was repealed by the 79th General Assembly, met on Saturday, April 19th, and approved a requisition upon this office for money to pay salaries and other expenses for one month.
>
> "Under these circumstances, should we recognize the requisition of the board and issue a warrant in payment of the same?"

If the situation presented is understood, it grows out of the fact that the act of May 11, 1911, creating the board of administration, repealed section 1833, General Code, under which trustees for the Ohio soldiers' and sailors' home at Xenia were appointed, but did not place that institution in charge of the board of administration, or otherwise provide for its management and control. As a result of this the trustees in office on May 11, 1911, have continued to act, but legislative action was not taken until a bill was passed providing that the governor should appoint a board of trustees for that institution, and the same was signed by the governor on Friday, April 18, 1913. On April 19, 1913, the "old board," as you properly designate it, approved a requisition upon your office to pay salaries and other expenses for one month.

The passage of the act mentioned is conclusive evidence of the legislative intention to keep the Ohio soldiers' and sailors' orphans' home as one of the state institutions and not to place it under the control of the board of administration. Therefore, as the power of the old board has not been questioned, and should not be, I am of the opinion that until the governor appoints a new board, under the new act, and such board qualifies, you should honor requisitions of the old board for all legitimate current expenses; which, of course, includes the requisition in question, or at least all items of the same as are proper and lawful charges for the conduct and management of that institution.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

275.

ALTERATIONS IN BUILDING OF STATE BUILDING—PROCEDURE—POWER OF GOVERNOR, SECRETARY OF STATE, AUDITOR OF STATE TO RATIFY CHANGE MADE WITHOUT THEIR PREVIOUS CONSENT AND APPROVAL.

Under section 2320, General Code, changes in a contract of a state building involving more than one thousand dollars, may not be made unless approved by the governor, auditor, secretary of state, and under section 2322, changes involving less than one thousand dollars may not exceed in the aggregate two and one-half per cent. of the original contract price, must be in writing with full specifications and estimates, shall become part of the original contract and shall be filed with the auditor of state.

All contracts for such change, in accordance with these statutes, must be entered in writing before the work is performed and the contract finished, and such contract must be approved by the attorney general, in accordance with section 2321, General Code.

When such changes are made, however, without the approval of the aforementioned authorities, the contracts may be ratified but should be subjected to the closest scrutiny.

COLUMBUS, OHIO, May 21, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of inquiry of the date of April 22, 1913, wherein you inquire as follows:

> "The board of trustees of the Kent Normal School has approved an estimate in favor of Robert H. Evans & Company, contractors for the construction of buildings, which estimate contains extras amounting in the aggregate to $3,379.13, and reductions amounting to $778.49. This office has refused to issue a warrant in payment of the estimate, by reason of the provisions of sections 2320, 2321 and 2322 of the General Code.
>
> "We are enclosing herewith the correspondence with the architect and contractors, together with an itemized statement of the extras, submitted by the architect; also the estimate upon which payment was refused. This estimate has been cancelled and another filed without the

extras, so that the contractor has received his entire compensation under the contract, with the exception of the charges for extras.

"The exact question at issue is, whether each extra, being less in amount than $1,000.00, is in compliance with section 2322, or whether the aggregate of the extras, being in excess of $1,000.00 is contrary to the provisions of section 2320."

In reply thereto I desire to say that section 2314 of the General Code provides for the making of plans and specifications and for erecting, altering or improving state buildings except the penitentiary when the costs thereof exceed $3,000.00 as follows:

"Section 2314. Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Sections 2315, 2316, 2317 and 2318 of the General Code respectively provide:

First, that the plans, drawings, representatives, bills of material, specifications of work and estimates of cost in detail and in the aggregate shall be submitted to the governor, auditor of state and secretary of state for their approval.

Second, that the officer or board or other authority having such work in charge shall give public notice of the time when, and place where sealed proposals will be received for performing labor and furnishing materials of such construction.

Third, that the notice shall be published four consecutive weeks next preceding the day named for awarding such contract, and in the paper having the largest circulation in the county where the work is to be let, and in one or more dailies having the largest circulation and published in each of the cities of Cincinnati, Cleveland, Columbus and Toledo.

Fourth, that on the day named in the notice such officer, board or other authority shall open the proposals and award the contract to the lowest bidder.

Section 2319 of the General Code provides in part as follows:

"* * * All contracts shall provide that such officer, board or other authority may make any change in work or materials on the condition and in the manner hereinafter provided."

Two methods are provided by statute whereby changes can be made in the plans, descriptions, material and specifications.

First. If the change increases or decreases the cost to exceed one thousand

dollars, then the proposed change in the plans, descriptions, material and specifications must be approved by the governor, auditor of state and secretary of state and filed in the office of the auditor of state as provided by section 2320 of the General Code as follows:

> "After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increases or decreases the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state. When so approved, the plans of the proposed change, with descriptions thereof, specifications of work and bills of material shall be filed with the auditor of state as required with original plans."

Second. If all changes in the contract, plans, descriptions, bills of material or specifications involve less than one thousand dollars, and does not exceed in the aggregate two and one-half per cent. of the original contract price, then such changes shall be in writing with full specifications and estimates and shall become part of the original contract, and shall be filed with the auditor of state as provided by section 2322 of the General Code as follows:

> "All changes in a contract of less than one thousand dollars shall be in writing with full specifications and estimates, become part of the original contract and be filed with the auditor of state. The aggregate of such changes in the contract, plans, descriptions, bills of material or specifications shall not increase the cost of the construction more than two and one-half per cent. of the original contract price."

Regardless of the method whereby changes are made in the plans, descriptions, specifications or bills of material as called for in the original contract for the erection, alteration or improvement of state buildings, nevertheless no allowance shall be made for work performed or material furnished under the changed plans, descriptions and specifications unless a contract has been entered into in writing before the work is performed or the materials furnished, and such contract must be approved by the attorney general as provided by section 2321 of the General Code as follows:

> "No allowance shall be made for work performed or materials furnished under the changed plans, descriptions, specifications or bills of material unless a contract therefor is made in writing before the labor is performed or materials furnished, showing distinctly the change. Such contract shall be subject to the conditions and provisions imposed upon original contracts, and approved by the attorney general."

It appears from additional information received from your department that a contract was not made in writing, showing distinctly the changed plans, descriptions, specifications or bills of material, and it does not appear furthermore that such contract was approved by the attorney general, as required by section 2321 of the General Code.

In view of that fact, it is the opinion of this department that no allowance can be made for the extras amounting to $3,379.13 less the amount of the reductions as stated in your letter of inquiry, and that the auditor of state's department is without authority of law to issue a warrant in payment of said extras, less the amount of the reductions.

The foregoing is the condition of affairs now presenting itself to your department and you were correct in refusing to issue voucher in payment of the bill for extras, because the change made was so made without the approval of the governor, the auditor of state and the secretary of state, the same being required when the amount of the expenditure is in excess of one thousand dollars.

The matter of change requiring the approval of the chief executive, the secretary of state and the auditor of state is important not only in respect to the cost but in respect to the character of the alterations. It is intended that the party erecting the building should have the approval of these three state officials in respect to the character of the change. Public contractors should have learned before this that it is necessary to conform to the statutes of this state. Time and time again have the courts spoken upon this subject. Notwithstanding the statutes provide along liberal lines for changes in plans, yet experience has demonstrated that interested parties will still take chances, and those affected pass up to the auditor of state and to the attorney general the hard proposition of denying them pay for services actually rendered or hunting out some way whereby the payment of an honest bill may not be ignored. Interested parties owe a duty to the officials who have to pass upon these questions, and continual neglect and disregard of these duties invite an official to apply the hard and fast rule. Assuming that all parties concerned do not intend to disregard the law in this case, I invite your attention to section 2320 of the General Code, which is as follows:

> "After they are so approved and filed with the auditor of state, no change of plans, descriptions, bills of material or specifications, which increases or decreases the cost to exceed one thousand dollars, shall be made or allowed unless approved by the governor, auditor and secretary of state. When so approved, the plans of the proposed change, with descriptions thereof, specifications of work and bills of material shall be filed with the auditor of state as required with original plans."

Had the contractor in this case procured the approval of the governor, the auditor of state and the secretary of state before making the changes, no question would have been before you. Now the question is, may they legally make the approval at this time? I think they can; but contractors better take no risks of this kind, because unquestionably the wisdom of the changes and the cost thereof will be most carefully scrutinized by the governor, the auditor and the secretary of state.

I suggest, therefore, that you have the contractor who presents this bill to make application to the governor, the auditor of state and the secretary of state and the other proper officials—that is, the trustees of the Kent Normal School—for approval of the plans, description, bills of material and specifications, and if these officials approve the change, you may lawfully issue the voucher.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

292.

PEDDLER EMPLOYING AUTOMOBILE TRUCK MUST PAY LICENSE REQUIRED FOR PEDDLING IN TWO-HORSE VEHICLE.

Section 6347, General Code, requires compliance with section 6349, General Code, for the obtaining of a peddler's license, and said section 6349, General Code, provides only for peddlers on foot or with a one-horse vehicle or a two-horse vehicle, or a boat, watercraft or railroad car, and prescribes a specific fee for each mode of peddling. Section 6355, General Code, provides a penalty for peddling without a license.

Since an automobile truck resembles more closely a two-horse vehicle than it does any of the other modes of locomotion, unless the principle that a law becomes applicable to new inventions as new inventions come into use, without special application thereto, a peddler intending to travel on an automobile truck, shall be required to pay the license provided for a two-horse vehicle.

COLUMBUS, OHIO, June 4, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under favor of May 2nd, you requested my opinion upon a letter referred to by you. This letter is as follows:

> "Referring to section 6349, General Code, in regard to peddler's license. We have an application for a peddler's license to travel with a motor truck. How shall we handle this? As I can find no law in regard to motor trucks, do you think the same charge should govern as with two-horse wagon?"

The statutes for the General Code, relative to your inquiry, providing for a peddler's license, are 6347, 6349, 6353 and 6355. They are as follows:

> "Section 6347. When a person files with the auditor of a county, under oath, which may be administered by such auditor, a statement of his stock in trade in conformity with the law requirig the listing of such stock for taxation by merchants or others, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with law, and *complies with the terms set forth in section sixty-three hundred and forty-nine.* Such auditor shall issue to him a license to peddle such stock anywhere in this state.
>
> "Section 6349. Before receiving such license, the applicant if intending to travel on foot, shall file with the county auditor the county treasurer's receipt for twelve dollars; if intending to travel on horseback or in a one-horse vehicle, he shall file such receipt for twenty dollars; if intending to travel in a two-horse vehicle, he shall file the receipt for twenty-eight dollars; or, if intending to travel in a boat, watercraft or on a railroad car, he shall file it for sixty dollars. He shall also pay to the auditor the sum of fifty cents as the auditor's fee for granting the license.
>
> "Section 6353. A license granted in conformity with this chapter shall authorize the person named therein to sell goods, wares and merchandise for one year from the date of the receipt of the treasurer, as a peddler or traveling merchant. Such person may take out a license to peddle for three months or six months, and pay for it proportionately in accordance with the provisions of section sixty-three hundred and forty-nine.

"Section 6355. If a peddler or traveling merchant sells goods, wares or merchandise, except such as are manufactured within this state by himself or employer, *without having obtained a peddler's license so to do,* he shall forfeit and pay for each offense the sum of fifty dollars to be recovered in a civil action before any justice of the peace of the county where the offender is found. Such sum shall be paid into the treasury of the township in which the judgment is rendered, for the use of the township school fund, except ten per cent. thereof, which shall be paid to the informer."

Under section 6347 above quoted, the auditor is authorized to issue a peddler's license only upon compliance with the provisions therein contained, one of which is that the terms of section 6349 be followed by the applicant. Section 6349 authorizes the issuance of a license to persons (first) intending to travel on foot; (second) intending to travel on horseback or in a one-horse vehicle; (third) intending to travel in a two-horse vehicle; (fourth) intending to travel in a boat, watercraft or in a railroad car. It is clear in the terms of these two sections a license may not be issued in the absence of compliance therewith.

It appears that if a peddler or traveling merchant, sells goods, wares or merchandise, except such as are manufactured within this state by himself or employer, without having obtained a peddler's license so to do, he shall forfeit and pay for each offense the sum of fifty dollars to be recovered in a proper civil action, so that if one attempts to peddle without a license he is liable to a fine.

At the time the above statutes were passed ordinary motor trucks were unknown and the legislature undertook to provide so that peddlers all might be accommodated with a license. It is not to be assumed that it was intended to limit licenses to certain classes of persons; on he other hand is was evidently intended that the descriptions given were ample to accommodate all who might wish to peddle; for instance, if one intended to travel on muleback and peddle, he would come within the description of one intending to travel on horseback; likewise a two-horse vehicle might be drawn by two mules or by two oxen; or it might be necessary to use three horses to pull a heavy wagon. A wagon drawn by three or four horses was quite commonly in use in the hilly counties of southeastern Ohio a quarter of a century ago, although it must be confessed that the writer did not know many peddlers whose possessions were of such extent as that it required a double team to transport them over even the indescribable roads of Vinton and Jackson counties, yet I apprehend that if a peddler found it necessary to use four horses in those days to draw his wagon, his license would not be automatically forfeited.

It would seem that the intention was to grade the amount to be paid for a license according to the business done. The foot man should pay $12.00, the man on horseback or in a one-horse vehicle, $20.00, a two-horse vehicle, $28.00, railroad car, $60.00.

Now, it must be admitted that a motor truck is neither a one-horse vehicle, a two-horse vehicle, a boat, watercraft or a railroad car. In many respects it resembles neither, but in some respects it resembles a vehicle and in some respects it resembles a railroad car. It resembles a railroad car in that it is propelled by power made available by the use of machinery. It resembles a vehicle in that it is operated on a public highway or cart way and may be driven with convenience from place to place as a vehicle and business may be done at any point as conveniently as if it were conducted in a horse-drawn vehicle.

The common pleas court of this county, in a somewhat recent decision, held that an automobile was, in relation to the livery business, a vehicle; for similar reasons a motor truck may be regarded as a vehicle used on public highways.

Without going into detail, there would seem to be more reasons for putting a motor truck in the class of public highway vehicles than in the class of railroad cars; it would be classed as a railroad vehicle on account of its being propelled by power; railroad car transportation is usually considered transporation under the law of common carriers, while the motor truck is not yet in the class of common carriers. It is a means of transportation more rapid than that of the ordinary public highway vehicle and ordinarily more may be transported upon it than a two-horse vehicle; it usually operates within limited territory, as the two-horse vehicle, while the railroad car operates over larger areas. In one sense there is no more reason for placing it in the class of vehicles drawn by two horses than in the class of vehicles drawn by one horse except as to the extent of business that may be conducted with its use.

It is a well known principle of law that the law becomes applicable to new inventions as new inventions come into use without the same being especially applied. It is not within the province of this department to make laws, but rather to interpret them and to explain the statutes so as that absurd conclusions may not be arrived at. It certainly is not intended to excuse any peddler from the payment of license; it would hardly be fair to exact a license fee from a motor truck man as if he were peddling in a railroad car, but there is no doubt that the state is on fair and safe ground in exacting the same license fee from the motor truck man as from the man who peddles in a two-horse vehicle.

While the question is indeed novel, my conclusion is that it is your duty to collect from the motor truck peddler the same amount as from the man who peddles in a two-horse vehicle and the license should be issued to the licensee as for a motor truck.

Very respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

328.

LIABILITIES INCURRED PRIOR TO DATE OF LAPSE OF APPROPRIATION MAY BE PAID AFTER SUCH DATE.

Although the proper procedure would be for the legislature to appropriate receipts and balances for such contingency, nevertheless, the established custom of the auditor's office, and principles of propriety and justice should permit the payment of liabilities incurred prior to the date of lapse of an appropriation to be made out of such appropriation subsequently to such date.

COLUMBUS, OHIO, June 17, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have asked for my advice in reference to the issuing of warrants for liabilities incurred prior to the date of the lapsing of the appropriation.

In reply thereto I beg to advise that I am informed by the cashier and secretary of the auditor of state that it has been the practice for years past to issue warrants in favor of such liabilities incurred prior to the date at which such appropriation would undoubtedly lapse were liabilities not previously incurred.

While, undoubtedly, the better practice for the general assembly to follow would be to reappropriate receipts and balances wherever any part of them were

intended to be expended after the date at which the appropriation would otherwise lapse, yet the general assembly doubtless in failing to reappropriate expressly acted in the light of the then well known practice.

I think it your duty as auditor of state to issue vouchers in payment of liabilities referred to. This department will call the governor's attention to the fact that the general assembly should be specifically advised hereafter with reference to the necessity of reappropriating receipts and balances where it is intended the same may be used after the two years' period provided in the constitution. This will prevent any confusion.

Should you decline to issue warrants under the circumstances, doubtless injury would result to the state institutions, and no possible criticism can attach to you in issuing your warrants under these circumstances, because many of the boards did not ask for reappropriations of the receipts and balances to meet liabilities of the kind in question, for the reason that in the light of the practice theretofore they did not deem it necessary to do so.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

344.

RAILROAD COMPANY ENGAGED IN SELLING STEAMSHIP OR RAILROAD TICKETS FOR TRANSPORTATION TO OR FROM FOREIGN COUNTRIES WITHOUT FURNISHING BOND TO THE STATE.

There being no statutory provision therefor, a railroad company which is under bond to another corporation is not exempted from the requirements of section 295, General Code, providing that persons, firms or corporations which engage in selling steamship or railroad tickets for transportation to or from a foreign country must furnish bond to the state of Ohio.

COLUMBUS, OHIO, June 18, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under favor of June 9th, you request the opinion of this department as follows:

> "I am enclosing herewith the following:
> "Exhibit No. 1. Copy of the law governing transportation agents.
> "Exhibit No. 2. Copy of notice mailed to a Mr. Blaisdell.
> "Exhibit No. 3. Statement of Mr. H. E. Malone in reply to same.
> "In connection with the above I desire to submit for your consideration and advice the position of the railroad companies operating in Ohio and who sell steamship tickets. None of them so far have filed bonds. Is it necessary under the law that they should?
> "We are awaiting your decision in this matter before replying to the enclosed and similar letters, therefore, an early reply would be appreciated."

The notice referred to by you is as follows:

> "I am enclosing herewith a copy of the law governing foreign ticket agents and transmitters of money in this state; also a blank bond.

"I am reliably informed that you are engaged in such business, and not finding your bond on file in this department, I have concluded that you are not aware of the existence of this law. Now that you are, I trust that I will experience no difficulty in having you comply with the provisions of same.

"Kindly accept this as a notice that I will expect you to do so within the next fifteen days."

The statement of Mr. Malone in reply to your notice is as follows:

"Replying to your letter of May 27th, to Mr. Blaisdell, wish to advise, that we are under the impression that railroad agents under bond are not required to take out state bond, as requested in your letter. Will you kindly give us full information regarding same?

"All accounts in this office are handled by City Passenger Agent K. A. Cook, who is now under bond to the Canadian Pacific Railway and Soo line.

"We will be pleased to hear from you in connection with the above."

Sections 290 to 295 of the General Code provide as follows:

"Section 290. No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.

"Section 291. Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries, or for both if to be engaged in both of such businesses.

"Section 292. The bond shall be executed by such person, firm or corporation as principal, with at least two good and sufficient sureties, who shall be responsible and owners of real estate within the state. The bond of a surety company may be received, if approved by the auditor of state and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction.

"Section 293. The auditor of state shall keep a book to be known as a 'bond book' wherein he shall place in alphabetical order all such bonds received by him, the date of receipt, the name or names of the principals and place or places of residence, and place or places for transacting their business, the names of the surety upon the bond, and the name of the office before whom the bond was executed or acknowledged. Such record shall be open to public inspection. The auditor of state shall collect a fee of five dollars for each bond so filed.

"Section 294. A person, firm or corporation which engages in such business, contrary to the provisions of the second and third preceding sections, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both.

"Section 295. Nothing herein shall apply to drafts, money orders or travelers' checks issued by trans-Atlantic steamship companies or their duly authorized agents or to national banks, express companies, state banks or trust companies."

These statutes make it necessary for any person, firm or corporation who engages in selling steamship or railroad tickets for transportation to or from foreign countries to execute a bond to the state of Ohio, in the sum of five thousand dollars.

From the statement of facts, it is clear that the company in question is engaged in such business.

I am not able to find any provision in the statutes which excepts from compliance with this requirement, a railroad agent under bond to his company, and therefore, I am of the opinion that this company is obliged to furnish the bond referred to in the above quoted statutes, or become subject to the penalty prescribed by section 294 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

P. S. I am returning correspondence submitted with reference to the question.
T. S. H.

382.

SURETY COMPANY—BONDS—EFFECT ON SALE OF A BONDSMAN'S PROPERTY ON THE LIABILITY OF HIS BOND—CERTIFICATE OF RENEWAL OF BOND—PLACE OF BUSINESS—SALE OF RAILROAD AND STEAMBOAT TICKETS—PENALTY.

1. *The liability of a surety company on a bond for an indefinite period may be terminated by notice being given to the obligee, and a reasonable time must be given so that the obligee may acquire a new bond.*

2. *Where a personal surety sells his property and ceases to be longer qualified as a surety, the bond is not invalidated. The bond is still a binding obligation although execution may not be made upon a judgment.*

3. *Where a bond is given for an indefinite period, a certificate of renewal from the principal is unnecessary.*

4. *The statutes do not require a separate bond for each place of business run by a principal engaged in selling transportation to foreign countries. One bond may be made large enough to cover two or more places of business, or separate bonds may be made for each place of business. The auditor is required to issue one certificate, although he may issue more than one.*

5. *A person engaged in selling railroad or steamboat tickets without a license may be prosecuted under section 2904, General Code.*

6. *When a bond is invalidated and no collection can be made, the party should be notified that his certificate has been cancelled and demand its return. If he continues to transact business he may be prosecuted under section 2904, General Code.*

COLUMBUS, OHIO, July 12, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your favor of May 8, 1913, through Hon. W. E. Baker, deputy auditor of state, is received, in which you inquire:

"1. I respectfully direct your attention to the enclosure marked 'A.' You will note that under date of May 5th, the Cincinnati agent of the F. & D. Co. of M. requests that they be relieved from responsibility on the bond of G. P. A. P. Acting upon the advice of a member of your department, we refused to relieve them, but suggested to Mr. P. that he substitute another bond, per carbon copies of correspondence attached to enclosure. We do not question the soundness of the advice given us, but would be thankful for an explanation thereof for our future guidance in such matters, why a surety company or a personal surety cannot be relieved at their request, and by what procedure can they secure relief? Also can we compel the principal in question to substitute another bond?

"2. Recently we discovered one or two personal bonds, where one of the sureties had previously disposed of their property and no longer qualified. By disposing of their property, did they invalidate the bond? If after the property was disposed of and before a new bond had been substituted it became necessary to sue, at whom would a suit to recover be directed?

"3. It has been the custom with the bond of a surety company to request the principal to certify every year that he renew the bond. It is necessary that we do this?

"4. Some operate two places of business, a certificate being issued for each, under one bond only. Is that permissible, or should we require a separate bond for each place?

"5. We have names of some operating without a bond. Should we report these to the chief of police in the locality in which they operate or to the county prosecutor?

"6. In the event that a bond is invalidated and we are unable to collect, by what procedure can we cancel the certificate so as to thoroughly protect the state?"

The enclosure marked "A" above referred to is a written request of the surety company to be relieved from further liability on the bond and is in words as follows:

"We desire to be relieved from responsibility on the bond of one G. P. A. P., operating foreign exchange business under certificate No. 272.

"Kindly advise us of your acceptance of this cancellation."

The several questions submitted by your inquiry require a consideration of the principles of law applicable to the parties to a surety bond such as was given in the case submitted.

In the first instance the bond inself must be looked to in order to ascertain its provisions.

The bond, omitting the signatures and acknowledgement, is in words as follows:

"Know all men by these presents:

"That we, G. P. A. P., Cincinnati, Ohio, as principal, and F. & D. Co. of M., a corporation, Baltimore, Maryland, as surety, are hereby held

and firmly bound unto the state of Ohio, in the just and full sum of five thousand dollars, for the payment whereof well and truly to be made, we bind ourselves, and each of us, said G. P. A. P. for himself, his heirs, executors, administrators, successors and assigns, and said F. & D. Co. of M., for itself, its successors and assigns, and each of them firmly by these presents.

"The condition of the above obligation is such, That, whereas, the said G. P. A. P. is engaged in the business of selling steamship or railroad tickets for transportation to or from foreign countries and in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries.

"Now, therefore, if the said G. P. A. P. shall faithfully and honestly hold and transmit any money, or the equivalent thereof, which shall be delivered to him for transportation to a foreign country, or if such steamship or railroad tickets for transportation to or from foreign countries, so sold or offered for sale by him shall be genuine and valid, or if he shall faithfully and honestly perform both such obligations, if engaged in both businesses, then this obligation shall be void, otherwise to be and remain in full force and effect.

"Witness our hands and seals this 3rd day of October, 1911."

This is a written bond and it is given to secure future transactions. It is a continuing security. It is not limited as to the time it shall run. The bond is a complete obligation and does not refer to any other paper or instrument, as for example, the application. This latter statement is important when we come to consider the decision of the supreme court of Ohio hereinafter referred to.

The provisions of the statutes governing this bond and the business secured, are found in sections 290 to 295, inclusive, of the General Code.

Section 290, General Code, provides:

"No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation."

Section 291, General Code, provides:

"Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries, or both if to be engaged in both of such businesses."

Section 292, General Code, provides:

"The bond shall be executed by such person, firm or corporation as principal, with at least two good and sufficient sureties. who shall be re-

sponsible and owners of real estate within the state. The bond of a surety company may be received, if approved, or cash may be accepted in place of surety. The bond shall be approved by the auditor of state, and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction."

Section 293, General Code, provides:

"The auditor of state shall keep a book to be known as a 'bond book' wherein he shall place in alphabetical order all such bonds received by him, the date of receipt, the name or names of the principals and place or places of residence, and place or places for transacting their business, the names of the surety upon the bond, and the name of the officer before whom the bond was executed or acknowledged. Such record shall be open to public inspection. The auditor of state shall collect a fee of five dollars for each bond so filed."

By virtue of these sections the person, firm or corporation that engages in the business of selling transportation to or from foreign countries, must give a bond, and thereupon the auditor of state is authorized to grant a certificate to such person, firm or corporation that it has complied with the law governing such business.

The statutes do not prescribe the length of time for which such certificate shall be issued. The bond required by sections 291 and 292, General Code, is to secure the faithful holding and transmission of money to be received from time to time in the future and to secure the validity of the foreign transportation tickets.

First as to the right of the surety to be relieved upon notice to the obligee.

It is stated on page 75 of volume 32 of Cyc.:

"A surety bond for the fidelity and honesty of his principal, and so for an indefinite and contingent liability and not for a sum fixed and certain to become due, may revoke and end his future liability in either of two cases: (1) Where the guaranteed contract has no definite time to run; and (2) where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach."

Also on page 76 of 32 Cyc. it is further said:

"If an employe is appointed to hold office at the pleasure of his employer, sureties on his bond, in the absence of any reservation on their part, will be liable indefinitely; but if the employment is for a fixed time, the sureties will not be liable for any default occurring after that time; or if the principal has been employed to accomplish certain work, his sureties are not liable after that work has been accomplished."

The right to terminate an indefinite bond by notice is set forth on page 85 of 32 Cyc., as follows:

"If the consideration for the contract of a surety is executory—if his liability is to arise or to be increased by future acts of the obligee or creditor, and no time has been prescribed in the contract, the surety can

terminate his liability by notifying the creditor or obligee that he withdraws, remaining liable, however, for any rights the creditor or obligee previously may have acquired; but, if the consideration for the surety's contract is entire, and has been executed fully, as in the case of a bond for the payment of a sum certain, or for the performances of services, the surety is bound indefinitely, and cannot terminate his liability by notice, even though by death or insolvency of cosureties he is the only responsible party remaining; and the personal representative of a surety has no greater right, in this respect, than the surety had. The right to terminate his contract is sometimes given to a surety by statute; and of course a surety may expressly reserve that right in his contract. Where such right is reserved, notice by the surety cannot operate instantly, but the right must be exercised reasonably, so as to enable the obligee to procure new security from the principal."

It will be observed that the foregoing rule applies to the future acts of the obligee or creditor. In the case submitted the future acts are done by the principal, that is he sells the transportation and receives the money for transmission.

In construing the terms of a contract of surety, the surety has occupied a favorite position because he is usually a volunteer and assumes the obligation without consideration.

Surety companies give bonds as a business proposition and for a consideration. They do not occupy the favorite position of a surety who acts without consideration.

The rule is stated in 32 Cyc. at pages 306-307:

"Generally speaking, a contract of suretyship by a surety company is governed by the same rules as the contracts of other sureties, but some distinctions are made by the courts in construing such contracts. The doctrine that a surety is a favorite of the law, and that a claim against him is *strictissimi juris,* does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves "surety companies," their business is in all essential particulars that of insurers. Their contracts are usually in the terms prescribed by themselves, and should be construed most strongly in favor of the obligee."

This same principle is stated by Spear, J., in case of Bryant, vs. Bonding Company, 77 Ohio State 90, on page 99 of the opinion as hereinafter quoted.

In accordance with this rule surety companies are bound by the terms of their contract, and such contracts will be construed according to the principles of law applicable to contracts founded on valuable consideration.

As to the right of discontinuing the bond as to future transactions, Brandt on Suretyship and Guaranty 3rd Ed., says at section 184:

"Where no time is specified for which a continuing guaranty is to remain in force, it is held to be limited to a reasonable time, and in determining what is a reasonable time, all the attendant facts and circumstances are taken into consideration. It has already been stated that a continuing guaranty may be revoked at any time by the guarantor. Unless the terms of a continuing guaranty forbid it, the law writes into it a power on the part of each guarantor to revoke it by giving notice as to liability thereafter arising."

At section 153 he further says as to the time when such notice become effective:

> "Where the surety on the bond of a bank cashier notified one of the directors and vice-president, that he wished no longer to be the cashier's surety and that he had so notified the cashier, it was held that whatever might be the effect of such notice, it could not operate instantaneously, for the directors must have a reasonable time to give notice to the cashier and the other sureties, and to procure a new bond. The court say: 'If the effect of the notice is to be such as is now claimed on the part of the appellant, that is, if it discharged Haight (the surety), and, in consequence thereof discharged all the other sureties, the instant it was communicated to the bank, it might be quite embarrassing and damaging to the bank. The cashier might be so situated that the directors could not immediately arrest his discharge of duty or his ability to bind the bank, and hence reasonable time at least must be given to the bank in such case to act after receiving the notice.' What is a reasonable time depends upon the facts of each case. In one case thirty days was held too short a time."

The case referred to wherein thirty days was held as being too short was as to the surety of a deputy sheriff.

In case of La Rose vs. The Logansport National Bank, 102 Ind. 332, it is held:

> "A continuing contract, guaranteeing the fidelity of a bank cashier, may be revoked by the guarantors without cause, upon proper notice, but the right must be exercised reasonably."

These authorities consider the right of the creditor, the obligee and the employer to be given time in which to adjust themselves to the changed conditions which occur not because of their fault but because of the inability or failure of the principal, the risk, to give bond or to continue a bond already given.

In the present case the state of Ohio is not concerned as to whether a particular person shall engage in the business of selling foreign transportation. That is the concern of the principal and it is his duty to see that a sufficient bond is given. The state of Ohio is concerned in seeing that those who trust such person are protected.

In case of Jeudevine vs. Rose 36 Mich. 54, it is held:

> "Sureties in a bond given to secure performance by their principal of future mercantile engagements, and in which no period of limitation of liability is fixed, who have notified the obligees that they will no longer be bound for future transactions are held discharged from liability for transactions thereafter entered upon, where no change in circumstances by the obligees has occurred on the faith of a longer continuance of the suretyship, and they are not prejudiced by such withdrawal."

The court, however, say that a very slight difference in facts might require a different opinion.

This last quoted case comes nearer the present situation than the other authorities above cited. There is a difference, however, which is material.

Where a bond is given to secure the payment of the purchase price of future

sales, the notice of release is given to the person who makes the sale and he can protect himself as to future sales.

In the present case the state has issued a certificate that a certain person is authorized to engage in a certain business and has given a bond. The certificate is outstanding and imports verity. The state cannot revoke or recall such certificate at will and without cause. It requires time to adjust the rights of the parties. The state does not buy foreign transportation or deposit money with such person. This is done by people who have no knowledge of the desire of the surety company to be relieved from further liability under its bond. It is the purpose of the state to protect the people who deal with such person and the bond is required for that purpose.

Before answering your specific questions it will be necessary to consider the opinion in the case of Bryant vs. The American Bonding Company, 77 Ohio St. 90, wherein it is held:

> "A bond procured by a state officer to be issued by a bonding company to the state guaranteeing the faithful performance of duty by such officer, which is in terms indefinite as to duration, will, in the absence of any stipulation to the contrary, be regarded as remaining in force during the incumbency of such officer on his present term, and where the consideration for such bond moving from the officer to the company is the payment in advance by the officer of a special annual premium, he will be liable to the company for such payment during the term for which the company is liable to the state on the bond.
>
> "But where, in a trial to recover against the officer for an annual premium, the application is introduced in evidence by the company as constituting in part its right of recovery, that instrument becomes a part of the bond, and if its language, taken in connection with that of the bond, imports that the bond is to run indefinitely, one year at a time, providing payment of the annual premium is made, the contract will be treated as continuing only upon the condition of mutual assent by the parties, and if such assent is not had, the officer will not be liable to the company in such action.
>
> "Because of the refusal by the officer to assent to a renewal and his refusal to pay an annual premium, the obligation of the company under the bond to the state for future conduct of the officer does not attach."

This was an action by the surety company to recover the premium for a renewal of the bond. The officer had notified the company that he did not desire a renewal of the bond. The right of the state as obligee under the bond were not in question, but the obligation of the company to the state was considered for the purpose of determining whether a consideration had passed from the company to the officer as a basis for recovery of the annual premium.

The company itself introduced in evidence the application as a part of its contract, although the written terms of the bond did not refer to such application or make it a part of the bond.

Spear, J., says on pages 98 and 99:

> "The question presented, therefore, is: What is the legal effect of the bond, taken in connection with the application, each paper being an essential part of the transaction between the parties? Both having been introduced in evidence by the company, we are relieved of consideration

of the query, which might otherwise arise, whether or not the application is part of the bond, for the act of the company in basing its right of recovery in part upon that instrument, incorporates it for all the purposes of the case. * * * The contention of counsel in support of the judgment of the circuit court is, in brief, that this being a surety bond guaranteeing the faithful discharge of his duties by an officer, of necessity must be coextensive with the duration of such office. Hence, as Colonel Bryant has been, and still remains such officer, the company is bound to the state to make good its guaranty, and this continuing obligation implies necessarily the yearly payment of the premium by the officer; otherwise the company would be subject to loss without corresponding consideration or benefit accruing to it. As a proposition at large, this statement will be assented to, because if the contract, when properly construed, imposes a continuing liability, the duty to pay premiums would seem to follow. But the question remains, What is the proper construction of this contract? And first, what is the nature of the contract? Is it one simply of suretyship, one of those known as voluntary contracts, or is it rather one of the class issued for a money consideration and because of a pecuniary gain? If the former, then it is one wherein the surety is regarded as a favorite of the law, and all doubtful questions to be resolved in his favor; if the latter, then he is regarded as an insurer, whose contract, being drawn by the surety himself, and for a money consideration, is, if ambiguity exists in the language, to be resolved most strongly against the surety."

Also on pages 101 and 102 he further says:

"It will be noted that there is no definite term stated for the duration or life of the obligation. That feature is left entirely to inference. It therefore cannot be determined in this case, except by reference to the application. * * * The state, under these facts, being a party to the contract, reaping advantage from it, should be held to have had knowledge of the entire contract, and to have accepted the indemnity subject to any infirmities attaching to the transaction. In other words, it would take cum onere. Then what follows? The applicant, the 'risk,' could not be heard to claim that the bond would remain in force after his refusal to pay the premium, and it is difficult to see how the beneficiary, the state, could successfully make that claim. One thing is certain: The contract is, as to duration, at least ambiguous."

He further says on page 103, in making his conclusion:

"We are of opinion, therefore, that a bond of this character, indefinite as to duration, will, standing alone, be held to remain in force during the incumbency of the officer on his present term, and the officer will remain liable for the payment of annual premiums so long as liability to the state on the bond continues. But where the application has been made a part of the bond, as in this case, and its language taken in connection with that of the bond imports that while the bond may run indefinitely, but one year at a time, and continued providing the annual premium is paid, the contract should be regarded as continuing only upon the condition of mutual assent, and if such assent is not had, the officer will not be liable for the premiums. And, further, that in case the officer refuses to assent to a continuance of the contract, liability for future conduct of the officer does not attach."

It will be observed that the conclusion of the court is based upon the fact that the application has been made a part of the bond. Whether the application has been rightly made part of the bond as against the obligee is not determined. But the company having introduced the application in evidence as a part of its contract, the application was therefore considered a part of the bond for the purposes of the case decided.

This decision, therefore, is not to be construed as changing the rule of law that a written contract, complete in itself, cannot be modified or varied by parol evidence or by a written instrument outside of said contract and not referred to in the contract.

In the present case, therefore, it is not necessary for the state to look to the application to explain the terms of the bond. Nor is the state required to take notice that the premium is paid for one year. If the company desires the application to be made a part of the contract, the bond, it should be so stated in the bond. Also if the company desires to limit its liability to a definite period that also should be stipulated in the bond. The same is true as to the payment of the premium.

Coming now to answer your specific questions:

The bond in the present case is a continuing obligation. It is an executory contract given to secure faithful performance of future acts. The bond is not limited as to its duration. It will therefore run for an indefinite period.

The liability of the surety company under such a bond may be terminated upon notice given to the obligee. Its liability will not cease instantaneously with the giving of the notice. A reasonable time must be given so that the state may require a new bond, and in the event that such new bond is not given so that the certificate may be cancelled and the rights of the persons dealing with such agent be protected.

What is a reasonable time will depend upon the circumstances of each case. The time should be shorter where default has been made by the principal, than where no default has been made.

Under ordinary circumstances thirty days would be considered a reasonable time in which to secure a new bond.

The company would be liable on its bond upon all transactions made up to the time of giving a new bond, or the cancellation of the certificate if a new bond is not given. If a new bond is not given the certificate should be cancelled at the expiration of the time given to secure a new bond.

The rights which may exist as between the surety company and the principal should be determined by them and not by the state.

In answering your third inquiry:

Under a bond such as submitted it is not necessary to require a certificate, each year, that it has been renewed. The bond is silent as to the time it shall run and it will continue for an indefinite period. A certificate of renewal from the principal, if any was required, would be of little avail. The notice of renewal, if any, should be received from the surety.

If the bond is given for a definite period, a notice of renewal would then be required and this should be from the surety. If a bond limited in time is given the certificate should be issued only for the time the bond runs.

Answering your second question:

Section 292, General Code, provides that the bond shall be executed "with at least two good and sufficient sureties, who shall be responsible and owners of real estate within the state."

This provision applies to personal bonds and not to bonds given by a surety company. A personal bond must be signed by two good and sufficient sureties, and each of them must be owners of real estate within the state.

This is a continuing qualification and the sureties must own real estate and be good and sufficient sureties during the continuance of the bond, or the bond will not be sufficient.

If the surety sells his property and he is no longer a good and sufficient surety the principal should be required to give a new bond and upon failure to do so within a reasonable time, his certificate should be cancelled. In such case a reasonable time would be shorter than where a good and sufficient surety desires to be relieved from further liability.

Where a personal surety sells his property and ceases to be longer qualified as a surety the bond is not invalidated. The bond is still a binding obligation, although execution may not be made upon a judgment.

Generally in case of default suit should be directed against each of the sureties and the principal, even though one of the sureties has no property. The circumstances of a particular case may not make this desirable. That can be considered when such case arises.

As to your fourth inquiry:

The statute does not require a separate bond for each place of business run by the principal. It does require that "the certificate shall be conspicuously displayed in the place of business of such person, firm or corporation."

One bond could be made to cover two places of business, but if in the opinion of the auditor of state a bond of five thousand dollars is not sufficient to secure the public, where a person is running two or more places of business, he could require a bond for each place of business or require a larger single bond. The auditor is not required to issue more than one certificate upon one bond, but he may do so.

Section 293, General Code, contemplates that one bond may be made to cover two places of business when it requires the auditor of state to place in the "bond book" the "place or places for transacting their business."

In your fifth inquiry you ask as to your duty when persons operate such business without a bond and certificate.

The penalty is prescribed in section 294, General Code, as follows:

> "A person, firm or corporation which engages in such business, contrary to the provisions of the second and third preceding sections, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both."

The procedure to follow in case of violations of the law will depend upon the locality.

In cities which have a police court with jurisdiction to imprison, an affidavit should be filed therein and the facts presented to the police prosecutor.

In other places, the facts should be submitted to the prosecuting attorney for presentation to the grand jury, or an affidavit could be filed before a justice of the peace or mayor and a preliminary hearing had.

In your sixth inquiry you state:

> "In the event that a bond is invalidated and we are unable to collect, by what procedure can we cancel the certificate so as to thoroughly protect the state?"

The simplest process and probably the most effective would be to notify the person that his certificate has been cancelled and demand its return. If he continues to transact business after such notice has been given him, prosecution should be entered under section 294, General Code.

The return of the certificate might be enforced, if this is deemed desirable, in a court of equity.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

439.

AN OFFICIAL WHOSE SALARY IS PRESCRIBED UNDER SECTION 2259, GENERAL CODE, MAY RECEIVE ADDITIONAL COMPENSATION FROM STATE INSTITUTION FOR SERVICES RENDERED, PROVIDED THE RENDERING OF SUCH SERVICES DOES NOT CONFLICT WITH HIS OFFICIAL DUTY.

An officer whose salary is prescribed by section 2259, General Code, may receive further compensation for services rendered an institution of the state at such times as do not conflict with his official duties, and when the work is not required to be done as a part of his official duty, but is done in an individual capacity.

COLUMBUS, OHIO, August 8, 1913.

HON. A. V. DONAHEY, *Auditor of State. Columbus, Ohio.*

DEAR SIR:—I have your letter of August 6, 1913, in which you ask:

> "1st. May an official whose salary is prescribed under section 2251 of the General Code receive further compensation for services rendered an institution of the state, and paid from the state treasury?
>
> "2nd. May a person drawing an annual salary as provided by sections 2249 and 2253 of the General Code, receive from the state treasury further compensation for services rendered other state departments? In this connection I would also respectfully refer you to section 2259 of the General Code."

In reply thereto I desire to advise you that your first question was asked in slightly different form by Hon. W. O. Thompson, and on January 8, 1908, Hon. Wade H. Ellis, the then attorney general of Ohio, rendered an opinion in which he construed section 2 of the act of April 2, 1906, 98 O. L., 368, which then read as follows:

> "Provided, further, that no fees whatever, in addition to the above salaries, shall be allowed to such officers; and provided, further, that no additional remuneration whatever shall be given any such officer under any other title than the title by which such officer was elected or duly appointed. The salaries herein provided for shall be in full compensation for any and all services rendered by said officers and employes, payment for which is made from the state treasury."

and which finds its way into the General Code as section 2259, to which you refer (section 1, Page and Adams, section 2259) "*History,*" R. S. 1284-d: 98 v. 368, section 2.

Mr. Ellis there held:

> "There is nothing in this act to prevent an officer named therein from teaching in the university at such times as do not conflict with the proper performance of his official duties. Since the statute refers to services required by law or rendered by such officers in their official capacity, and since such teaching is not so required and is done in an individual capacity, compensation may be made to persons holding the offices named in this act for services as instructors in the university."

Attorney General Denman, in an opinion given to Hon. E. O. Randell on January 5, 1909, construed the same section as not prohibiting his receiving compensation as secretary of the Ohio archeological society while serving and being paid as reporter for the supreme court.

In answer to Mr. Randall I have given out an opinion confirmatory of and following the opinions of my predecessors, of which I enclose you a copy.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

514.

SALARIES AND DUTIES OF OFFICIALS AND EMPLOYES OF SOLDIERS' AND SAILORS' ORPHAN HOME—LAWS REGULATING CONTROL OF THE SOLDIERS' AND SAILORS' ORPHAN HOME ARE RATHER UNCERTAIN AND AMBIGUOUS IN MANY INSTANCES.

The answers to the ten submitted questions in the following opinion contain the rules regulating employment and compensation in the soldiers' and sailors' orphan home.

COLUMBUS, OHIO, September 19, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—In your letter of September 15, 1913, you propound the following ten questions, relating to the soldiers' and sailors' orphan home:

> "1. Please designate the officers whose salaries must be approved by the governor under the provisions of section 1842, General Code, as it appears in the 1912 edition.
>
> "2. Who should appoint and discharge the employes?
>
> "3. Who should fix the compensation of employes?
>
> "4 Are the teachers referred to in section 1936 governed by the compensation fixed for 'school teachers' in section 1946, General Code?
>
> "To explain the fourth question: Industrial departments have been established as follows: house keeping, cooking, baking, sewing, tailoring, laundrying, shoemaking, carpentering, printing, painting, tinning, plumbing, butchering, blacksmithing, nursing, farming and gardening, stationary engineering, electrical engineering and machinist.

"Trained persons have been placed in charge of all these departments. Said departments do all the work necessary for the institution while instructing the children in the various avocations, and the fourth question pertains to their compensation.

"5. May seamstresses and tailoresses, who act as instructors, receive the pay of teachers or must they be confined to the pay particularly designated for them in section 1946, General Code?

"6. Should the board of trustees purchase *all* the supplies needed for the institution from the Ohio board of administration, or only such articles as are manufactured by the institutions under its control?

"7. Do the salaries fixed by section 1946, General Code, include board, room and laundry for any one except the physician?

"8. Does the compensation of the military instructor come under the provisions of section 1496, General Code, as fixed therein for school teachers?

"9. Is the compensation fixed in section 1946, General Code, to be taken as a basis for fixing the compensation of other employes not therein designated?

"10. What is the status of the superintendent of instruction mentioned in section 1946, General Code, that is, does his authority extend to the industrial schools as well as the elementary and high schools?"

Some of these questions cannot be answered by reference to the statutes, as they are not provided for or referred to therein.

The law relating to this institution is uncertain and ambiguous in many instances. You refer me to sections 1840, 1844 and 2256 of the General Code, edition of 1910.

Sections 1840 and 2256, aforesaid, were repealed in 102 O. L., page 223, and said section 1844, now constitutes section 1844 of the General Code of 1912.

Chapter 6 title 5, division 2, being sections 1931 to 1946-2, General Code, inclusive, contained the law applicable to this institution until section 1931-1 was enacted, as found in 103 O. L., 159. This section was enacted as a compromise, between the advocates and opponents of placing this particular home under the control of the board of administration, along with the other state institutions. This act provides for a board of five trustees to have charge and control of said home. The important provision of the new act is as follows:

"Such board shall govern, conduct and care for such home, the property thereof and the inmates therein as provided in the laws governing 'the Ohio board of administration' so far as the provisions are not inapplicable and are not inconsistent with the provisions of the laws governing such home."

This indefinite and unsatisfactory provision at once incorporates into the orphans' home law all provisions of the board or administration act, which *"are not inapplicable"* and *"not inconsistent"* with the laws governing said home.

This home is not under the control of the board of administration. Yet instead of providing in clear, explicit language, the manner of conducting, controlling and managing it, the legislature has driven us to search the law pertaining to the board of administration; and by comparison, adoption, and other means, to formulate a set of rules which are *not inapplicable or inconsistent.*

The board of administration act covers fifteen pages of the statutes, from section 1832 to 1871-1, General Code, inclusive. In the light of all the laws on the

subject, I will take up your questions in their order and give you the benefit of my best judgment under the perplexing circumstances.

I. In my opinion the superintendent, steward, matron, clerk and physicians, are officers whose salaries are to be approved by the governor. The others are employes whose salaries are fixed as hereafter set forth.

2. The superintendent appoints and discharges the employes, under section 1842, General Code; and the trustees may, in writing, order the discharge of any employes. Under section 1935, General Code, the board of trustees on the nomination of the superintendent, appoint the clerk. This is why I have called him an officer in answer to your first question. The superintendent employs and discharges teachers under section 1936, General Code.

3. Under the provisions of section 1842, General Code, the board of trustees of the institution fixes the salaries and wages of all employes, subject to those specifically fixed by section 1946, General Code.

4. Your fourth question presents some complications. I am of opinion that the words "school teachers" as used in section 1946 have reference to those who teach the same, or similar branches of education, as are taught in the public schools of the state. I also think that those who instruct in the twenty callings and occupations named by you in your explanation to query 4 fairly fall within the title of "school teachers" as those words are commonly used and understood, and applied at said institution. The departments mentioned in section 1936 are called "schools;" and the employes are called "teachers."

These instructors and heads of these departments give instruction and training in these trades, occupations and callings and each of them can be called a "school teacher." Therefore, the instructors or teachers referred to in section 1936 are governed by the compensation mentioned in section 1946.

5 Until further legislation or rules are adopted by the board of trustees of said home, seamstresses and tailoresses cannot receive school teachers' wages.

6. The trustees of this home are only required to purchase such supplies from the Ohio board of administration as are manufactured by the state institutions under its control. The latter board is not a dealer in any commodities other than those so, as aforesaid, manufactured or produced.

7. Section 1844, General Code, says: "Superintendents, stewards and matrons shall reside in the institution with which they are connected, and devote their entire time to its interests." Section 1946, General Code, says the same of the physician. From the very nature of his employment, the clerk, appointed under section 1935, must be at the institution at all times. Therefore, I am of the opinion that the superintendent, matrons, steward, clerk and physician, all being officers of the institution are entitled to board, room and laundry at the institution. I am unable to find any provision of law that entitles teachers, instructors or other employes (other than the above named officers), to enjoy the privileges you speak of at the expense of the state.

8. The military instructor is in no sense a school teacher, and his compensation is not fixed in section 1946.

9. The compensation fixed in section 1946, cannot be taken as a basis for fixing compensation of other employes not therein designated. Said statute in the beginning says: "the compensation of the officers and employes *herein named* shall be as follows:" So it applies to none others.

10. The words "superintendent of instruction" as used in section 1946, General Code are broad enough to include and extend to all the schools of the institution, industrial, elementary and high. Therefore his jurisdiction covers them all.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

551.

IN THE CONSTRUCTION OF PUBLIC BUILDINGS THE BOARD OF ADMINISTRATION MUST LIMIT ITSELF TO THE AMOUNT OF THE APPROPRIATION, AND THE MONEY MUST BE SPENT FOR THE PURPOSE FOR WHICH IT WAS APPROPRIATED.

1. *If the legislature appropriates a specific amount for the erection of a building at a state institution the board of administration must limit itself to the expenditure of the sum specifically appropriated, and the money must be used for the purpose for which it is appropriated.*

2. *The language in the appropriation act under the Ohio board of administration exempts it from the provisions of section* 2314, *General Code, but does not nullify the section. By the provision of house bill No.* 616 *found in* 102 *O. L.* 408, *the exception of the Ohio penitentiary from the provisions of section* 2314 *shall apply to the institution for the feeble minded. This provision does not amend section* 2314, *General Code.*

COLUMBUS, OHIO, October 13, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of October 9, 1913, you ask:

"1. May the Ohio board of administration erect, alter, or improve a state institutional building, the cost of which exceeds $3,000.00, other than in accordance with the provisions of sections 2314 et seq., of the General Code? (See sections 1838 and 1839, General Code, also section 1858.)

"2. May the board of administration legally expend a greater amount of money for any purpose than the legislature specifically appropriates for said purpose?

"Example: An appropriation of $22,000.00 is made for the erection of a laundry and industrial building; may the board spend more than this amount and pay the excess out of the appropriation for ordinary repairs and improvements?"

Under date of October 10, 1913, you inquire:

"1. Does the language in the appropriation act under 'Ohio board of administration' nullify the provisions of section 2314, General Code, so far as the appropriation for ordinary repairs and improvements is concerned?

"2. Does the language in the appropriation act under 'the institution for feeble minded' amend section 2314 (see O. L. 102, page 408), and if not, how does it affect the $10,000.00 appropriation which it immediately follows?"

First. Section 1838, General Code, provides that:

"The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive, administrative and fiscal supervision over all said institutions."

Section 1839, General Code reads thus:

> "The board on its organization shall succeed to and be vested with the title and all rights of the present boards of trustees, boards of managers, and commissions of and for said several institutions in and to land, money or other property, real and personal, held for the benefit of their respective institutions, or for other public use, without further process of law, but in trust for the state of Ohio. Said several board of trustees, boards of managers, and commissions now charged with duties respecting the institutions above named shall on and after August 15, 1911, have no further legal existence and the board is hereby authorized and directed to assume and continue, as successor thereof, the construction, control and management of said institutions, subject to the provisions of this act."

Section 1858, General Code, authorizes the board to detail temporarily from a correctional or penal institution any inmates under its control, to perform specified labor.

In answering this question regard must be had to the manner in which the appropriation of funds to the Ohio board of administration has been made. In the absence of any exception in such appropriation act, sections 2314 et seq., of the General Code, obtain and govern the erection, alteration and improvement of state institutional buildings, the cost of which work exceeds $3,000.00. You will note, however, that this section, last cited, does not govern the erection, alteration or improvement of the penitentiary. This statute is very clear and I assume that you do not desire any construction thereof, but merely wish to know whether it is applicable to a state of facts suggested by your question.

Section 1838 does not have any effect upon section 2314, as it is merely designed to confer certain powers upon the board of administration in order to enable that body fully and efficiently to supervise said institutions.

Second. Article 2, section 22 of the constitution of Ohio provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, no appropriation to be for a longer period than two years.

If the legislature appropriates a specific amount for the erection of a building, the board of administration must, in the erection of such building, limit itself to the expenditure of the sum specifically appropriated. When the legislature, by an appropriation act, specifically sets apart a certain sum of money for a designated purpose, it excludes the idea that this expenditure is to be made for an ordinary repair or improvement, because if the work to be done were that of ordinary repairs and improvements, the act would not have appropriated the money for a special purpose, but would have included it within the appropriation for ordinary repairs and improvements without concrete designation.

The expression of one purpose effectually excludes the idea of any other purpose. If this were not true there would be no reason for designating a specific amount for a particular object. Besides this, the expenditure of additional money is not consonant with the letter and spirit of sections 2314 et seq., which require estimates of the cost of the doing of the work and the approval thereof by the governor, auditor of state and secretary of state, the statutes just referred to having for their object the keeping of the cost of buildings,etc., within a specified and definite amount. Strict adherence to these statutes will completely obviate any possibility of expenditures exceeding an appropriation, as the board knows exactly what it will have to expend for a certain purpose, and, with this in mind, can and should see that the estimates do not exceed this sum. If the bids exceed the estimates they may be rejected, and the plans so altered as to bring the expend-

iture within the amount set apart for the purpose for which such money is to be used.

Under section 2313-2 (103 O. L. 445) it is expressly provided that no board shall have authority to create any deficiency or incur any indebtedness except as provided by sections 2312, 2313, 2313-1, consequently, the board of administration cannot create a deficiency by making an expenditure for a specific purpose in an amount in excess of the sum appropriated for that purpose, unless the exceptional sections just referred to permit this to be done. These sections provide for the creation of an emergency board; and section 2313, General Code, provides:

> "In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, which may lawfully and by any unforeseen emergency happen when the general assembly is not in session, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission, may make application to the board for authority to create obligations within the scope of the purpose for which such appropriations were made. Such applicant shall fully set forth to the secretary in writing the facts in connection with the case. As soon as can be done conveniently, the secretary shall arrange for a meeting of the board, and shall notify the applicant of the time and place of the meeting, and request his presence. No authority shall be granted with the approval of less than four members of the board, who shall sign it."

The language last quoted only authorizes the creation of obligations for the expenses of an institution, which may lawfully and by any unforeseen emergency happen. I think that the finding of the emergency board as to what is an "unforeseen emergency" would be conclusive; but it is impossible for me to conceive how the expenditure in excess of an appropriation for the erection of a building could be any such unforeseen emergency. The board knows what it has to expend for the erection of the building, and by expending this amount for the partial construction of the building most assuredly cannot call for a further expenditure on the ground that an unforeseen emergency arises for the completion of the building. If the board follows the provisions of sections 2314 et seq., it can foresee whether the building may be finished for the amount specified, and it should see that a contract for the completion of the work does not call for a greater expenditure than the amount set aside for that purpose. The emergency board is to deal with these cases wherein some unanticipated event necessitates the expenditure of money, by creating a deficiency in an appropriation for the *expenses* of an institution, department or commission, when the legislature is not in session.

An inspection of section 2323 of the General Code adds force to the foregoing argument. This statute reads as follows:

> *"No contract shall be made for labor or materials at a price in excess of the entire estimate thereof. The entire contract or contracts, including estimates of expenses for architects and otherwise, shall not exceed in the aggregate the amount authorized by law for such institution, building or improvement, addition thereto or alteration thereof."*

This indicates, not only that no unforeseen emergency would occur in the case suggested by you but also that the deficiency was not lawfully created.

Answering your question submitted in your second letter, I would say:

1. In house bill No. 590, making general appropriations to the various departments, the following language appears in the Ohio board of administration appropriation:

"Ordinary repairs and improvements; balance and * * * $326,000.00. Expenditures from the appropriation for ordinary repairs and improvements to be exempt from section 2314 of the General Code of Ohio * * *."

I think that under the language last quoted the expenditures for ordinary repairs and improvements form a temporary exception to the provisions of section 2314 of the General Code. This appropriation act, however, does not nullify the provisions of the general statute just cited, but merely holds it in abeyance during the life of the appropriation act, which is two years.

2. In the appropriation made for the "institution for feeble minded" in house bill No. 616 (102 O. L. 408) it is provided that the exception of the Ohio penitentiary from the provisions of section 2314 of the General Code shall be extended to the institution for feeble minded. This language does not amend section 2314, because it is a sound and fundamental rule of statutory construction that any special provisions in a temporary appropriation act must be restricted in their operation to the subject-matter of the act and may not be treated as permanent regulations unless there is a clearly expressed intention so to make them. Here there is no such intent and the exception expires with the appropriation act. (2 Lewis Sutherland Statutory Construction p. 663.)

This provision does, however, except all appropriations made for the institution for feeble minded from the provisions of section 2314 of the General Code of Ohio, and, consequently in the expenditure of the money therein appropriated for this institution the board of administration need not comply with the provisions of section 2314.

Trusting that I have fully answered your questions, I am,

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

566.

THE AUDITOR OF STATE MAY NOT CHARGE BACK AGAINST STATE INSTITUTIONS EXPENSES OF EXAMINATION MADE BY EXAMINERS FROM THE AUDITOR'S DEPARTMENT.

There is no statutory authority for the auditor of state to charge back against state institutions the cost of examinations made by examiners from the auditor of state's office, as is done in the examination of taxing districts. Section 288 General Code refers to taxing districts, and no state institution can be considered a taxing district.

COLUMBUS, OHIO, October 18, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of September 25th you submitted for my consideration the following:

"Attached you will find a statement directed to the emergency board of Ohio, and I trust you will, at your earliest convenience, answer the following questions:

"*First.* Would the evidence hereto attached constitute an emergency under the recent emergency act, page 445 volume 103 Sessions Laws?

"*Second.* Taking into consideration sections 271 to 273-4, General Code, and sections 274,277, 279, 284, 287 and especially note 288, General Code.

"Would it be proper for the auditor of state to render a bill to institutions and departments of the state for actual expenses of the examiners making the audit of such department or institution, the examiners' expenses, of course, to be paid first from the public audit fund, and when paid by the department or institution, credited back to the public audit expense fund, as is done in other political subdivisions of the state?

"Many institutions and universities now do this, pay for their examinations from their funds. If this could be generally done in the state, it would be fair to all departments, and would not necessitate a direct appropriation for the departmental examiners of the state. Emergencies would not arise under this system, but what could be met, and the law could, at all times, be complied with by this department."

The state emergency board has since granted you the amount that you desired and, therefore, I do not undertake to pass upon the question as to whether the evidence attached to your inquiry would constitute an emergency, under the recent emergency act 103 O. L. 445.

Section 274, General Code, as amended 103 O. L. 246, provided as follows:

"There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred and seventy-five to two hundred and eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state officers, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio. Said bureau shall have the power to examine the accounts of every private institution, association, board or corporation receiving public money for its use and purpose, and may require of them annual reports in such form as it may prescribe. The expense of such examinations shall be borne by the taxing district providing such public money. By virtue of his office the auditor of state shall be the chief inspector and supervisor of public offices, and as such appoint not exceeding three deputy inspectors and supervisors, and a clerk. No more than two deputy inspectors and supervisors shall belong to the same political party."

Section 288, General Code, to which you call my special atttention provides as follows:

"The expenses of the inspection and auditing of the public accounts and reports of a taxing district shall be borne by the districts, and the auditor of state shall certify the amount of such expenses to the auditor of the county in which the district is situated. The county auditor shall forthwith issue his warrant in favor of the auditor of state on the county treasurer, who shall pay it from the general fund of the county, and the county auditor shall charge the amount so paid to the taxing district at the next semi-annual settlement. Moneys so received by the auditor of state shall be paid into the state treasury to the credit of the public audit expense fund."

In your inquiry you request my opinion as to whether or not your department can render a bill to institutions and departments of the state for actual expenses of examiners in making the audit. Section 274, General Code, as amended, provides in part that "expenses of such examinations shall be borne by the taxing district

provided such public money," but as I construe said sentence so used in said act it refers to the sentence just preceding it relative to the right of the bureau to examine public institutions, etc., receiving public money for its uses and purposes, but even if this were not so I assume that the institutions to which you refer are those which receive appropriations from the legislature.

Unless the two sections above quoted give the authority for your department to charge back against a particular institution the cost and expense of examinations made by your examiners there is no authority for you to make such a charge, and from a careful consideration of said sections I cannot find any such authority. The only authority to charge back is that found in section 288, General Code, which refers to the expense of inspection and auditing of public accounts and reports of a taxing district and no institution or university can be considered as a taxing district.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

568.

THE STATE ARMORY BOARD IS NOT REQUIRED TO COMPLY WITH SECTIONS 2314, ETC., GENERAL CODE—DEEDS FOR ARMORY SITES SHOULD BE FILED WITH THE AUDITOR OF STATE AFTER BEING PROPERLY RECORDED.

1. *Sections 2314, 2315, 2320 and 2326, General Code, do not apply to the state armory board, and the state armory board is not required to comply with them.*

2. *Deeds for armory sites should be filed with the auditor of state after they have been properly recorded in the counties wherein property is located as provided by section 267, General Code.*

COLUMBUS, OHIO, October 18, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of July 17th, which reads in part as follows:

> "Sections 5255-5258 of the General Code provide that the state armory board shall prepare plans, specifications, etc.
>
> "Should not the state armory board comply with sections 2314, 2315, 2320 and 2326 of the General Code?
>
> "Should the state armory board file with the auditor of state deeds for armory sites?"

Sections 5255-5258 are special statutes relating solely to the construction of armories, and sections 2314 et seq., are a part of the general statutes governing the subject of "erection, alteration or improvement of a state institution or building, except the penitentiary."

Without quoting from these statutes, it is sufficient to say that the sections of the general statutes you mention contain provisions upon matters not included in the armory statutes, and you wish to be advised whether the armory board must comply with those sections of the general statutes.

According to a well established principle of statutory construction, a special statute is to be read and construed as an exception to a general statute.

There was no authority for the erection of armories by the state until the passage of the act of 1909, (100 O. L., p. 25).

The first paragraph of section 3 of said act, provides:

> "When the state armory board deems it to the best interests of the state and advisable to erect an armory for any of the organizations of the national guard, it shall cause plans, specifications and estimates to be prepared for an armory at the place it has so directed, and proceed to erect such armory as hereinafter provided in this act."

The foregoing appears in the General Code as section 5257, the only change being to substitute the word "chapter" for the word "act," found in said section three.

From this provision, it is clearly manifest that the legislature intended the procedure for building armories, as outlined by the statutes on that subject, to be exclusive.

If it were the intention that the general statutes should apply in a case where no specific provision was made in the armory statutes, the legislature doubtless would have inserted in the latter a provision to that effect.

I am therefore of the opinion, in answer to your first question, that sections 2314 etc., do not apply to armories and that the state armory board is not obliged to follow the same.

Section 267 of the General Code, provides:

> "The evidence of title of lands other than public lands, belonging to or hereafter acquired by the state shall be recorded in the office of the recorder of the counties in which they are situated, and when so recorded such evidence of title shall be deposited with the auditor of state and kept in his office. He shall make an abstract of the title of all lands acquired by the state in a book prepared for that purpose and open for inspection by all persons interested."

Section 5256, General Code, provides:

> "The board may receive gifts or donations of land, money or other property for the purpose of aiding in the purchase, building, furnishing or maintaining of an armory building. All lands so acquired shall be deeded to the state of Ohio, and all property received under the provisions of this section from any source, shall become the property of the state."

It will be observed that under section 267, the evidence of title of lands belonging to the state or hereafter acquired by it, except public lands, shall be recorded in the office of the county recorder of the counties in which they are situated, and when recorded, deposited and kept in the office of the auditor of state. While land acquired by the state for armory sites is in a sense public land, it cannot be regarded as such public land, the evidence of title whereof would not have to be recorded and deposited in the office of the auditor of state. The public lands coming within the exception, are lands ceded to the state by the United States government for school purposes, canal lands and the like.

I am clearly of the opinion, in answer to your second question, that deeds for armory sites should be filed with your department after they have been duly recorded as required by section 267, supra.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

585.

THE STATE MEDICAL BOARD HAS NO AUTHORITY TO PASS A RESOLUTION AUTHORIZING PAYMENT TO THEMSELVES of 50 CENTS EACH FOR GRADING EXAMINATION PAPERS—VOUCHERS THAT HAVE BEEN PAID UNDER A RESOLUTION OF THIS KIND CANNOT BE CHANGED, BUT THE PRACTICE SHOULD BE DISCONTINUED.

1. *Under the provisions of section* 1264, *General Code, the state medical board is not authorized to pass a resolution authorizing the payment to themselves of* 50 *cents each for grading examination papers.*

2. *Members of the state medical board should not be required to pay back fees which they received under the former auditor of state, but the honoring of such vouchers for such fees should be discontinued.*

COLUMBUS, OHIO, October 23, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of inquiry of the date of August 6, 1913, wherein you inquire in regard to the state medical board as follows:

> "1st. Under the provisions of section 1264, General Code, is it legal for the board to pass a resolution authorizing the payment to themselves of 50 cents each for grading examination papers?
>
> "2nd. If the passage of such a resolution is illegal, could the several vouchers on file in this department be corrected to show per diem instead of fees charged for grading papers; excess fees over the per diem to be paid back into the treasury?
>
> "The former state auditor permitted a charge of 50 cents per paper for grading examination papers in lieu of per diem."

In reply thereto I desire to say that section 1264 of the General Code provides as follows:

> "Each member of the state medical board shall receive ten dollars for each day employed in the discharge of his official duties and his necessary expenses so incurred."

Under the provisions of said section, the state medical board would not have authority to pass a resolution, authorizing payment to themselves of 50 cents each for grading examination papers, for the reason that said section provides that members of the said board shall receive $10.00 for each day employed in the discharge of their official duties and their necessary expenses so incurred. The payment to themselves of 50 cents each for grading examination papers could not be considered as coming within the term "necessary expenses." Such fee, therefore, not being "necessary expenses," could not legally be paid to the members of said board and the section in question specifically limits them to $10.00 a day for their services in the discharge of their official duties, and does not provide for the payment of 50 cents each for grading examination papers.

In answer to your second question, I desire to say that there is no legal authority which gives you the right to correct vouchers on file in your department in order

that said voucher may show per diem instead of the fees, charged for grading papers. I take it from the wording of your inquiry that the said excess fees over and above the per diem, which were charged for the grading of papers, were so charged because of the policy of the former administration of the state auditor's department in permitting the same. This being the case, it is my opinion that the members of the state medical board ought not to be required to pay back the fees which they received under the former auditor of state, but the honoring of such vouchers for said fees should be discontinued.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

628.

THE AUDITOR OF STATE HAS POWER TO EXAMINE TITLE GUARANTEE AND TRUST COMPANIES—THE SUPERINTENDENT OF BANKS HAS POWER TO EXAMINE SAFETY DEPOSIT AND TRUST COMPANIES—THE REPORTS OF THESE COMPANIES ARE TO BE MADE RESPECTIVELY TO THE AUDITOR OF STATE'S OFFICE AND TO THE SUPERINTENDENT OF BANKS—THE EXPENSE OF SUCH EXAMINATION BY THE AUDITOR'S DEPARTMENT MAY BE PAID OUT OF THE CONTINGENT FUND OR OUT OF FUNDS CREATED BY THE APPROPRIATION FOR THE AUDITOR OF STATE AND HIS OFFICE.

The superintendent of banks has no power with reference to the examination of title guarantee and trust companies. The auditor of state has power to examine such companies, and the reports of such companies should be made to the auditor of state. Safety deposit and trust companies should make their reports to the superintendent of banks, who has the power to examine such companies. The payment for expenses of such examinations by the auditor of state may be made out of the fund created by the appropriation for the auditor of state and his office staff for the conduct of the office, or out of the fund appropriated for contingent expenses of the office.

COLUMBUS, OHIO, December 1, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of June 12, 1913, you requested opinion of me as follows:

> "1. Has the auditor of state authority to at any time order an examination of the business of any safe deposit and trust company of Ohio?
>
> "2. Does the act creating the superintendent of banks, passed in 1908 sections 79 and 91, and the last paragraph of section 119, pages 287, 288 and 296, (99 O. L.), abrogate by implication the authority conferred on the auditor by the law passed in 1886 and found in section 9835 of the General Code?
>
> "3. Are such companies required to make annual reports to the auditor (section 9834, General Code), in addition to the regular reports required to be made to the superintendent of banks?

"4. The superintendent of banks does not make regular examination of title guarantee and trust companies and no examinations of such companies have been made by the auditor of state for a dozen of years. If the auditor has no authority to make examinations of state deposit and trust companies how under section 9856 of the General Code can he have authority to make examinations of title guarantee and trust companies?

"5. If the auditor has no such authority, is it the duty of the superintendent of banks to regularly examine title guarantee and trust companies?

"6. If the auditor of state is authorized to examine guarantee title and trust companies by whom should the expense of such examination be paid?"

Section 9834 and 9835, General Code, making provision respectively as to reports by safe deposit and trust companies and their examination by the auditor of state, were originally enacted in 1882 (79 O. L. 101, 103) and are as follows:

"Sec. 9834. Within six months after the incorporation of such company, its trustees must notify the auditor of state of the date of the organization. Within ten days after the annual meeting thereof in each year, under oath, such trustee shall make a complete statement of the condition of the company, in which they shall specify the different kinds of its liabilities and assets, stating the amount of each kind, which statement shall be filed with the auditor of state, and published in his annual report. The trustees also shall publish it in a newspaper of general circulation in the county in which the principal office of the company is located.

"Section 9835. Such auditor, at any time, through an expert appointed by him, may make a full examination of the affairs and condition of every such company."

Section 9856, General Code, covering the same subject-matters with reference to title guarantee and trust companies was originally enacted in 1902, and is as follows:

"Title guarantee and trust companies shall make such reports to the auditor of state as are required of safe deposit and trust companies and be subject to like examinations and penalties."

In 1908 the legislature passed the Thomas act, a comprehensive act relating to the organization of banking companies including safe deposit and trust companies and providing for inspection and supervision thereof by a superintendent of banks, the office of which was created by the act (99 O. L. 269-296).

Section 79 of the act just noted was carried into the General Code as section 711, which reads as follows:

"The superintendent of banks shall execute the laws in relation to banking companies, savings banks, savings societies, societies for savings, savings and loan associations, savings and trust companies, safe deposit and trust companies and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state. Nothing in this chapter shall apply to building and loan associations."

Sections 720 and 721, being parts of the same act, provide for examinations by

the superintendent of banks of any of such banking companies on the request of such company, its directors or stockholders, and section 730 makes provision for the examination of any such company by the superintendent of banks when he has reason to believe that the capital has been impaired, while section 724, General Code, provides as follows:

> "At least twice each year, and also when requested by the board of directors or trustees thereof, the superintendent of banks or an examiner appointed for that purpose shall thoroughly examine the cash, bills, collaterals or securities, books of account and affairs of each bank, savings bank, safe deposit and trust company, savings and loan society or association incorporated under any law in this state. Such examination shall be made in the presence of the members of the executive committee or a majority thereof. He shall also ascertain if any such corporation, company, society or association is conducting its business in the manner prescribed by law and at the place designated in its articles of incorporation."

Comprehensive powers with reference to the examination authorized by the sections just noted are given to the superintendent of banks by the provisions of this act. (Secs. 725-729, G. C.)

Sections 108 and 109 of the Thomas banking act are now sections 737 and 738 of the General Code and read as follows:

> "Sec. 737. Not less than four times during each calendar year each banking company, savings bank, savings and trust company, chartered or incorporated under any law of this state, and every person or copartnership doing a banking business shall make a report to the superintendent of banks required by the superintendent on forms prescribed and furnished by him, and, so far as possible, they shall be made on the same day on which reports are required from national banking associations by the comptroller of the currency.
>
> "Sec. 738. Such reports shall be verified by the oath of affirmation of the president, vice-president, cashier, secretary or treasurer thereof, and shall exhibit in detail, and under appropriate heads, a true statement of the resources, assets and liabilities, of such banking company, savings bank, society or association, at the close of business of any past day by him specified, which day shall be the same for all corporations required to make such reports."

Section 739 provides for newspaper publication of the reports called for by the sections just before noted while sections 740 and 741 provide respectively for special reports on request of the superintendent of banks, and for penalties imposed on such companies for failure to meet the requirements of the law as to the reports required of them.

The act of 1908 does not in terms repeal the statutory provisions now in the General Code as sections 9834 and 9835 above noted providing for reports to be made by safe deposit and trust companies to the auditor of state and providing for the examination of such companies by him. The question remains whether the provisions of sections 9834 and 9835 are repealed by implication by force of the provisions of the later act providing for the examination of safe deposit and trust companies by the superintendent of banks and providing for reports by such companies to him, which provision as carried into the General Code have been herein noted. The Thomas banking act of 1908, creating the office of superintendent of

banks, is comprehensive and complete in its provisions with reference to the examination of banking companies including safe deposit and trust companies by such officer, and in the provisions with reference to reports by such companies to him, and it is fair to assume that such provisions were intended to furnish the sole requirements as to the examination of such companies and as to reports by them, and to be a substitute for previous legislation on the subject.

> "It is a well settled rule that when a law enacts a thing to be done different from the same thing required by a former law, the first thereby becomes repealed without any direct expression of such intention by the law-making power."
>
> Moore vs. Vance, 1 Ohio 1, 10.
> Commissioners vs. Frega, 26 O. S. 488, 491.
>
> "A statute revising the whole subject-matter of an existing statute, and plainly intended as a substitute therefor though not in terms repugnant thereto, operates as a repeal of the same."
>
> Attorney General vs. Commissioners 117 Mich. 477.
> Loraine Road Co. vs. Cotton 12 O. S. 263, 272.
> Goff vs. Gates, 87 O. S. 142, 149.
> Roche vs. Mayor, 40 N. J. L. 257.
> Ritter vs. Ry. Co., 6 N. P. (n. s.) 161, 168.

On the consideration just noted I am of the opinion that the provision of sections 9834 and 9835, General Code, have been repealed by implication by force of the provisions of the Thomas banking act covering the subject-matter of these two sections, and that the authority of the auditor of state with reference to the examination of safe deposit and trust companies has been abrogated, and this is likewise true with reference to the obligation and duty of such companies to make reports to him.

As has been noted, section 9856, General Code, provides that title guarantee and trust companies shall make such reports to the auditor of state as are required of safe deposit and trust companies and be subject to like examinations and penalties. In the enactment of the provisions of this section prescribing the duties of title guarantee and trust companies with respect to reports to the auditor of state and prescribing the authority of such officer with respect to the examination of such companies, the legislature, by necessary intendment, had reference to the provisions covering the same subject-matter with reference to safe deposit and trust companies, now contained within sections 9834 and 9835, General Code. The effect of this reference was to adopt and incorporate the provisions as to reports and examinations applying to safe deposit and trust companies into the act applying to title guarantee and trust companies the same as if such provisions had been in terms re-enacted in the latter act.

> "When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect, generally, is not to revive or continue in force the statute referred to, for the purpose for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose, the law referred to, is, in effect, incorporated with, and becomes a part of the one in which the reference is made, and, so long as that statute continues,

will remain a part of it, although the one referred to, should be repealed, such repeal would no more effect the referring statute, than a repeal of this latter, would the one to which reference is made."

Ludlow vs. Johnson, 3 Ohio 533, 572.
Stall vs. Macallister, 9 Ohio 19, 23.
Shull vs. Barton, 58 Neb. 741, 743.
Phoenix Assur. Co. vs. Fire Dept., 117 Ala. 631, 646.
Sika vs. C. & N. Co., 21 Wis. 370.
In re Heath, 144 U. S. 92, 94.

Applying the principle of construction just noted, it follows that the provisions of sections 9834 and 9835 adopted by reference by the provisions of section 9856 and by legal intendment incorporated in the latter section as applying to the title guarantee and trust companies, are not effected in their application to such companies by the fact that they have been impliedly repealed and abrogated in their application to safe deposit and trust companies by the later provisions of the Thomas banking act.

The next question is whether there is anything in the act last mentioned which in any wise affects the powers, duties and requirements of section 9856 with reference to title guarantee and trust companies. An examination of the sections of the General Code carried into the same from the Thomas act and before noted herein making provision for examination by the superintendent of banks of the companies therein mentioned, and making provision for reports by such companies, fails to disclose any legislative intention to cover title guarantee and trust companies within the provisions of the same. No specific authority is given to the superintendent of banks with reference to the examination of title guarantee and trust companies, and if such authority is given at all, or if such companies are within the jurisdiction of the superintendent of banks for any purpose, such authority and such jurisdiction must be found in the more general provisions of the act. I note that section 711, General Code, provides that the superintendent of banks shall execute the laws in relation to the particular companies therein named, "and every other corporation or association having the power to receive, and receiving money on deposit, chartered or incorporated under the laws of this state."

Section 91 of the Thomas act, carried into the General Code as section 9793, provided:

> "Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust companies, society for savings, savings society and every other corporation or association except building and loan associations, having the power to receive, and receiving money on deposit, now existing and chartered or incorporated, or which may hereafter become incorporated shall be subject to the provisions of this act."

In carrying the same into the General Code, the provisions of section 91 of the act were changed so as to provide that the companies therein specified and every other corporation or association except building and loan associations empowered to receive, and receiving deposits should be subject to the provisions of the *chapter* of which section 9793 is a part. Ordinarily, mere changes of phraseology in carrying a statute into a revision of the statutes of the state is not to be considered as changing or otherwise affecting the meaning of the statute as enacted (110 S. I.; 36 O. S. 326); while on the other hand, it seems to be the rule that

where in the course of a revision of the statutes, language is added to a particular section, the plain and obvious effect of which is to qualify the former operation of such section, this effect should not be denied on the ground that the language was added in the course of the revision; on the contrary, the new section should receive the construction required by the natural import of the language it contains.

Collins vs. Millen, 57 O. S. 289.
In re Hinton 64 O. S. 485, 493.

If the latter view as to the construction of section 9793 obtains, this section passes out of view with reference to the question at hand, for there is nothing in the chapter of which this section is a part, relative to examination by the superintendent of banks or otherwise.

However, whatever may be the proper construction of section 9793 with respect to the question as to the jurisdiction of the superintendent of banks over title guarantee and trust companies, it is apparent that as to both sections 711 and 9793, General Code, any claim of jurisdiction over title guarantee and trust companies must rest on the general language and provision therein contained, as follows:

> "And every other corporation or association having the power to receive and receiving money on deposit, chartered or incorporated under the laws of this state."

It is a general rule of construction however, to be observed as an aid in ascertaining the meaning of statutes, that general words following the enumeration of particular classes of things are to be limited and confined in their operation to things of the same kind or nature as those enumerated.

> "General words, following particular and specific words must, as a general rule, be confined to things of the same kind as those specified."

Shultz vs. Cambridge, 38 O. S., 659.
Rutheford vs. Ry Co., 35 O. S. 559, 563.
State vs. Liffring, 61 O. S. 39, 50.
State vs. Gravatt O. S. 289, 306.

All of the companies specifically enumerated in both the sections noted are classed as banking companies (see section 9702, G. C.); and the language above noted is to be limited as applying to such corporations and associations, having the power to receive and receiving deposits as can fairly be said to be banking companies within the purview of the Thomas act as indicated by its title and manifest scope.

State vs. Gibbs, 7 N. P. (n. s.) 335.
Burgett vs. Burgett, 1 Ohio, 469, 480.
Terrill vs. Anchaauer, 14 O. S. 80.

This conclusion follows as well from the rule that general words as used in a statute should be limited to the objects to which it is apparent the legislature intended to apply them.

Board of Education vs. Board of Education 46 O. S. 595, 599.
Brigel vs. Starbuck, 34 O. S., 280, 285.
Steamboat vs. Pressler, 13 O. S. 255, 262.
Tracy vs. Card, 2 O. S. 431, 441.

I do not deem it necessary to express any opinion here with reference to the power of title guarantee and trust companies to receive deposits. Certainly no express power to that end is given by the section defining the power of such companies (9850, G. C.).

Were it to be conceded that the language of section 711 and section 9793, General Code, is broad enough and specific enough to bring title guarantee and trust companies under the jurisdiction and supervision of the superintendent of banks for any purpose, yet as it appears that specific provision has been made with reference to the examination of such companies by the auditor of state, such specific provision so made will prevail as against the general language and provision of the section just noted, and operate as an exception thereto.

Fosdick vs. Perrysburg, 14 O. S. 473.
Shunk vs. Bank, 22 O. S. 508, 515.
Commissioners vs. Board, 390 S. 628, 632.
Cincinnati vs. Holmes, 56 O. S. 104, 114.

Moreover, the immediate question at hand is with reference to the power of the superintendent of banks to examine title guarantee and trust companies, and as it appears that the particular companies subject to this power are specifically named and designated in the section granting this power to the superintendent of banks (section 724, G. C.) a familiar rule of construction suggests the legislative intent to exclude all other companies than those named therein from the operation of the section and the power therein named.

Telephone Co. vs. Cincinnati, 73 O. S. 64, 80.

On the consideration above noted, I am of the opinion that the superintendent of banks has no power with reference to the examination of title guarantee and trust companies, but that the sole power to examine such companies is in the auditor of state, to whom likewise the reports of such companies should be made. As before noted, however, I find that since the enactment of the Thomas act, safe deposit and trust companies are subject solely to the examinations made by the superintendent of banks, and the reports of such companies must be made to him.

The question as to how the expenses of examinations of title guarantee and trust companies is to be met and paid is one of difficulty on which the statutes throw no satisfactory light. This question, however, it is evident, is governed by the same considerations which governed the question of expenses in the examination of safe deposit and trust companies by the auditor of state before the enactment of the Thomas act which by implication abrogated his power and duty with respect to the examination of such companies. I know of no provision casting the burden of such expense upon the company examined by the auditor of state, nor is there any special fund out of which payment for the services of the examiner is to be made. It seems to follow that payment for services and expenses in making such examinations can be made only out of the fund created by the appropriation for the auditor of state and his office staff for the conduct of the office, or out of the fund appropriated for contingent expenses of the office.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

672.

WORKMEN'S COMPENSATION ACT—METHODS BY WHICH FUNDS ARE TO BE PAID OUT UNDER THIS ACT—SOURCE OF FUNDS UNDER THIS ACT—PERSONS COMING WITHIN WORKMEN'S COMPENSATION ACT—PERSONS NOT WITHIN THIS ACT.

1. *103 O. L., p. 77, section 14, includes school teachers who have access to pension funds in cities, also employes on township road work, but does not include physicians employed to take care of the township poor, and probably does include road superintendents. All elective officers are excluded from the provisions of this act by virtue of the exception of officials.*

2. *Funds paid out under the provisions of section 16 and 17 of said act should be paid from the general revenue fund of the state.*

3. *Under the provisions of this act it is the duty of the county auditor to issue his warrant on the county treasurer, in favor of the treasurer of state, for the aggregate amount due from the county and its taxing districts. This amount shall be paid from the county treasury and out of the undivided tax fund.*

4. *The auditor of state shall draw the funds to comply with section 17 from the general revenue fund of the state.*

5. *It is not necessary for the political subdivisions of the state to appropriate sufficient funds to comply with this act.*

6. *It is the duty of the county auditor to withhold from the several political subdivisions' funds in his February settlement in order to comply with this act.*

7. *The auditor of state may require public officers and employes to furnish him with the data necessary to enable him to make up the list required by the workmen's compensation act.*

COLUMBUS, OHIO, December 26, 1913.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Under date of December 11, 1913, you urgently request an early answer to certain questions.

As these questions arise under the workmen's compensation act, which is now in the supreme court, by virtue of a petition in mandamus filed by the Ohio equity association and Charles Gongwer, to compel the secretary of state to submit this law to the electors, I am in doubt as to what course to take. If it should be held that the law should be submitted to the electors it would probably be held in abeyance, and consequently the answer to your questions would be a moot matter. Should the supreme court decide that the secretary of state was correct in rejecting the referendum petition, I can readily see that it is important for you to know just what course to pursue in regard to the law, and consequently I shall give you my opinion upon the questions suggested. They are as follows:

"1. 103 O. L., p. 77, section 14. Does this section include,

"(a) School teachers who have access to pension funds in cities?

"(b) Employes on township road work?

"(c) Physicians employed to care for township poor?

"(d) Road superintendents?

"(e) Are all elective officers exempt?

"2. From what funds shall money be paid out under the provisions of sections 16 and 17 of said act?

"3. How shall the county auditor determine from what funds to pay out money in compliance with section 19?

"4. From what shall the auditor of state draw funds to comply with section 17?

"5. Is it necessary for the political subdivisions of the state to levy or appropriate sufficient funds to comply with this act?

"6. Would the county auditor be authorized to withhold from the several political subdivisions, funds in his February, 1914; settlement to comply with this act?

"7. Has the state auditor authority, under sections 12888-283, to require county auditors to furnish the data required in sections 17, 18 and 19?"

1. (a) Section 13 of the act in question, 103 O. L. p. 77, expressly designates as an employer the state and each county, city, township, incorporated village and school district therein, while the term employe is construed to mean every person in the service of such school district, with certain exceptions, among which are not mentioned school teachers who contribute or have access to pension funds; hence, I hold school teachers come within the provisions of the act whether or not they contribute or receive payments out of pension funds maintained by the school districts. This construction receives added force from the fact that the act in express terms does not apply to policemen or firemen where pension funds for them are now or may hereafter be established. The exclusion of them carries with it the implication of inclusion of others who have not been expressly excluded.

(b) Employes on township road work are in the service of the township, and consequently are included within the act. It will be observed that this act applies generally to all employes of townships, while it does not include persons casually employed by a private individual, or one who is not in the usual course of occupation of such employer, No such exception is to be found regarding those serving the state or its political subdivisions.

(c) Under sections 3490 and 3491 of the General Code, township trustees may contract with physicians to furnish medical relief to persons coming under their charge under the poor laws, no contract to extend beyond one year. This contract is to be awarded to the lowest competent bidder. Under an arrangement of this kind, I do not think that the physician is in the service of the township, and, therefore, is not within the provisions of the act.

(d) The statute providing for the employment of road superintendents, viz.: section 3370 of the General Code, authorizes the trustees to "employ and hire a suitable person." Section 3371 refers to his "employment" which is subject to the will of the township trustees. Section 3373 provides for compensation for his "services" for time actually employed in the care of the roads, and all of the sections quoted clearly place him under the direction of the trustees. Section 7137, also providing for powers and duties of a road superintendent, authorizes him to remove encroachments, enter upon lands and carry away timber, dig gravel, sand and stone necessary to make, improve or repair an adjoining road, but section 7139 clearly states that he shall at all times be under the direct control and supervision of the township trustees and perform only such work as is directed by them. It is true that in some sections he is referred to as an officer and is required to give bond and take oath before entering upon "the duties of his office," to use the words of the statute; but the character of an office cannot be attached to a position merely by the name, as its existence must be determined by the nature of the duties attached to it. It is the function and not the designation that controls.

State vs. Jennings, 57 O. S., 415.
Bender vs. Cushing, 14 O. D. N. P. 65, 70.

Its distinguishing characteristic is that the incumbent is clothed in an independent capacity with some part of the sovereignty of the state, and those sovereign functions should be performed continuously and not transiently or incidentally. With these considerations in mind, I very much doubt if a road superintendent may be said to be an official of the township, and, therefore, hold that he comes within the spirit and letter of the statute. In this connection it must be noted that the purpose and object of this law was to include rather than exclude persons in the service of the political subdivisions of the state, and consequently doubts should be resolved in favor of inclusion.

(e) All elective officers are excluded from the provisions of this act by virtue of the exception of officials.

2. Sections 16 and 17 of the act in question read as follows:

> "Section 16. The amount of money to be contributed by the state itself, and by each county, city, incorporated village, school district or other taxing district of the state shall be, unless otherwise provided by law, a sum equal to one percentum of the amount of money expended by the state and for each county, city, incorporated village, school district or other taxing district respectively during the next preceding fiscal year for the service of persons described in subdivision one of section fourteen hereof.
>
> "Section 17. In the month of January in the years 1914 and 1915, the auditor of state shall draw his warrant on the treasurer of state, in favor of said treasurer as custodian of the state insurance fund, and for deposit to the credit of said fund, for a sum equal to one percentum of the amount of money expended by the state during the last preceding fiscal year, for the service of persons described in subdivision one of section fourteen hereof, which said sums are hereby appropriated and made available for such payment; and thereafter in the month of January of each year, such sums of money shall in like manner be paid into the state insurance fund as may be provided by law; and it shall be the duty of the state liability board of awards to communicate to the general assembly on the first day of each regular session thereof, an estimate of the aggregate amount of money necessary to be contributed by the state during the two years next ensuing as its proper portion of the state insurance fund."

In my judgment the following language from section 17:

> "which said sums are hereby appropriated and made available for such payments"

justifies your payment of the sums required out of the general revenue fund of the state. You understand that the amount to be paid is one per cent. of the sum expended by the state for the service of those persons described in subdivision one of section 14 of the act. You should enter on your appropriation book the amount computed by compliance with section 17, and place this sum to the credit of the treasurer of state as an appropriation account.

3. Section 19 reads thus:

> "In January of each year following the filing with him of the lists mentioned in the last preceding section hereof, beginning with January, 1914, the auditor of each county shall issue his warrant in favor of the

treasurer of state of Ohio on the county treasurer of his county, for the aggregate amount due from such county and from the taxing districts therein, to the state insurance fund, and the county treasurer shall pay the amount called for by such warrant from the county treasury, and the county auditor shall charge the amount so paid to the county itself and the several taxing districts therein as shown by such lists; and the treasurer of state shall immediately upon receiving such money, convert the same into the state insurance fund."

Under the provisions of this section it is the duty of the county auditor to issue his warrant on the county treasurer, in favor of the treasurer of state, for the aggregate amount due from the county and its taxing districts. The county treasurer shall pay this amount from the *county treasury,* and out of the undivided tax fund. The county auditor shall charge this amount to the county and the several taxing districts in proportion to the sums that should be contributed by them under the provisions of section 18. It is not necessary that the county auditor specify out of what particular fund of the political subdivision the money should come, as it should be deducted from the aggregate of all taxes collected for such taxing district, and should not be apportioned to the taxing district in question. In other words, it never reaches the treasury of the political subdivision, and is not intended so to do.

4. The funds should be drawn out of appropriation of the general fund referred to in the answer to your second question.

5. From the foregoing answer you will see that it is not necessary for the political subdivisions to appropriate funds for compliance with this act, as this money is not to be paid out by them and never reaches their treasury. In making up their budget, they should take into consideration the fact that this money must be deducted from the funds coming to them, and, therefore, that it will not ever reach their treasury.

6. It is the duty of the county auditor to withhold from the several political subdivisions funds in his February settlement in order to comply with this act. Section 19 expressly calls for the beginning of the operation of this act in January, 1914, in this regard.

7. Section 257 of the General Code reads thus:

"The auditor of state shall prepare and transmit to the auditors of the several counties such forms of returns to be made by them to his office, and such instructions as he deems conducive to the best interests of the state upon a subject affecting the state finances, or the construction of any statute the execution of which devolves in part upon county auditors, and affects the interests of the state. County auditors and all local officers shall observe and use such forms and obey such instructions."

It would seem that the proper collection of moneys for the state insurance fund is a matter affecting the state finances, and so vitally affects the interests of the state, that the state auditor would be empowered under this section to require from the county auditors such returns as will enable him to comply with the provisions of the act in question.

Section 277 of the General Code reads thus:

"The auditor of state, as chief inspector and supervisor, shall prescribe and install a system of accounting and reporting for public offices, (named

in section 274). Such system * * * shall prescribe * * * form of reports and statements required for the administration of such offices, or for the information of the public."

Section 278 provides that this system shall provide forms of accounts showing the sources from which the public revenue is received, the amount collected, the amount expended for each purpose, etc.

Section 279 prescribes that a separate account shall be kept of each fund created by each taxing body, showing date and manner of payment therefrom, the name of person or organization paid, and *for what purpose paid.* These sections provide for the inspection and supervision of public offices and are applicable to all taxing districts. This being true, it is manifest that the auditor of state may require public officers and employes to furnish him with the data necessary to enable him to make up the lists required by the workmen's compensation act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Deputy Auditor of State)

450.

EXPENSES OF THE PRESIDENT OF THE BOARD OF TRUSTEES OF BOWLING GREEN NORMAL SCHOOL MAY BE PAID OUT OF THE FUNDS APPROPRIATED FOR THE EXPENSES OF THE BOARD OF TRUSTEES.

The president of the board of trustees of the Bowling Green normal school may legally be paid a per diem for services as president, payment to be charged against the appropriation for the expenses of the trustees.

Where the president incurred traveling expenses outside the state, they should also be paid out of the same fund if they were incurred at the request and under the direction of the board and in the interest of the school.

COLUMBUS, OHIO, July 23, 1913.

HON. W. E. BAKER *Deputy Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 11, 1913, in which you inquire:

> "We hand you herewith two vouchers approved by the president and secretary of the board of trustees of the Bowling Green Normal School, and beg to submit the following questions for your opinion:
>
> "1. Are both vouchers payable from appropriation for expenses board of trustees?
>
> "2. Is either one of the two payable from said appropriation?"

The accounts are very long and for that reason are not copied here, and I content myself by saying the one is for $35.00 for per diem of H. B. Williams, president of said normal college and the other for $178.43 for Mr. Wililams' expenses to Columbus, Toledo, Sandusky, New York and other points from March 21, 1912, to April 14, 1913.

The act of May 10, 1910, 101 Ohio Laws, 320-321, provides:

> "Section 2. * * * The members of said commission shall serve without compensation but shall be paid their reasonable and necessary expenses while in the discharge of their official duties and shall serve until appointment and organization of the boards of trustees, hereinafter provided.
>
> "Section 4. * * * Before adopting plans for the buildings of said normal schools each board shall elect a president of known ability for the school under its control, who shall have advisory power in determining said plans. In planning said buildings, ample provisions shall be made for the establishment of a well equipped department for the preparation of teachers in the subject of agriculture.
>
> * * * * * * * * * * * *
>
> "They shall serve without compensation other than their reasonable and necessary expenses while engaged in the discharge of their official duties. Not more than three members of each board shall be selected from any one political party."

From this it will be seen—the trustees are not entitled to compensation, but are entitled to their "reasonable and necessary expenses." It is their duty to "elect a president" and there is no provision as to his salary nor prohibition as to

his receiving compensation. He is not an "officer" in the sense that where no compensation is provided he must serve without, and cannot be compelled to serve without pay, under the rule laid down in State vs. Boone, 85 O. S. 313.

Such being the law we consider what is meant by the word elect.

> "Chosen to an office, as by vote, but not yet inaugurated, consecrated, or invested with office; in this sense usually after the noun: as governor or mayor *elect.* Of such a nature as to merit choice or preference; noble; exaulted."

The authority to elect must be construed as part of the duties of the trustees and if in the exercise of such power, and the securing of a proper person, expenses are incurred, the same, if reasonable, become a proper charge against the appropriation for expenses of the trustees. This conclusion results in advising you that the $35.00 item is a proper charge to be paid from said appropriation for expenses of trustees.

When the other bill is considered, another question arises in regard to certain of the items presented. The expenses of President Williams for attending meeting of said board of trustees to Columbus and other points within the state is answered above—the question above suggested being as to the items of expense to New York City, Albany, New York, other places outside the state, and expenses while away from the state.

Under the act mentioned, provision is made for the creation and establiment of two normal schools; the appointment of a commission to select sites for the same, and as soon after the report of said commission as the general assembly shall appropriate money to purchase said sites and the erection of suitable buildings; the appointment of five trustees for each school, who before adopting plans for such building shall elect "a president of known ability" for the school, who shall have advisory power in determining said plans. This has been done. Mr. Williams has been elected; he has accepted and is acting, and if the entire board felt that it was their duty and in the best interest of their trust to visit normal schools and buildings, erected and used therefor, located outside of Ohio, in order that they might best determine upon plans for said buildings, there can be no question but their reasonable and necessary expenses in so doing would be payable out of an appropriation for their expenses under said act.

However, the railroad fare, hotel bills and the like paid by President Williams are not expenses paid out by the trustees and technically speaking are not their expenses, yet, the expenses of one man are not so great as that of two, three or five, and if, in the opinion of the board it was concluded best to send Mr. Williams and not go themselves, as they had the right, I can see no legal reason why his expenses in the interest of said school, and in performing duties to better qualify him to act in his advisory capacity, under said act, may not also be considered as expenses of said trustees and paid from said appropriation, the same as the other. If you have reason to think the expenses outside the state were not incurred at the request and under the direction of the board or not for the purpose mentioned, you have the right and it is your duty to secure full information on this subject.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Bureau)

6.

INFIRMARY DIRECTOR—COUNTY COMMISSIONERS—TERMS OF INFIRMARY SUPERINTENDENTS EXPIRE JANUARY 1, 1913, UNLESS CONTRACT OR APPOINTMENT MADE FOR A REASONABLE TIME, EXTENDS BEYOND SUCH DATE.

Section 2523, General Code, which formerly provided that infirmary directors could not remove the superintendent of the infirmary except for good and sufficient cause, and which now places the same limitation upon the county commissioners, must be construed to place its inhibition only upon the officers making the appointment and does not in any way abrogate the established rule of law that the term of a deputy expires with the term of the officers or board making the appointment. It is well established, however, that an officer or board may, when necessity demands, contract with a deputy for a term extending beyond his own term, providing such contract is made in good faith and for a reasonable time.

With the exception of cases where such contracts or appointments are made, therefore, the terms of superintendents of infirmaries will expire with the abolition of the board of infirmary directors, to wit: January 1, 1913.

COLUMBUS, OHIO, December 28, 1912.

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

GENTLEMEN:—Under date of December 12th, you requested my opinion as follows:

> "The office of infirmary director was abolished to take effect January 1, 1913, at which time their duties devolve in part upon the infirmary superintendents and in part upon the county commissioners. Do the terms of the present infirmary superintendents expire January 1, 1913? What authority, if any, have the county commissioners to discharge the present infirmary superintendents after January 1, 1913?"

and under date of December 17th, you sent the following further communication which is so closely related to the first that it would seem advisable to take up both inquiries together:

> "If you should hold that the county commissioners, after that date, will not be authorized to remove a superintendent of an infirmary without good and sufficient cause, then in that case, where the infirmary directors have contracted with a superintendent of an infirmary for a stipulated term expiring after January 1, 1913, will the county commissioners have authority to employ anyone else at the expiration of such contract without showing good and sufficient cause?"

Prior to the abolition of the board of infirmary directors, section 2523, General Code, reads as follows:

> "The infirmary directors shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they

determine. The superintendent shall perform such duties as the directors impose upon him, and be governed in all respects by their rules and regulations. *He shall not be removed by them except for good and sufficient cause.* The directors shall not appoint one of their own number superintendent, nor shall any director be eligible to any other office in the infirmary or receive any compensation as physician, or otherwise, directly or indirectly wherein the appointing power is vested in such board."

Under the present law, however, that section now reads:

"The county commissioners shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. The superintendent shall perform such duties as the commissioners impose upon him, and be governed in all respects by their rules and regulations. *He shall not be removed by them except for good and sufficient cause.* The commissioners shall not appoint one of their own number superintendent, nor shall any commissioner be eligible to any other office in the infirmary or receive any compensation as physician, or otherwise, directly or indirectly wherein the appointing power is vested in such board."

The ordinary rule applicable in the absence of contrary statutes with reference to the time of incumbency for deputies and subordinates of officers, is stated in 29 Cyc., page 1395, as follows:

"Rights and duties: Deputies, whether common law or statute, are, where their terms are not fixed by statute, supposed to be appointed at the *pleasure* of the *appointing power* and their *deputation expires with the office on which it depends.*"

That the word deputies, as stated in this rule, must be construed to include subordinates of a county officer, such as the superintendent of an infirmary, authority is presented in 13 Cyc. 1043. In Ohio, the case of Brady vs. French 6 Nisi Prius, supports the above rule. The fourth syllabus of this case is as follows:

"The employment of a collector by the treasurer for a period of two years does not bind the successor of the treasurer making the appointment, but the appointment expires with the power that gave it. The appointee assumes the peril of the death of the treasurer appointing him, and the law affords him no remedy."

On page 126, the court says:

"Having determined that the collector is a deputy treasurer, the question remains to what extent may one treasurer contract for the employment of a deputy so that such contract shall be binding upon his successor. The answer is found in the language of section 9, which declares that 'a deputy or clerk, appointed in pursuance of law shall hold the appointment during the pleasure of the officer appointing him;' but an officer can have no legal or official 'pleasure' after his term expired, because with the expiration of his term of office he is functus officio and a private citizen. His appointments expire necessarily with the power which gave him life."

It will be observed that this rule contains two distinct elements:

"First. The incumbency of a deputy or subordinate ceases with the authority appointing him.

"Second. Such deputy or subordinate is removable at the will of the appointing power."

At one time the statute providing for the appointment of a superintendent of the infirmary by the infirmary directors, expressly permitted the superintendent of the infirmary to be removed, by the board at its pleasure. This statute was subsequently changed, however, so as to read as above quoted, providing that the infirmary directors could only remove the superintendent for good and sufficient cause.

The question arises, therefore, as to whether the effect of this change was to do away with both of the elements of the rule above stated, and to practically thereby give the superintendent a life position; or whether the effect was merely to remove one element, that is, the right to dismiss at pleasure. The effect of this change of the statute has, to a limited extent, been subjected to the interpretation of the courts. Thus, in the case of Ziegler vs. Palmer, 10 N. P. 545, the superintendent, P., had been appointed for a term of two years, and the infirmary directors attempted to dismiss him and appoint a substitute on the date of the expiration of said term. P. claimed the right to retain the position against the contested claim of the new appointee to office, on the ground that he could be dismissed only for good and sufficient cause. The court, however, on page 547, said:

> "In the opinion of the majority of the court, the amendment simply changed the statute so that into any contract of employment that might thereafter be made for any definite term there would be written, as one of its terms, the law of the state, that he should not be removed during said term of employment without cause, and the majority of the court are of the opinion that he having accepted employment, and by the terms of his employment the contract ceased and determined on April 1st, and he had no longer any right to be and remain on said premises, or in any wise to interfere or obstruct the plaintiff who was then the incumbent and superintendent of the Richland county infirmary."

This case was affirmed in 76 Ohio State, 219.

During the present term of the supreme court, the case of board of infirmary directors of Ross county, Ohio, vs. George Parrett, was decided. In that case the defendant in error had been employed by the infirmary directors for a period of one year; said period extending beyond the term of the infirmary directors making the appointment. Their successors dismissed the superintendent in March, although by its terms, his appointment was to extend to December. The supreme court sustained the appointment and held that the petition of the superintendent for salary from the time intervening the date of his dismissal and the date upon which his appointment was to terminate, by its terms was not subject to demurrer. This case established that when a superintendent of the infirmary has been appointed by the infirmary directors for a definite term, he may not be dismissed during that term even though the personnel of the board may have changed.

In the case of County Commissioners vs. Ranck, 9 O. C. C., 301, it was established that an officer or a board may not make a contract extending beyond their term, unless the same be for a reasonable time and unless made in good faith on the ground of public expediency.

In both of the above cases pertaining to the superintendent of the infirmary, however, it will be observed that the appointment was for a reasonable time, and the question of their good faith did not arise.

I am of the opinion, therefore, that the cases above cited, with reference to the appointment of the superintendent of the infirmary, cannot be said to have established more than that a contract made by a board of infirmary directors for a superintendent, to extend beyond their own term will hold good when such contract is made in good faith and for a reasonable time.

These cases do not throw any direct light, therefore, on the question of the right of a superintendent of the infirmary, who has been appointed *without a specification* of any definite time, to remain in office after the board making the appointment goes out of office.

The true import of the words "may be removed only for good and sufficient cause" remains to be determined. In very rare instances do we find provision made by statute for the maintenance of a life position and where the long established incident to appointment (to wit a cessation of office with the termination of the appointing power) has been dispensed with, the statutes invariably provide the machinery of the civil service or like safeguards. Under the further policy that statutes conferring rights and powers upon the officers should be construed strictly against the exercise of the right or power, I am of the opinion that we cannot read into the statute in question, the intention to vest the superintendent of the infirmary with the right to his position for life, and I, therefore, conclude that the effect of the words "shall be removed by them only for good and sufficient cause" is to deprive the *board making the appointment* of the right of removal at pleasure and that the further incident of appointive power, to wit: the cessation of the appointee's term with the termination of the term of office of the appointing power, has not in any way been limited by these words. In other words, this clause places a limitation with respect to power of removal upon the officers making the appointment and does not extend its limitation to their successors in office.

Coming then to your questions which are made with reference to the powers of the county commissioners in this connection, under the change recently made in these statutes, *the board of infirmary directors which formerly constituted a body corporate with perpetual succession, has been abolished,* and I am of the opinion that this fact further supports the rule adopted in the premises that all appointments made by the board shall cease with the expiration of the board, where no contract has been entered into or no definite time of appointment made.

Where a contract has been made, however, or the term of appointment fixed for a reasonable time, and as to which there is no question of good faith, I am of the opinion that the rule established in the case of Commissioners vs. Ranck should be observed and the superintendent so appointed should be allowed to retain his position until the expiration of such specific term.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

7.

INFIRMARY SUPERINTENDENT—CONTRACTS—POWER OF SUPERINTENDENT TO CONTRACT IN EMERGENCY—EMPLOYMENT OF HELP.

The term superintendent implies the power to control and manage, and therefore, although section 2522, General Code, provides that the county commissioners shall make all contracts and purchases necessary for the county infirmary, nevertheless when emergencies arise, requiring temporary appointments or purchases for county supplies which the commissioners themselves cannot care for, the superintendent may be authorized by the county commissioners by general regulations to act. The county commissioners are without power, however, to delegate the discretionary duties imposed upon them by section 2522 to make permanent contracts.

COLUMBUS, OHIO, January 7, 1913.

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

GENTLEMEN:—Under favor of December 16th you request my opinion as follows:

"Section 2522, G. C., as approved June 8, 1911, provides that the county commissioners shall make all contracts and purchases necessary for the county infirmary.

"Section 2523 of the same act provides that the superintendent shall perform such duties as the commissioners impose upon him.

"*Question* 1. May the county commissioners delegate to the infirmary superintendent the authority to employ any necessary help needed at the infirmary? If this should be held in the negative, would the commissioners have the authority to authorize the superintendent to make temporary employment until the next regular meeting of the board?

"*Question* 2. In view of the provision in section 2522 that the commissioners shall make all purchases necessary for the county infirmary, what is the effect or limitation of section 2528 providing for a reserve fund to be expended by the superintendent for current supplies and expenses?"

Sections 2522, 2523 and 2528 of the General Code provide as follows:

"Section 2522. The board of county commissioners shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates. The commissioners shall keep a separate book in which the clerk, or if there is no commissioners' clerk, the county auditor, shall keep a separate record of their transactions respecting the county infirmary, which book shall at all times be open to public inspection.

"Section 2523. The county commissioners shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. The superintendent shall perform such duties as the commissioners impose upon him, and be governed in all respects by their rules and regulations. He shall not be removed by them except

for good and sufficient cause. The commissioners shall not appoint one of their number superintendent, nor shall any commissioner be eligible to any other office in the infirmary or receive any compensation as physician, or otherwise, directly or indirectly, wherein the appointing power is vested in such board.

"Section 2528. At the request of the superintendent, the county commissioners shall set apart from the poor fund a reserve fund not to exceed at any time two hundred dollars, which upon their order shall be paid to the superintendent and expended by him as needed for current supplies and expenses. The superintendent shall keep an accurate account of such fund, and all expenditures therefrom shall be audited by the board. When, and as often as such amount is entirely disbursed, on the order of the commissioners, the county auditor shall pay to the superintendent the amount so appropriated."

The rule as to the power of an officer to delegate his powers is set out in Mechem on Public Officers, section 567, as follows:

"It is a well settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment and discretion, its performance cannot, in the absence of express or implied authority, be delegated to another."

Power to contract involves a discretion, and, in view of the rule that grants of power to an officer must be strictly construed against the existence of the power, I am constrained to hold that the power of making contracts with reference to the infirmary, in view of section 2522, General Code, should be left to the county commissioners as far as it is possible to so do, without defeating the intents and purposes of the act.

A statute, however, must be interpreted with a view to the whole act, to the effect that its purposes shall not be defeated. When the present act was enacted, providing for the abolition of the infirmary directors, the powers of the superintendent of the infirmary were extended; and when the duties of the infirmary directors were transferred to the county commissioners the county commissioners were not given duties as extensive as those which formerly rested upon the infirmary directors.

The word "superintendent" is defined in the Century dictionary as,

"One who superintends or has the oversight and charge of something, with the power of direction. * * *"

The superintendent, therefore, has charge and direction of the infirmary, and, as you suggest in your letter, circumstances may arise in connection therewith which would require the exercise of powers in the nature of contract, which it would be impossible for the county commissioners to exercise in emergencies; as where a fireman or engineer, or an employe whose services are indispensable, should resign without notice. Inasmuch as it would be impossible, in such cases, for the county commissioners to take the necessary action, I am of the opinion that the proper person to perform such duties is the superintendent; and, under section 2522, the county commissioners may make such regulations as would permit the infirmary superintendent to act in such cases.

The act itself, in section 2525, General Code, recognizes that the superintendent, at times, shall be required to purchase certain articles for the infirmary, by providing that he shall require itemized bills for all articles so purchased by him.

Also, section 2526, General Code, provides that the superintendent shall sell all products of the infirmary farm, not necessary for its use, and section 2528, cited by you, provides that the county commissioners shall set apart a certain sum, which may be expended by the superintendent for current supplies and expenses.

All of these duties partake, in a sense, in the nature of a contract and clearly show a recognition of the fact that the power of contract cannot be left absolutely to the county commissioners.

Having in mind these principles, in answer to your second question, I am of the opinion that the effect of section 2528, General Code, therein referred to by you, is to enable the superintendent to make use of the funds allotted by such section for the purpose of meeting current needs, which cannot, conveniently, be met by the county commissioners.

In direct answer to your questions, therefore, I am of the opinion that the county commissioners alone can make contracts of permanent employment; but, in cases of emergency, wherein it is impossible for the county commissioners to act, the superintendent may be authorized by them, through general regulations, to act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

11.

PROSECUTING ATTORNEYS—TERM OF OFFICE—OFFICER HOLDING OVER UNTIL SUCCESSOR ELECTED AND QUALIFIED, ENTITLED TO PROPORTIONATE COMPENSATION—NEW BOND RECOMMENDED.

When by virtue of prosecution, under the corrupt practice act, a prosecuting attorney-elect withholds from qualifying, the former incumbent, under section 8 of the General Code, holds his office until the officer-elect is qualified. The former incumbent retains his term to all intents and purposes and is entitled, therefore, to the proportionate compensation pertinent to the position.

It is recommended that the officer holding over provide a new bond.

COLUMBUS, OHIO, January 9, 1913.

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

GENTLEMEN:—Under favor of December 31st, you requested my opinion as follows:

> "A prosecuting attorney was elected November 5, 1912. Subsequent to his election investigation was made based upon the corrupt practices act made a law in 1911. As a result of the investigation the prosecuting attorney-elect was indicted by the grand jury on December 13, 1912.
>
> "By legal advise the officers empowered to issue the certificate of election and commission have refused to grant the prosecuting attorney-elect his proper credentials and it is quite apparent that said prosecuting attorney-elect will not be qualified on the 6th of January, 1913, when the term of his predecessor expires.

"Query. Does the law authorize the present incumbent to hold over until the qualification of his successor and can he legally continue to draw his salary as prosecuting attorney; or should there be an apopintment by the court of common pleas? In case the prosecuting attorney holds over, should he again qualify?"

Section 2909 of the General Code provides as follows:

"There shall be elected biennially, in each county, a prosecuting attorney, who shall hold his office for two years, beginning on the first Monday of January next after his election."

Section 2911 provides as follows:

"Before entering upon the discharge of his duties, the prosecuting attorney shall give bond to the state in a sum not less than one thousand dollars, to be fixed by the court of common pleas or the probate court, with sureties to be approved by either of such courts, conditioned that he will faithfully discharge all the duties enjoined upon him by law, and pay over, according to law, all moneys by him received in his official capacity. Such bond, with the approval of such court of the amount thereof and sureties thereon, shall be deposited with the county treasurer."

Section 8 of the General Code provides as follows:

"A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

Inasmuch as it is not otherwise provided as to prosecuting attorneys, the provisions of section 8, supra, are controlling, and the officer at present holding the office will continue as incumbent until his successor is elected and qaulified. In the present case his successor has been elected, but he had not qualified, and the present incumbent will retain his office until the officer elected has qualified.

The third paragraph of syllabus in the case of State vs. Metcalfe, 80 O. S., 245, provides that when the term of an officer is extended until a successor is elected and qualified, the period between the expiration of his original term and the election and qualification of his successor *is as much a part of the incumbent's term of office as the fixed statutory period.* On page 264 the court says:

"The potential capacity to hold over on the part of Judge Borrows then became an actuality and accomplished fact, the effect of which was to extend Judge Burrows' term *to all intents and purposes* as completely as would have been the case had he originally been elected for such extended term, or as it would have been extended had the general assembly, acting under the constitutional warrant, made provision by statute for its extension."

Under this principle, an officer holding over possesses to all intents and purposes the rights, powers and authorities of a regular incumbent with a fixed term and would therefore be entitled to draw the proportionate salary for the actual time of his incumbency.

As to the necessity for the prosecuting attorney holding over to file a new bond, under section 2911 of the General Code above quoted it is provided:

"The prosecuting attorney is required to file a bond before entering upon the discharge of his duties in the sum of ($1,000.00) one thousand dollars *conditioned that he will faithfully discharge all the duties enjoined upon him by law and pay over, according to law, all money received by him in his official capacity.*"

Under this provision it would seem that the bond of one thousand dollars required of him covered his entire term of office, and the fact that the term has been extended under the circumstances herein presented appears to be contemplated by the bond. Inasmuch as the condition of the bond provides for the performance of all the duties required by law, and there is no period of time fixed for its duration, it would seem that the bond first provided for the prosecuting attorney would continue for the time of his extended term. However, the court in the case of State ex rel. Monen vs. Killits, 8 O. C. C., 34, in considering a question very similar to the one at hand, used the following language:

"For myself I have pretty distinct views upon that question. But it is a very important question, and one that we have not ourselves been able to give our full attention to; and inasmuch as it is a question of doubt, and this is a matter that affects the public, the public welfare, and those who do business with the courts in the clerk's office, it has seemed to us the safer and more prudent course will be for the clerk to give a new bond."

I would, therefore, suggest that the present officer pursue the safer and more prudent course of filing a new bond.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

13.

INFIRMARY—CONTRACTS WITH PHYSICIANS INCLUDE BOTH MEDICAL SERVICES AND MEDICINES.

The provisions of section 2546, General Code, disclose the intention that the county commissioners in their contracts with physicians as therein provided, should include both medical relief and medicines necessary within the jurisdiction of their work.

COLUMBUS, OHIO, December 30, 1912.

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

GENTLEMEN:—Under date of December 17th, you requested my opinion upon the following:

"Must contracts with infirmary physicians made under section 2546. G. C., include medicines, or should separate bills be submitted for medicines and professional services and separate contracts entered into?"

Section 2546, General Code, is as follows:

> "County commissioners may contract with one or more competent physicians, to furnish medical relief and medicines necessary for the persons of their respective townships to come under their charge, but no contract shall extend beyond one year. Such contract shall be given to the lowest competent bidder, the county commissioners reserving the right to reject any or all bids. The physicians shall report quarterly to the county commissioners on blanks furnished by the commissioners, the names of all persons to whom they have furnished medical relief or medicines, the number of visits made in attending such persons, the character of the disease, and such other information as may be required by the commissioners. The commissioners may discharge any such physician for proper cause."

If the above statute is to be construed to permit or require county commissioners to enter into separate contracts for medical services and for medicines, it would be necessary to read the word "and" as "or" as it appears in the statute.

The rule pertaining to the interchange of the words "and" and "or" is stated in Southerland on Statutory Construction, section 397, as follows:

> "Use of the words 'or' and 'and'—The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context. In People vs. Rice it is said that the words 'and' and 'or' when used in a statute are convertible as the sense may require. The word 'or' in a statute may have the meaning of 'that is to say,' 'to wit,' etc."

In accordance with this rule the words should be read as they appear when the statute gives a clear meaning without interchange. In the above statute, "and" may be read as it appears without detriment to clearness of meaning. The statute authorizes the county commissioners to enter into a contract with one physician to furnish medical relief and medicines, if it is deemed advisable. It would not seem consistent or necessary to require a separate contract for each purpose, with one contractor.

I am of the opinion that the medicines referred to are such as are directly connected with and incidental to the work of furthering medical relief contracted for. If the legislature had intended that separate contracts should be entered into for each purpose, it would not have compelled a contract to be made for medicines with physicians alone; it would have authorized such contract to be made with druggists, dealers or other persons able to furnish the same, if it had not been intended that the same contract was to include both medicines and medical relief.

The matter of furnishing medicines is so closely connected with the administering of medical relief, that it is unquestionable that economy and efficiency are clearly best to be conserved by placing both matters in the hands of a single individual.

I am of the opinion, therefore, that the statute authorizes but one contract to be entered into for both medical relief and medicines.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

20.

OFFICES COMPATIBLE—DEPUTY CITY AUDITOR AND OFFICE IN STATE MILITIA.

Inasmuch as an office in the state militia is not incompatible with the office of deputy city auditor, an incumbent of the latter office, who is also an officer in the state militia, may draw a salary from the municipality and from the United States government, while on special duty for the United States for the same period, being absent from duty as deputy city auditor for a period of two weeks.

COLUMBUS, OHIO, January 9, 1913.

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

GENTLEMEN:—On December 30, 1912, you requested my opinion as follows:

> "May a deputy city auditor, who is an officer in the state militia, draw a salary from a municipality and from the U. S. government, while on special duty for the United States for the same period, being absent from deputy city auditor for a period of two weeks?"

I am of the opinion that an office in the state militia does not bear such a relation to the office of deputy city auditor as to bring them within the rule of incompatibility. "One is in no sense subordinate to or interfering with the other," nor are their "nature and duties such as to render it impossible from conditions of public policy for one incumbent to retain both;" nor does either office in any way act as a "check upon the other," and the absence of two weeks on military duty is not such a circumstance as would make it "physically impossible to perform the duties of both offices."

The rule is well settled that where two public offices are not incompatible in their nature under the rule of common law, and where the holding of both contemporaneously by one individual is not expressly prohibited they may be occupied and their compensation drawn by a single incumbent.

I am, therefore, of the opinion that a deputy city auditor may draw his salary both from the municipality and from the United States government while on special duty for the United tSates for the same period, being absent from duty as deputy city auditor for a period of two weeks.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

21.

FEES OF OFFICER CONDUCTING PRISONER TO WORKHOUSE, PAID FROM COUNTY AND MUNICIPAL TREASURY IN ACCORDANCE WITH LAST STATUTE—REPEAL OF FORMER STATUTE BY IMPLICATION.

Inasmuch as section 12385, *General Code, providing that the fees of an officer transporting a prisoner to the workhouse, shall in state cases be paid from the county treasury and in city cases from the municipal treasury, completely covers the problem of the payment of such fees, and as this statute was enacted subsequent to section* 4132, *General Code, which provides for the payment of such fees from the county and township treasury, the former statute must be construed to repeal the latter. The payment of such fees will be governed exclusively by section* 12385, *General Code.*

COLUMBUS, OHIO, January 6, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 14, 1912, in which you state:

> "Please construe and harmonize, if possible, sections 4132 and 12385 of the General Code."

The sections of the General Code referred to in your communication are as follows:

> "Section 4132. The officer having the execution of the final sentence of a court, magistrate, or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced, and all officers shall be paid the fees therefor allowed by law for similar services in other cases. Such fees shall be paid, when the sentence is by the court, from the county treasury, and when by the magistrate, from the township treasury.
>
> "Section 12385, Sheriff or other officer, transporting a person to such workhouse shall have the following fees therefor: six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and, in cases for the violation of the ordinance of a municipality, by such municipality on the order of the council thereof."

The conflict between these two sections has reference to the source from which the payment of the fees allowed to transporting officers is to come. The former provides that such fees, when the sentence is by the court, shall be paid from the county treasury, and when the sentence is by the magistrate from the township treasury. The latter provides that such fees shall be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and in cases involving the violation of municipal ordinance, by the municipality on the order of the council thereof.

The legislative history of these statutes discloses that what is now section 4132 of the General Code was formerly section 2101 of the Revised Statutes (Bates 1536-372), It is first found in volume 66 O. L. at page 196, being section 277 and has remained substantially in the same form from the date of its enactment to the present time.

Section 12385 was originally enacted in 1883, 80 O. L. 220 and amended in 1884, 81 O. L. 84. It was carried into the Revised Statutes as section 6801a.

It is clearly apparent that these statutes are directly in conflict with one another in respect to the source of payment of the fees of officers transporting prisoners to the workhouse. Neither section was expressly repealed by the legislature and therefore both cannot stand.

On the subject of repeals by implication our supreme court in the recent case of Goff et al. vs. Gates et al. Com., and Gates et al. Com. vs Granger to be reported in 87 O. S., held:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

Donahue, J., in rendering the opinion of the court says:

> "Repeals by implication are never favored. On the contrary, a court will endeavor to make such reasonable construction of the new legislation so that effect may be given to both. Thorniley, Auditor vs. State ex rel. Dickey, 81 O. S. 108; Eggleston et al. vs. Harrington, Assignee, 61 O. S. 397-404.
>
> "If, however, a statute is in clear conflict with existing legislation upon the same subject-matter, effect must be given to the later act even if the result is to repeal by implication the older statute. It is also a well known rule of construction that where a statute purports to revise the whole subject-matter of a former act and thereby evidences the fact that it is intended as a substitute for the former, although it contains no express words to that effect, it operates as a repeal of the former law."

Section 12385 fully covers the subject of payment of fees to officers transporting prisoners to workhouses, and was, in my judgment, intended by the legislature as a substitute for section 4132, although the latter was not expressly repealed. Inasmuch as section 12385 was passed after section 4132, I am of the opinion that the former section repeals the latter by implication. In other words, section 4132 is ineffective. The source from which the fees of such officers are to come is governed by section 12385 rather than by section 4132. In all state cases such fees are to be paid from the county treasury and in cases involving the violation of a municipal ordinance from the municipal treasury. In no event can the township become liable for the payment thereof.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

22.

CONTRACTS—BIDS FOR CONTRACTS IN EXCESS OF $500.00 ISSUED BY DIRECTOR OF PUBLIC SERVICE WITHOUT AUTHORIZATION OF COUNCIL, VOID—REISSUE OF BIDS NECESSARY.

When a director of public service advertises for bids for a contract in excess of $500.00, without authorization of council, in accordance with section 4328, General Code, such bids are illegal and void. The subsequent authorization of council for such contracts does not remedy the defect; bids must be reissued.

COLUMBUS, OHIO, December 16, 1912.

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

GENTLEMEN:—Your favor of November 22, 1912, is received in which you inquire:

> "A director of public service advertised for bids for water meters involving an expenditure of over $500.00 without first obtaining the authority of council to contract in such sum. The bids submitted as the result of such advertisement were opened on November 7th. Thereupon, the city auditor notified the director that he could not enter into contract for the reason that no authority had been granted by council. On November 11, 1912, the council passed a resolution authorizing and directing the director of public service to enter into a contract, a copy of which resolution is enclosed.
>
> "Query. May the director of public service, acting upon the bids submitted on November 7th, make award to the lowest and best bidder and enter into a contract which would be a valid and legal obligation, or would said director be required to readvertise and make award on bids subsequently submitted in order to make such contract legal."

This question involves the construction of section 4328, General Code, which reads:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

This section requires that the expenditure in question "shall first be authorized and directed by ordinance of council," and that "when so authorized and directed" the director of public service may enter into a contract after advertisement.

The first step to be taken is to secure the authorization of council to make the expenditure. If the council so authorizes the expenditure the director may enter into the contract after advertising for bids.

If the council fails to authorize the expenditure at all the advertisement for bids, if made before council has acted, would be a useless expense.

The director of public service should first secure the authorization of council and thereafter he may proceed to advertise for bids.

It is my opinion that council must first authorize the expenditure and that the advertisement for bids must be made thereafter.

It will be necessary, therefore, in the case in question to readvertise for bids. The contract cannot be let upon the bids which were received before council authorized the expenditure.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

25.

PUBLICATIONS—COUNCIL MAY BY ORDINANCE PROVIDE FOR PUBLICATION OF SEMI-ANNUAL APPROPRIATION ORDINANCES.

Under the decisions of Ohio, when council is authorized to publish in a specified manner, the power of council to make further publication is not restricted. There is no express provision for the publication of a semi-annual appropriation ordinance.

Under section 4229, General Code, however, the right of council to require its ordinances to be published is recognized and the construction is, therefore, justified that it was the legislative intent to permit council, by ordinance, to provide for the publication of any ordinance which it may in its discretion desire to publish.

Newspapers may, therefore, be paid for publication of semi-annual appropriation ordinances, when the ordinance expressly states that the clerk of council shall make publication thereof and the publication is made in accordance with section 4229, General Code.

COLUMBUS, OHIO, December 7, 1912.

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

GENTLEMEN:—I am in receipt of your letter of October 7th wherein you inquire as follows:

> "We respectfully request your written opinion as to the payments made to newspapers for publication of the semi-annual appropriation ordinances, provided that the ordinance expressly states that the clerk of council shall make publication of said ordinance."

Section 4227, General Code, provides that ordinances of a general nature, or providing for improvements shall be published before going into operation and that no ordinance shall take effect until the expiration of ten days after first publication of such notice.

Section 4228, General Code, provides:

> "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality

such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

Section 4229, General Code, provides:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipt of disbursements required shall be published once; the ordinances and resolutions once a week for two weeks consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and of sale of bonds once a week for four consecutive weeks; all other matters shall be published once."

Under section 4227, General Code, the only ordinances that require publication are those of a general nature or providing for improvement. It has been held by this department, following the decision of State ex rel. Transcript Printing Co. vs. City of Wellston, decided by the circuit court of Jackson county, Ohio, that a semi-annual appropriation ordinance did not require publication as it was not an ordinance of a general nature or providing for an improvement. Therefore, as far as section 4227, General Code, is concerned there is no requirement upon a village council to publish such an ordinance, and there being no requirement of law in that regard there would be no power in council to publish such an ordinance under said section.

In Wasem vs. Cincinnati, 2 Cincinnati superior court reports page 84, decided in 1871, it was held:

"Section 100 of the Municipal Code, which requires the publication of ordinances in some newspaper of general circulation, does not preclude the publication of ordinances by other means, in the discretion of the city council, and the court will not by injunction restrain that discretion, even though the ordinances should be published in newspapers which have not a general circulation in the city; provided, they are also published in some newspaper which has such general circulation."

Storer, J., on page 86 says:

"Does, then, the language of section 100 of the Municipal Code expressly or impliedly limit the power of the city council in that particular? It requires that the ordinance shall be published in some newspaper of general circulation in the corporation. But it does not expressly, nor impliedly, say that that is all the publication that shall be permitted or procured. Nor is there any such limitation of power expressed or implied in section 562 of the Municipal Code. That section requires the publication of the notice of all improvements to be contracted for in some newspaper of general circulation, and in two if there are so many in the corporation. There is no language of restriction in either section. The council has as much power to publish it as it would have had under the

general powers in section 8, if there had been no provisions like that in section 100. It may give such additional publicity to an ordinance as it may deem expedient, and it may employ other means than newspapers in general circulation, if in its discretion such other means are deemed useful. It may publish in a newspaper which is printed in the German language; but the publication must be made in at least one paper of general circulation in the corporation."

In the case of Cincinnati et al. vs. Davis et al. 58 O. S. 225, decided in 1898, Minshall, J., in delivering the opinion of the court says on page 237:

"As to the claim that the advertising, amounting to $300.00, was excessive: We do not understand that it is claimed, that the amount paid any particular paper was excessive—the claim is that the advertising in each particular instance was in more newspapers than required by law. The statute does not limit the number of papers in which the advertising shall be made. It simply is that, in each instance, the advertisement shall be in 'some newspaper.' But this is not saying that it shall be in no more than one. The board seems to be given a discretion in this matter; and when there is nothing to show an abuse of its discretion, exception cannot be taken to the amount paid for advertising the various steps in the proceeding as required by law."

It would appear from the two cases foregoing cited that it is the opinion of the courts that where authority is given for publication a municipal council may cause additional publication to be made of the particular ordinance as in their discretion they deem advisable. This rule, however, does not seem to be borne out in the case of county officers as is shown by the case of The Vindicator Printing Co., vs State 68 O. S. 362, the first syllabus of which is as follows:

"Where the number of publications of a sheriff's election proclamation or other public notice, is fixed by statute, there is no authority in the board of county commissioners, or other county officer, to contract for publications in excess of the number directed by statute. The board is also without authority to allow a claim for such excessive publications, and the allowance of such claim does not bind the county. Nor is authority to adjudicate and allow such claim given by the fact that with the charge for unauthorized publications there is, on the same paper, a charge for a publication which is authorized by statute."

I believe that the rule as expressed in 68 O. S. above referred to is the better rule in this: That wherever it is definitely provided by law for publication a municipality or other public body is not authorized to go beyond the express provisions of the statute.

In the case in question there is no provision whatever for the publication of the ordinance for the reason that it is not one of a general nature or providing for an improvement, and even though the cases of Wasem vs. Cincinnati *supra,* and Cincinnati vs Davis *supra* were considered as stating the proper rule of law, yet in each of those cases the municipality was authorized to publish a particular ordinance or notice.

Section 4229, General Code, however, provides in part as follows:

"Except as otherwise provided in this title, in all municipal corpora-

tions, the * * * ordinances * * * required by this title, *or the ordinances of a municipality to be published,* shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times; * * * ordinances and resolutions once a week for two consecutive weeks * * *."

As it is not otherwise provided in the title in which section 4229, G. C., is found that ordinance other than those of a general nature or providing for improvements shall be published, and as it is provided in said section 4229 that ordinances *required by the ordinances of a municipality* to be published shall be published in a specific manner, and as the ordinance in question in itself provides that it should be published, I am of the opinion that the legislature intended to leave it discretionary with the council of the municipality to decide what ordinance other than those of a general nature or providing for an improvement should be published.

I am, therefore, of the opinion that it is proper to pay newspapers for publication of semi-annual appropriation ordinances providing the ordinance expressly states that the clerk of council shall make publication thereof and the publication is made in accordance with section 4229, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

31.

MUNICIPAL CORPORATIONS MAY NOT EXPEND MONEY FOR PURPOSE OF MUNICIPAL BUDGET EXHIBITION.

A municipal corporation does not possess the power to expend moneys for the purpose of conducting a municipal budget exhibition; furthermore, even though such power exists, where an amount for such purpose had not been set forth in the annual budget and had therefore not been included by the budget commission, it could not be allowed by virtue of the Smith one per cent. law.

COLUMBUS, OHIO, December 13, 1912.

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

GENTLEMEN:—I have your letter of October 28, 1912, in which you inquire as follows:

"The city of Cincinnati has recently held a municipal budget exhibition, the principal object of which was to show the citizens how their money is being expended and how the various departments are operated. This was a new undertaking not contemplated by council when the appropriation ordinance was drawn, and no provision therein was made for such expenses. It was operated mainly by the bureau of municipal research and the bulk of the expenses was paid from private funds, but the city auditor is now receiving vouchers from various departments to cover expenses undergone in preparing this exhibit and the city desires to know if said expenses are a legal charge against the city funds. We are informed that no provision for such expenses was made in the annual budget for the municipal expenses of 1912.

"Should the city auditor honor such vouchers and draw his warrant on the city treasurer?"

In answer thereto permit me to say that there are two reasons to my mind which preclude the payment out of city funds for expenses in connection with the municipal budget exhibition. They are,

"1. This exhibit does not come within the provision of any of the legislative grants of power to municipalities, and,

"2. The act of May 31, 1911, (Smith one per cent. law) provides:

" 'But no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commission exclusive of receipts and balances.' "

It necessarily follows that if appropriations are to be limited as stated, the payments cannot be made to satisfy a claim not provided for in the budget.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

32.

CONSTITUTIONAL AMENDMENT — EIGHT-HOUR LAW NOT SELF-EXECUTING—ABSENCE OF PENALTY.

Inasmuch as proposal 13 of the constitutional amendment, providing that eight hours will constitute a day's work in public affairs, does not provide any penalty for violation thereof, it is to be presumed that is left to the legislature to determine whether or not such law shall apply to municipal corporations in their governmental, as well as private capacity, and also to provide for its proper enforcement.

Until, therefore, the legislature has made such provision, it cannot be considered illegal for a city to employ an engineer in the operation of the municipal waterworks or electirc light plant for more than eight hours in any one day.

COLUMBUS, OHIO, December 13, 1912.

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

GENTLEMEN:—In your letter of October 17, 1912, you ask:

"We respectfully request your written opinion upon the following question, construing the amendment to article 2, section 37 of the constitution: Is it a violation of the provisions of said constitutional amendment for a city to employ engineers in the operation of a municipal waterworks or electric light plant for more than eight hours in any one day? If so, what is the penalty?"

Proposal 13, as adopted September 3, 1912, reads as follows:

"Section 37. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight

hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political sub-division thereof, whether done by contract, or otherwise."

The only question is whether the expression "any public work carried on" is to be limited to construction work such as public buildings, pikes and the like or shall be held to include operatives of utilities when owned and operated by the state or a municipality.

Inasmuch as section 37 does not enforce itself automatically, so to speak, I feel that until the legislature takes action, which it will doubtless do at its coming session, a specific answer to your inquiry cannot be made as the legislature may or may not include the employes you mention in its action.

However, no penalty can attach until one is prescribed by the legislature, and it must be remembered that this section does not go into effect until January 1, 1913.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

50.

COUNTY COMMISSIONERS—CLERK SHALL KEEP BUT ONE RECORD OF OFFICIAL ACTS EXCEPT WITH REFERENCE TO INFIRMARY AFFAIRS.

Section 2406, General Code, providing that the clerk of the county commissioners shall keep a full and complete record of the proceedings of the board, provides but one book for that purpose. In view of the language of this statute, therefore, and of the further fact that the keeping of separate records of separate departments of work would require either a duplication of records in two books or would result in a part of the proceedings of each particular session being found in separate books, the clerk cannot be required, in contemplation of this statute, to maintain records in regard to county ditches and turnpikes.

With respect to infirmary affairs, however, section 2522, General Code, expressly requires the county commissioners to keep separate books in which the clerk shall keep a separate record of the transactions respecting the county infirmary.

COLUMBUS, OHIO, January 16, 1913.

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

GENTLEMEN:—Your favor of November 22, 1912, is received in which you inquire:

"May the clerk of the board of county commissioners legally record the official acts of said board in regard to county ditches, turnpikes and infirmary affairs in a record book separate from the record giving the action of said board upon the allowance of bills and other general duties devolving upon them?"

Section 2406, General Code, provides:

"The clerk shall keep a full record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose, entering each motion with the name of the person making it on the record.

He shall call and record the yeas and nays on each motion which involves the levying of taxes or the appropriation or payment of money. He shall state fully and clearly in the record any question relating to the power and duties of the board which is raised for its consideration by any person having an interest therein, together with the decision thereon, and shall call and record the yeas and nays by which the decision was made. When requested by a party interested in the proceedings or by his counsel, he shall record any legal proposition decided by the board, the decision thereon and the votes by which the decision was reached. If either party, in person or by counsel, except to such decision, the clerk shall record the exceptions with the record of the decision."

It will be observed that in this section the word "book" is used in the singular. There is a special provision of statute in reference to the recording of the acts of the commissioners in reference to infirmary matters.

Section 2522, General Code, provides:

"The board of county commissioners shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates. The commissioners shall keep a separate book in which the clerk, or if there is no commissioners' clerk, the county auditor, shall keep a separate record of their transactions respecting the county infirmary, which book shall at all times be open to public inspection."

By virtue of this section the county commissioners are not only authorized, but they are required to keep a separate book in which to record their transactions respecting the county infirmary. This section was placed in its present form by the act of 102 Ohio Laws 433, which act abolished the position of infirmary director and placed the infirmary in charge of the county commissioners.

Section 2407, General Code, provides:

"Immediately upon the opening of each day's session of the board, the records of the proceedings of the session of the previous day shall be read by the clerk, and, if correct, approved and signed by the commissioners. When the board is not in session, the record book shall be kept in the auditor's office, and open at all proper times to public inspection. It shall be duly certified by the president and clerk, and shall be received as evidence in every court in the state."

By virtue of this section the first order of business is the reading and approval of the record of the proceedings of the session of the previous day. The clerk of the county commissioners is required to keep a full and complete record of the proceedings of the board.

Section 2401, General Code, provides:

"There shall be four regular sessions of the board of county commissioners each year, at the office of the commissioners at the county seat, commencing, respectively, on the first Monday of March, June, September and December. At each meeting the board shall transact such business as required by law,"

Section 2402, General Code, provides:

> "Special sessions of the board may be held as often as the commissioners deem it necessary. At a regular or special session, the board may make any necessary order or contract in relation to the building, furnishing, repairing or insuring the public buildings or bridges, the employment of janitors, the improvement or inclosure of public grounds, the maintenance or support of idiots or lunatics, the expenditure of any fund, or provide for the reconstruction or repair of any bridge destroyed by fire, flood or otherwise, and do any other official act not, by law, restricted to a particular regular session."

By these sections it appears that the commissioners, at a regular or special session, may transact the general business of the board. At any session it may act upon county ditches, turnpikes, or upon other matters.

There is no statutory provision requiring separate books for the record of the commissioners, other than that pertaining to the county infirmary.

If separate books were kept for the recording of the proceedings of the county commissioners as to particular matters, you would be confronted with one or the other of two situations:

First. A part of the proceedings of a particular session would be found in one book and another part thereof in some other book, or

Second. In order to obviate this difficulty and at the same time to have the proceedings pertaining to a particular matter in its proper book, it would be necessary to make a complete record of the proceedings of a particular session in two or more books. This would mean a duplication of record.

If it were desired to keep separate books, it would be necessary to limit the business of a particular session to matters which could all be properly recorded in a particular book. This separation of business would be hard to carry out in practice. The county infirmary is a separate institution which has but recently come under the control of the county commissioners, and they can easily separate the business of the infirmary from their other duties.

The statutes contemplate that a full and complete record of the proceedings of each session of the commissioners shall be made. It does not contemplate that a record of part shall be kept in one book and another part in another, except as to the county infirmary.

The record should show the business as transacted and should be complete.

It is my opinion that a record of the proceedings of a particular session of the board of county commissioners should be made consecutively and that the records of the sessions should follow each other in order of date. In this way a continuous record of the proceedings will be obtained and it is this kind of record that the statute contemplates.

It is my conclusion, therefore, that the county commissioners are not authorized to provide separate books in which to have their proceedings on particular matters recorded, except as to their transactions in reference to the county infirmary, for which they are required by statute to keep a separate record.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

52.

BUREAU—FINDING AGAINST COUNTY AUDITOR AND OTHER OFFICERS FOR PAYMENT OF CLERK HIRE IN EXCESS OF AMOUNT ALLOWED BY COUNTY COMMISSIONERS.

It is the official duty of the county auditor to know the manner of drawing, and the statutory restrictions relating to vouchers for payment of county expenses. Furthermore, in the case of the allowance of clerk hire in the office of county officers, the auditor has notice of the proceedings of the commissioners when he serves as their clerk, under the provisions of section 2566, General Code; if he does not serve as their clerk, he has notice of their proceedings by virtue of section 2407, General Code, which provides that the record book of the county commissioners' work shall be kept in the auditor's office. The county auditor, therefore, is charged with actual or constructive notice of the allowance made by the county commissioners, for clerk hire in excess of which no payment can be made, by virtue of sections 2980 and 2981, General Code.

When a county auditor, therefore, allows a voucher for the payment of clerk hire, in excess of the county commissioners' allowance, he is liable for such payment.

By virtue of section 2981, General Code, the various officers are required to limit the salaries of their clerks to the aggregate amount allowed by the commissioners. If such officer, therefore, employs help and certifies to the county auditor, compensation in excess of the aggregate amount allowed his office by the commissioners, he violates his official duty and is liable to the county for such excess payment. The county treasurer is not given any official or formal notice of the action of the county commissioners in fixing such an allowance, nor has he in his possession any records of such proceedings. He is not, therefore, liable for overpaying the annual allowance made by the county commissioners for such clerk hire.

Under section 2980-1, General Code, however, the aggregate sum, fixed by the county commissioners to be expended in any one year for compensation of any assistants of any employes shall not exceed a certain percentage of the fees, costs and allowances, etc. When in making their allowances, therefore, the county commissioners violate this statute, they and all other county officers are charged with knowledge of this limitation and are liable for payment made in contravention thereto, the county treasurer as well as the others.

Deputies and clerks are not required to take notice of these statutory limitations and they have the right to presume that the officers will perform their duties as prescribed by statute. They are not liable, therefore, for excess amounts paid to them when they have received money in good faith for services performed.

COLUMBUS, OHIO, December 10, 1912.

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

GENTLEMEN:—Under date of August 28, 1912, you inquire:

> "What should be the finding of this department wherein amount allowed by the county commissioners for clerk hire in the office of county officers under the salary law, is exceeded, the excess being paid out of the fee fund of the respective officers upon the signing of a receipt by the clerk receiving the excess compensation, such compensation being paid at the rate fixed by the county officer, and certified to the county auditor."

You further call attention to the opinion of May 10, 1911, in which it was held that the county treasurer was liable for overpaying the allowance made by

the county commissioners for the compensation of the deputies and clerks in the various county offices subject to the salary law, and ask for a reconsideration of such finding.

Your inquiry involves the financial liability of various officials, to wit, the county auditor, the county treasurer, the officer who employed the deputy or clerk to whom the excess amount was paid, and also the liability of such deputy or clerk.

In fixing the liability of the various officers the provisions of the county salary law must be considered.

Section 2980, General Code, provides:

> "On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

This section requires the commissioners to enter their allowance upon their journal. It does not require that notice shall be given to the county auditor or to the county treasurer of the amount of such allowance. I find on statutory requirement that either the county auditor or the county treasurer shall be officially or formally notified of the action of the county commissioners.

Section 2981, General Code, provides:

> "Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury."

By virtue of this section the various officers are authorized to employ the necessary deputies, clerks and other help in their offices and to fix their compensation. They are required to certify such action to the county auditor, and when the compensation is so fixed and certified the county auditor is authorized to draw a warrant monthly for such compensation upon receiving a receipt such as is provided in section 2988, infra, General Code.

Section 2983, General Code, provides:

> "On the first business day of April, July, October and January, and at the end of his term of office, each such officer shall pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, per-

centages, allowances and perquisites of whatever kind collected by his office during the preceding quarter or part thereof for official services, which money shall be kept in separate funds and credited to the office from which received; and he shall also at the end of each calendar year, make and file a sworn statement with the county commissioners of all fees, costs, penalties, percentages, allowances and perquisites of whatever kind which has been due his office and unpaid for more than one year prior to the date such statement is required to be made.

By virtue of this section both the county auditor and the county treasurer have official notice of the amount of fees collected by each office, and such fees are required to be kept in separate funds and credited to the office from which received.

Section 2987, General Code, provides:

"The deputies, assistants, clerks, bookkeepers and other employes of such offices shall be paid upon the warrant of the county auditor, from the fees, costs, percentages, penalties, allowances, or other perquisites or sums of whatever kind collected and paid into the county treasury and credited by the treasurer to the fee fund of such offices."

Section 2460, General Code, provides:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law."

By virtue of this section each voucher drawn by the county auditor must show the account or fund from which it is to be paid, and upon whose allowance the payment is made, if the same is not fixed by law. This applies to all payments made for compensation of deputies and clerks in the various offices. It is the official duty of the county auditor to know the manner in which vouchers for such compensation should be drawn.

In the case of paying salaries to the deputies, clerks and other employes in county offices under the salary law, the auditor is required to act in accordance with the provisions of the statutes. Specific duties are placed upon him and he is presumed to know those duties and the manner in which they are to be performed. It is made his official duty to pay such deputies and clerks upon the fixing of their compensation by the county officer in charge and upon the proper certificate having been filed with him.

By virtue of section 2981, General Code, the various officers are required to limit the salaries of their deputies, clerks and other employes in their offices to the aggregate amount allowed by the commissioners. Each officer in fixing the compensation of his deputies, clerks and employes must take notice of the amount allowed such officer by the county commissioners. If he employs help and certifies to the county auditor compensation in excess of the aggregate amount allowed his office

by the commissioners he violates an official duty and is liable to the county for any excess payment made by reason of such illegal act.

In many counties the county auditor is clerk to the board of county commissioners. Where he is such clerk he has actual knowledge of the proceedings of the commissioners.

Section 2566, General Code, provides:

> "By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

Section 2409, General Code, provides:

> "If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

In many instances the county auditor is not the clerk of the county commissioners.

Section 2407, General Code, provides:

> "Immediately upon the opening of each day's session of the board, the records of the proceedings of the session of the previous day shall be read by the clerk, and, if correct, approved and signed by the commissioners. When the board is not in session, the record book shall be kept in the auditor's office, and open at all proper times to public inspection. It shall be duly certified by the president and clerk, and shall be received as evidence in every court in the state."

By virtue of this section the record of the proceedings of the county commissioners is left in charge of the county auditor, when the board is not in session. So, even though the county auditor is not the clerk of the commissioners, the means of informing himself of the action of the commissioners is in his office and under his care. The statute fixes the time when commissioners shall make the annual allowance for clerk hire. This is fixed by statute and all officers are presumed to know the provisions of the statutes.

The county auditor, therefore, has notice, either actual or constructive, of the action of the commissioners in making the annual allowance for clerk and deputy hire. Furthermore the several officers certify to the auditor the compensation of their help and the appointment thereof. All the facts necessary to inform himself as to the limitations placed upon the amount to be paid for such compensation are in his possession. He is bound to take notice of the statutory provisions as to the limit of the amount to be paid for each office and of the amount fixed by the commissioners.

The county auditor, therefore, would be liable for any payment made upon a voucher drawn by him in excess of the amount allowed by the county commis-

sioners for deputy and clerk hire in a county office which comes within the provisions of the county salary law.

It has been seen that it is not required that the county treasurer shall be given any official or formal notice of the action of the county commissioners in fixing the allowance for clerk hire in the various offices. Neither has he possession of the records of the county commissioners so that he may inform himself of such allowance.

The county treasurer is required to keep a separate account of the fee fund of each office. The compensation of the deputies and clerks of an office is paid from the fee fund of such office.

The county auditor is required to certify all moneys, except that collected on the tax duplicate, into the county treasury. He is also required to keep accurate accounts of all funds, showing the amount paid in and the amount paid out.

Section 2567, General Code, provides:

> "Except moneys collected on the tax duplicate the auditor shall certify all moneys into the county treasury, specifying by whom to be paid and what fund to be credited, charge the treasurer therewith and preserve a duplicate of the certificate in his office. Costs collected in penitentiary cases which have been paid by the state or to be so paid, shall be certified into the treasury as belonging to the state."

Section 2568, General Code, provides:

> "The county auditor shall keep an accurate account current with the treasurer of the county, showing all moneys paid into the treasury, the amount thereof, the time when, by whom, from what source and to what fund paid, and of all moneys paid out, showing the amount thereof, the time when, to whom, for what purpose and from what fund paid. Upon the receipt of the daily statement of the county treasury required by law, the auditor shall enter on his account current as a charge to the treasurer the amount of tax collected as shown by such statement, in the following manner: Collections of liquor taxes, to be credited to the 'undivided liquor tax fund,' collections of cigarette tax, to be credited to 'the cigarette tax fund,' collections of inheritance tax to be credited to the 'undivided inheritance tax fund;' and collections of other taxes and assessments of whatever kind to be credited to the 'undivided general tax fund.'"

Section 2569, General Code, provides:

> "On the first business day of each month, the county auditor shall prepare in duplicate a statement of the finances of the county for the preceding month, showing the amount of money received to the credit of each fund and account, the amount disbursed from each, the balance remaining to the credit of each, and the balance of money in the treasury and depository. After careful comparison with the treasurer's balances, he shall submit such statement to the commissioners, who shall place it on file and forthwith post one copy thereof in the auditor's office, to remain so posted for at least thirty days for the inspection of the public."

Section 2640, General Code, prescribes the duty of the county treasurer as to the accounts to be kept by him. Said section reads:

"The county treasurer shall keep an accurate account of all moneys by him received, showing the amount, the time, from whom and from what source received, and of all disbursements by him made, showing the amount thereof, the time, to whom and for what purpose paid. He shall so arrange his accounts that the amount received and paid on account of each separate and distinct fund, shall be exhibited in a separate and distinct account."

Section 2674, General Code, provides the manner of paying money from the county treasury as follows:

"No money shall be paid from the county treasury, or transferred to any person for disbursement, except on the warrant of the county auditor, but money paid over by the county treasurer to the state treasurer shall be on the warrant of the auditor of state."

Section 2675, General Code, provides:

"When a warrant drawn on him as treasurer by the auditor of the county is presented for payment, if there is money in the treasury or depository to the credit of the fund on which it is drawn, and the warrant is endorsed by the payee thereof, the county treasurer shall redeem it by payment of cash or by check on the depository, and shall stamp on the face of such warrant, 'Redeemed,' and the date of redemption."

While the county treasurer is required to keep a separate and distinct account of each distinct fund, yet he is not required to keep such accounts and funds in such detail as is required of the county auditor. He has not the same notice as the county auditor as to the allowance made by the county commissioners for compensation of deputies and clerks. Neither has he official notice of the compensation fixed for each deputy, clerk or other employe, or of their appointment.

For these reasons the county treasurer is not liable for overpaying the annual allowance made by the county commissioners for the clerk hire of a county office, where such payment is made in good faith upon a voucher of the county auditor.

In fixing the liability of the various officers another statute must be considered.

Section 2980-1, General Code, provides in part:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; * * *"

This section prescribes certain percentage limitations upon the amount that may be allowed by the county commissioners for the compensation of deputies, clerks or other employes in the several county offices. This is a statutory limitation of which all county officials are presumed to know and of which they must take notice. In this respect this limitation is different from the order made by the county commissioners for the annual allowance.

The county commissioners in making the annual allowance must take notice of this percentage limitation and they will be liable for any loss to the county by reason of their making an allowance in excess of such percentage limitation.

The various officers who employ the deputies and clerks and fix their compensation must also take notice of this statutory limitation and they will be liable for any payment made to employes of their office, who have been appointed and certified to by them, in excess of such limitation. The county auditor is also required to take notice of such limitation and will be liable for payments made in excess thereof, if he draws a voucher therefor.

The county treasurer has at his command in his office records the amount of the fees collected for and by each office and he also is required to know the statutory limitations and will be liable for payments made by him in excess of such limitation.

There is a further question of the liability of the clerk or deputy who receives the excess payment.

The deputies and clerks are not required to take notice that their compensation is certified to the auditor, or to the amount of the allowance, or that such allowance has been exceeded. This is the duty of the respective elective officers. The deputies and clerks would have a right to presume that these officers will perform their duties as prescribed by statute. If the excess has been discovered before payment the clerk or employe could not hold the county liable for his compensation. But where payment has been made and the services performed in good faith the clerk and deputy are not liable to an action by the county for the recovery of the amount paid in excess of the annual allowance. The county looks to the county officer to protect it from loss. This is also true of the percentage limitation.

In cases of overpayment of an annual allowance a question would arise, where there is more than one employe, as to which one actually received the excess.

The deputies and other employes are required to sign a receipt before a warrant is drawn in their favor by virtue of section 2988, General Code, which reads:

> "Before the auditor issues a warrant upon the county treasurer to any such deputy, assistant, clerk, bookkeeper, or other employe, for his compensation, such person shall sign a receipt which shall be in the following form:
>
> "No _____19____
>
> "Received of the (here recite the county, or officer, as the case may be) by (here insert the name of the party receiving compensation) _____ dollars in full for services as (here insert services) for _____ ending _____ 19____.
>
> "I hereby certify that I have rendered the services as herein stated, and that I have received the full sum set forth in the above receipt for my own use and benefit, and that I have not paid, deposited or assigned, nor contracted to pay, deposit or assign, any part of such compensation for the use of any other person, nor in any way directly or indirectly, paid, or given nor contracted to pay or give, any reward or compensation for such position or the emoluments thereof _____.
>
> (Name of the party receiving money.)
>
> "Such receipts shall be preserved and filed by the auditor."

This is a receipt for payment of his compensation and a certificate that he has performed the services. There is no provision as to the annual allowance.

I am of the opinion that no finding can be made against a deputy or clerk for any payment made to him over and above the amount allowed by the county commissioners for the compensation of deputies and clerks in a county office under the salary law, where the services are performed and the money received in good faith. Such deputy or clerk is not liable for payment to him in excess of the statutory limitation prescribed in section 2988, General Code, supra.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

63.

SINKING FUND TRUSTEES—PREMIUMS AND ACCRUED INTEREST RECEIVED FROM SALE OF BONDS NOT ISSUED FOR SPECIAL ASSESSMENTS SHALL BE APPLIED GENERALLY ON BONDED DEBT AND INTEREST ACCOUNT OF MUNICIPAL CORPORATION.

By section 3932, General Code, it is expressly provided that premiums received from the sale of bonds issued for purposes other than special assessments, shall be applied by the sinking fund trustees on the bonded debt and interest account of the municipal corporation. Premiums, therefore, received from the sale of bonds issued for the extension of the distrubution lines of a municipal water works plant, which bonds are to be paid from the general revenues of the municipality, may be applied by the sinking fund trustees to the general bonded debt and interest account of the corporation, instead of the payment of water works bonds.

COLUMBUS, OHIO, January 30, 1913.

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

GENTLEMEN:—Your favor of January 3, 1913, is received in which you inquire:

> "May the premium received from the sale of bonds issued for the extension of the distribution lines of a municipal water works plant and turned over to the sinking fund trustees be applied by said board in meeting other debt obligations of the municipality, or are such moneys required to be held by the trustees and applied on the water works debt (see section 3932, General Code)?"

I assume that the bonds in question are to be paid by means of general taxation upon the taxable property of the municipality, or from the general revenues thereof and are not to be paid by special assessments upon certain property.

Section 3932, General Code, provides:

> "Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others."

This section provides that when bonds are issued for special assessments, the premium and accrued interest upon such bonds shall be applied "to the payment of the principal and interest of those bonds, and no others." This provision does not apply to the case submitted as the bonds in question are not to be paid by means of special assessments. By virtue of section 3932, General Code, the premium and accrued interest on such bonds are to be paid to the sinking fund trustees "to be by them applied on the bonded debt and interest account of the corporation." This does not refer to any particular bonded debt or interest account. It means the general bonded debt and interest account of the corporation.

I am, therefore, of the opinion that the premium and accrued interest secured upon the sale of bonds for the extension of the lines of the waterworks which are to be paid for by general taxation, or from the general revenues, may be applied by the trustees of the sinking fund to the payment of the general bonded indebtedness and interest account of the corporation and they are not required to apply such premium and accrued interest to the payment of the waterworks bonds.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

76.

MEMORIAL TRUSTEES—FUNDS EXPENDED BY, MAY ONLY BE PAID UPON ORDER OF BOARD AND WARRANT OF COUNTY AUDITOR.

Section 3063, General Code, provides that the fund arising from the sale of bonds for a memorial building shall be placed in the county treasury to the credit of a fund to be known as the memorial building fund; the same section provides that such fund shall be paid out upon the order of the board of trustees, certified by the chairman and the secretary. This statute must be read in connection with section 2460; which provides that no claim against the county shall be paid otherwise than upon the warrant of the county auditor, and with other statutes which disclose the scheme of finance in counties.

Such fund, therefore, must be paid upon the order of the board of trustees, certified to the county auditor, by the warrant of the county auditor upon the county treasury.

COLUMBUS, OHIO, January 21, 1913.

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

GENTLEMEN:—I take pleasure in replying to yours of January 4, 1913, which is as follows:

> "Clark county is about to erect a memorial building in accordance with the provisions of sections 3095, et seq.
>
> "Section 3063 provides that 'such funds shall be paid out upon the order of the board of trustees, certified by the chairman and secretary.' Please render this department your written opinion as to whether or not such funds may be paid out direct upon the order of the board of trustees or whether the county auditor should issue his warrant upon the order of the board of trustees, certified by the chairman and secretary."

I do not see much difficulty in answering your inquiry. The logical way of disposing of the question, is to trace the history of this particular fund, from its inception to its ultimate disbursement. The matter of "memorial buildings" is provided for in title 10, division 4, chapter 2, (sections 3059 to 3069 inclusive) General Code.

The governor appoints a board of five memorial trustees, who organize, certify these facts to the county election board, which, in turn, causes the proposition to issue bonds to be submitted to the voters of the county. If a majority favors the issuance of bonds, the same are issued as *"the bonds of the county."* They are advertised and sold, for not less than par, with accrued interest. Sections 3059, 3060, 3061 and 3062, General Code.

Section 3063, General Code, then provides as follows:

> "The funds arising from the sale of the bonds shall be placed *in the county treasury* to the credit of a fund to be known as *'the memorial building fund.'"*

This same section makes it mandatory on the county commissioners, to levy annually, a sufficient amount to meet the interest on these bonds, and create a sinking fund for their redemption at maturity.

All of the above provisions, in chronological order, result in this fund becoming part of the *county's money,* the same as the various other apportioned sums, of which the county treasurer is the custodian.

In section 3063, General Code, occurs the language which forms the basis of your inquiry, and is as follows.

> "Such fund shall be paid out upon the order of the board of trustees, certified by the chairman and secretary."

This language, standing alone, might give rise to the impression that the certificate of the chairman and secretary, *when presented directly to the county treasurer,* would authorize the latter to honor the same, and pay out the money thereon, without further action by any one. But it must be remembered, that when there is more than one statute on a given subject, (as for instance payment of money out of the county treasury) the *true sense* can only be obtained by reading and construing *all such statutes together.*

Section 2460, General Code, says:

> "No claim against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount is fixed by law, *or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim."*

The tribunal *fixing and allowing the claims,* in the matter under consideration, is the board of trustees of the memorial association of Clark county, Ohio.

The matter of drawing money from the county treasury, is further safeguarded by section 2570, General Code, which says:

> "Except moneys due the state, which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the

county treasurer *for all moneys payable from such treasury, upon presentation of the proper order or voucher therefor, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose and on what fund.*"

This section further provides that the county auditor *shall not issue such warrant* unless allowed by the county commissioners, "except where the amount due is fixed by law, *or is allowed by an officer or tribunal authorized by law so to do.*"

Section 2567, General Code, provides:

"Except moneys collected on the tax duplicate, the auditor shall certify *all moneys into the county treasury,* certifying by whom to be paid and what fund to be credited, charge the treasurer therewith and preserve a duplicate of the certificate in his office."

Section 2568, General Code, says:

"The county auditor shall keep an accurate account current with the treasurer of the county, showing all moneys paid into the treasury, the amount thereof, the time when, by whom, from what source and to what fund paid, and of *all moneys paid out, showing the amount thereof, the time when, to whom, for what purpose and from what fund paid.*"

A monthly statement is required of the auditor in duplicate, showing the amount of money received to the credit of each fund, the amount disbursed therefrom and the balance remaining. Section 2569, General Code.

If any doubt should remain as to the only means of drawing money from the county treasury, it is settled in section 2674, General Code, which reads:

"No money shall be paid from the county treasury, or transferred to any person for disbursement, *except on the warrant of the county auditor,* but money paid over by the county treasurer to the state treasurer shall be on the warrant of the auditor of state."

The statutes provide for settlements between the auditor and treasurer. The various records and books kept by each are a check on each other. Through these books of the auditor and treasurer can be ascertained, daily, monthly, etc., the exact amount of money in each fund in the treasury. If the treasurer could pay out money directly, to parties presenting vouchers, without the warrant therefor of the auditor, there would be no means of checking up and comparing the status of the various funds which ought to be in the treasury. The books and records of the auditor and treasurer are preserved from year to year, and if either officer goes wrong it can be ferreted out by means of the records of the other. So it is with payments out of school, municipal and state treasuries. There must always be an authority to issue an order or voucher, generally known as auditor or clerk.

In this mutuality of accounting and keeping records, lies the safety of the public funds.

A commission, such as a memorial commission, may only last a short time, and furthermore their records are not required by law to be kept permanently, or safely, for future reference.

Official salaries, expenses, witness fees, clerk hire, jury fees, stenographers, court constables, and the like, *are all paid out of the county treasury on the certificate of the proper officer;* but *before any one can realize the cash thereon, he*

must repair to the auditor, and get his warrant on the treasurer therefor. Furthermore, if a voucher from an officer or board is presented to the auditor, and he has reason to believe it incorrect, or unjust, he may hold it up until he investigates it, or the commissioners pass upon it, or allow what is just thereon. On this line see 34 O. S. 137.

I am therefore of the opinion that the county treasurer is without authority to pay out, directly, any part of such memorial funds, upon the order of the trustees; and that he can only disburse the same or any part thereof, on the warrant of the county auditor, based upon the certificate of the chairman and secretary of said memorial board.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

85.

FINDING AGAINST OFFICERS FOR ALLOWANCE BY COUNTY COMMISSIONERS OF BILL PRESENTED BY COUNTY SURVEYOR FOR RECORDING PLATS IN RECORDER'S OFFICE—PROCEDURE FOR ALLOWANCE OF SUCH CLAIM—LIABILITY OF COUNTY COMMISSIONERS, AUDITOR AND SURVEYOR.

The work of recording plats in the office of the county recorder is a part of the duty of the county recorder and his assistant. Under section 2981, General Code, an assistant performing such work, must be appointed and his compensation, fixed by the recorder and certification of such action made by him to the county auditor; and such compensation allowed such assistant shall not exceed the amount so fixed. When, therefore, the county commissioners allow a claim for recording plats to a county surveyor, who was not appointed by the county recorder to do the work and whose compensation was not fixed and certified by that official, the county commissioners exceed their authority and are liable for such payment. The county auditor is charged with knowledge of this limitation and is also liable.

The assistant surveyor who presents a claim is presumed to know the statutory limitation of the powers of the county commissioners to allow the same and is personally liable for repayment of the amount so illegally received.

COLUMBUS, OHIO, December 31, 1912.

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

GENTLEMEN:—Under date of August 28, 1912, you inquire as follows:

"The allowance for clerk hire in the office of the recorder of Guernsey county, as fixed by the commissioners in 1910 for the calendar year 1911, was exceeded by the payment of $24.00 to a surveyor for recording plats. The bill was not approved by the recorder, but was allowed by the county commissioners.

"The amount was paid to an assistant county surveyor out of county funds upon the allowance of the county commissioners, and was included in a voucher covering other services of said assistant for the month of April, 1911. The voucher was not approved or certified in any manner by the county recorder, nor did the recorder file with the county auditor any certificate appointing the assistant county surveyor a clerk in his office.

"The question is, what findings should be made by this department under these circumstances."

The claim as approved by the commissioners was submitted to them in itemized form, as follows:

"CAMBRIDGE, OHIO, May 1, 1911.

"Guernsey County to H. H. W., Assistant County Surveyor.

"April 1, Platting new county tax map	$3 00.
"April 3, Platting new county tax map	3 00.
"April 4, Assistant Derwent bridge masonry	3 00.
"April 5, Platting new county tax map	3 00.
"April 7, Platting new county tax map	3 00.
"April 8, Platting new county tax map	3 00.
"April 10, Platting new county tax map	3 00.
"April 11, Platting new county tax map	3 00.
"April 12, Platting new county tax map	3 00.
"April 13, Platting new county tax map	3 00.
"April 14, Platting new county tax map	3 00.
"April 15, Platting new county tax map	3 00.
"April 17, Platting new county tax map	3 00.
"April 18, Platting new county tax map	3 00.
"April 19, Platting new county tax map	3 00.
"April 20, Platting new county tax map	3 00.
"April 21, Platting map of Dudley on recorder's plat book	3 00.
"April 22, Platting map of Woodland ad. recorder's plat book	3 00.
"April 24, Platting map of Woodland ad. recorder's plat book	3 00.
"April 25, Platting map of Westview ad. recorder's plat book	3 00.
"April 26, Platting map of Westview ad. recorder's plat book	3 00.
"April 27, Platting map of Buckeye and Needland's ad. recorder's plat book	3 00.
"April 28, Platting map Hall's ad. to Q City recorder's plat book	3 00.
"April 29, Platting map Oakland ad. to Cambridge, recorder's plat book	3 00."

This claim was approved and ordered paid by two of the county commissioners on May 2, 1911, in words endorsed thereon as follows:

"Examined, approved and ordered paid, $75.00 from the county fund."

The items submitted for opinion are the eight items dated April 21, 22, 24, 25, 26, 27, 27 and 29. These items are for services performed in recording plats in the county recorder's office. This is a part of the work of the county recorder.

Section 2757, General Code, provides:

"The recorder shall keep four separate sets of records, namely: first, a record of deeds, in which shall be recorded all deeds, powers of attorney, and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; second, a record of mortgages, in which shall be recorded all mortgages, powers of attorney, or other instruments of writing by which lands, tene-

ments, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or incumbered in law; third, *a record of plats,* in which shall be recorded all plats and maps of town lots, and of subdivisions thereof, and of other divisions or surveys or lands; fourth, a record of leases, in which shall be recorded all leases and powers of attorney for the execution of leases. All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record."

The claim in question was allowed and paid from the county funds upon order of the county commissioners and not upon allowance or certificate of the county recorder.

Section 2460, General Code, gives the board of county commissioners authority to allow claims against the county, as follows:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, *except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the same.* No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law."

The county commissioners are not authorized to allow claims which are "authorized to be fixed by some other person or tribunal."

The amount in question was paid for work performed in recording plats in the office of the county recorder, which is a part of the duty of the county recorder and his assistants.

Section 2981, General Code, provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

By virtue of this section the county recorder is authorized to employ the necessary assistants in his office and to fix their compensation. The county commissioners, therefore, have no authority to allow a claim for services performed in the recording of plats in the recorder's office. They had no authority to allow the eight items in question in the above bill.

The county recorder did not certify the items in question to the county auditor for payment, nor did he fix the compensation of the person who performed the services and certify that fact to the county auditor. Authough the county recorder may have authorized the person in question to perform the services, yet the payment from the county treasury was not made upon his certificate and he cannot be held liable for such wrongful payment.

The voucher shows that it was to be paid from the county fund. The compensation of the deputies, clerks and other employes of the various county offices, within the salary law, is to be paid from the fee fund of such officers, as required by section 2987, General Code, which reads:

> "The deputies, assistants, clerks, bookkeepers and other employes of such officers shall be paid upon the warrant of the county auditor, from the fees, costs, percentages, penalties, allowances, or other perquisites or sums of whatever kind collected and paid into the county treasury and credited by the treasurer to the fee fund of such offices."

The allowance by the county commissioners would not authorize the auditor to draw a warrant for payment of such services from the fee fund of the recorder. The county auditor did not authorize this payment from his fee fund and the auditor was not authorized to make the payment therefrom.

The county auditor is presmued to know the provisions of the statutes pertaining to his official duties. An examination of the bill in quiestion would have shown him that part of the services for which bill was rendered should have been paid from the fee fund of the county recorder and upon the certificate of the recorder. It was his duty to know that he could not draw a warrant for services in the recorder's office, without the certificate of the county recorder appointing such employe and fixing his compensation. It was his duty, also, to know that the county commissioners had no authority to allow a claim for services performed by an assistant or employe in the recorder's office. The services were performed by an assistant surveyor, but when he was recording the plats in the recorder's office he was acting in the capacity of an assistant to the recorder.

In drawing a warrant for payment of the eight items in question by virtue of the approval of the county commissioners, the auditor violated his official duty and is liable for such illegal payment.

The county commissioners in allowing the eight items in question acted beyond their authority. They also must know the statutory limitation upon their powers.

It might be urged that as the county commissioners had no jurisdiction to allow the items in question, that therefore they would not be liable. This argument is effectively disposed of in case of Drolesbaugh vs. Hill, 64 Ohio St., 257, wherein Minshall, C. J., says at pages 265 and 266:

> "In the case of Clancy vs. Kenworthy, 74 Iowa 740, the facts were much the same as in this case, and the same argument was made against the sufficiency of the petition. In answer to the argument the court said:
>
> "'If in exercising the functions of this office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in the discharge of his duty he of course is not liable. It follows that if defendant's position be sound, no action can be maintained on the bond in any case.'
>
> "It would seem that the public have as much interest, if not more, in the duty of an officer not to colorably exercise the powers with which he is clothed, as not to use unnecessary violence, where he is otherwise clearly within the duties of his office. It is by virtue of the office he holds that he may exercise its duties to the injury of another. It is not probable that any individual, not an officer, would have attempted to do what the marshal is charged with doing."

The allowance made by the county commissioners was made by them as commissioners. it was done by color of their office. They would not have attempted to act as they did if they had not been the acting commissioners. The commissioners are liable for any loss occasioned by the county because of their illegal act in making the allowance in question.

As to the liability of the person receiving the money, the items in question present a different situation from that of overpaying the annual allowance of a county officer. In the case of overdrawing the annual allowance made for clerk hire of a county officer, it has been held by this department that the employe who performs the services and receives the excess amount in good faith would not be liable therefor.

In the present case the assistant surveyor presented his bill to the county commissioners for allowance. He is presumed to know the statutory limitations upon the powers of the county commissioners to allow this claim. In accepting the money which was paid upon the illegal allowance of the county commissioners, he participated in the illegal act, and he would be personally liable for repayment to the amount so illegally received by him.

A finding should be made against the county auditor, the two commissioners who approved the claim and against the assistant surveyor who received the money.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

95.

BRIDGE—PRIVATE CORPORATION MUST CONSTRUCT AND MAINTAIN, WHEN IT CONSTRUCTS DITCH OVER PUBLIC ROAD OR ENLARGES EXISTING PUBLIC DITCH OR NATURAL WATERCOURSE.

Money raised by taxation may be expended only for public purposes, and in accordance with this rule, county commissioners are not empowered to construct or maintain a bridge which is made necessary by virtue of the fact that a private corporation has located a ditch across a public road. A contrary rule applies, however, where a highway is laid over an existing private ditch or drain.

In using a public ditch or natural watercourse, a land owner or corporation who increases the flow of water therein, cannot interfere with the natural capacity of the stream, or in any way conflict with the lower land owner's right to the original flow of water therein. Such owner or corporation increases the capacity beyond its existing limits, he is bound to protect the public and the lower land owner from any damage therefrom. In accordance with the above rule, therefore, when the enlargement of bridges is made necessary by the enlargemnt of a public ditch or natural watercourse, the expense of enlarging such bridge and maintaining the same be borne by the private person or by the corporation making such enlargement necessary.

COLUMBUS, OHIO, January 6, 1913.

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

GENTLEMEN:—Your favor of December 19, 1912, is received in which you inquire:

> "If a corporation owning a large tract of swampy land drains the same by the construction of large ditches or canals which cross county roads at points where it has not been required heretofore to construct and

maintain bridges, may the county commissioners legally construct and maintain bridges over such canals or ditches, or should such corporation construct the same at its own expense?

"Upon whom should the expense of the construction and maintenance of bridges in such case devolve, where the same are necessary at points in the public roads where bridges have heretofore been maintained but where larger bridges are now necessary on account of the enlargement of the watercourse?"

Your inquiry involves two propositions:

First. The right and duty of the county commissioners to construct bridges over artificial ditches or canals constructed by private persons or corporations, where such ditches or canals cross public highways.

Second. The duty and right of the county commissioners to enlarge bridges on public highways crossing natural streams, where such watercourses are increased beyond their natural capacity because of their drainage therein of water from swamp lands by a private corporation.

The statutes prescribes the duties of the county commissioners as to the construction, maintenance and repair of bridges.

Section 2421, General Code, provides:

"The commissioners shall construct and keep in *repair necessary bridges over streams and public canals on* state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

This section covers bridges over streams and public canals. The canals constructed to drain the swamp land in question are private canals constructed for a private purpose. They are not public canals. The word "streams" in the above statute would include natural water courses. It is the duty, therefore, of the county commissioners to construct bridges over public canals and over natural water courses. Your question does not involve the construction of bridges over artificial ditches constructed by the county or other public agency.

Section 7554, General Code, provides:

"No person possessed of the right to a water privilege shall be required to erect a bridge over a mill race or water course, excavated or constructed by him across a public road or highway for hydraulic purposes; nor shall any person be required to keep in repair a bridge erected over a mill race or water course so excavated or constructed."

The canals or ditches constructed to drain the swamp land are not used for hydraulic purposes and section 7554, General Code, does not apply.

Section 7555, General Code, provides:

> "The commissioners of a county through which a canal or feeder thereof passes, *except such as are built by incorporated companies,* shall keep in good repair all bridges, where a state or county road crosses such canals."

The ditches and canals now in question are constructed by an incorporated company and section 7555, General Code, does not apply, even though said section may be held to apply to canals other than those used for carrying freight and passengers by boat. It is not necessary to decide that question.

The above section 7555, General Code, by excepting canals built by incorporated companies, tends to show that it is the duty of said incorporated company to construct and maintain bridges on highways where such highways cross its canal.

Section 6518, General Code, provides:

> "The county commissioners, at a regular or called session *when necessary to the public health, convenience or welfare,* in the manner provided in this chapter, so far as applicable, may cause to be located, constructed, deepened, widened or enlarged a bridge or culvert, made necessary by the crossing of a ditch, drain, water course or stream of water, by a railroad, turnpike, plank road, or other road of a corporation, *at the expense of said corporation.* The necessity for making an improvement herein provided for, may be heard and determined at a like time and under a like petition as provided for the location and construction of single county ditches."

This section does not apply to your questions, but it shows the tendency to require private corporations to enlarge bridges where such enlargement is made necessary by their works.

The statutes have prescribed a method of draining marsh lands by the county commissioners.

Section 6535-1, General Code, provides:

> "The commissioners of any county at a regular or called session may, in manner provided in this act, cause to be drained, protected, improved and reclaimed any marsh land, or land in any marsh, or land which is covered with water, or which is too low or too wet for agricultural pursuits thereon and cannot be efficiently drained by ditches or drains on account of insufficient fall to water level, or which is subject to overflow from any cause, so as to make and maintain such land available and suitable for agricultural purposes, *if in the opinion of the commissioners such improvement will be conducive to public health, convenience or welfare."*

The power granted by this section can be exercised "if in the opinion of the commissioners such improvement will be conducive to public health, convenience or welfare."

The cost of such improvement, however, is to be levied against the land benefited thereby.

Section 6535-9, General Code, reads:

> "The engineer appointed by the commissioners shall go upon the land and make the necessary surveys, plans, specifications, maps, plats, profiles and estimates, showing in detail the amount and kind of ditches, dredge-cuts, dikes, kind of pumps or other devices to be installed to remove the water from such lands, machinery and other material and the location of the same, and labor required for the completion of said improvement and the estimated cost of the same, together with a schedule of all the lands and the owners thereof, that, in his opinion, would be benefited by the improvement, and apportion the cost thereof among such land owners according to the benefits, and he shall make his report to the commissioners within thirty days after said order, unless the commissioners shall extend the time for the filing of said report."

Section 6535-21, General Code, provides:

> "The commissioners shall each year while said improvement is being carried on levy such assessments on all the lands benefited by the operation, as will in their opinion, pay all the expenses and outlays of the improvement for the following year, together with any unpaid costs and expenses and collect such assessments for maintenance and improvements as is provided by law for collecting special assessments, and all assessments shall be made according to benefits, and shall be a lien on the lands benefited. The commissioners shall have the power to issue certificates of indebtedness in anticipation of the collection of the assessments."

The drainage now in question has not been done by virtue of the foregoing power. These sections show, however, that the land benefited is required to pay for such improvement.

In McQuillen vs. Hatton, 42 Ohio St., 202, it is held:

> "The facts being ascertained, the question whether or not a ditch will conduce to the public health, convenience or welfare, within the meaning of Revised Statutes, section 4511, so that it will be of *public* use, is a question of law; and the mere fact that larger and better crops may be raised on two farms sought to be drained, does not authorize the establishment of the ditch."

It is apparent from this decision that the mere fact of a benefit to the land is not sufficient to make the improvement a public use or a public benefit. There must be a benefit to the public in addition to the private benefit.

In the case submitted, the means of drainage are constructed by a private corporation and evidently for private purposes and not for a public purpose. If the county commissioners should construct a bridge over such ditches or canals it would be necessary for them to pay therefor by means of taxation. It is a well established rule that needs no citation of authorities, that taxes can be levied only for public purposes.

I assume that the highways in question were constructed before said ditches or canals were established. In that case the necessity of the bridges would be caused by reason of the artificial drains. They would not be required because of any public use.

In 5th Cyc. at page 1083, the rule is stated:

"An individual liability to repair a public bridge may arise by express agreement, by prescription, or by the pursuit or assumption of a business necessitating the maintenance of a bridge in the public highway, which, aside from such individual interest, would be unnecessary."

At page 661 of 40 Cyc., it is said:

"The owner of a canal or other artificial waterway is bound at common law to build and keep in repair suitable bridge where it crosses a public highway and to fence it off where it runs so near the highway as to be dangerous to travelers."

In 6 Cyc. at page 272, the rule is stated:

"Where a canal is constructed under a charter it must be bridged where it crosses an existing public highway and the duty to build and maintain bridges at such points exists whether it is specifically imposed by the charter or not."

The bridges in highways over artificial drains which are constructed for private purposes, are not necessary because of a public purpose and the county commissioners are not required to construct or to maintain such bridges where the highways exist prior to the construction of such artificial drains. The county commisisoners cannot legally construct or maintain such bridges. That duty devolves upon the corporation or person who maintains such canals.

Where a highway is laid out over a private drain a different rule will apply. This is not involved in your question.

In your second inquiry, I assume that the water courses which are enlarged are natural water courses, or are artificial water courses constructed by or through the public for the drainage of the land in the neighborhood.

Section 6504, General Code, prescribes when a public ditch shall become a natural water course, as follows:

"When a ditch has been established and constructed for the public health, convenience, or welfare, by private agreement between two or more individuals, whose real property has been affected thereby, or by the township trustees, or the county commissioners, and such ditch has been used for the drainage of private lands or public highways for seven years or more, without obstruction or interruption, it shall be a public water course, notwithstanding errors, defects or irregularities in the location, establishment, or construction thereof. Such public water course shall be considered a natural water course and the public shall have and possess, in and to such public water course, like rights and privileges which pertain and relate to natural water courses."

Each land owner has a right to the natural drainage of the surface water from his land.

Surface water is defined at page 639 of 40 Cyc. as follows:

"Surface waters are such as diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into

or forming any more definite body of water than a mere bog or marsh. * * * Surface water ceases to be such when it empties into and becomes part of a natural stream or lake, but it does not become a water course by being gathered into an artificial ditch and led away."

In the case of Crawford vs. Rambo, 44 Ohio St. 279, Owen, C. J., defines surface water at page 282, where he says:

"Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well defined channel in which it is accustomed to, and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water."

The right of the owner of the land to the drainage of the surface water must be exercised within certain limitations.

On page 646 of 40 Cyc. it is said:

"An upper owner has no right to increase materially the volume of water discharged upon the lower estate. Nor can he artifically drain a swamp, bog, pond, or marsh upon his land and discharge the water in a body on the lower estate, cast upon the lower land water which would not have reached it if the natural drainage conditions had not been disturbed, divert the water from the courses it would naturally have followed and discharge it through new artificial channels, or cause it to discharge upon the lower estate at a point which would not have been its natural destination; but a mere acceleration of the flow is not an actionable injury."

On page 648 of 40 Cyc. the rule as to the discharge into a natural water course is stated as follows:

"The owner of land has the right to collect the surface water and the natural drainage of his land into ditches, drains, or artificial streams and discharge it into a natural water course on his own land, which is the natural outlet of the waters so collected, and is not liable to lower proprietors although, by this arrangement, the flow of the waters is accelerated and increased, *provided the discharge is not beyond the natural capacity of the water course.* And the same rule is applied in some cases where the conduit thus made use of is not a water course in the sense of a running stream, but is a ravine or gully or a natural depression in the soil, having a fixed and determinate course, and which forms the natural and usual channel for the escape of surface water."

In The Pontifical College vs. Kleeli, 5 Nisi Prius N. S., 241, it is held:

"An upper proprietor has a legal right to a reasonable use of a natural water course flowing through his land; and in furtherance of such use he may change and control the natural flow of surface water, and by ditches or otherwise accelerate its flow, deepen, widen or straighten the stream, or cut a new channel for it in his own land, provided he allows the stream to pass off his land and upon the servient lands of lower proprietors substantially as before *and without increasing the volume of water beyond the natural capacity of the stream.*

"Surface water includes water that has collected in basins or depressions which will not drain into the natural water course except by artificial means, and an upper proprietor has the right to make connections which will promote the drainage of such depressions, *provided they are within the general watershed and the capacity of the stream is not thereby increased to such an extent as to substantially injure lower proprietors.*"

The right, therefore, of the corporation in question to flow the swamp water of his land into the natural water course is limited to the natural capacity of the water course. The water course must also be the natural watershed of his land. The same conditions will apply to an artificial public water course.

In using the natural water course the land owner who increases the flow of water therein must take into consideration the natural capacity of the water course. He has no right to increase that capacity to the damage of another. If he increases the capacity beyond its limit he is bound to protect the public and the lower land owner from any damage therefrom.

The enlargement of the bridges is not made necessary from natural causes but from the increased flow of the water caused by the drainage of the swamp land.

For the same reasons as above stated in answer to your first question the county commissioners cannot legally enlarge the bridges to take care of the increased flow of water. It devolves upon the corporation to take care of the increased flow.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

101.

COUNCIL OF CITY—COMPENSATION MAY NOT BE FIXED AT PER DIEM RATE—SALARY.

Under section 4209, General Code, the compensation of councilmen is to be fixed in accordance with the population of the city. This section speaks of the compensation as a salary and requires that a proportionate reduction of the same shall be made for non-attendance at special and regular meetings.

Inasmuch as the fixing of such compensation at a per diem rate per meeting could defeat the requirement of the constitution by permitting an incumbent to receive the full amount allowed in payment for special meetings, prior to the end of the year, so that subsequent absence would not receive that proportionate reduction, this statute must be construed to permit the fixing of such compensation only upon a salary basis.

COLUMBUS, OHIO, February 27, 1913.

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

GENTLEMEN:—Under date of December 14, 1912, you submitted the following inquiry:

"The council of a city, acting under the provisions of section 4209, G. C., fixed their compensation at $8.50 per night, payable semi-monthly, for each regular or special session, with the restriction that the total amount for attendance received by any member of council should not ex-

ceed the limitations contained in said section. Does this method of fixing the salary and compensation of members of council comply with the provisions of the law?"

Section 4209, General Code, in relation to the fixing of compensation of members of a city council provides as follows:

> "The compensation of members of council, if any is fixed, shall be in accordance with the time actually consumed in the discharge of their official duties, but shall not exceed one hundred and fifty dollars per year, each, in cities having a population according to the last preceding federal census, of twenty-five thousand, or less. For every thirty thousand additional inhabitants so determined, such compensation may be, but shall not exceed, and additional one hundred dollars, per year, each, but the salary shall not exceed twelve hundred dollars per annum, and shall be paid semi-monthly. A proportionate reduction in his salary shall be made for the non-attendance of any member upon any regular or special meeting of council."

The above section provides that the *compensation* shall not exceed one hundred and fifty dollars per year for each councilman in cities having a population of twenty-five thousand or less, and a further compensation for every thirty thousand additional inhabitants not to exceed one hundred dollars per year, but that the *salary* shall not exceed twelve hundred dollars per year payable semi-monthly. It further provides that a proportionate reduction in the salary of each councilman shall be made for non-attendance upon any regular or special meeting of council.

The word "compensation" as used in the first sentence of section 4209 is a general term and would embrace not only a salary but would also embrace a per diem. However, since in the second sentence of said section where it speaks of the additional one hundred dollars for every thirty thousand above the original twenty-five thousand, the word *salary* is used, and such word is also used in the third sentence of such section.

As I construe said section it is the intent thereof that the compensation of members of a city council shall be fixed on an annual salary basis, payable semi-monthly and that if in any half month a meeting of council is held, either regular or special and a member fails to attend such meeting the amount which would be paid to him semi-monthly would be proportionately reduced.

The city concerning which you inquire has fixed the compensation of its councilmen at a per diem and not on the annual salary basis, and I am of the opinion that that method of fixing the salary and compensation of members of council does not comply with the provisions of the law. This is more clearly shown by the fact that a councilman might attend a sufficient number of meetings to entitle him at the per diem rate to the total amount of the salary to which he would be entitled to by law and then fail to attend any of the subsequent meetings; in this way he would receive the full salary to which he would have been entitled by law had he attended the entire meetings throughout the year and at the same time absent himself from certain of such meetings. This would be directly in conflict with the third sentence of said section 4209, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

107.

INTEREST OF PUBLIC OFFICER IN PUBLIC EXPENDITURE—CITY SOLICITOR MAY NOT RECEIVE COMPENSATION FOR TAKING ACKNOWLEDGMENT OF CEMETERY DEEDS AS NOTARY PUBLIC.

Under section 3808, *General Code, which prohibits any officer of a corporation from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation, under penalty of dismissal from office; and also under section* 12912, *General Code, which prohibits an officer from being interested in the profits of any services for such corporation, under penalty of fine or imprisonment and forfeiture of office, a city solicitor may not receive compensation in addition to his salary for taking acknowledgment of cemetery deeds as notary public.*

COLUMBUS, OHIO, February 12, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 24, 1912, wherein you inquire as follows:

> "May the city solicitor, taking acknowledgment of cemetery deeds as notary public, receive compensation from the city treasury (see sections 3808 and 12912)?"

In answer to your question I desire to say that section 4305 of the General Code prescribes the duties of city solicitors in respect to drawing contracts, bonds and other instruments in writing in which the city is concerned as follows:

> "Section 4305. The solicitor shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

Section 4306 of the General Code provides that the city solicitor shall be the prosecuting attorney of the police or mayor's court as follows:

> "Section 4306. The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

Section 4308 of the General Code prescribes the duties of city solicitors in respect to suits, etc., as follows:

> "Section 4308. When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

For the performance of his respective duties section 4307 of the General Code prescribes that the compensation of city solicitors shall be such as the council shall prescribe as follows:

> "Section 4307. The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the police or mayor's court shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

Section 3808 of the General Code provides that the respective officers, members of boards, etc., of municipal corporations shall not have any interest in the expenditures of money on the part of the corporation other than their fixed compensation as follows:

> "Section 3808. No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

The provisions of the last quoted section are broad and sweeping in their terms, and I take it were enacted for the purpose of providing all officers of municipal corporations from acquiring any interest in the expenditure of money made on the part of the municipality other than their compensation as fixed by the municipality, thereby preventing municipal officers from having any possible pecuniary interest other than their stated salary.

Inasmuch as the municipal corporation in question, to wit, the city of Piqua, pays the fees to the notary public for the taking of acknowledgments of deeds to lots in its city cemetery I am of the opinion, therefore, that the payment of such notary fees to the city solicitor for the taking of such acknowledgments constitutes an "interest in the expenditure of money on the part of the corporation other than his fixed compensation," and, therefore, comes within the prohibition of said section 3808 of the General Code as above quoted.

Furthermore, such solicitor by taking acknowledgments of such cemetery deeds and charging a fee therefor becomes "interested in the profits of the job, work or service," in contravention of section 12912 of the General Code which provides as follows:

> "Section 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

However, inasmuch as the city solicitor in this particular instance has taken such notarial fees under and by virtue of an opinion of the former attorney general I would, therefore, suggest that he be not required to pay back into the city treasury such notary fees heretofore paid to him by the city, but that from now on he refrain from taking such notary fee for the acknowledgment of such cemetery deeds as he shall hereafter take for the reasons as above stated.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

119.

LEGAL ADVERTISING—ADVERTISEMENT IN EIGHT POINT TYPE ENTITLED TO LESS COMPENSATION THAN THE SAME IN SIX POINT TYPE.

Inasmuch as under section 6254, General Code, advertising measurements are to be calculated upon the number of ems rather than upon the actual space occupied in the paper, and inasmuch as an advertisement in eight point type contains a less number of ems than the same advertisement in six point type, an advertisement in the former may not be accorded the same amount as an adevrtisement in the latter form type.

COLUMBUS, OHIO, February 11, 1913.

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

GENTLEMEN:—Under date of January 8, 1913, you inquired of me as follows:

> "If a legal advertisement required to be published in two papers is set by both in compact form by one in six point and by the other in eight point type—may the latter legally receive the same amount for the publication as the former?"

Section 6254 of the General Code provides:

> "A square shall be a space occupied by two hundred and forty ems of the type used in printing such advertisements. Legal advertising shall be set up in compact form, without unnecessary spaces, blanks or head lines, and printed in type not smaller than nonpareil."

It will be observed from the foregoing that the space occupied by two hundred and forty ems of type *used* in printing legal advertisements shall constitute a square, and that no such advertisements shall be printed in less than nonpareil—that is six point type. A publisher may print such advertisements in type larger than nonpareil, but if he does so the measurement must be upon the basis of the type used. Standard nonpareil type contains twenty-six ems to the line and eight point or brevier type contains nineteen and one-half ems to the line of standard newspaper column.

I am informed by practical printers that a given advertisement when printed in eight point type will not contain as many ems as if the same were printed in

six point type. Assuming this to be true, and as the measurement is to be calculated upon the number of ems rather than upon the actual space occupied in the paper, I am of the opinion that the publisher is not entitled to as much money for printing a legal advertisement in eight point type as he is when the same is printed in six point type.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

145.

APPROPRIATION—UNEXPENDED APPROPRIATION MEANS SUCH AS CLERK'S CERTIFICATE HAS NOT BEEN ISSUED AGAINST—CERTIFIED APPROPRIATON MAY NOT REVERT TO GENERAL FUND.

Section 3798, General Code, requiring that unexpended appropriations or balances of apropriations, remaining over at the end of the year, or after a fixed charge has been terminated, shall revert to funds from which they were taken, and section 5649-3e, providing that such funds shall revert to the general fund, have substantially the same meaning and effect.

In view of the provisions of section 3806, General Code, to the effect that sums certified by the auditor to be sufficient for a specific appropriation as a condition precedent to a contract or expenditure, shall not thereafter be considered unappropriated until the obligation is discharged, the word unexpended in these statutes must be construed to mean only such appropriations and balances as have not been certified in accordance with section 3806, General Code, by the auditor to be in the fund.

COLUMBUS, OHIO, March 31, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 24th, and to apologize for my failure to answer sooner, which has been due to the unusual pressure of business in this department arising out of the legislative session. You request my opinion upon the following question:

> "Does the phrase 'unexpended appropriations or balances of appropriations remaining over at the end of the year,' etc., as found in section 3798, G. C., relate to the balances remaining in the appropriation accounts obtained by deducting the amount of warrants issued at the close of business on December 31st from the total amount appropriated for the several purposes, or does it relate to the uncertified balances of appropriations?"

The sections of the General Code to be considered in this connection are as follows:

> "Section 3798. Unexpended appropriations or balances of appropriations remaining over at the end of the year and balances remaining over at any time after a fixed charge shall have been terminated, by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund and shall then be subject to other authorized to such other authorized uses as council determines.

"Section 3806. No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. *The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force.*

"Section 5649-3e. Unexpected appropriations or balances of appropriations remaining over at the end of the year, and the balances remaining over at any time after a fixed charge shall have been terminated, by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund and shall then be subject to other authorized uses, as such board or officers may determine."

I have quoted section 5649-3e merely for the purpose of pointing out that whether or not this section, which is a part of the Smith one per cent. law, so called, and is in terms applicable to all subdivisions of the state, supplants section 3798, which is a special provision applicable to municipal corporations only, there is nevertheless no inconsistency between the two sections, which, as I have heretofore held in an opinion to the bureau, mean substantially the same thing. In my opinion the last sentence of section 3806 furnishes a complete answer to the question which you have submitted. It is true there seems to be an inconsistency in logic between the scheme of that section and that of the series of sections, of which section 3798, General Code, is one. That is to say, it would seem at first blush that both of these sections or groups of sections have the same general object, namely: to require that municipal corporations live within their annual revenue and thus to discharge extravagance. In a sense they are both "appropriation" provisions.

Upon reflection, however, it will appear that the precise object sought to be attained by section 3806 is somewhat different from the general object sought to be achieved by section 3798. A municipal corporation might be required to live within an allowance appropriated at certain periods and yet, if the officers of the corporation were permitted to make contracts payable out of such appropriations without some such check as is incorporated in section 3806, the object of such a general appropriation provision as is found in section 3798 would be defeated. Upon reflection, then, it appears that the only inconsistency, if any, between the two sections is that section 3806, in order to be perfectly harmonious with section 3798, should require that the certificate be to the effect that the money required for the contract is not only credited to the fund from which it should be drawn, but also that there is a sufficient amount in the current appropriation account to cover it. Indeed, this is the construction of section 3806 which has been adopted by this department, and I believe by the bureau.

The legislative history of the two sections confirms the opinion that they are not inconsistent, as it shows that the two provisions were simultaneously incorporated in the Municipal Code of 1902, and therefore must be intended to operate together.

It is apparent therefore that the only question is as to the meaning of the word "unexpended" in section 3798, in the light of the last sentence of section 3806, already referred to.

This question has not been passed upon by the courts. I am of the opinion, however, that for the purposes of section 3798 money is "expended" from an appropriation account when the auditor's or clerk's certificate is issued against the account. Any other interpretation would nullify the express provisions of section 3806 to the effect that the sum certified "shall not thereafter be considered unappropriated," etc. I am, therefore, of the opinion that the balance of an appropriation which reverts, under section 3798, at the end of the year to the fund from which it was taken is such balance only as has not been "appropriated" within the sense of that term as used in section 3806.

In reaching this conclusion it is necessary to give to the word "appropriated," in section 3806, a meaning somewhat different from that of the noun "appropriation" in section 3798, and to make the former mean something more nearly equivalent to the word "unexpended." I am satisfied however the sense requires this distinction to be made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

154.

MUNICIPAL CORPORATION—BOND FOR CONTRACTING FOR LIGHTING SERVICES UNAUTHORIZED—STATUTORY ACT LAST SIGNED BY GOVERNOR REPEALS LAW PASSED SUBSEQUENTLY TO FIRST LAW BUT SIGNED PRIOR THERETO.

Sections 3939 *and* 3939-1, *as they appear in the General Code, cover the same subject-matter, with slight variations of detail. The later statute was passed prior to the first statute, but signed by the governor subsequent to his signing the first statute. Section* 3939, *was expressly given that number by the terms of its enactment and in express terms repealed the existing statutes on the subject. Section* 3939-1, *General Code, was given its number by the attorney general, and in express terms repealed section* 3939, *General Code.*

Section 3939-1, *General Code, therefore, being the last signed by the governor and having by its terms repealed section* 3939, *formerly signed by the governor, is the existing law upon the subject.*

In either statute the provision for the issuing of bonds supplying lights to the corporation and the inhabitants thereof, must be construed as incidental and directly connected with the provision for the erection or purchase of gas works or electric light works for the supplying of electricity, and cannot be held to authorize the purposes of raising money for paying contractors for the supplying of gas or electricity, but only for the purpose of supplying gas and electricity by means of gas works or electric light works erected by the municipality itself.

COLUMBUS, OHIO, April 3, 1913.

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

GENTLEMEN:—Your favor of October 28, 1912, is received in which you inquire as follows:

> "The council of a city on August 22, 1911, authorized the issuance of bonds, and also on January 9, 1912, authorized a further issue of bonds, said bonds being issued for the purpose of supplying light to the city and

purport to be issued under authority of section 3939, General Code. Lighting bills, since November, 1911, have been paid to a light, heat and power company from the proceeds of said bonds, for lighting the streets with electricity. Said bonds were not issued through authority of a vote of the people, such as is required for the issue of deficiency bonds.

"Question. Were the bonds legally issued and if not, what kind of a finding or recommendation should be made, particularly as to further disbursement of the proceeds of said bonds for the current expenses of the city in lighting its streets?"

The provisions of section 3939, General Code, which authorize the issue of bonds for electric light purposes is found in subdivision 12 thereof, which reads:

"When it deems it necessary, the council of a municipal corporation, by affirmative vote of not less than two-thirds of the members elected or appointed thereto, by resolution or ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, at such rate of interest, not exceeding six per cent., and in the manner as provided by law, for any of the following specific purposes:

"12. For erecting or purchasing gas works or electric light works, and for supplying light to the corporation and the inhabitants thereof."

Page and Adams' Annotated General Code, gives two sections 3939, General Code. In 102 Ohio Laws this section was amended by two bills as shown at pages 153 and 268 thereof. Both acts were passed on May 15, 1911. The one in 102 Ohio Laws 153 was approved by the governor on May 22, 1911. The one in 102 Ohio Laws 262 was approved by the governor on May 26, 1911, four days later than the approval of the first.

The above quotation from said section is taken from the amendment in 102 Ohio Laws 153. The same part of said section reads as follows in the amendment of 102 Ohio Laws 262:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

"12. For erecting or purchasing gas works or works for the generation and transmission of electricity, for the supplying of gas or electricity to the corporation and the inhabitants thereof."

In section 2835 of the Revised Statutes and in section 3939 as first inserted in the General Code, said subdivision 12 reads the same as the provision in 102 Ohio Laws 153, which is first herein quoted.

There is a difference in these provisions which makes it necessary to determine which act is not in operation.

In each of the amendatory acts original section 3939, General Code, is specifically repealed. In the note to said section in Page and Adams' Annotated General Code, it is said:

"This section was amended by senate bill 281, 102 vs. 153, which passed May 15, 1911, and was approved May 22, 1911. It was also amended by

senate bill 131, 102 vs. 262, which passed May 15, 1911, and was approved May 26, 1911. It appears from the record of the senate that senate bill 131, was signed in the senate immediately before senate bill 281, but at the same session. Because of doubt as to which statute is in force, both are given."

It appears, therefore, that both bills were signed at the same session of the senate. The act of 102 Ohio Laws 153 was signed in the senate last, but was approved by the governor first. The act of 102 Ohio Laws 262 was signed first but was approved by the governor at a later date than the other. Neither bill became a law until signed and approved by the governor. His act in approving the bills was the last act required to make the bills effective.

Article 2, section 16 of the constitution of Ohio of 1851, reads in part:

"Every bill passed by both houses of the general assembly shall, before said bill can become a law, be presented to the governor. If he approves he shall sign said bill and thereupon said bill shall be a law."

By virtue of this provision of the constitution the bills in question became effective when signed by the governor. The act of 102 Ohio Laws 153 was approved by the governor on May 22, 1911. It became effective on that date and by virtue of the repealing clause thereof, it repealed on that date the former section 3939, General Code. The act of 102 Ohio Laws, 262, was signed by the governor on May 26, 1911, and became effective on that date. This act also contained a clause which specifically repealed section 3939, General Code. At the time the act of 102 Ohio Laws 262 was approved by the governor, the act of 102 Ohio Laws 153, approved on May 22, 1911, was effective. The repealing clause of the act of 102 Ohio Laws 262, at the time of its approval, applied to section 3939 as amended in 102 Ohio Laws 153. At that time there was no other section 3939, General Code, in effect.

Another feature of the two bills in question should be taken into consideration. In the act of 102 Ohio Laws 262 the legislature did not number the sections thereof in accordance with the numbering of the General Code. The sections of this act were numbered from one to sixteen inclusive and these sections were given numbers by the attorney general by virtue of the authority granted to him by section 342-1 of the General Code, which reads:

"The attorney general shall be the codifier of the laws of the state. When an act of a general and permanent nature is passed by the general assembly and has been enrolled and signed by the necessary officers and before it is filed with the secretary of state, the attorney general shall examine the same. If there is no sectional numbering in the act or such numbering is not in conformity to the General Code he shall give each section of the act so passed its proper sectional or supplemental sectional number by writing or printing on the left hand margin of the enrolled bill such proper number or numbers, and the numbers so designated by him shall be the official number. Such numbers so placed shall be published in the session laws and in any publication of the General Code. It shall be a sufficient reference to any section to refer to it by such official number."

The act of 102 Ohio Laws 153, however, contained the sectional numbering of the General Code, to wit, section 3939.

The act of 102 Ohio Laws 153, however, contained the sectional numbering of repealed former section 3939, General Code. When the act of 102 Ohio Laws, 262, was approved on May 26, 1911, it then specifically repealed section 3939, General Code, which at that time was the amendment of said section as found in 102 Ohio Laws, 153. At the time, therefore, when the attorney general gave to the act of 102 Ohio Laws, 262, its sectional numbers there was no section 3939, General Code, in existence, except the act of 102 Ohio Laws, 262, to which the attorney general gave the sectional number of 3939.

While I have gone into the preliminary part at considerable length in the foregoing, I am of the opinion that the question as to which of the two statutes is in force, insofar as the same may be contradictory or irreconcilable, is clearly determined by the case of State ex rel. Guilbert vs. Halliday, Auditor, 63 O. S., 165, the syllabus of which is as follows:

> "Two statutes irreconcilable—Effect given to later—Bill not law until signed by presiding officer—Order of signatures prevail.
>
> "1. In so far as two statutes are irreconcilable. effect must be given to the one which is the later.
>
> "2. A bill cannot become a law until it has been signed by the presiding officer of each house; and when one bill was so signed after another bill so signed on the same day, the former is the later enactment."

At the time this case was decided the governor did not have the veto power, nor was he required to approve. Under our present constitution, article 2, section 16, "if he (the governor) approves he shall sign it and thereupon it shall become a law and be filed with the secretary of state."

So, therefore, section 3939, as indicated by 102 Ohio Laws, 153, became a law May 22, 1911; section 3939-1, as found in 102 O. L., 262, became a law May 26, 1911.

The first syllabus in the case of the City of Cincinnati vs. Holmes, Administrator, 56 O. L., 104, is as follows:

> "Where the general provisions of a statute and those of a later one on the same subject are incompatible, the provisions of the latter statute must be read as an exception to the provisions of the earlier statute."

Now, then, if there be any conflict between subdivision 12 of the act found in 102 Ohio Laws, 262, and subdivision 12 in the act found in 102 O. L., 153, the latter must yield to the former.

In the case of Ex Parte William M. Roach, 104 California Reports, 272, the syllabus reads:

> "1. Constitutional grant of municipal power—construction of ordinance. Where the constitution grants legislative power to municipal corporations, the source of the power is the same as is that exercised by the legislature, and an ordinance within the exercise of the legislative power of the municipal corporation is to be construed with the same effect as if it had been adopted by the legislative power itself, and will be deemed to contain in the legislative will for the municipal corporation.
>
> "2. Construction of constitution—Local police regulations. Section 2 of article 11 of the constitution, which provides that 'any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws,' confers the power to make these regulations upon cities as well as

upon counties, and must be held to be equally authoritative in each, *and the only limitation upon the exercise of the power is that the regulations to be made shall not be in conflict with general laws.*"

It is my judgment that there is no conflict between sections 12 in either act so far as relates to the present question, and that under either the council was without power under favor of the section under which it acted, and without the vote of the people, to issue bonds for the purpose of supplying light for the corporation. The purpose under section 3939, subdivision 12 is for erecting or purchasing gas works or electric light works, which works are intended to supply light to corporations and to the inhabitants thereof. The expression "and for supplying light to the corporation and the inhabitants thereof" is a limitation upon what precedes: erecting gas works and electric light works, and is not an additional grant of power.

A careful reading of section 3939 of the General Code discloses that the bond issue is not only for specific purposes, but for purposes of a permanent as distinguished from a temporary character. Subdivision 12 is not intended to confer power to issue bonds for the mere purpose of supplying light by contracting with a lighting company. It would seem strange that while all of the other purposes in the section are of a permanent nature, if it were the intention of the legislature to switch something into subdivision 12 of a temporary nature.

Coming now to subdivision 12—Is section 3939-1 the last act on the question? I am clearly of the opinion that the language "for supplying gas or electricity to the corporation or the inhabitants thereof" is likewise a limitation upon what precedes and is not a separate and additional grant of power.

My conclusion, therefore, is that the municipality corporation has clearly exceeded its authority.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

172.

COUNTY SURVEYOR — COMPENSATION — FEES FOR RECORDING PLATS OF OTHER SURVEYORS AND FOR HIMSELF WHEN MADE FOR PRIVATE PARTY—APPROVAL OF COUNTY COMMISSIONERS.

Under section 2803, General Code, when a county surveyor is not given a per diem compensation, he is to be allowed the fees therein specified for recording plats made by him in the course of his official duties. He is to be allowed the same fees for recording plats made by other surveyors or by himself for private parties, when they are recorded by him upon the order of the county commissioners.

COLUMBUS, OHIO, March 26, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 25, 1913, wherein you inquire as follows:

"Section 2803, G. C., makes it the duty of the county surveyor to make an accurate record of all surveys made by himself or his deputies for certain purposes and also provides that surveys made by other competent

surveyors may, by order of the commissioners, be recorded by the county surveyor.

"Section 2822 provides fees for recording plats. May the county surveyor receive compensation out of the county treasury for recording plats of other surveyors when ordered by the commissioners?"

"May the county surveyor receive such compensation for recording plats of other surveys when ordered by the commissioner?"

In reply to your inquiry I desire to say that section 2803 of the General Code provides that a record shall be kept by the county surveyor as follows:

> "The county surveyor shall make and keep in a book provided for that purpose an accurate record of all surveys made by himself or his deputies for the purpose of locating any land or road lines, or fixing any corner or monument by which it may be determined whether official or otherwise. Such surveys shall include corners, distances, azimuths, angles, calculations, plats and a description of the monuments set up, with such references thereto as will aid in finding the names of the parties for whom made, and the date of making such surveys. Such book shall be kept as a public record by the county surveyor at his office, and shall be at all proper times open to inspection and examination by all persons interested therein. Any other surveys made in the county by competent surveyors, duly certified by such surveyors to be correct and deemed worthy of preservation, may, by order of the commissioners, be recorded by the county surveyor."

Section 2822 of the General Code provides for the compensation the county surveyor shall receive if employed by the day, and if not, that fee he shall receive as follows:

> "When employed by the day, the surveyor shall receive five dollars for each day and his necessary actual expenses. When not so employed, he shall be entitled to charge and receive the following fees: For each rod run, not exceeding one mile, three-fourths of one cent, and for each rod over one mile, one-half of one cent; for making out or recording a plat not exceeding six lines, seventy-five cents, and for each line in addition, five cents; for each one hundred words or figures therein, six cents; for calculating the contents of a tract not exceeding four sides, six cents, and for each additional line, ten cents; for mileage, going and returning, five cents per mile; and for all other services, the same fees as those of other officers for like services. Chain carriers and markers are entitled, each, to two dollars."

By virtue of section 2803 of the General Code, the county surveyor is legally bound to make and keep, in a book provided for that purpose, an accurate record of all surveys, whether official or otherwise, and such survey shall include corners, distances, azimuths, angles, calculations, plats, etc. Under section 2822 of the General Code the county surveyor may be employed by the day, or if not so employed by the day, then he is to receive certain prescribed fees. The fee prescribed for making out and recording a plat not exceeding six lines, seventy-five cents; and for each line in addition, five cents. If the surveyor is employed by the day, as provided in said section, then he is not legally entitled to fees for the making and recording of such plats. If, on the other hand, the surveyor is not so employed by the

day, but is paid for his services by fees in accordance with said section, then he is entitled to the fees prescribed therein for making and recording plats of his own official surveys. If such surveys are not official, but have been made by the county surveyor for private parties and such surveyor's record records the survey without its being submitted to the county commissioners and found by them to be worthy of preservation, then he is not entitled to such fees as has been held by the court in construing said section in the case of Strong vs. Commissioners, 47 O. S., 404, the first syllabus of which is as follows:

> "A county surveyor who makes a survey for a private individual, upon an employment by him, and records the same without its being submitted to the county commissioners and found by them to be worthy of preservation, does not thereby acquire a valid claim against the county, to be paid for making such record."

However, I am of the opinion that if he submitted such private survey to the county commissioners and it met their approval as being worthy of preservation, then he would be entitled to the fees prescribed for making and recording the plats of such surveys, likewise such county surveyor may receive compensation for making and recording plats of surveys made by other surveyors, provided same has been ordered by the county commissioners after having been submitted to them and deemed worthy of preservation by the commissioners.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

187.

AGRICULTURAL SOCIETIES — SPECIAL PROVISION AUTHORIZING PAYMENT OF $800 TO CUYAHOGA COUNTY SOCIETY REPEALED.

By action of the codifying commission and by adoption of the General Code by the legislature, the legislative provision of section 3697, Revised Statutes, authorizing the payment of not over $800.00 to the two agricultural societies of Cuyahoga county has been repealed.

COLUMBUS, OHIO, March 28, 1913.

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

GENTLEMEN:—I desire to acknowledge receipt of your letter of March 17, 1913, wherein you inquire as follows:

> "Section 3697, Revised Statutes, contains a special provision applicable only to Cuyahoga county, authorizing the payment of not over $800 to two agricultural societies in that county. By the adoption of the General Code this section was repealed, apparently without saving the special provision, and was re-enacted as section 9880 of the General Code.
>
> "Please advise us whether or not in your opinion payment to two agricultural societies may now be legally made."

In reply thereto, section 3697 of Bates' Revised Statutes, prior to the adoption of the General Code, provides as follows:

> "When thirty or more persons residents of any county of the state, or of a district embracing one or more counties, organize themselves into an agricultural society, and adopt a constitution and by-laws and select the usual and proper officers, and otherwise conducts its affairs in conformity to the statutes of Ohio and to the rules of the state board of agriculture, and when such county or district agricultural society shall have held an annual exhibition in accordance with section 3698 of the Revised Statutes of Ohio, and made proper report to the state board of agriculture, then, upon presentation to the county auditor of a certificate from the president of the state board of agriculture, attested by the secretary of said board, that the laws of the state and the rules of the state board of agriculture have been complied with, the county auditor of each county wherein such agricultural societies are organized, shall annually draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents for each inhabitant of the county, upon the basis of the last previous national census, but the total amount thereof shall not exceed in any county the sum of eight hundred dollars ($800.00); and the treasurer of the county shall pay the same.
>
> "(Cuyahoga county) Provided, that where in any county containing a city of the second grade of the first class, the site for holding county fairs is situated so far from the geographical center of said county that, in the opinion of the commissioners of said county the agricultural interests of said county will best be promoted by the establishment of another and additional society and site whereon to hold fairs; upon the organization of such additional society in the manner provided herein, said additional society shall be entitled to receive out of the county treasury the sum provided in this section and also be entitled to the provisions of other sections of the statutes in reference to county agricultural societies."

In the case of Lawrence County Commissioners vs. Brown, Auditor, 14 Ohio Decisions, 241, 1 Ohio Nisi Prius, n. s., 357, the court held that all of said statute was constitutional except that portion of said statute which applied only to Cuyahoga county, as follows:

> "2. Rule of construction where original act valid and amendatory act void: The Ohio rule of construction is that if a portion only of a statute is unconstitutional, the rest may be allowed to stand if the constitutional part will accomplish the substantial purpose desired by the legislature if separated from the unconstitutional part. Thus section 3691, Revised Statutes, providing for the organization of district or county agricultural societies, insofar as it has a uniform operation throughout the state is valid, notwithstanding the amendment thereto of May 6, 1903, (95 O. L. 403) inasmuch as it applies to only one county, violates section 26, article 2 of the constitution and is void."

and at pages 243 and 244 of the opinion the court holds:

> "The elementary rule of construction that where a portion of the statute only is unconstitutional, the rest may be allowed to stand if the unconstitutional portion does not so far affect the whole statute as that

it must be said the legislature would not have passed the law except in the form and substance as it did pass it, has received frequent approval and application in this state. Minshall, J., on this subject, in Gager vs. Prout, 48 Ohio St., 89, 108 (26 N. E. Rep. 1013) shows that there is 'a rule of construction that has been firmly established by repeated decisions of this court. By this rule a statute may be invalid in part, by reason of some provision being repugnant to the constitution, and valid as to the residue, where it appears that the invalid part is an independent provision, not in its nature and connection essential to the other parts of the statute, not so related to the general purpose of the statute as to warrant the conclusion that the legislature would have refused to adopt it with the invalid part stricken out.' So it was announced in Gibbons vs Catholic Institute, 34 Ohio St. 289, that:

"'The validity of section 8 of the act of May 1876, is not affected by the fact that the remainder of the act is unconstitutional. That section is separable from the remainder of the act.'

"But it will be remembered that the objectionable portion of this statute is added by amendment to a section.

"The rule, however, is not limited in its operation to the rejection or acceptance of an entire section; but any portion of a section, as I understand, may be rejected as unconstitutional, and the remainder allowed to stand, if it comes within the rule of construction.

"In the case of Treasurer vs. Bank, 47 Ohio St. 503, 504 (25 N. E. Rep. 697), it is adjudicated:

"' One part of a section of a statute may be void for want of conformity to the constitution, without affecting the validity of the remainder, unless the objectionable and unobjectionable portions are essentially and inseparably connected in substance, or are so interdependent, that the general assembly would not have enacted the one without the other.'

"It seems to me that the case in hand comes palpably and clearly within the rule just announced. The original section as it stood provided for assistance to agricultural societies throughout the state. It was part of the policy of the state, and there is nothing to indicate that the legislature ever intended to depart from it, but meant for it to stand as it had stood for many years; but they undertook in addition thereto to make a special provision applicable to Cuyahoga county alone, and which additional provision, by the recent holding of the supreme court (if, indeed, any holding was necessary), is clearly inimical to the provision requiring uniform operation. It seems to me quite clear that the provision as to Cuyahoga county can be rejected without affecting the substance or in any wise defeating the legislative will as to the remainder of the section, and that it can be very well said that the legislative purpose, in passing the law, was in no wise affected by the acceptance or non-acceptance of this particular provision."

On April 2, 1906, (98 O. L. 221). the 77th general assembly passed an act entitled "An act to provide for the revision and consolidation of the statute laws of Ohio." Said act required the governor to appoint three commissioners to revise and consolidate the general statute laws of Ohio. Section 2 of said act provides that in performing this duty the said commissioners shall bring together all the statutes and parts of statutes relating to the same matter, making alterations to harmonize the statutes with the constitution as construed by the courts. As above provided the codification commission had the power, by virtue of legislative enactments, to harmonize the statutes with the constitution as construed by the courts,

and as above set forth the court in the case of Lawrence county commissioners vs. Brown, supra, has declared all that part of section 3697, Bates' Revised Statutes, which applied only to Cuyahoga county was unconstitutional, and hence the same was left out of section 9880 of the General Code by the codifying commission, so as to read as follows:

> "When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such county or district society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars and the treasurer of the county shall pay it."

The legislature, on February 14, 1910, adopted the General Code as submitted by the codifying commission by enacting section 13765 of the General Code, which provides as follows:

> "The general statutes herein revised and consolidated, with the parts, titles, divisions, subdivisions, chapters and sections herein designated, shall be known and recognized as 'The General Code' (codifying commission)."

Section 13767 of the General Code provides as follows:

> "The following section of the Revised Statutes and acts, and parts, of acts, of the general assembly are hereby repealed."

and among the sections of the Revised tSatutes as being repealed appears section 3697 of Bates' Revised Statutes. As a net result, therefore, the legislature by enactment of section 13765 of the General Code, supra, adopted the General Code and thereby adopted section 9880 of the General Code, supra, as the same now appears therein, and at the same time repealed section 3697 Bates' Revised Statutes, thereby eliminating the provisions which related solely to Cuyahoga county.

Therefore, in direct answer to your inquiry, this department for the foregoing reasons is constrained to hold the payment to the agricultural societies cannot be made legally.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

204.

CITY NOT ESTOPPED TO COLLECT UNIFORM RATE FROM WATER CONSUMER BY ACCEPTANCE OF A LESS RATE BY A DULY QUALIFIED COLLECTOR.

A city is not bound by unauthorized acts of a water rent collector who accepts from a water consumer, rent less than that uniformly charged by the city, and is entitled to receive the difference, from said consumer, between the amount as paid such collector and the proper amount to which the city is entitled.

COLUMBUS, OHIO, April 11, 1913.

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

GENTLEMEN:—I take pleasure in replying to your letter of March 11, 1913, which is as follows:

> "Is a city estopped from instituting action in court to recover of a consumer who has been supplied service from a municipal waterworks plant, by reason of the fact that an insignificant sum, much below the actual value of the service rendered, had been previously accepted by a duly qualified collector of said plant?
>
> "In the absence of fraud would the acceptance of said payment by the collector and the giving of a receipt to the consumer be binding upon the city?"

I am of the opinion that the facts stated in your inquiry, standing alone, are insufficient in law to estop the city from collecting of the customer the actual value of services rendered him in the supplyof water. Conceding that no fraud, corruption, or collusion tainted the transaction, yet the matter might have arisen through a mistake on the part of the city, the consumer, or both.

In such event, the city is entitled to recover from the customer the full fair value of the services rendered, less the amount heretofore received by it thereon. No matter if the collector was duly qualified to collect—he was an agent of the city, and as such he held no power to sacrifice the city's interests by gift, remission, or otherwise. As an individual owning the water, he might do as he pleased, but not so with city property. He must collect what is the fair value of the services rendered, and anyone dealing with him is chargeable, as a matter of law, with knowledge of these facts, and cannot avail himself of such circumstances.

If the city had a schedule of prices for such services, such schedule must apply equally to all customers; and no collecting agent could suspend or modify the universality of its application, without express authority. If the city had no schedule of prices, then the collector must treat all alike, make no discriminations, and collect of each patron an amount commensurate with the services accepted by him.

Any other course would be detrimental to the city, unfair to other consumers, and against public policy in dealing with a municipal utility. The consumer will not be permitted to intrench himself behind such circumstances, and should be made to respond fully for what he has enjoyed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

206.

BOARD OF EDUCATION—POWER TO PAY EXPENSES OF SUPERINTENDENT OF CITY SCHOOLS AT INSTITUTE OF NATIONAL ASSOCIATION OF SCHOOL SUPERINTENDENTS AT PHILADELPHIA —PURPOSE OF INSTRUCTING TEACHERS.

Under section 7872, General Code, a city board of education is empowered to expend, not to exceed $500.00 for instructing teachers in an institute or in such other manner as it prescribes. The discretion conferred upon the board, by this statute, would empower it when it sees fit, to pay the expenses of its superintendent, incurred in attending a national association of school superintendents for the purpose of conveying information obtained to its teachers.

COLUMBUS, OHIO, April 24, 1913.

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

GENTLEMEN:—Under date of March 4th you request my opinion as follows:

"Can a city board of education, under section 7872, General Code, pay from school funds the expenses incurred by superintendents in attending the institute of the national association of school superintendents at Philadelphia?

"Does your opinion of November 22, 1911, apply to city boards of education?"

Section 7872 of the General Code is as follows:

"The expenses of such institute shall be paid from the city institute fund hereinbefore provided for. In addition to this fund the board of education of any district annually may expend for the instruction of the teachers thereof, in an institute *or in such other manner as it prescribes,* a sum not to exceed five hundred dollars, to be paid from its contingent fund."

This statute would in no sense empower a board of education to allow the expenses incurred by a superintendent in attending such institute for his own personal benefit, or for the mere purpose of maintaining his membership in such an association, or of providing a representation for the city board at such a meeting. The statute, however, in providing that the board of education may expend school funds for the instruction of its teachers *in such other manner as it prescribes* confers upon such board a broad and controlling discretion as to the methods which it may desire to pursue in obtaining the end of instructing its teachers; and I am of the opinion that if such board sends its superintendent to the meeting of this national association in pursuance of a well-defined plan for providing instruction for its teachers, by enabling the superintendent to carry the information obtained from such meeting to the teachers, the same would be authorized under the terms of this section.

In brief, I see no reason why the board may not make the superintendent an instrument for the purpose of conveying to its teachers the benefits of the meeting. In the letter enclosed by you, which is signed by the president of the board of education in question, that official says:

"We desire to pay the necessary expenses of our superintendent for we consider such visitation on his part is instruction which will be of material benefit to him in the administration of our public schools."

From the terms of this letter I take it that the meeting is one whereby modern methods of instruction are discussed, and wherein it is designed that each board of education be able to partake of the benefits of innovations and advanced methods which may have been installed in other schools throughout the country. Such is manifestly a valuable instruction, which it may well benefit any school to keep its teachers in touch with.

I am therefore of the opinion that if the board of education is of the opinion that the meeting is such as will afford valuable instruction to its teachers, and if they send their superintendent to such meeting for the purpose of conveying the information acquired therein to its teachers, they may allow the expenses of travel incurred by the superintendent in making such trip.

In answer to your second question, with reference to my opinion of November 22, 1911, I beg to say that, taking the language of that opinion strictly, it would have application only to village boards of education. The facts of that opinion, however, were very indefinitely stated, and I may well say that it should be read with reference to city boards of education in the light of the modification stated herein.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

232.

CIVIL SERVICE IN CITIES—RIGHT OF APPOINTING POWER TO DEMAND LIST OF NAMES FROM COMMISSION—INVALIDITY OF RULE OF COMMISSION REQUIRING PROMOTION TO FILL VACANCY.

Under section 4480, *General Code, the civil service commission may make rules and regulations permitting the filling of offices and positions in the higher grades as far as practicable through promotion. It is the intention of this act, however, to vest the power of appointment to positions in the specified officials of the municipality, and therefore, since the rule adopted by the commission compelling a vacancy to be filled by promotion would be an exercise of the appointing power, such a rule would be invalid.*

In its discretion, therefore, when a vacancy exists, the appointing power is entitled on demand to have three names presented for the examination list from which to select an appointee.

COLUMBUS, OHIO, April 29, 1913.

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

GENTLEMEN:—Under date of March 26, 1913, you inquire as follows:

"First. May the civil service commission by adoption of rules and regulations provide for the filling of vacancies in the classified service of the city by promotion from the next lower grade, or has the appointing authority of the city a right to demand of the commission three names from which to make his selection in the case of a vacancy in the classified service?

"Second. Is the discretion lodged in the appointing authority to determine whether or not such vacancies are to be filled by promotion or by recourse to the eligible list, or may the civil service commission, by its rules, deny to the appointing authority such recourse to the eligible list, and by said rules provide that certain positions in the classified service in case of vacancies shall be filled by promotion?"

In an opinion given to Hon. Allen G. Aigler, city solicitor of Bellevue, Ohio, under date of April 29, 1912, this department held that the appointing power was not required to make an appointment to a position in the classified service, unless three names were submitted to it by the civil service commission as being eligible for appointment. It was further held in that opinion that the civil service commission had no power of appointment under our statutes.

In that opinion no question of the right to fill positions through promotion was considered.

Section 4480, General Code, provides:

"Applicants for admission into the classified service shall be subjected to examination which shall be competitive, public and open to residents of the city, with such limitations as to age, residence, health, habits and moral character as the commission prescribes. The commission shall prepare rules and regulations adapted to carry out these purposes with reference to the classified service of the city, *which rules and regulations shall provide for the grading of offices and positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions, and for public* examinations to ascertain the fitness of applicants for appointment in the classified service. Such applicants shall take rank upon the register as candidates in the order of their relative standing without reference to priority of examination. The result of the examination shall be accessible to all persons."

This section requires that "applicants for admission into the classified service shall be subject to examination." It then authorizes the civil service commission to prepare rules and regulations to carry out the purposes of the civil service act, and specifically requires the commission to make rules and regulations,

"for the grading of positions similar in character in groups and divisions so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions."

Under this power the civil service commission is authorized to group positions so as to "permit" the filling of the higher positions through promotions. This power will authorize the filling of positions through promotion from a lower to a higher office without requiring the employe to take an examination for the higher position. But the civil service commission cannot make a rule which will require the appointing officer to fill a higher position through promotion. The commission can only make such rules and regulations as will permit the filling of positions through promotions.

The civil service commission has no power of appointment. That power rests in some other officer or board. If the civil service commission could make a rule requiring the filling of positions through promotions, they could in fact make

the rule so as to virtually make the appointment. This would be encroaching upon the right of the appointing power. The rules should be made so as to permit the appointing power to fill positions through promotions if he so desires.

The statute does not require the higher positions to be filled through promotions. It only permits such filling of the offices. It is left to the appointing power to determine whether positions of a higher grade shall be filled through promotions or by selection from the eligible list, as provided in section 4481, General Code, which reads:

> "Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a persiod of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

By virtue of this section the appointing power is entitled to three names from which to make the selection.

The civil service commission may make rules and regulations to permit the filling of positions through promotions from a lower grade, but it cannot require the appointing power to fill the positions through promotion. The appointing power may fill the higher positions through promotions as provided by the rules of the civil service commission, or he may demand three names of the civil service commission from the eligible list from which to make his selection.

The appointing power has the discretion to either fill a higher position through promotion or from the eligible list.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

261.

TOWNSHIP TRUSTEES—DUTIES WITH REFERENCE TO SALE OF CEMETERY LOTS—COLLECTION OF FEES—LIABILITY OF PARTIES FOR MONEY PAID TO AND DONE AWAY WITH BY SEXTON—CLERK, TREASURER AND PRIVATE PARTIES.

Under section 3448, *General Code, it is the duty of township trustees to sell cemetery lots, but it is not made their duties to collect the money therefor.*

Under sections 3457, 3458 *and* 3459, *General Code, the township treasurer is the proper custodian of funds received by the trustees, by way of gift, request, etc., and it is the duty of that official to receive all moneys secured by the sale of lots, digging of graves and from other sources of the township cemetery.*

The clerk of the township is not authorized to receive any money on behalf of the township and when money from the sale of cemetery lots is paid to him and not turned over by him, the bondsman of the clerk cannot be held for such defalcation, under the terms of the bond required of him. Under section 3300, *General Code, he is personally liable for money so misappropriated.*

Private parties are presumed to know the limitations placed upon public officers and when the clerk and sexton are made by them agents for the payment of moneys given for cemetery lots to the township treasurer, said sexton and clerk are liable to their prinicpals and the prinicpals are liable to the township. If the trustees did not authorize a sexton or clerk to collect the money, they may not be held for its loss. They may, however, be liable for any loss to the township, resulting from the sale by them of deeds without making provision for the payment of the money to the township treasurer. When the money is not received by the township, the deed is voidable for want of consideration, but would be good in the hands of an innocent purchaser for value.

The township trustees not having the duty to collect money for lots sold, they may not delegate that power to a sexton. The township treasurer having such duty, may delegate the power and if he does so and it is abused, he may be held personally liable.

COLUMBUS, OHIO, April 30, 1913.

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

GENTLEMEN:—Under date of February 3, 1913, you inquire of this department as follows:

> "Under section 3451, General Code, township trustees are given control of certain cemeteries. Section 3448, General Code, makes it the duty of township trustees to sell cemetery lots. Is it the duty of the trustees to collect money for lots sold and work done on cemeteries in their charge and if so, can said trustees delegate this authority to a cemetery sexton or superintendent?
>
> "If the sexton or superintendent of a township cemetery, drawing a salary as such, with no record of his employment or official duties appearing in the minutes of the proceedings of the trustees, collects money from patrons of the cemetery for cemetery lots, digging of graves and other work done by him and pays said money to the township clerk instead of the township treasurer and a loss results from the mispayment, the money never reaching the township treasury, can the township trustees be held for the amount thus lost? If not, can the clerk and his bondsmen be held for the amount lost?

"Is it the duty of the township treasurer to collect money due his township for cemetery lots, digging graves and other cemetery receipts? If so, can he delegate that power to another?"

The law pertaining to township cemeteries is found in sections 3441 to 3475, General Code.

Section 3447, General Code, prescribes certain duties of the township trustees in reference to such cemeteries, as follows:

"The trustees shall have such cemetery laid out in lots, avenues and paths, number the lots and have a suitable plat thereof made, which shall be carefully kept by the township clerk. They shall make and enforce all needful rules and regulations for its division into lots, and the allotment thereof to families or individuals, and for the care, supervision and improvement thereof, and they shall require the grass and weeds to be cut and destroyed at least twice each year in all such cemeteries. Suitable provision shall be made therein for persons whose burial is at the expense of the township."

Section 3448, General Code, provides for the sale of lots in the cemetery as follows:

"Upon application the township trustees shall sell at a reasonable price such number of lots as the public wants demand for burial purposes. Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute, and which shall be recorded by the township clerk in a book for that purpose, the expense of recording to be paid by the person receiving the deed. Upon the application of a head of a family living in the township, the trustees shall make and deliver to such applicant a deed for a suitable lot for the burial of his or her family without charge, if in the opinion of the trustees, by reason of the circumstances of such family, payment therefor would be oppressive."

This section authorizes the trustees to sell the lots; but it does not provide that the trustees shall collect the money therefor.

Section 3449, General Code, provides:

"The proceeds arising from the sale of such lots shall be used in improving and embellishing such grounds, and the trustees shall build and maintain proper and secure fences around all such cemeteries, to be paid for from the township funds."

Section 3457, General Code, authorizes the trustees to receive funds by gifts for the care of such cemetery, and reads:

"The township trustees may receive by gift, devise, bequest, or otherwise, any money, securities or other property in trust, as a permanent fund to be held and invested by them and their successors in office, the income therefrom to be used and expended under their direction, in the care, improvement and beautifying of any burial lot designated and named by the person making such gift, devise or bequest, in any township cemetery over which such trustees have jurisdiction."

Section 3458, General Code, provides for the investment of such fund, as follows:

> "Such trustees shall invest such fund, in their names as such trustees, in interest-bearing securities, with interest payable annually or semi-anually, and the principal as it becomes due, to the treasurer of such township, change the investment as the interest of the trust demands and collect the interest dividends, or other income, as they become due and payable. From such income the trustees shall first pay the cost and expense connected with the trust, and the balance shall be expended, under their direction, in the proper care and beautifying of such burial lot, and draw warrants on the township treasurer to pay therefor, which shall be paid only from such income funds. Such gift, devise or bequest and income therefrom shall be exempt from taxation, the same as other cemetery property."

Section 3459, General Code, provides:

> "The township treasurer shall keep accurate and separate accounts of such investments, the income therefrom, and of all disbursements, thereof, which shall be open to inspection at all reasonable times, and shall be approved by the trustees at each annual meeting. All moneys, securities and other property shall be and remain in the care and custody of the township treasurer and his successors in office, and he and his sureties shall be liable upon the official bond for the safe keeping and proper accounting, as for other money coming into his hands as such treasurer, belonging to the township. For any purpose connected with such trust, the trustees and their successors may commence any action at law, or in equity, in any court, or make any defense therein necessary to the execution of the trust."

It appears from these sections that the treasurer of the township is the proper custodian of the funds received by the trustees by virtue of section 3457, General Code.

The general duties of a township treasurer are prescribed by sections 3309, et seq. of the General Code.

Section 3310, General Code, provides:

> "Before entering upon the discharge of his duties the township treasurer shall give a bond payable to the trustees, with sureties approved by them, in such sum as they determine, conditioned for the faithful discharge of his duties as treasurer and the paying over according to law of all moneys that come into his hands by virtue of his office. Such bond shall be deposited with the clerk."

Section 3316, General Code, provides:

> "No money belonging to the township shall be paid out by the treasurer, except upon an order signed personally by at least two of the township trustees and countersigned personally by the township clerk."

These sections contemplate that the township treasurer shall receive, pay out and be the custodian of all moneys belonging to the township, and it is the duty of the township treasurer to receive all such funds.

The trustees are given certain duties in reference to receiving gifts, and paying out moneys for repairs and improvement of cemeteries. They receive and pay out this money through the treasurer of the township who is the treasurer of the board of township trustees.

It is the duty of the township treasurer to receive all money secured in the sale of lots, digging of graves and from other sources from the township cemetery.

It appears in your case that the funds were received by the clerk and were misappropriated by him. You ask as to the liability of the clerk and his bondsmen for such misapplication.

Section 3300, General Code, provides for the giving of a bond by the township clerk, as follows:

> "Before entering upon the discharge of his duties, the township clerk shall give bond payable to the trustees with sureties approved by them, in such sum as they determine, conditioned for the faithful performance of his duties as clerk. Such bond shall be recorded by the clerk, filed with the township treasurer and carefully preserved."

Section 3301, General Code, prescribes the duties of the clerk and reads:

> "The clerk shall keep an accurate account of the proceedings of the trustees at all their meetings, including their acceptance of the bonds of township officers. He shall record all township roads that are established by the trustees. He shall record the earmarks of cattle, sheep and hogs, used by the owners, and such other marks and brands as any person may wish to have recorded, but he shall not record the same mark or brand to two persons."

The statutes give the clerk other duties, but I find no statute which authorizes the clerk to receive any money on behalf of the township.

In State of Ohio vs. Griffith, 74 Ohio St., 80, it is held:

> "A public officer is personally, and may be even criminally, liable for malfeasance in office; but the sureties on his official bond are answerable only within the letter of their contract for the unfaithful performance of his official duties and not for dereliction outside of the limits of his official duties. State vs. Carter, 67 Ohio St., 422, distinguished.
>
> "The clerk of a board of education is not authorized, nor is it made his duty by statute, to receive and become the custodian of tuition funds belonging to such board, and such board is not empowered by section 3985, Revised Statutes, to make a rule conferring such authority or imposing such duty on the clerk of the board; and where pursuant to such a rule, the clerk of the board was permitted to and did receive and have the custody of tuition funds which he failed to safely keep and account for, the sureties on his statutory bond are not liable therefor."

This rule applies to the case now in question. It was not the duty of the clerk to receive this money, and the statutory bond given by him would not cover such money.

The bondsmen of the clerk cannot, therefore, be held for the defalcation of the clerk as to this money.

The clerk, however, received this money and he has not properly accounted for it. He is, therefore, personally liable for refunding the money so received. The question arises; to whom is he liable, also who must stand the loss if the clerk is unable to account for it?

It has been seen that neither the sexton nor the clerk have been authorized to receive this money for the township. The money never reached an officer of the township who was chargeable with the collection thereof.

A person who deals with an officer, and an officer is in fact but an agent of the public, must take notice of the authority and powers of the officer at his peril.

At section 551 of Throop on Public Officers, the rule is stated.

> "But the rule is different when an officer exceeds his powers; in such a case, the body for which he acts, whether it is the state, a municipal corporation or other public organization, is not bound by his acts; and every person dealing with an officer must, at his peril, ascertain the extent of his powers. In this respect the rule is more stringent respecting public officers and agents, than it is respecting private agents; the former are held more strictly within the limits of their prescribed powers, than the latter; and a contract, made by a public agent, relating to a subject within the general scope of his powers, does not bind his principals, if there was a want of specific power to make it."

The sexton had no right to receive the money on behalf of the township. The failure of the sexton to pay to the treasurer of the township money entrusted to him could not be charged against the township. The same is true as to the money received by the clerk. Neither of them had any authority to receive money for the township.

When a purchaser of a lot paid the sexton, such purchaser made the sexton his agent to remit the money for him. When the sexton gave the money to the clerk, the clerk thereby became the agent of the purchaser. The clerk was not the agent of the township for the purpose of collecting money.

The money was lost through the defalcation of the agent of the purchaser of the lot. The agent is responsible to his principal and the principal must stand the loss if the agent is unable to make it good.

The clerk, therefore, is personally liable to the persons from whom the money is received and is not liable to the township therefor.

You ask further as to the liability of the trustees for such defalcation.

It does not appear that the trustees authorized the sexton to collect this money, or that the trustees authorized the sexton to pay the money to the clerk. The trustees, therefore, would not be liable for the money thus collected and lost.

They may, however, be liable for any loss to the township if they gave a deed for a cemetery lot which was paid for to the clerk, but which money never reached the township treasury.

Section 3448, General Code, supra, provides:

> "Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor which the trustees shall execute."

One of the terms of the sale would be payment of the purchase price. The trustees are not authorized to execute a deed for a cemetery lot, except to an indigent family, without receiving pay therefor.

If, therefore, the trustees have executed deeds for lots the purchase price of

which was paid to the clerk or sexton but the same did not get to the township treasury, and a loss to the township is occasioned thereby, such trustees would be liable for such loss.

If the purchase money never reached the township treasury there was no consideration to the township for the deed and the title of the purchaser would be invalid. Such deed would be good in the hands of a bona fide purchaser for value without notice. In such case there would be a double liability; first, the trustees would be liable; second, the original purchaser would be liable to the township for the purchase price of the lot.

In City of Tiffin vs. Shawhan, 43 Ohio St., 178, it is held:

> "The execution of a special power to convey lands by a public officer must be in strict pursuance of the power, or no title is conveyed."

At page 1158, volume 37 of Cyc., the rule is stated:

> "A payment of taxes, in order to be effective in relieving the person and his property from liability, must be made to the officer primarily authorized to receive them, or at least to some one legally delegated to act in his behalf in receiving and receipting for the taxes."

Also at page 1368 of 31 Cyc. it is said:

> "Authority to collect, like all authority of an agent, must be traced to the principal. Moreover it is not to be inferred from mere employment as agent. To bind the principal the collection must be made by one who is not only his agent but who has been clothed with authority to make such collection."

The rule of recovery against a bona fide purchaser is stated at page 1057, volume 32 of Cyc. as follows:

> "The government cannot repudiate a patent on the ground of fraud and recover the land as against an innocent purchaser for value from the patentee, and the fact that a person purchased from an entryman before the issuance of the patent does not deprive him of the character and rights of a bona fide purchaser for value."

As the purchaser of the lot has not paid the money to the proper officer the debt is not discharged and he is still liable to pay the debt. As the trustees executed deeds for lots before the township was paid therefor, they are liable for all loss occasioned thereby.

It does not appear that the trustees performed any act in reference to the money received for digging graves and the other work. Unless it can be shown that they participated in this loss the trustees would not be liable.

The statutes do not authorize the township treasurer to appoint a deputy. If the township treasurer directed some one to receive the money of the township for him, such person would not be an official of the township, but would be the private agent of the treasurer, and the treasurer would make himself liable for a misapplication of funds received by such person.

It is not the duty of the township trustees to collect money for lots sold in a cemetery and they cannot delegate that power to a sexton. The treasurer is required to receive and collect such money under the direction of the trustees.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

265.

CITY HEALTH OFFICER NOT AN OFFICER—MAY BE PAID BY CITY FOR SERVICES TO INJURED FIREMEN.

Since none of the indicia usually connected with a public officer are present in the case of a health officer; since the incumbent of that position is subject to the will of the board of health, as to the nature of his duties, as to his term of office, and to his salary, he is not to be considered a public officer and therefore does not come within the terms of either section 3808 *or section* 12912, *General Code, prohibiting the allowance of compensation to municipal officers for work, services or materials furnished in addition to those required by the office.*

COLUMBUS, OHIO, April 30, 1913.

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

GENTLEMEN:—Under date of April 19th you request my opinion as follows:

"Is the health officer of a city such an officer as would make it illegal for him to be paid from the city treasury for services for professional attendance upon injured firemen, it not being one of his official duties as health officer to render such services?"

Sections 3808, 12912 and 4408 of the General Code are as follows:

"Section 3808. No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such section, and if in office he shall be dismissed therefrom.

"Section 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office.

"Section 4408. The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians or one ward physician for each ward in the city as it deems necessary."

The answer to your question depends upon whether or not the health officer is an officer of the corporation within the meaning of sections 3808 and 12912, above quoted. The only reference to the duties of the health officer are the words of section 4408, which state that he shall be the executive officer.

I am able to find but two decisions in this state which passed upon the nature of this position. The first is State vs. Craig, 69 O. S. 236, which held that a health officer is not an *employe* as that word is used in section 189 of the Municipal Code. The decision in this case, however, was confined solely to the language of the respective statutes and simply held, as is disclosed by the language of the court on page 246, that a health officer is not such an employe as is comprised within the terms of section 189 of the Municipal Code. The other decision is that of State ex rel. Miller vs. Council of Massillon, 2 O. C. C. R. page 167, wherein the court says, no page 169:

> "It will be observed that the duties of the appointee or health officer are not prescribed by statute. He is the servant of the board of health that makes the appointment. He is under their absolute control and direction; and in addition to that, they fix his salary. His salary is at the will of the board of health. His term of office is at their will; they may terminate it at their pleasure. * * * Now, that being the nature of the employment, perhaps it is a misnomer here to call him officer at all. He is more like an *employe or servant* of the board of health."

In substance, this decision held that a health officer did not come within the terms of section 1717 of the Revised Statutes prohibiting an increase of salary of an officer during his term. The decision was based rather upon the fact that the health officer did not have a definite term of office than upon the circumstances that he was not a public officer. The language of this case, above quoted, therefore, is merely dicta and cannot be considered controlling.

It is well understood that the question whether or note a certain office is properly a public office is a very vague and difficult one at times to decide. It is well settled that the mere designation of the term "office" or "officer" does not of itself constitute a public office. State vs. Jennings, 57 O. S. 415; State vs. Kennon, 7 O. S. 557.

The indicia of a public office are enumerated in State vs. Wilson, 29 O. S. 349:

> "He is appointed for a definite term. He must take the oath prescribed by the constitution. He must reside in the institution that he superintends. His duties are prescribed by law and not by contract. He is clothed with the right and correspondent duty to execute a public trust. He has a right to the salary attached to the office. The office is continuing. If it becomes vacant, it may be filled by a successor, upon whom the duties will be cast."

From a review of the decisions, however, it is clear that the existence or non-existence of one or several of these indicia is not controlling.

In State vs. Halliday, 61 O. S. 171, the court said:

> "The distinguishing characteristics of a public officer is that the incumbent, in an *independent capacity*, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law."

This principle is borne out by a host of decisions cited in 11 Encyc. Digest of Ohio Reports, 214. In the case of a health officer none of the indicia set out in

these authorities are present unless it be that he is clothed with authority to execute a public trust. The decisions substantially bear out the proposition, however, that this authority must be extended to the officer in an independent capacity. Thus, in State vs. Mason, 61 O. S. 62, the court said:

> "One who performs no duties except such as by law are charged upon a superior does not hold an office but merely an employment."

It is a well settled principle of common law that the office of superior and deputy constituted one office; that the deputy was not looked upon as a public officer.

I am unable to see how, in the present case, the health officer can be accorded any greater dignity than a deputy. Since, therefore, none of the indicia usually attendant upon a public office seem to be present in this case; since the health officer is subject to the will of the board, as to the nature of his duties, as to his term of office and as to his salary, I am of the opinion that the dicta of the court in State vs. Council of Massillon, above quoted, should be accorded deference as the only existing Ohio authority.

I therefore hold that the health officer is not such an officer of the municipal corporation as is comprehended by the terms of either section 3808 or section 12912, General Code, and that he may properly be allowed compensation for professional attendance upon injured firemen.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

267.

APPORTIONMENT OF PERCENTAGES TO COUNTY AUDITOR ON FEBRUARY SETTLEMENT, 1907, AS AFFECTED BY THE ENACTMENT OF COUNTY OFFICERS' SALARY LAW—CLAIMS BARRED BY STATUTE OF LIMITATIONS.

Although the decision of the supreme court providing a method of apportioning fees to the county auditor at the semi-annual settlements, under the fee system law, in accordance with the year extending from settlement to settlement, is contrary to the former custom of allowing such fees, in accordance with the official year of the auditor, nevertheless, the lapse of six years from the date of accrual of any claims with reference thereto, will bar recovery at this time by county auditors of any differences in payments which may be shown to have been made by reason of the adoption of this custom.

COLUMBUS, OHIO, May 2, 1913.

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

GENTLEMEN:—Under date of January 4, 1913, you requested my opinion as follows:

> "The supreme court recently held in the case of Will R. Lewis vs. the State ex rel. Stilwell, Case No. 12881, that the fees accruing to the auditor

on the February settlement, 1907, compensated such auditor for the six months from August 15, 1906, to February 15, 1907, and decided how the fees accruing on said settlement should be divided as between the county auditor personally and the fee fund due the county.

"Applying this principle, would the fees accruing on any preceding February settlement, and February, 1905, belong to the auditor who entered upon his first term the third Monday of October, 1904, or should such fees be divided pro rata between him and his predecessor as the time from the 15th of August to the third Monday of October, 1904, is to the time from the third Monday of October, 1904, to the 15th of February, 1905?

"Is a county auditor whose term expired the third Monday of October, 1904, *now* entited to receive from the county treasury any part of the settlement fees accruing at the February settlement, 1905? If so has the county a claim in the same amount against the county auditor who entered upon his first term the third Monday of October, 1904?

"P. S. The custom in the several counties of the state for a great many years past, prior to the enactment of the salary law, was to consider the February settlement fees as compensation for the first half of the official year beginning the third Monday of October and the August settlement fees as compensation for the last half of the official year ending the day preceding the third Monday of the following October. The supreme court took a different view and it seems to us that if it should be held that any part of the fees of the February, 1905, settlement are due to the auditor whose term expired the third Monday of October, 1904, there would be due from this last mentioned county auditor to the county or his predecessor a similar division of the fees of February settlement next following his entering upon his first term of office. This case arises in Noble county, where Mr. Hastings (now a member of the general assembly) has filed a bill with the county commissioners claiming a compensation from the 15th day of August, 1904, to October 17, 1904. Mr. Hastings was succeeded by J. W. Shinely, who was in office when the salary law took effect, January 1, 1907, and to whom there is now due the sum of $247.89 under the supreme court decision, less a finding made by this department on account of overcharges for indexing. The present auditor of Noble county will not pay any money to either of the claimants until he has written authority of this department under the instruction of the attorney general's department."

Your statement in brief is that the supreme court in the recent case of Lewis vs. State ex rel. Stilwell, held that an auditor holding office on January 1, 1907, (the date upon which section 1069, Revised Statutes, providing for the allowance upon a monthly estimate to the auditor of certain percentages of the moneys shown to have been collected by the county treasurer, upon the February semi-annual settlement, was repealed and substituted by the statue providing for a salary in lieu of said percentages) was entitled to the portion of such percentages, represented by that part of the six months immediatey preceding said semi-annual settlement, which was served by the auditor up to the time of the taking effect of the salary law.

In substance the court allowed the auditor payment from August 15th, to January 1st, such payment being three-fourths of the percentages allowed upon the collections of the treasurer as shown by the February semi-annual settlement.

This decision of the supreme court was contrary to the former custom of allowing such percentages according to which custom the percentages allowed at the semi-annual settlements were apportioned to the first and second six months respectively

of the auditor's *official year.* Had the auditor, therefore, been paid in accordance with the former custom, he would have been paid that portion of the percentages allowed at the February semi-annual settlement, in accordance with section 1609, Revised Statutes, which the period from the third Monday in October to the first day of January, bore to the period of six months intervening the third Monday of October and the third Monday of April.

It is clear, therefore, that when the auditor in question, (that is Mr. S.) took office, he was allowed his percentages on the February settlement from October, 1904, to April, 1905, on the basis of the former custom; and his predecessor was allowed his percentages on the August settlement, 1904, in accordance with this same custom, on the basis of the August settlement. Had the rule of the supreme court been applied when the predecessor was in office, his percentages from August, 1904, to the third Monday in October of the same year would have been based upon the settlement of the following February, instead of the settlement of August, 1904, as was the case.

The settlement of the question involved in your inquiry would involve a complete reaccounting and reapportioning of all payments made to each auditor and after the same had been determined, the probable result would be a finding to the effect that the predecessor (Mr. H.) would have had a claim against the county for the difference between the amount actually received by him and the amount which would have been received had he been paid in accordance with the supreme court's ruling; and the successor (Mr. S.) would probably owe the county the difference between the amount actually received by him and the amount which would have been paid in accordance with the court's ruling.

It is well settled, that the statute of limitations may be employed as a defense against a claim in behalf of counties, townships and municipalities.

8 Encyc. Digest of Ohio Reports, page 850.
Oxford Township vs. Columbia, 38 O. S. 87.
State vs. Blake, 2 O. S. 148.
Williams vs. First Presbyterian Society, Cin. 1 O. S. 478.

Section 12222, General Code, provides as follows:

> "An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

The claims under consideration in the present case are claims for money had and received, and therefore, come within the terms of section 12222, General Code, implied contracts.

Mount vs. Lakeman, 21 O. S. 643.
Commissioners vs. McClure, 7 O. N. P. 187.

Since Mr. S. received compensation in accordance with the supreme court's ruling, from August, 1906, the causes of action against him would not have accrued subsequent to that date, and I am, therefore, of the opinion that the county is barred, by this statute of limitations, from pursuing any action thereon. The claim of Mr. H. who went out of office in 1904 a fortiori is also clearly barred by this statute.

In conclusion, therefore, I am of the opinion that whatever claims may be

shown, by a reapportionment of the percentages to have been due to or owed by the county by reason of the supreme court's ruling in this matter at some prior time, these claims are now all barred by reason of lapse of time.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

284.

SHERIFF ENTITLED TO JAIL FEES FROM CITY FOR PRISONERS COMMITTED FOR VIOLATIONS OF ORDINANCES—RIGHT OF CITY TO CHARGE SUCH FEES AS COSTS AGAINST INDIVIDUALS—PAYMENT OF FEES INTO COUNTY FEE FUND.

Under section 2845, General Code, a sheriff is entitled to receive jail fees for all prisoners under his charge, and when the prisoners are committed to a county jail for violations of ordinances, in accordance with section 4564, General Code, the sheriff is entitled to receive from the city the proper fees.

It is well settled that costs are governed by statutory provisions and that in the absence thereof, costs may not be charged a criminal proceeding.

The authority of a municipal council to fix fees in ordinance cases, is provided by section 4581, General Code, and in accordance therewith, council may charge similar fees for sheriffs' services to those prescribed by section 2845, General Code, and charge the same as costs in the case.

Inasmuch as these fees were received by the sheriff in his official capacity, they must be paid by the sheriff, into his fee fund, under the county officers' salary law.

COLUMBUS, OHIO, May 14, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 17th, wherein you request my opinion upon the following questions, arising under sections 4564 and 2845, General Code:

"1. May sheriffs' jail fees be charged against and collected of a city making use of the county jail: (a) When the ordinance under which the prisoners are confined in the county jail makes no provision for jail fees and (b) when the ordinance makes provision for such fees?

"2. If the sheriff legally collects such jail fees from a city shall the same accure to the benefit of the sheriff's fee fund or to his personal profit?

"3. May a city legally tax such jail fees in the cost bill against the defendants, and if so, and the costs are collected from the defendant, shall the same accrue to the sheriff's fee fund or to his profit?"

The sections which you cite, insofar as they are applicable, are as follows:

"Section 4564. * * * Any (municipal) corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment,

the use of the jail of the county, at the expense of the corporation. * * * Persons, so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law.

"Section 2845. For the services hereinafter specified, when rendered, the sheriff shall charge and collect the following fees and no more: * * * jail fees for receiving, discharging or surrendering each prisoner, to be charged but once in each case, fifty cents * * *. When any of the foregoing services are rendered by an officer or employe whose salary or per diem compensation is paid by the county other than from the sheriff's fee fund, the legal fees provided for such services in this section shall be taxed in the costs in the case and when collected shall be paid into the general fund of the county."

Your question relates, of course, to prisoners received under convictions of violations of city ordinances. In this connection I call your attention to section 4556, General Code, which provides as follows:

"The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace. In case of conviction the fees of officers, jurors and witnesses shall be taxed against the parties convicted, and in case of acquittal of the violation of an ordinance, the costs, except the fees of the mayor and marshal, shall be taxed against the corporation."

and also to section 4581, General Code, which provides as follows:

"Other fees in the police court shall be the same * * * in cases for violation of ordinances * * * as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

It seems to me that the questions which you ask may be approached from two angles of view; first, as to the right of the sheriff to receive the sum of fifty cents in each case. I am of the opinion that this right exists in the sheriff as jailer. The source from which his fees are paid is, in my opinion, immaterial, so far as the sheriff is concerned. As jailer he deals with the city in the capacity of a contracting party, by virtue of the statute (section 4564) above quoted. Therefore, I am of the opinion that the sheriff must look to the city in the first instance for his fees; and that it not incumbent upon the sheriff to make his costs, so to speak, out of the costs in any case.

The other angle from which I have suggested the question may be viewed is that of the authority of the city to fix by ordinance the fees of the sheriff. This is suggested by your first question. In my opinion, however, the city council has no authority to fix or remit the fee of the sheriff in his capacity as jailer, that being fixed by the statute itself. Council does have authority, however, to determine what fees of officers shall be included in the *costs* chargeable in ordinance cases. This distinction must be observed. In fixing the costs the municipal corporation is not in any way limited in determining the right of the sheriff to fees, but is only limited in determining the amount which it will authorize the mayor or police judge to tax against the defendant in case of conviction under a penal ordinance. That is, if the ordinance of the city should fail to provide that the jail fees of the sheriff should be taxed as costs in case of conviction, the defendant could not be held for them, because, as has been often decided, liability for costs is entirely

statutory, there being no common law on the subject in Ohio. A fortiori, then, it must follow that liability for costs in proceedings under municipal ordinances is entirely a matter of ordinance, so long as the legislature has not determined the question itself, but has specifically delegated the power to fix costs in ordinance cases.

I am of the opinion that the sheriff may charge against and collect from a city making use of the county jail the fees to which he is entitled under section 2845, General Code, regardless of the provisions of the ordinance under which the prisoners are confined in the county jail. This constitutes an answer to both branches of your first question.

Answering your second question, I am clearly of the opinion that inasmuch as the sheriff receives these fees in his capacity as an officer of the county they must be turned into his fee fund under the county officers' salary law, the language of which, in this particular, is, as you know, very comprehensive.

Answering your third question, I am of the opinion that the city may legally tax such jail fees in the cost bill against the defendant, provided such fees are made costs by an ordinance passed under section 4556 or section 4581, as the case may be. However, if the costs are collected from a convicted defendant they do not accrue to the sheriff's fee fund, but, in my opinion, must be paid into the treasury of the municipality. This follows, I think, not alone because of the provisions of section 4231, General Code (seemingly applicable only to cities), which might not be regarded as applicable to the fees of the sheriff, but also because of the fact, which I have already pointed out, that under the statute which requires that the use of the jail shall be at the expense of the city, the city is itself primarily liable for the sheriff's jail fees. This being the case, the city cannot shift this liability by providing by ordinance for taxing such fees in the costs of an ordinance case. Inasmuch, then, as the city is the responsible party, so far as the sheriff is concerned, it must pay him his fees, and if it chooses to reimburse itself by providing for their taxation as costs, that is a matter with which the sheriff has no concern whatever.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

285.

CITY COUNCIL MAY PROVIDE COMPENSATION FOR SERVICES OF A JUSTICE OF THE PEACE APPOINTED TO ACT DURING ABSENCE OR DISABILITY OF MAYOR—FEES IN STATE CASES MAY BE RETAINED—FEES IN ORDINANCE CASES PAID INTO CITY TREASURY.

Under section 4549, *General Code, a justice of the peace appointed by the mayor in cities having no police judge, to act during the absence or disability of the executive, has the same authority and power as the mayor and is, therefore, entitled to collect the same fees in state ordinance cases as the mayor.*

Under section 4213, *General Code, fees collected in ordinance cases, must be turned into the city treasury, but in accordance with the decision of Portsmouth vs. Millstead, fees pertaining to state cases may be retained.*

Under section 4214, *General Code, council may fix the compensation of officers in the city government, and thereunder may allow such justice of the peace a fixed compensation for services performed by him in ordinance cases.*

COLUMBUS, OHIO, April 11, 1913.

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

GENTLEMEN:—Under date of October 5, 1912, you requested my opinion as follows:

> "Is it legal for the city council to provide a salary for the services of a justice of the peace designated by the mayor to perform his duties in criminal matters in the absence of the mayor from the city? If the compensation of such justice of the peace cannot be legally paid from the city treasury, may he be allowed to retain his fees in ordinance cases, as well as those in state cases?"

In cities having no police court, the justices of the peace may be appointed to act in the mayor's stead under section 4549, which follows:

> *"In cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor."*

Under this statute such justice succeeds, during the time of his service in the place of the mayor, to the same powers and authority in criminal procedures. The following sections provide for fees allowed to a mayor in criminal cases for violation of state statutes:

> "Section 4534. * * * The fees of the mayor in *all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justice of the peace for similar services."*
>
> "Section 4550. He (the mayor) shall keep a docket, *and shall be entitled to receive the same fees allowed justices of the peace for similar* services."

Section 4556 of the General Code provides for the fixing of his fees in cases tried by him for violation of city ordinances, as follows:

> "The costs of the mayor and other officers, in all cases, shall be fixed by ordinance, but in no case greater than the fees for similar services before justices of the peace. In case of conviction the fees of officers, jurors and witnesses shall be taxed against the parties convicted, and in case of acquittal of the violation of an ordinance, the costs, except the fees of the mayor and marshal, shall be taxed against the corporation."

Until council has fixed fees for such cases, none can be assessed by the mayor. (City of Bellefontaine vs. Haviland, 3 N. P. n. s., 79.) Section 4213 of the General Code is as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, *excepting as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury.*"

This provision is interpreted in the syllabus of the case of Portsmouth vs. Millstead, and the case of Portsmouth vs. Baucus, 18 C. C. decisions, 384, as follows:

> "The provision of 96 O. L., (section 126 Rev. Stat. 1536-633) requiring 'that all fees pertaining to any office shall be paid into the city treasury' has reference to municipal fees solely or such fees as may be fixed by municipal authorities. This section does not authorize the city to interfere with the fees of mayors or chiefs of police in state criminal cases. Whether such authority can be delegated to such municipalities—query."

In view of this decision, therefore, the mayor is entitled to retain the fees assessed by him in state cases, which are the same as those provided for justices of the peace, under section 4550 of the General Code, but he must pay all fees received by him, as provided by ordinances of council, into the city treasury under section 4213 of the General Code quoted above.

Under section 4549 of the General Code above quoted, the justices of the peace appointed by the provisions therein, succeed to the power and authority of the mayor. The question, therefore, arises as to whether or not such justices of the peace are entitled to any compensation for their services in cases for the violation of city ordinances.

Section 4214 of the General Code provides as follows:

> "Except as otherwise provided in this title, *council,* by ordinance or resolution, *shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation,* and the amount of bond to be given for each officer * * *."

In the case of State ex rel. Smith vs. Lotschuetz, Auditor, 10 Nisi Prius, n. s., on page 263, the court says of this statute:

> "This section clearly confers upon council, except as otherwise provided in that act, the right to determine the number of officers, clerks and employes in any department of the city government, and also confers upon

council the right to fix, by ordinance or resolution, their respective salaries and compensation. Here is an express declaration upon the part of the legislature that the council shall have the right to fix the salaries and compensation of *all* officers, clerks and employes in *any* department of the city government, except as otherwise provided in that act."

A justice of the peace appointed by the mayor under section 4549, General Code, renders service in behalf of a municipality, when hearing and disposing of ordinance cases, and when acting in these cases, he charges the same fees which are prescribed for hearing by the mayor, by virtue of section 4549, General Code, which fees, in accordance with section 4213, General Code, above quoted, which prescribes that all fees *pertaining to any office* shall be paid into the city treasury, must beyond question of doubt be paid into the municipal treasury.

I am of the opinion that there is nothing expressly provided or which could justify the implication anywhere in these statutes, that when a mayor is obliged to appoint a substitute in these cases by reason of necessary absence or disability, he is obliged to compensate such substitute from his own funds. On the other hand, I do not think it plausible that the statutes intended a justice of the peace so serving to act without compensation in ordinance cases.

In the 11th volume of Encyc. Digest of Ohio Reports, page 215, it is said:

"Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer when his authority is confined to narrow limits; for it is the duty of his office and the nature of that duty which makes him an officer and not the extent of his authority. Shaw vs. Jones, 4 N. P., 372. State vs. Rust, 4 O. C. C., 329."

In view of this authority, therefore, I am of the opinion that a justice of the peace, supplanting a mayor to this extent is an officer in a department of the city government, whose compensation may be fixed by council in the exercise of a reasonable discretion by authority of section 4214, General Code, above quoted.

It would seem well to state in this connection, however, that section 4549, General Code, above quoted, must not be construed to authorize a mayor to appoint a substitute justice of the peace at random, for it clearly seems to be the intention of the statute, that when a police court has not been provided, the duty of hearing ordinance cases must be shouldered by the mayor as part of his official duties. This statute authorizes the appointment of a substitute only in cases of necessary absence or disability.

As to the fees of such justices in state cases, the case of Portsmouth vs. Millstead, above quoted, is decisive upon the point that such justices may retain their fees in state cases.

With your communication you enclose a copy of an ordinance of the city of Mansfield, providing for the compensation of such justices to be paid out of the city treasury, for services in both state and city cases; and you inquire whether such ordinance is legal. As to the allowance in state cases, since the statutes provide the compensation to which a justice is entitled therein, and since he is entitled to retain such compensation and since, furthermore, such services are determined to be rendered in behalf of the state instead of the municipality, I am of the opinion that an ordinance of council allowing further compensation is illegal and void. As to the compensation permitted in said ordinance for services in ordinance cases, I am of the opinion, for the reasons aforesaid, that the same is legal and proper, provided such services were rendered on account of *absence or disability* of the mayor.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

288.

BOARD OF COMMISSIONERS OF SINKING FUND OF SCHOOL DISTRICT HAS CONTROL OF SINKING FUND, BUT CUSTODY REMAINS IN THE TREASURY OF THE BOARD OF EDUCATION.

Under section 7604, General Code, and the following statutes which provide for the deposit of all moneys coming into the hands of the treasurer of the board of education of a school district and the following statutes which provide the mode of procedure for deposit of funds; and under section 4768, which provides that no money shall be withdrawn from depositories except upon an order signed by the treasurer and by the president or vice-president, and counter-signed by the clerk of the board of education; and under section 7613, and related statutes, which require the board of education to set aside and appropriate funds for the use of the sinking fund commission, the custody of such funds must reside with the board and its treasurer, whilst the control of the same is vested in the sinking fund commission.

The commission of the sinking fund may withdraw for its own purpose from such funds, therefore, only by requisition directed to the board.

COLUMBUS, OHIO, May 14, 1913.

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

GENTLEMEN:—Under date of April 24th you request my opinion as follows:

"We respectfully request your written opinion upon the following questions:

"Section 7614, G. C., provides for the appointment of a board of commissioners of the sinking fund for school districts.

"Section 7615, G. C., makes it the duty of the commissioners of the sinking fund to invest such fund.

"Section 7617, G. C., requires that the commissioners of the sinking fund make an annual report to the board of education, giving a detailed statement of the funds in their charge for each year, ending April 31.

"Is the board of commissioners of the sinking fund made custodian of the money in such fund? If so, would a depository contract made between a board of education and a bank, provided for in sections 7604 to 7608, General Code, cover funds separately deposited by the board of commissioners of the sinking fund of the district?"

Sections 7613 to 7619, General Code, are the statutes which provide for a sinking fund and a commission for its management and control in school districts. They are as follows:

"Section 7613. In any school district having a bonded indebtedness, for the payment of which, with interest, no provision has been made by a special tax levy for that particular purpose, the board of education of such district annually, on or before the thirty-first day of August, shall set aside from its revenue a sum equal to not less than one-fortieth of such indebtedness together with a sum sufficient to pay the annual interest thereon.

"Section 7614. The board of education of every district shall provide a sinking fund for the extinguishment of all its bonded indebtedness,

which fund shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of _____" (inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that, in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district. Such commissioners shall serve without compensation and give such bond as the board of education requires and approves. Any surety company authorized to sign such bonds may be accepted by such board of education as surety. The cost thereof, together with all necessary expenses of such commissioners shall be paid by them out of the funds under their control.

"Section 7615. The board of commissioners of the sinking fund shall invest that fund in bonds of the United States, of the state of Ohio, of any municipal corporation, county, township or school district of any state or in bonds of its own issue. All interest received from such investments shall be deposited as other funds of such sinking fund, and reinvested in like maner. For the extinguishment of any bonded indebtedness included in such fund, the board of commissioners may sell or use any of the securities or money of such fund.

"Section 7616. The board of commissioners of the sinking fund may refund, extend or renew the bonded debt of the school district or any part thereof, existing April 25, 1904, by issuing the bonds of such school district for such periods, not exceeding twenty years, in such denomination, payable at such place and at a rate of interest not to exceed the rate previous to such refunding, extension or renewal. But the aggregate amount of the refunding, extending or renewing bonds so issued shall not exceed that of the bonds so refunded, extended or renewed.

"Section 7617. The board of commissioners of the sinking fund shall make an annual report to the board of education giving a detailed statement of the sinking fund for each year ending with August 31st. Such report must be filed with the board of education on or before September 30th of each year and other reports may be required by such board of education when deemed necessary.

"Section 7618. The board of education shall appropriate to the use of such sinking fund any taxes levied for the payment of interest on its bonded indebtedness, together with the sum provided for in sections seventy-six hundred and thirteen and seventy-six hundred and fourteen. Sums so appropriated shall be applied to no other purpose than the payment of such bonds, interest thereon and necessary expenses of such sinking fund commission.

"Section 7619. When a board of education issued (issues) bonds for any purposes, such issue first shall be offered for sale to the board of commissioners of the sinking fund, who may buy any or all of such bonds at par. Within five days of the time when notice is given, the board shall notify the board of education of its action upon the proposed purchase. After that time the board of education shall issue any portion not purchased by such commission according to law."

Section 7604, General Code, provides that the board of education of any school district, by resolution, shall provide for the deposit of *any or all moneys coming into the hands of its treasurer.*

The following sections, to wit: Sections 7605 to 7608, inclusive, provide for advertising and bids, and the method of contracting with banks for such deposits:

"Section 7605. In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent. for the full time funds or any part thereof are on deposit. Such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond.

"Section 7606. The board shall determine in such resolution the method by which bids shall be received, the authority which is to receive them, the time for which such deposits shall be made and all details for carrying into effect the authority herein given. All proceedings in connection with such competitive bidding and deposit of moneys must be so conducted as to insure full publicity and shall be open at all times to public inspection. If in the opinion of a board of education there has been any collusion between the bidders, it may reject any or all bids and arrange for the deposit of funds in a bank or banks without the district as hereinafter provided for in districts not having two or more banks located therein.

"Section 7607. In all school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent. for the full time and funds or any part thereof are on deposit. Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum at least equal to the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond.

"Section 7608. The resolution and contract in the next four preceding sections provided for, shall set forth fully all details necessary to carry into effect the authority therein given. All proceedings connected with the adoption of such resolution and the making of such contract must be conducted in such a manner as to insure full publicity and shall be open at all times to public inspection."

Prior to their amendment in 98 Ohio Laws, page 45, sections 7615, 7617, 7618 and 7619, General Code, appeared in 97 Ohio Laws, 353:

"(3970-2) Section 2. The board of commissioners of the sinking fund shall invest the sinking fund in bonds of the United States, of the state of Ohio, of any municipal corporation, county, township or school district within the state of Ohio or in bonds of its own issue. All interest received from such investments shall be deposited in the treasury to the credit of said sinking fund, and reinvested in a like manner; at no time shall there be over one thousand dollars kept on deposit if investment can be made without jeopardizing the prompt redemption of bonds falling

due. For the extinguishment of any bonded indebtedness included in said sinking fund, the board of commissioners of the sinking fund is authorized to sell or use any of the securities or money in said fund.

"(3970-4) Section 4. The clerk of the board of commissioners of the sinking fund shall make an annual report to the board of commissioners of the sinking fund, giving a detailed statement of the sinking fund, such report shall be filed at such time as the board shall designate and other reports may be required by the board when the same shall be deemed necessary. *Orders on the sinking fund shall be drawn by the same authority and in the same manner as other orders for the payment of money from the school funds.*"

With reference to these statutes, the court, in the case of State vs. Board of Education, 3 O. N. P. page 404, said:

"In the light of these provisions of the statute and in the absence of some provision of statute for the transfer or turning over of the sinking fund to this commission, and in the absence of some statutory authority for them to provide a depository for themselves, or even to elect a treasurer, and in the face of specific statutory provisions, made by section 3968, Revised Statutes, (97 O. L. 351), allowing the board of education to provide a depository by public letting for 'all moneys coming into the hands of the treasurer of the board.' I think the conclusion is irresistible that this sinking fund must remain with the treasurer of the board of education in until paid out upon the order of its president and clerk to the person entitled thereto upon requisition therefor made by said commission, stating the amount and purpose thereof in each case."

In taking this view the court laid particular stress upon the provision of the former law requiring that "orders on the sinking fund shall be drawn by the same authority and in the same manner as other orders for the payment of money from the school funds." This provision has been stricken out, as it now appears. The other reasons mentioned by the court in that case, however, still exists for holding that the moneys themselves must remain in the possession of the board.

The statutes providing for trustees of a sinking fund in cities expressly provide, in section 4512, General Code, for the turning over to such trustees of all moneys under their control and management. In the statutes providing for a sinking fund commission for the state, section 388, General Code, requires money from the state treasury to the credit of the sinking fund to be paid out by the treasurer of state on the warrant of the auditor of state, upon the requisition of the commissioners of the sinking fund.

In view of the fact in these statutes the legislature has taken pains to specifically say whether or not the sinking fund commission shall have possession of moneys under its control, I am of the opinion that such possession cannot be allowed to them in the absence of specific provision therefor.

Section 4768, General Code, provides as follows:

"No treasurer of a school district shall pay out any school money except on an order signed by the president or vice-president and countersigned by the clerk of the board of education, and when such school moneys have been deposited as provided by sections 7604-7608, inclusive, *no money shall be withdrawn from any such depository, except upon an order signed by the treasurer and by the president or vice-president* and countersigned

by the clerk of the board of education; and no money shall be paid to the treasurer of the district other than that received from the county treasurer, except upon the order of the clerk of the board who shall report the amount of such miscellaneous receipts to the county auditor each year immediately preceding such treasurer's settlement with the auditor."

In construing the intent of these statutes providing for a sinking fund for school districts, permit me to call attention to the fact that section 7604, General Code, provides that the board of education shall provide for the deposit of any or all moneys coming into the hands of its treasurer; that section 7613, General Code, requires the board of education to *set aside* a certain sum for sinking fund purposes; and section 7618, General Code, provides that the board of education shall *appropriate* to the use of the sinking fund moneys therein stated to be for sinking fund purposes.

Section 4768 provides that no treasurer shall pay out any school money except upon an order signed by the president or vice-president and countersigned by the clerk of the board of education, *when such school moneys have been deposited as provided by sections* 7604 *to* 7608, *inclusive,* and that no moneys may be withdrawn from any such depository except in accordance with similar procedure.

Inasmuch as all these provisions very pointedly place the control of all school moneys in the board and its treasurer and clerk; and as the provisions relating to sinking funds only provide for their setting aside an appropriation, and as there is no reason to believe that the safeguards provided for deposits by the board of education should not be observed, as respecting sinking funds, I am of the opinion that the funds must remain in the possession of the board of education; and no moneys may be drawn for sinking purposes except by requisition of the sinking fund commissioners upon the board, and a consequent order signed by the treasurer and president and countersigned by the clerk of the board.

Section 7604, General Code, and the following sections, alone provide the regulations for deposit of the funds of the board of education; and since these statutes govern any or all moneys coming into the hands of the treasurer of the board, I am of the opinion that moneys may be deposited in accordance with these sections, and that the commissioners of the sinking fund have no such power.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

289.

POWER OF COUNTY TREASURER TO DEDUCT DELINQUENT PERSONAL TAXES WHEN PAYING WARRANT PRESENTED BY TAXPAYER.

There are no special provisions permitting the county treasurer to deduct delinquent personal taxes when paying a warrant to a taxpayer.

Under 2656, General Code, however, which permits the county treasurer to collect delinquent personal taxes by distress or otherwise, and under section 2665, General Code, which permits the treasurer to garnishee a delinquent taxpayer for such purpose, the treasurer may, when rendering a check upon a depository in payment of such warrant, give notice to the depository to retain the amount of the delinquent taxes.

Whether or not the treasury may retain from specific moneys given to him in payment of such warrant, the amount of such delinquent taxes depends on whether or not the power to distrain sufficient goods and chattels, under section 2658, includes the power to distrain moneys.

COLUMBUS, OHIO, April 23, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 20th, requesting my opinion as follows:

> "Will you please give us your written opinion whether or not a county treasurer, in paying a warrant due to a party from whom there is due to the county uncollected delinquent personal taxes, may retain the amount of such taxes?
>
> "Would the fact that the warrant issued by the county auditor bears written or stamped across its face the words 'subject to delinquent personal taxes' authorize such proceeding on the part of the county treasurer?"

I find no express authority of law for the procedure described by you; nor is there any provision authorizing the county auditor to stamp his warrants with a statement to the effect that they are issued subject to set-off or counterclaim for delinquent taxes. Obviously, therefore, whatever may be the implied rights and powers of the county treasurer, such a statement cannot enlarge them.

The general powers and duties of the county treasurer in collecting delinquent taxes are described by various sections, of which the first in numerical order is section 2656, General Code. This provides in part as follows:

> "When one-half of the taxes charged against any entry * * * is not paid on or before the twentieth day of December * * * or when the remainder of such tax is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect it by *distress or otherwise* together with the penalty of * * *"

Section 2658, General Code, gives the treasurer express authority to "distrain sufficient goods and chattels belonging to the person charged with such taxes" for the payment of taxes. This section certainly applies to the collection of delinquent personal taxes, whether it applies to the collection of taxes assessed upon real estate or not.

Section 2660, General Code, provides in part that,

> "If a county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, etc., shall apply to the clerk of the court of common pleas * * * at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, etc., requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court * * * shall enter a rule against him * * * which rule shall have the same force and effect as a judgment * * *."

Section 2665 of the General Code provides another method which the treasurer may pursue in the event that distraint is ineffectual. In effect it provides that the treasurer may in such case garnishee any property, moneys or credits due or coming due to the taxpayer. Procedure for this purpose is completely outlined in the section.

Section 2675 prescribes the duty of the county treasurer with respect to the payment of warrants drawn on him. It is in full as follows:

> "When a warrant drawn on him as treasurer by the auditor of the county is presented for payment, if there is money in the treasury or depository to the credit of the fund on which it is drawn, and the warrant is endorsed by the payee thereof, the county treasurer shall redeem it by payment of cash or by check on the depository, and shall stamp on the face of such warrant, 'redeemed,' and the date of redemption."

This duty is a ministerial one and performance of it may be enforced by mandamus. If the treasurer should refuse to pay the amount of a warrant to the holder thereof he might be sued in such a proceeding and would have therein no right of set-off on account of any claim for taxes which he might hold as collector of public revenue against the owner of the warrant. This is because a set-off cannot be pleaded and made available in an action in mandamus.

Viewing the question from this angle discloses what is obvious, viz.: that the capacity in which the treasurer acts as a collector of public revenue is quite different from that in which he acts in paying a warrant. His duty in the latter capacity is in no sense connected with or related to his power and duty in the former capacity.

It seems to me that the treasurer's substantive rights and powers in this instance can be best worked out through consideration of the remedial aspect of the case. I am of the opinion that, as a technical proposition of law, the treasurer has no right to withhold from one who presents a warrant to him (regardless, of course, of what may be unofficially stamped on its face) any sum of money on account of delinquent personal taxes due from such holder.

Practically, however, the question is not completely answered by this technical proposition. When personal taxes become delinquent it is the duty of the treasurer, under section 2656, supra, to collect them "by distress or otherwise," together with the penalty. Whether or not the word "otherwise" as here used enlarges the express authority of the county treasurer, contained in any of the sections above quoted, might be an interesting question. Before that question is raised, however, the meaning and application of the statutes pertaining to collection by distress may be considered.

Section 2658, above quoted, provides in effect that the treasurer may distrain "sufficient goods and chattels" to pay the taxes, and requires him, upon seizure of goods and chattels, to "immediately advertise * * * the time and the place it will

be sold." The question which arises here is as to whether or not money (assuming the payment to be made in money) is included within the term "goods and chattels." This question has never been directly passed upon in this state. The term itself is capable of a very wide variety of meanings, depending upon the context in which it is employed. It may be so restricted in meaning as to be the equivalent of wares and merchandise, or it may be so broad in its meaning as to include choses in action. It will not do, therefore, to cite authorities containing definitions of the term; but, having established the possibility of its including both moneys and checks (for I take it that if payment of a warrant were not made in cash it would be made by check on the depository), it remains, having regard to the inter-relation of taxing statutes, to ascertain the sense in which it is here used.

On the one hand, section 5671 provides in part that, "all personal property subject to taxation shall be liable to be seized and sold for taxes;" and sections 5325 and 5326, read together, exclude moneys from the meaning of the term "personal property" as used in the title relating to taxation. However, the sections found in the chapter relating to the duties of the county treasurer are not in that title, and the mere failure of section 5671 expressly to provide that moneys and credits shall be liable to be seized for taxes is not sufficient to establish the conclusion that they are not so liable.

In my opinion section 2658 must be construed in reference to the underlying theory of tax collections. Taxes on real estate are liens on the specific real estate taxed, and it is not the intention of section 2658, which relates to the collection of personal property taxes, to enlarge the remedy for the collection of real estate taxes by affording a direct personal execution upon the taxpayer himself and his personal property. It would seem reasonable to suppose, therefore, that section 2658 is intended to afford a remedy for the collection of personal taxes by distraint of all property which is not real. If this be true construction of the section, then, the term "goods and chattels" might be held to include moneys and the treasurer would be authorized to seize moneys found by him in the possession of a delinquent personal taxpayer for the satisfaction of the tax. If this were the case, then, while the treasurer would be obliged to pay the full sum of the warrant presented to him by a delinquent taxpayer he could, immediately upon delivering to him cash in payment thereof, seize enough of the money to satisfy the delinquent taxes and penalty.

This would not necessarily follow, however, if payment were made, as is usual, by means of a check on the depository of the county. In such event the procedure outlined in section 2665, General Code, might be appropriately followed. The first portion of this section provides for garnishee process which can be issued against the property, moneys or credits due or coming due to a delinquent personal taxpayer who has not sufficient property which the treasurer can find to distrain. The last sentence of the section, which I have heretofore quoted, provides as follows:

> "If the treasurer serves upon any person indebted to such taxpayer a notice, stating the amount of delinquent tax and penalty due, such debtor may, after the service of such notice, pay such tax and penalty to the treasurer, whose receipt therefor shall be a full discharge of so much of the indebtedness, as equals the tax and penalty so paid."

Under this section it would be possible for the treasurer, immediately upon honoring a warrant presented to him by a delinquent personal taxpayer, by the issuance of a check upon the county depository, to notify the depository in writing, as therein provided, if the treasurer were satisfied that the tax could not be made in any other way (and the discretion of the treasurer in this connection is undoubtedly broad). Then, it would be the duty of the depository to pay the check,

less the amount in the notice, which should be paid to the county treasurer in satisfaction of the delinquent tax and penalty.

It seems to me that by virtue of the statutes which I have quoted the treasurer might, in practice, take the money necessary for the satisfaction of the delinquent tax and penalty from the delinquent taxpayer to whom payment of a county warrant is due. The theory of the proceedings or proceedings necessary to accomplish this purpose seems somewhat involved and laborious. Possibly, however, in practice, more summary methods might be adopted. Thus, the treasurer, if he had an understanding with the depository, might arrange to stop payment on depository checks upon the giving of verbal notice, so as to afford time within which the written notice might be prepared and transmitted to the depository; or, the treasurer might assume that the term "goods and chattels" includes moneys, and, electing to pay the warrant in cash, immediately seize enough cash to satisfy the delinquent taxes and penalty, and thus place the burden upon the taxpayer to establish the illegality of the proceedings.

The whole question is far from clear, and the proceedings I have suggested are rather to be characterized as proceedings of convenience than to be positively recommended as regular in all particulars. It would be best, of course, to have the statutes amended so as to provide explicitly for the retention by the treasurer of the amount of delinquent taxes in cases like that submitted by you.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

291.

VILLAGE TREASURER MAY PAY BILLS ALLOWED BY BOARD OF PUBLIC AFFAIRS ONLY UPON WARRANT OR ORDER OF THE VILLAGE CLERK.

Since the enactment of sections 3960, 4285, 4286 and 3795, General Code, placing upon the village clerk the duty of keeping account of all receipts and expenditures of the board of public affairs and the amounts in each appropriation of the municipal corporation, it is now necessary that bills allowed by the board of trustees of public affairs must be paid through order of the village clerk upon the treasurer.

COLUMBUS, OHIO, May 22, 1913.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES, *Columbus, Ohio.*

GENTLEMEN:—Under date of February 20, 1913, you inquire as follows:

> "Should the village treasurer make payment of bills allowed by the board of public affairs upon orders signed by the members of said board and their secretary or clerk, or should such bills be paid upon allowance of said board of public affairs by issue of warrant or order by the village clerk, designating the appropriation against which such claim is chargeable?"

You call attention to the opinion of this department given to Hon. Earl D. Bloom, as solicitor of Bradner, Ohio, under date of October 5, 1911, and in effect ask a reconsideration of a conclusion therein reached. In that opinion it was held that it was not necessary for the clerk of the village to sign vouchers upon the treasurer of the village upon bills allowed by the board of public affairs.

That conclusion was based upon the decisions of State vs. Corzilius, 35 Ohio St. 69, and State vs. Griffin, 4 Cir. Ct. 156. These two decisions construed the law as contained in the municipal code of 1878, as set forth in 75 Ohio Laws, pages 160, et seq. The supreme court case was decided in 1878 and the circuit court case was decided in 1888.

The statutes under construction were the same in each case, and these provisions were substantially the same up to the time of the adoption of the municipal code of 1902.

The municipal code of 1902 made some radical changes in the methods of making appropriations and of drawing vouchers upon the treasurer of a municipal corporation. It materially increased the duties of the village clerk and of the city auditor in references to the receipts and expenditures of the corporation.

The municipal code of 1878, 75 Ohio Laws, 342, contained the two following sections which were afterwards placed in the Revised Statutes of 1880, as sections 2413 and 2414.

Section 2413, Revised Statutes, provided:

> "The trustees or board shall make monthly reports to the council of the receipts and disbursements of money belonging to the waterworks, and an annual report of the conditions of the same, which report the council may cause to be published in some newspaper of general circulation in the corporation; and all money collected for waterworks purposes shall be deposited weekly, by the collectors thereof, with the treasurer of the corporation, and one of the receipts therefor shall be by such collectors deposited with the trustees, board or authorized agent.

Section 2414, Revised Statutes, provided:

> "Money so deposited shall be kept as a separate and distinct fund, subject to the order of the trustees or board; and all orders drawn by the trustees or board, on the treasurer of the corporation, shall be signed by one of the trustees or board, and countersigned by the clerk of the waterworks, or of the board of public works."

These were the statutes that were construed in 35 Ohio St. 69 and 4 Cir. Ct. 156, supra. Section 2414, Revised Statutes, was the authority to the treasurer to pay out money upon a voucher signed by one of the trustees, or by the board, countersigned by the clerk of the waterworks.

The duties of the clerk of the municipal corporation, as set forth in sections 1755, et seq., Revised Statutes, and the duties of the auditor as set forth in sections 1765 and 1766, Revised Statutes (75 Ohio Laws 214, 215 and 216) did not require them to sign vouchers upon the treasurer. Neither of them were required to see that the appropriations were not overdrawn. These with other important duties were given to the clerk of the village and the auditor of the city by the municipal code of 1902. Some of the added duties will be referred to specifically when the present provisions of the General Code are quoted.

The duties of the clerk and auditor as prescribed in the municipal code of 1902 were materially different than those prescribed for officers of the same name in the municipal code of 1878.

The difficulty in the question under consideration arises from the provisions of section 4361, General Code, which refers to the trustees of the waterworks.

Said section reads:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith.

The office of trustee of waterworks has been abolished, and at present the director of public service performs the duties formerly devolving upon the trustees of the waterworks. This department has held that the words "trustees of waterworks," as contained in section 4361, General Code, must be read as "director of public service."

The provisions of sections 2413 and 2414, Revised Statutes, which authorized the treasurer to pay out money upon order of the trustees of the waterworks, when countersigned by their clerk, were not repealed by the municipal code of 1902, and became known as sections 1536-524 and 1536-525, Bates' Revised Statutes of 1904. These two sections were consolidated into one section by the codifying commission and materially changed. This section is known as 3960, General Code, and reads:

> "Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. *When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund.*"

The provision "when appropriated by council" is new.
The provision:

"Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

is different from that contained in section 1536-525 (2414) Revised Statutes, which reads:

"And all orders drawn by the trustees or board, on the treasurer of the corporation, shall be signed by one of the trustees or board, and countersigned by the clerk of the waterworks, or of the board of public works."

The provision that the clerk must countersign the orders has been omitted. This omission is fully explained when the duties of the clerk of a village and the auditor of a city are examined.

It will be observed that section 3960, General Code, does not authorize the payment of the money solely upon the authority of the director of public service, but makes his approval one of the requisites. Other requisites and approvals may be required.

Section 4283, General Code, provides:

"In the following provisions of this chapter, the word 'city' shall include 'village' and the word 'auditor' shall include 'clerk.' "

Section 4285, General Code, provides:

"The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

The duties prescribed in section 4285, General Code, were not prescribed for the clerk or auditor by the municipal code of 1878.

Section 4286, General Code, provides:

"On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. *The auditor shall countersign each receipt given by the treasurer before it is delivered to the person entitled to receive it, and shall charge the treasurer with the amount thereof.* If the auditor approves any voucher contrary to the provisions of this title, he and his sureties shall be individually liable for the amount thereof."

These duties were also not prescribed in the municipal code of 1878. It will be observed that the auditor is required to sign all receipts given by the treasurer. This is done in order that the auditor or clerk as the case may be, may keep an accurate account of all moneys received by the treasurer. This is one side of the account. There must be another side of the account, and that is the expenditures. If the clerk or auditor is to keep an account and is also required to see that no appropriations are overdrawn, he must also have an account of the expenditures.

Section 3795, General Code, provides:

> "The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. *Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council.*"

The last sentence of this section is a direct prohibition against the paying out of money from the treasury of the municipal corporation without the warrant of the auditor or clerk, "unless otherwise provided by law." This provision was not in the municipal code of 1878, as construed in 35 Ohio St. 69 and 4 Cir. Ct. 156, supra.

The provision of section 3960, General Code, that the director of public service shall sign all orders upon the waterworks fund does not authorize payment therefrom upon the signature of the director of public service alone. Sections 3795 and 3960, General Code, must be read together and vouchers upon the waterworks fund require the approval of both the auditor and the director of public service.

In view of the material changes in the statutes herein referred to the decisions of State vs. Corzilius, 35 Ohio St., 69, and State vs. Griffin, 4 circuit court, 156, supra, are not controlling of the question under consideration. They are not in any way a guide to a solution of the present inquiry.

The statutes contemplate that the clerk of the village and the auditor of a city shall have complete and accurate accounts of the receipts and expenditures of the municipal corporation and that they shall be a check upon the acts of their respective treasurers. In order to keep such accounts and to have such a check, the clerk or the auditor must know of all receipts and expenditures. Their knowledge of receipts is acquired by virtue of section 4286, General Code, which requires one or the other of them to sign all receipts given by the treasurer, and their knowledge of expenditures is secured by section 3795, General Code, which requires them to sign all vouchers.

I am, therefore, of the opinion that the clerk of a village is required to sign all vouchers for bills allowed by the board of public affairs and that the treasurer is not authorized to pay out money from the waterworks fund solely upon the order of the board of public affairs and its clerk or secretary.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

293.

TOWNSHIP DITCHES—NO PROVISION FOR ENFORCEMENT OF RECLEANING OF SECTIONS APPORTIONED BY TOWNSHIP DITCH SUPERVISOR—NO POWER TO RESTORE LOST RECORDS—TIME FOR RESPECTIVE NOTICES FOR DITCH PROCEEDINGS AND GRADING AND BRIDGE WORK.

The statutes providing for the cleaning of township ditches and for their apportionment into sections for this purpose, are useful only to the extent of accomplishing a general cleaning, after notice of apportionment. There being no provision for the enforcement of the duty to reclean such sections, the recleaning must be considered to be merely directory, and there is no power given to the township ditch supervisor to at any time reapportion such ditches, except in accordance with these statutes, providing for their division into sections for the purpose of a general cleaning as therein provided for.

The language of the statutes seems to convey the intent that the duties of recleaning and keeping ditches free from obstructions are to rest in the owners of the land in which the obstructions or a part of the ditch to be cleaned exists.

Where the bench marks or records of any sections so apportioned are lost, the statutes provide no power for their restoration so far as the procedure relating to cleaning of ditches is concerned.

The township trustees, however, under sections 6618 *to* 6643, *General Code, for the purpose of locating, establishing, deepening, widening or repairing a ditch, when the records, proceedings and papers pertaining to such ditch have been lost or destroyed, may reapportion and make a full record of the proceedings.*

Under sections 6618, 6622, 6625 *and* 6635, *General Code, when the trustees have apportioned parts of the ditches to be cleaned by owners and prescribed the time in which the work shall be completed, and the provisions have been complied with as to extension of time and as to stay of action upon their decisions, the trustees must sell unfinished work forthwith.*

Under section 2354, *General Code, no notice is required for grading or bridge work, involving less than* $200.00. *Under section* 2353, *General Code, fifteen days' notice is required for grading or bridge work between* $200.00 *and* $1,000.00. *Under section* 2352, *General Code, for grading or bridge work, involving more than* $1,000.00, *notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract.*

COLUMBUS, OHIO, February 4, 1913.

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

GENTLEMEN:—Under favor of January 8th, you wrote as follows:

> "We enclose herewith letter from Clyde Harveym surveyor of Medina county, and request that you render us your opinion as to the law upon the questions therein asked."

The letter referred to is, in part, as follows:

> "1. When the ditch supervisor of any township apportions off a ditch, either township or county, and sets stakes at the various points of divisions calling them sections does the same necessarily have to remain as apportioned and staked off until a new petition is given out, and the ditch

recleaned, deepened, widened or straightened under said petition before the changes of another division of sections is made by any such ditch supervisor; or can such ditch supervisor have the full power either by, or without the consent of the respective township trustees to change any apportionments made by him or his predecessors at any time that he deems it necessary, or when so ordered by the trustees?

"2. When any bench-marks of any ditch, whether county or township, are lost so that the apportionment of any such ditches in relation to the depth to be cleaned and the last grade as was laid out cannot be determined what is the necessary course to be taken by the trustees and supervisor of any such township? Please explain same in detail.

"3. What is the minimum length of time of giving notice either by poster, serving notices, or by publication of the following kinds of work:

"a. Time for hearing of ditch petition.

"b. Time for viewing ditch.

"c. Time for engineer's report of ditches.

"d. Time for sale of ditches.

"e. Time for giving notice for grading or bridge work under $200.00.

"f. Time for giving notice for grading or bridge work over $200.00 and under $1,000.00.

"g. Time for giving notice for grading or bridge work over $1,000.00."

Answering question number one: The statutes now providing for the cleaning of township, county and joint ditches are comprised within the chapter entitled, "cleaning and repair of drains and water courses," to wit: section 6691 to section 6726, General Code.

The following statutes are material to your inquiry:

"Section 6691. For the cleaning and keeping in repair of township, county and joint county ditches, the township ditch supervisor or supervisors of the township or townships through which such ditch runs, shall divide them into working sections and apportion such sections to the land owners, corporate roads, railroads, township and county according to the benefits received. Owners of land not contiguous to the ditch but the water from whose lands is carried into it by means of tile or by passing over the land of others, must assist in cleaning and keeping such ditch in repair, and all working sections allotted to each land owner shall be on or as near as practicable to his premises.

"Section 6693. When an established ditch or water course is located in two or more townships, the township ditch supervisors of the townships in which such improvement is located shall jointly make the apportionment provided for in the next two preceding sections.

"Section 6694. When the apportionment of a ditch provided for in the next three preceding sections is completed, the ditch supervisor, *within ten days thereafter* shall notify in writing each of the lot land owners, corporate roads, railroads, township and county, assessed thereon, of the portion assigned to them and of the date of the completion thereof.

"Section 6695. Each lot and owner, corporate road, railroad, township and county, *so notified, shall clean the portion or section* of the ditch or water course, as fixed by such apportionment, or if changed by the township trustees, as fixed by them, to its full depth and capacity as originally constructed, and *when necessary to reclean* such portion without further notice. The parties assessed, as provided in the next preceding section, shall mark the terminus of their respective working sections by planting a

substantial post or marker, on which shall be cut or painted the number of the sections."

then, follow a series of provisions for the review and possible change of the apportionment by the township trustees, and for an appeal by parties objecting to the apportionment to the township trustees or probate court.

Section 6706 then provides as follows:

"If a land owner, corporate road, railroad, township, or county *notified to clean the ditch or water course* under the provisions of this chapter, neglects or *refuses to comply therewith within thirty days,* the ditch supervisor, after giving ten days' notice by posting notices in three conspicuous places in said township, shall sell the work of cleaning said section or sections to the lowest responsible bidder, take a bond as provided in the next preceding section, and certify the cost thereof to the county auditor, as provided therein. The ditch supervisor shall certify the amount due the contractors, for the work done, to the township trustees, who shall order it paid out of the township fund."

It will be observed that section 6691 speaks of the *cleaning and keeping in repair* of township, county and joint county ditches, and section 6695 provides that when a land owner, corporate road, railroad, township and county are notified as provided by section 6694, of the apportionment, they shall clean the section apportioned to them respectively, and *when necessary reclean such portion without further notice.*

Under section 6706, when a person, notified to clean a ditch or water course, under the provisions of this chapter, neglects to comply therewith within thirty days, the ditch supervisor is required to sell the work of cleaning such ditch to the lowest bidder. This statute provides for the enforcement of the provisions for a *general cleaning* of a ditch within thirty days after the notice within ten days of the apportionment required by section 6694, General Code.

There are no provisions anywhere in this chapter, however, which I am able to find, after careful investigation, that in any way provide for the enforcement of the *duty to reclean when necessary,* the *sections* apportioned, as seems to be intended by section 6695, General Code, nor to keep in repair such sections as seems to be comprehended by section 6691, General Code. In short, while these statutes provide for the apportionment, into sections, of ditches for the purpose of cleaning them and in furtherance of this provision, require the land owners to clean the *section* apportioned to them within thirty days after notice is given to them of the apportionment, there are no provisions for notice to reclean at any subsequent time, the proportionate section allotted, under section 6691, General Code.

This distinction is made clearer by a review of the following statutes, which expressly provide in this chapter for the keeping of such ditches free from obstructions.

"Section 6710. A person or corporation, through whose lands a ditch improvement is constructed, must keep it free and clear of fallen timber, tree tops, logs or other obstructions upon his or its premises. Upon failure to do so, a person or corporation, aggrieved by such obstructions, may notify the ditch supervisor thereof, in writing, who must at once examine the premises and inquire into the truth of the statement. If he finds the statement to be true, he must forthwith notify *the owner of the land, on*

which such obstruction exists, to remove it within a reasonable time, not exceeding ten days.

"Section 6712. If the *owner or owners,* so found liable by the township trustees, fail to remove the obstructions, the ditch supervisor must forthwith cause them to be removed at the expense of the land owners *in proportion to the benefits received by them,* and certify such expense to the auditor, who shall place it upon the tax duplicate, as an assessment upon the lands of such person or corporation.

"Section 6715. The ditch supervisor may also enter upon improved or unimproved lands, drained by ditch improvements, for the purpose of cleaning or repairing a ditch, if he gives notice, written or printed, to *land owners* whose addresses are known, at least six weeks before, that he intends at such time to clean said ditch.

"Section 6717. The ditch supervisor shall go over said ditch improvement, at least once in the spring of each year, for determining upon actual view the condition of the ditch, and, on sight or information at any other time of year, shall remove, or cause to be removed, driftwood, fallen timber, rails, crossings, watergaps or other obstructions, which he finds in or upon the ditch, and which, in his opinion, does or may obstruct the free flow of water. Such removal shall be made by the supervisor, without notice to land owners, and if he finds that such obstructions were placed in or upon the ditch by the land owners upon whose lands they are found, they shall be removed by the supervisor at the expense of the *land owners.*

"Section 6719. The ditch supervisor shall keep a separate and accurate account with each land owner along the line of his ditch whose lands are taxed for such township ditch fund, and shall enter therein to each of them the sum expended by him in removing such obstructions. He shall present to each of said land owners a true account of the sums so expended and demand payment thereof, and if payment is not made within thirty days, he shall so report to the county auditor, who shall place such amounts upon the duplicate to be collected as other taxes."

It will be observed that under section 6710, General Code, a person or corporation, through whose lands a ditch improvement is constructed, must keep it free from fallen timber, tree tops, and logs, *upon his or its premises.* This section further requires a ditch supervisor to inspect for such obstruction, upon complaint of the person aggrieved, and requires him, upon ascertainment of the truth of of the complaint, *to notify the owner of the land upon which such obstruction exists* to remove it.

Under section 6712, General Code, if the land owner or owners, so found liable, fail to remove the obstructions, the ditch supervisor shall cause them to be removed at the expense of the *land owners in proportion to the benefits received.*

Under section 6715, General Code, the ditch supervisor may enter upon lands drained by ditch improvements and clean the same, after giving six weeks' notice to land owners.

Under section 6717, General Code, the ditch supervisor, once a year, is obliged to examine said ditch and remove obstructions on sight or information, and if he finds that such obstructions were placed in or upon the ditch by the land owners, *upon whose lands they are found,* he shall charge the expense of their removal to the land owners.

In none of these statutes is there any mention made of *section* apportioned, but the controlling idea seems to be, as will be readily conceived, by an observance of the language in these statutes which I have italicized, that the land owners are re-

sponsible, so far as keeping the ditches clean is concerned, for that portion of the ditch *which is upon their own premises.*

Answering your question directly, therefore, inasmuch as there is no provision made in this chapter for the enforcement of a duty to *keep clean sections* apportioned, under section 6691, General Code, and as furthermore, the statutes seem to present a well defined intention that land owners shall be responsible for the keeping clean of that portion of the ditch which is *on their own premises,* rather than for the sections apportioned to them, I am of the opinion that the apportionment is useful only to the extent of enforcing a general cleaning, when notice of the apportionment is given by the ditch supervisor within ten days after the apportionment is made, as provided by section 6694, General Code. In no other place in this chapter is mention made of such *apportionment* and no provision is made for recleaning or of the enforcement of the keeping clean of the *section so apportioned.*

The ditch supervisor is empowered, therefore, to make such apportionment only as provided by section 6691, General Code, and when such apportionment is made, all the procedures outlined by the statutes following must be observed. There is nothing in the statutes which gives him power to summarily change such apportionment, and in fact, no change can be made, except by compliance with the procedure set out.

Coming then to your second question as regards the chapter considered in answering your first question, the answer to the first question makes unnecessary the answer to your second question, for there is no need of maintaining such apportionment in view thereof.

Sections 6618, 6641 and 6643, General Code, of another chapter, however, are as follows:

> "Section 6618. The trustees, *in locating and establishing a ditch,* shall divide it into suitable sections, not less in number than the number of owners of the land through which it may be located. They shall apportion such sections equitably to the persons benefited, according to the benefits derived therefrom, prescribe the time within which the work shall be completed and by whom done, and order that each working section, beginning at the mouth of the ditch, shall be completed at least two days earlier than the section next above it. The day upon which the trustees conclude their proceedings on the petition shall be deemed the date of their decision thereon.
>
> "Section 6641. If a person fails or refuses to pay his apportionment of costs of *locating and establishing the ditch, or of the cleaning, deepening, widening or repairing thereof,* by the time specified by the trustees for the payment of such costs, the trustees shall certify it to the auditor of the county, giving a correct description of each piece of land upon which such cost is assessed, and the auditor shall place it on the tax duplicate to be collected as other state and county taxes are collected. The county treasurer shall pay such amount to the township treasurer as other township funds, specifying the purpose thereof, and the trustees shall pay it out in conformity with the record on the ditch journal.
>
> "Section 6643. Where the records, proceedings, or papers pertaining to a ditch under the provisions of this chapter, have been lost or destroyed, the trustees may reestablish the ditch on the original route, determine the depth, width and flare, divide it into suitable sections, apportion it as provided in this chapter, and make a full record of such proceedings. Such record shall be conclusive evidence of the original capacity and apportionment of of the ditch."

While section 6641, speaks of the *cleaning* of ditches by the township trustees, I am of the opinion that this reference has no longer any application; it formerly pointed to the powers of the township trustees to clean ditches prior to the passage of the act 94 O. L., page 144, which for the first time repealed these powers and instituted the procedure for apportionment by the ditch supervisor, substantially similar to that now provided for under section 6691, and following, as considered in the answer to your first question.

The township trustees, by the act of 95 O. L. 154, were again given certain powers to clean ditches when the act 94 O. L. was repealed. By the act of 98 O. L. 280, however, the jurisdiction of the township trustees was placed in the hands of the ditch supervisor and the plan set out in section 6691 and following again instituted. This change in the statute makes it clear that the procedure set out in section 6691 and following, is intended to be exclusive, and I am of the opinion that powers of township trustees as to the *cleaning* of ditches are only such as are included in this chapter.

Sections 6618 and 6643, General Code, therefore, providing for the apportionment of ditches and for the *restoration of lost records, proceedings or papers, apply only to proceedings in the location, establishment, alteration, repair, etc., of ditches as provided* by the chapter entitled "township trustees," to wit: section 6603 and following. These sections have no application to the procedure of cleaning ditches which is set out in section 6691 and following.

In direct answer to your second question, therefore, I am of the opinion that so far as the procedure of cleaning ditches is concerned, there is no provision for the restoration of lost bench-marks or other records, and that furthermore, the restoration of the same is altogether unnecessary, under the present state of the statutes relating thereto. So far as the restoration of such records may be desired for the purpose of deepening, widening, enlarging, boxing, tiling, etc., of a ditch, however, I am of the opinion that under section 6643, in compliance with the conditions therein stated, the township trustees may reestablish a ditch on the original route and make full record of such proceedings.

This conclusion is furthermore supported when it is noted that in the act of 94 O. L. 142, which for the first time placed upon the township ditch supervisor, the duty of making the apportionment for the purpose of constructing and cleaning ditches, provision was expressly made for the restoration of records which had been lost or destroyed, by requiring the township trustees to reapportion. The present act, however, contains no such provision, and the omission of the same implies that it was not intended to be provided for, or at least, that in the absence of specific provision, the power would not be anticipated.

In subdivision (a) of your third question you inquire as to the time of giving notice for hearing of a ditch petition. This notice is provided for in section 6607, General Code, which follows:

> "Upon the filing of such petition and bond, the township clerk *shall prepare the necessary number of notices for the petitioner, who shall cause one thereof to be given to the owner of each tract of land* sought to be affected by the proceeding. Such notice shall state substantially the prayer of the petition, and when and where it will be for hearing by the trustees. If a person, owning lands sought to be affected by the proceeding, is a non-resident of the county, like notice shall be sent by mail, if such residence is known by the clerk, otherwise it shall be published for two consecutive weeks in a newspaper of general circulation in the county."

It is well established that when a statute requires notice to be given, but does not specify the length of time, it will be construed to mean a reasonable time.

(29 Cyc. 118). This rule will have to be applied in construing section 6607, above quoted. It must be noted, however, that if a person owning land sought to be affected by the proceeding, is a non-resident of the county, such notice must be published for two consecutive weeks in a newspaper of the county. Where such non-resident exists, therefore, the statute will have to be observed. As to residents of a county, however, reasonable notice can only be construed to mean such time as will give the property holders affected a fair opportunity to be present at the time of the hearing of the petition.

In subdivision (b) of your third question, you inquire as to the time for viewing a ditch. This matter is covered by section 6612, General Code, as follows:

> *"If the trustees find that the bond has been filed and notice given as provided in this chapter, they shall proceed to hear and determine the petition and view the premises along the proposed route.* If they find such ditch is necessary, and that it will be conducive to the public health, convenience or general welfare, they shall locate and establish it in substantial conformity with the route described in the petition, or as near thereto as, in their opinion, will best answer the purpose. *The trustees may employ an engineer to locate, level and measure the course of such ditch, and such other assistance as they need, and may adjourn from day to day to complete their report and finding.* When their finding is in favor of such ditch, and their report is filed with the township clerk, they shall fix a day of hearing within ten days thereafter at the clerk's office in said township, and then and there determine the complaints of any persons affected by reason of the location and construction of said ditch."

Here, as in the former statute, no specific time is established by the statute. They are subject to no specific limitations in this respect, therefore, and the best that can be said is that the time for viewing a ditch shall be as close as possible to the time set for hearing the petition. In this connection, the trustees in the performance of such duty, can be charged with no further limitation than the requirement that they exercise the due precaution and diligence incumbent upon them in the performance of their general duties.

In subdivision (c) you inquire as to the time for engineer's report of the ditches. Here also no specific time is fixed and the same rule must apply; the trustees and engineer being charged with the duty of exercising reasonable dispatch and diligence in the completion of their report and finding.

In subdivision (d) you inquire as to the time for sale of ditches. With reference, thereto, section 6635, General Code is as follows:

> "As soon as an appeal is perfected from the decision of the township trustees, further proceedings before them on the petition shall be stayed. If no appeal is taken, the trustees, upon the expiration of the time specified by them for the opening of the ditch, *shall forthwith inspect it, and if a section or part thereof has not been completed, they shall accept a bond with sufficient surety from the person having such unfinished work to perform, conditioned for the faithful completion of such work within the time they specify therein. If* such person fails or refuses to give bond for the completion of the work the trustees *shall forthwith sell the unfinished work by sections to the lowest bidders, by posting notices of the sale in a least three of the most public places in the township, for at least ten days before the day of sale,* specifying the time when the work

shall be completed. The trustees shall take such bond or other security for the performance of the work as they deem proper."

Under section 6618, General Code, the trustees are obliged to apportion equitably to the persons benefited and prescribe the time in which the work shall be completed and by whom done.

Under section 6622, General Code, at the expiration of the time specified for the completion of such work, the trustees, if they deem it necessary and proper, may extend the time for the completion thereof, to a time not exceeding four months from the time previously specified.

Section 6625, General Code, and following, provide for appeal to the probate court, which proceedings, in accordance with said section 6635, operate to stay any further action on the petition.

Section 6635, General Code, above quoted, provides that at the expiration of the time specified by the trustees for the completion of the work, they shall forthwith inspect it and, if upon such inspection, they find the work uncompleted, they may grant a further extension of time, providing the person who should have completed the same files a bond conditioned for the faithful performance of the work within the time so allowed by the trustees. The section further provides that if the person fails to give such bond, the trustees *shall forthwith sell the unfinished work by sections to the lowest bidder, by posting notices of the same for at least ten days before the day of sale.* This, I think, answers subdivision (d).

Under subdivision (e) you inquire as to the time for giving notice for grading or bridge work under $200.00. The answer to this question is comprised within the terms of section 2354, General Code, which is as follows:

"When the estimated cost of a public building, bridge or bridge substructure or of making an addition thereto or repair thereof does not exceed two hundred dollars, it may be let at private contract *without publication or notice.*"

In accordance therewith, such grading of bridge work may be contracted for without any notice whatever.

Under subdivision (f) you inquire as to the time for giving notices for grading or bridge work over $200.00 and under $1,000.00. The answer thereto is covered by section 2353, General Code:

"When the estimated cost of a public building, bridge or bridge substructure or of making an addition to or repair thereof does not exceed one thousand dollars, it shall be let as heretofore provided, but *notice of the letting need be given for only fifteen days, by posting on a bulletin board or by writing on a blackboard in a conspicuous place in the county commissioners' or auditor's office, showing the nature of the letting and when and where proposals in writing will be received.* Plans or specifications, or both as hereinbefore provided shall be kept on file during the fifteen days and open to public inspection."

In accordance therewith, the notice required for this work is the fifteen days as prescribed by this statute.

Under subdivision (g) you inquire as to the time of giving notice for grading or bridge work over $1,000.00. Sections 2344 and 2352, General Code, are as follows:

"When it becomes necessary to erect a bridge, the county commis-

sioners shall determine the length and width of the superstructure whether it shall be single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. In their discretion, the commissioners may cause to be prepared, plans, descriptions and specifications, for such superstructure, *which shall be kept on file in the auditor's office for inspection by bidders and persons interested, and invite bids or proposals in accordance therewith.*

"Section 2352. When plans, drawing, representations, bill of material, specifications and estimates *are so made and approved, the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein,* of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the *erection of such building, bridge or bridge substructure, or addition to or alteration thereof, and a contract based on such proposals will be awarded.* If there is only one paper published in the county, it shall be published in such paper. *The notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract, and state when and where such plan or plans, descriptions, bills and specifications can be seen.* They shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract."

In accordance with section 2352, General Code, *notice for such work shall be published weekly for four consecutive weeks next preceding the day named for making the contract.*

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

305.

WOMAN MAY BE APPOINTED DEPUTY COUNTY AUDITOR, DEPUTY COUNTY TREASURER, DEPUTY COUNTY RECORDER, DEPUTY CLERK OF PROBATE COURT OR DEPUTY OF COMMON PLEAS COURT.

Inasmuch as a deputy is not to be considered a public officer in the absence of special provisions or the existence of special powers, a woman is not prohibited by the constitution or statutes of this state from being appointed to serve in the position of deputy county auditor, deputy county treasurer, deputy county recorder, deputy clerk of probate court or deputy of the common pleas court.

COLUMBUS, OHIO, May 22, 1913.

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

GENTLEMEN:—In your favor of May 17th, you inquire as follows:

"Please render us your written opinion as to whether or not a woman may legally be appointed and serve as deputy county auditor, deputy county treasurer, deputy county recorder, deputy clerk of probate court, or deputy of the common pleas court."

Article 15, section 4 and article 5, section 1, of the constitution provides as follows:

> "No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."
>
> "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections."

The question presented, therefore, in view of these constitutional provisions, is whether or not the positions mentioned by you constitute such an office as is contemplated by article 15, section 4, providing that none other than an elector shall be appointed or elected thereto.

The following appears in volume 9, page 369 of the American and English Encyclopaedia of Law:

> "It has been held that a special deputy is in no sense a public officer, but merely the private agent or officer of the principal.
>
> "And it has been held that in the common law even a general deputy is not a public officer where he is not appointed by the public nor by virtue of any special public authority, and does not give bond or take the oath of office, but his appointment is made by the principal by virtue of the general legal power in all ministerial officers of deputing their powers. But in several jurisdictions certain classes of general deputies have been recognized as officers by statute."

The rule in Ohio is set forth on page 214, vol. 2 of the Encyclopaedia Digest of Ohio Reports and I beg to quote the following statements therefrom, which are supported by numerous authorities therein cited.

> "A mere deputy or assistant is not a public officer.
>
> "One who performs no duties except such as by law are charged upon his superior, does not hold an office but merely an employment."

I may also refer to the 1911 supplement of this work, page 343, wherein it is said that:

> "A deputy assistant and other employes of a public officer are not officers within the meaning of the constitution."

These authorities seem to well establish the fact that in the absence of contrary provisions of statute, a deputy is not a public officer.

Referring to the several statutes which provide for the positions referred to by you, and taking them up in order, permit me to cite, first, the general statute which provides for the appointment of all of them in connection with the county salary law. This is as follows

> "Section 2981. Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amounts fixed by the com-

missioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

With reference to the deputy county auditor, the following is provided:

"Section 2563. The county auditor may appoint one or more deputies to aid him in the performance of his duties, The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy, he shall record such removal in his office, and file a certificate thereof with the county treasurer, who shall record and preserve it."

With reference to the deputy county treasurer, the following is provided:

"Section 2657. Each county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office."

With reference to a deputy county recorder:

"Section 2754. The county recorder may appoint a deputy approved by the court of common pleas. The appointment shall be in writing and filed with the clerk of such court. The recorder shall be responsible for his deputy's neglect of duty or misconduct in office. Before entering upon the discharge of his duties, the deputy shall take an oath of office."

With reference to the deputy county clerk:

"Section 1584. Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment."

In reference to the deputy clerk of common pleas:

"Section 2871. The clerk may appoint one or more deputies to be approved by the court of common pleas if in session, or by one of the judges thereof, if not in session. Such appointment shall be by certificate, signed by the clerk, which, with the approval of the court or judge, shall be entered on the journal."

In none of these statutes is it expressly provided, as is the case with section 3830 of the General Code, providing for a deputy sheriff, that such positions must be filled by a qualified elector, and therefore in view of the authorities above quoted,

I am of the opinion that a woman may be legally appointed to and may serve in any of the capacities mentioned by you.

I might further refer to the case of Warwick vs. State 25 O. S. page 21, wherein it was expressly held that a woman might serve as deputy clerk of the probate court, and also to the case of State vs. Myers, 56 O. S., wherein on page 348 appears the dictum of the court to the effect that a deputy county treasurer is in no sense a public officer.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

308.

OFFICES COMPATIBLE—MAYOR AND JUSTICE OF THE PEACE.

COLUMBUS, OHIO, June 5, 1913.

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

GENTLEMEN:—Under favor of May 31st, you inquire as follows:

> "If a justice of the peace is an elector of a village situated within the township in which he is serving as justice of the peace, may he also serve the village as its mayor?
>
> "Can he legally hold these two elective offices at the same time?
>
> "If he cannot legally hold both of said positions and the mayor persistently refuses to recognize a petition of at least two-thirds of the resident taxpayers, what action may be taken by the residents of the village to enforce the law?"

A careful investigation of the statutes has enabled me to find nothing therein providing any duties as to either of these offices which would in any way compel the incumbent of one to supervise or act as a check upon the other. Nor have I been able to find any such conflicting duties attached to these offices as would cause the holding of both by one individual to contravene public policy.

I am, therefore, of the opinion that if, in the present case, the duties of neither of these offices are so numerous as to make it impossible to faithfully discharge the obligations of both at the same time, they may be held simultaneously by one individual.

Since I conclude that both of said positions may be held at the same time an answer to your second inquiry would seem to be unnecessary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

311.

DUTY OF COUNCIL TO FURNISH JUSTICE OF THE PEACE WITH CIVIL DOCKET WHEN LIMITS OF TOWNSHIP AND MUNICIPALITY BECOME IDENTICAL—RIGHT OF JUSTICE TO RETAIN MONEYS FROM FINES FOR CRIMINAL DOCKET—DESK AND STATIONERY.

Under section 1724, *General Code, providing that township trustees shall provide a docket for justices of the peace, and under section* 3512, *General Code, providing that the corresponding officers of a municipality shall perform the duties formerly resting upon the officers of the township, when the municipal township lines become identical, council for such municipality succeeds to the duties of township trustees to furnish a civil docket for justices.*

Under section 1742, *General Code, a justice of the peace in such municipality, whose office and compensation have not been provided for by council, may retain out of fines or other county moneys coming into his hands in criminal proceedings, the amount paid for a criminal docket and such necessary papers, and a desk if the same has not been provided for by his predecessor.*

COLUMBUS, OHIO, May 27, 1913.

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

GENTLEMEN:—Under date of May 8th you request my opinion as follows:

> "In cities wherein the township offices have been abolished by reason of the fact that the lines of the municipal corporation are co-extensive with the lines of the township and the council of the city has not legislated upon the compensation or disposition of fees or maintenance of offices of justices of the peace, may the funds of said city be legally expended in providing offices, law books, civil dockets or blanks (to the extent of more than $5.00 per year) for the justices of the peace of said township, or should such expense or any item thereof be borne by the justice who retains for his own use all the fees accruing to the office?"

On April 19, 1913, I rendered an opinion to Hon. R. Clint Cole, city solicitor of Findlay, Ohio, copy of which I am enclosing herewith, and wherein I held that under section 3512, General Code, when the corporate limits of a city or village become identical with those of a township, all township offices are abolished except those of justices of the peace and constables; and that the duties formerly performed by the holder of the offices abolished become incumbent upon the corresponding officers of the city or village.

Upon this reasoning I further held that the duty formerly devolving upon the township trustees under section 1724, General Code, to provide a civil docket for a justice of the peace, was transferred to the council of the municipality when the limits of the same became identical with those of the township. The mere fact that council had failed to legislate upon the compensation or disposition of fees, or the maintenance of the office of the justice of the peace, does not, in my opinion, in any way operate to interfere with this duty of council to furnish his docket.

I find no further authorities in the Code making it necessary for the council to supply the justice with anything more than a civil docket, in the absence of legislation passed by council upon this subject, under section 3512, General Code.

I must therefore conclude that in the present case the council is obliged to

furnish a justice with a civil docket, but is not empowered to furnish him with any further supplies.

In conection with your further inquiry, as to whether the expense of any of the items enumerated should be borne by the justice, who retains for his own use all the fees accruing to the officer, permit me to cite section 1742, General Code, which provides as follows:

> "A justice of the peace may retain out of fines or other moneys belonging to the county coming into his hands in criminal proceedings, the amount paid for a criminal docket, and each justice of the peace, except those receiving a salary, may retain out of such fines or other moneys an amount not exceeding twenty dollars for a suitable desk in which to keep the docket, files, papers, books and documents of his office, which desk shall be the property of the county and shall be turned over by each justice of the peace to his successor. Such justice may expend of such fines and other moneys not exceeding five dollars per annum, for necessary paper, blanks and other stationery for his office, but a justice shall not purchase such desk if he has received a suitable desk from his predecessor. A justice of the peace paying out money for such purposes shall file with the county auditor, at the expiration of his term of office, a sworn itemized statement thereof. In making the annual statement to the auditor as required by law, a justice of the peace, having made such expenditures or having moneys in his hands contemplated for such purposes, shall include therein the moneys so paid or held by him."

Except, therefore, with reference to the civil docket provided by the council, and as is specifically provided in this statute with reference to moneys to be retained from fines for the purchase of a criminal docket and a desk, when the same has not been purchased by a predecessor, and the necessary paper, blanks and other stationery for his office, the justice in the situation presented by you must pay his expenses from his own funds.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

314.

SHERIFF WHO POSSESSES A PASS NOT ENTITLED TO ALLOWANCE FOR RAILROAD FARE—ALLOWANCE TO SHERIFF OF EXPENSES INCURRED IN PURSUING FELON OUTSIDE OF OHIO—"FLED THE COUNTRY."

Under the terms of section 2997, General Code, a sheriff is entitled to only his necessary expenses incurred and expended, and since when a sheriff possesses a pass, railroad fare is not a necessary expense, and the same may not be allowed to him by the county commissioners.

Under section 2997, a sheriff may be allowed actual and necessary expenses incurred by him in pursuing a fugitive criminal for the purpose of putting in motion the machinery for extradition procedure or for the purpose of receiving a criminal not a fugitive surrendered up by authorities of another state.

The term "fled the country" in section 3015, General Code, must be interpreted to mean "fled the state," and under this statute, a sheriff may also be allowed expenses incurred in pursuing a criminal outside of this state.

COLUMBUS, OHIO, May 20, 1913.

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

GENTLEMEN:—Under date of May 7th you request my opinion as follows:

"1. A sheriff by reason of being a railroad policeman commissioned by the governor, is provided with passes for the steam and electric roads of his county. Is he entitled to charge and collect from the county railroad fare under Sec. 2997 in cases in which he uses a pass?

"2. May a sheriff, under section 2997, charge and collect from the county expenses incurred while pursuing outside of this state a person accused of crime or offense?

"3. Under section 3015, may a sheriff be paid from the county treasury expenses incurred outside of the state of Ohio in the pursuit of a person charged with a felony?

"4. What interpretation should be given to the words "fled the country?"

Section 2997, General Code, provides as follows:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and *necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses,* in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing

witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

Section 3015, General Code, provides as follows:

"The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

Answering your questions in order, under section 2997 the sheriff is allowed by the county commissioners for his *actual and necessary expenses,* under the circumstances therein contemplated; and, inasmuch as when he is provided with a railroad pass it is not necessary for him to pay railroad fare, I am of the opinion, in answer to your first question, that the county commissioners may not allow him such expense when he has a pass.

Answering your second question, it is a well settled principle of law that a sheriff or other police officer is not authorized to make an arrest without this state. The warrant issued by the court is, as a general rule, available for the purpose of making an arrest only within the jurisdiction of the court issuing the same. In this state, however, the statutes permit a sheriff armed with a warrant to arrest in any county of the state. Sections 13502, 13597 and 13718, General Code; 2 American and English Encyc. 862; 3 Cyc. 890; Smith vs. Commissioners, 9 Ohio, 26.

In answering your second question, therefore, it is necessary to bear in mind that a sheriff is not authorized to pursue a criminal outside this state for the purpose of making an arrest. There are certain circumstances, however, under which a sheriff may be legitimately engaged in pursuing a criminal outside of this state.

When extradition procedure is instituted for the purpose of procuring a fugitive criminal from this state, it is necessary that someone file an affidavit before the court of the other state, in order that he may be held therein until such time as the proper machinery for executive demand for such criminal may be put in motion. Or, if the criminal in another state be not technically a fugitive from justice, the laws of that state may permit his surrender to an officer of this state without extradition procedure. 19 Cyc. page 85; State vs. Hall, 28 L. R. A. 289.

Under such circumstances, therefore, when a sheriff is properly engaged in either pursuing a fugitive or following up a criminal for the purpose of taking the preliminary steps necessary in another state for apprehension, I am of the opinion that under section 2997, General Code, the county commissioners should allow his actual and necessary expenses so incurred. The duty is most assuredly a necessary one, and one readily contemplated by the nature of his office.

Answering your third and fourth questions together, the interpretation requested by you for the term "fled the country" is necessary for a proper understanding of section 3015. The term "country" is defined in 7 Am. & Eng. Encyc. of law, page 972, as follows:

"The term 'country' in its primary meaning signifies place, and, in a larger sense, the territory or dominions occupied by a community, or even waste and unpeopled sections or regions of the earth; but its metaphorical meaning is no less definite and well understood; and in common parlance,

in historical and geographical writings, in diplomacy, legislation, treaties and international codes, not to refer to sacred writ, the term 'country' is employed to denote the population, the nation, the state, the government, having possession and dominion over the country. The word 'country,' in the revenue laws of the United States, has always been construed to embrace all the possessions of a foreign state, however, widely separated, which are subject to the same supreme executive and legislative control.

"A state, however, may with propriety be called a country; *and in certain cases, when the legislature uses the expression 'the country,' it is natural to suppose that they mean the country for which they are legislating.*

"The word is used also to signify a jury, as in the expressions, 'trial by the country,' 'conclusion to the country,' 'puts himself upon the country,' etc."

and in 11 Cyc. page 616, it is said:

"In extradition proceedings, under an international convention, the term has been defined as the special political jurisdiction that has cognizance of the crime."

Since throughout the statutes ample provision is made for the payment of expenses of any officer incurred in performing the duties of pursuing and transporting criminals within this state, I am of the opinion that the term 'fled the country,' in section 3215, General Code, is intended to extend the allowance of expenses to those necessarily incurred in pursuit made outside of the state, by either a detective of the prosecuting attorney or a sheriff.

I therefore hold that the term 'country' in this section is intended to mean 'state,' and conclude that when a sheriff is engaged in pursuing outside of this state a person charged with a felony, for the purpose of taking the necessary preliminary steps for the institution of extradition proceedings, or for the purpose of receiving a criminal surrendered up in another state, who is not such a fugitive as to come within the requirement of the extradition provision in the United States constitution, he may be allowed, under section 3015, General Code, his actual and necessary traveling expenses.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

350.

CITY BOARD OF HEALTH GIVEN CONTROL AND MANAGEMENT OF PEST HOUSES OR DETENTION HOSPITALS IN CITY.

Although section 4370, *General Code, gives the director of public safety the power to manage and make all contracts in reference to pest houses in cities, nevertheless this provision when viewed in the light of sections* 4452 *and following of the General Code, must be considered a general provision to which the latter statutes are special and exceptional. Under these latter statutes, the control and management of pest houses and detention hospitals is vested in the board of health of a city.*

COLUMBUS, OHIO, June 30, 1913.

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

GENTLEMEN:—In your letter of June 13, 1913, you say:

> "We respectfully request your written opinion upon the following question:
> "What, if any, powers over the management and control of the pest houses or detention hospitals may be exercised by a city board of health?"

Your question probably arose on account of an apparent conflict in the language found in section 4370, G. C., relating to the duties and powers of the director of public safety, and that found in section 4454, G. C., applying to boards of health and quarantine hospitals.

Section 4370 reads as follows:

> "The director of public safety shall manage, and make all contracts in reference to the police station, fire houses, reform schools, houses of correction, infirmaries, hospitals, workhouses, farms, *pest houses,* and all other charitable and reformatory institutions. *In the control and supervision of such institutions, the director shall be governed by the provisions of this title relating to such institutions."*

The title referred to is title 12 of the General Code. This is a *general section,* covering quite a number of subjects; and if there were no other statute on any subject contained therein, the director of public safety would have the management of all of the institutions, including pest houses.

But further along, in the *same title,* under the head of "board of health," subdivision—"quarantine hospitals," section 4452, G. C., provides as follows:

> "The council of a municipality may purchase land within or without its boundaries and erect thereon suitable hospital buildings for the isolation, care and treatment of persons suffering from dangerous contagious disease, and providing for the maintenance thereof. The plans and specifications for such buildings shall be approved by the board of health."

It will be noticed that "the plans and specifications for such buildings shall be approved by the board of health;" so that, in the very incipiency of all this class of structures, the board of health assumes supervisory control and direction.

Section 4454, G. C., then provides:

"Such buildings shall be under the care and control of the board of health. The board shall appoint all employes or other persons necessary to the use, care and maintenance thereof and regulate the entrance of patients thereto and their care and treatment."

Section 4456 then says:

"A municipality may establish a quarantine hospital within or without its limits. If without its limits, the consent of the municipality or township shall be first obtained, but such consent shall not be necessary if the hospital is more than eight hundred feet from any occupied house or public highway. When great emergency exists, the board of health may seize, occupy and temporarily use for a quarantine hospital, a suitable vacant house or building within its jurisdiction. *The board of health of a municipality, having a quarantine hospital, shall have exclusive control thereof."*

Section 4457 provides for temporary buildings, along this line and for the employment by the board of health of all necessary physicians, police, etc., to operate them. The words "pest houses" are fairly a part of, and interchangeable with ordinary quarantine arrangements of any description, temporary or permanent; and any such places for the detention of persons who are dangerous, or a menace to the public health, by virtue of contagious or dangerous diseases fall fairly within the jurisdiction of boards of health. This is the doctrine laid down in Judge Hohler's opinion, in the case of Rillings vs. Lorain, 13 Ohio Decisions, page 87, et seq.

All the sections, above quoted, are part of the same title of the statutes. They relate to the public health and the organization of cities and villages as a matter of public good and should be construed rationally together in *pari materia.*

In view of the provisions of all the statutes above quoted, I am of the opinion that boards of health in cities, have, by virtue thereof, control of the institutions named by you.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

367.

POLICEMEN AND FIREMEN—ANNUAL COMPENSATION—WORKING OVERTIME—HEALTH OFFICER MAY BE SPECIAL AGENT FOR VACCINATIONS.

The annual compensation fixed by council for policemen and firemen, unless otherwise provided by ordinance, is to cover all their services as such policemen or firemen, and they cannot draw pay for overtime. If any have been paid overtime, such payments are illegal and may be recovered.

The health officer of a city may be appointed as special agent for vaccinations, under section 4449, General Code, and he may draw the compensation fixed for each position.

COLUMBUS, OHIO, July 8, 1913.

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

GENTLEMEN:—Under date of April 7, 1913, you inquire as follows:

> "First. May policemen employed regularly by a city at an annual salary fixed by council be legally paid, in addition to said salary, for overtime; the rules of the department of public safety specifying the number of hours per day said policemen shall serve regularly? Can the amount paid for overtime be recovered?
>
> "Second: May firemen employed regularly by a city and annual salary fixed by council be legally paid, in addition to said salary, for overtime when held for duty on regular day off, provided for in the rules of the department of public safety?
>
> "Third. May a health officer who is also a practicing physician legally be paid for vaccinations from the city treasury in addition to his compensation as health officer fixed by council?"

The policemen and firement receive an annual salary which is usually payable in monthly installments. I assume that the salary ordinance says nothing about receiving pay for overtime. These officers are not paid by the day or hour as are common laborers. Their salary is full compensation for all services performed in the line of their duty.

Section 4382, General Code, provides:

> "The director of public safety shall classify the services in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments, except as otherwise provided in this subdivision."

Section 4393, General Code, provides:

> "The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and

organization of fire engine and hose companies, *establish the hours of labor of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any fireman to be on duty continuously more than six days in every seven,* and provide such by-laws and regulations for their government as is deemed necessary and proper."

It is proper that rules and regulations be made to fix the time of service of policemen and firemen. In the case of firemen they must not be required to work continuously for a longer period than that provided in section 4393, General Code.

The fact that a regular time of service is fixed for these positions does not mean that the occupants may not be required to be on duty at other times. They may be required to be on duty on other than their regular time. Their annual salary would cover this service.

The decisions in other states are not controlling, as charters are different, but such decisions may be a guide.

In Tyrrell vs. Mayor, etc., 159 N. Y. 239, it is held:

"A public officer who receives an annual salary for his services, cannot recover extra compensation for services rendered on Sunday, unless some statute allows it."

The position in that case was that of section foreman with an annual salary of $1,000.00.

In Lemoine vs. City of St. Louis, 120 M. 419, it is held:

"The principal deputy recorder of voters of the city of St. Louis, appointed by the recorder of voters at a fixed annual salary (Laws 1883, p. 38), is not entitled to extra pay for work for time over seven hours a day allowed to the clerks and deputies paid by the day."

The annual compensation fixed by council for policemen and firemen, unless otherwise provided in the ordinance, is to cover all their services as such policemen or firemen and they cannot draw pay for overtime. If payments have been made for overtime such payments are illegal and may be recovered.

Your next inquiry is as to a health officer drawing additional compensation for vaccinations.

Section 4404, General Code, provides:

"The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

Section 4408, General Code, provides:

"The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

Your inquiry is in reference to the health officer of a city. He is not, therefore, acting instead of a board of health as he may be doing in villages.

It does not appear in what capacity the health officer acted when making the vaccinations. By virtue of section 4408, General Code, the board of health may appoint a health officer, and also ward or district physicians.

Section 4410, General Code, provides:

"Each ward or district physician shall care for the sick poor and each person quarantined in his ward or district when such person is unable to pay for medical attendance, and for all persons sent from his ward or district to the municipal pest house when such persons are unable to pay for medical attendance."

Section 4412, General Code, provides:

"The board shall have exclusive control of its appointees, define their duties and fix their salaries, *but no member of the board of health shall be appointed as health officer nor shall a member of the board of health not the health officer be appointed as one of the ward physicians.* The board may suspend, but not remove, any member of the sanitary police now serving or hereafter appointed for cause authorizing the dismissal of any person in the classified service, and shall certify such fact together with the cause of such suspension, to the civil service commission, who, within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon and such judgment in the matter shall be final."

It appears by section 4410, General Code, that the district or ward physician is to care for the sick who are unable to pay for medical attendance. This duty is not a statutory duty of the health officer.

Section 4412 impliedly permits the health officer to also act as a ward physician when it provides that no member of the board of health "not the health officer" shall be appointed as one of the ward physicians.

The two positions are under the direction of the board of health and the duties of each are not inconsistent or conflicting.

The health officer of a city may also be a ward or district physician and draw the compensation of each position. If the health officer in question has been legally appointed as a ward or district physician he may draw pay as such health officer and also as a ward physician.

There is a special statute in reference to vaccinations.

Section 4449, General Code, provides:

"The board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination."

This section would authorize the board of health to appoint special agents for

vaccinations and by virtue of section 4412, General Code, supra, could fix the compensation of such special agents.

Making vaccinations are not a part of the duty of the health officer. The duties of such special agent for vaccinations are not inconsistent with the duties of a health officer.

The vaccinations would not when made by virtue of section 4449, General Code, necessarily be a part of the duties of the ward or district physician.

A health officer of a city may be appointed as special agent for vaccinations under section 4449, General Code, and draw the compensation fixed for each position.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

371.

REGISTRATION CITIES—ELECTION EQUIPMENT—EXPENSES IN CONNECTION WITH ELECTION EQUIPMENT.

Registration cities and not the counties in which said cities are located must furnish election equipments, such as voting booths, shelves and other furnishings and supplies, which are of a permanent nature, and they must pay all the expense in connection therewith, such as the delivering and setting up of the same.

COLUMBUS, OHIO, May 24, 1913.

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

GENTLEMEN:—Your letter of April 12, 1913, is received, in which you inquire:

> "The city of Hamilton is a registration city. Should the city of Hamilton or Butler county pay for the storage of the election equipment in the city of Hamilton and the delivery and setting up of the same in the several election precincts of the city of Hamilton? We call your attention to schedule D and schedule E, paragraph 5-a in said opinion."

The opinion referred to is the one given to your department under date of July 12, 1912, in reference to the division of election expenses.

Schedule D, to which you call attention is headed:

> "Expenses to be paid by registration cities.
> "Direct in both even and odd numbered years."

One of the items in said schedue to be paid by the city is:

> "Rent of voting places for registration and elections in such city. Held to include the cost of portable voting houses or any expenditure for the general maintenance or upkeep thereof such as repairs, cleaning, hauling, erecting, watching, displaying of signals, lots for storage.
> "Chairs, tables, fuel, lights for voting places in city."

Schedule E, to which you call attention, is headed:

"Expenses to be paid by county in even numbered years—Not charged back.

"Expenses to be paid by county in odd numbered years—Charged back."

Paragraph 5-a of said schedule E, reads:

"Other proper and necessary expenses of any general or special election.

"a. This is held to include expenses incurred in setting up and returning voting equipment under section 5046, General Code."

Section 5046, General Code, provides:

"After each election, the judges of elections of each precinct shall see that the booths, guard rails and other equipments are returned to the clerk of the township, or clerk or auditor of the corporation, in which the precinct is situated, for safekeeping. Such clerk or auditor shall have such booths and equipment on hand and in place at the polling place in each precinct, before the time for opening the polls on election day, and for this service the board of deputy state supervisors may allow the necessary expenses incurred. In registration cities, this duty shall devolve on the board of deputy state supervisors."

This section does not determine whether this expense shall be paid by the county or by the registration city when the precincts are located in a registration city.

Section 4946, General Code, provides:

"The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of the deputy clerk and his assistants and all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, *and the cost of the rent, furnishings and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city, shall be paid by such city from its general fund.* Such expense shall be paid by the treasurer of such city upon vouchers of the board, certified by its chief deputy and clerk and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

In construing this section in the opinion given to your department under date of February 27, 1912, it was held:

"In registration cities the expenses of supplying voting places with chairs, tables, lights, fuel and other furnishings is paid by the city by virtue of the above provision."

The provision referred to is the one italicized above in section 4946, General Code.

The equipment in question is not described but I take it that it is equipment for voting booths or rooms, such as voting shelves and the smaller booths for voting, furnishings and supplies for the same which are of a permanent nature.

Such equipment must be furnished by registration cities and they must pay all expenses in connection therewith, such as the delivery and setting up of the same.

The provisions in the above quoted parts of the schedules referred to are not inconsistent. There is special provision for payment of such expense in registration cities and this is covered by schedule D. The expense covered by schedule E, paragraph 5-a, is for precincts outside of registration cities. By adding at the end of paragraph 5-a, the words "except in registration cities," the clause would be cleared of all possible question or doubt.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

379.

CLERK OF COURTS—SALARY—COMMISSIONERS WITHOUT AUTHORITY TO MAKE TRANSFER TO THE FEE FUND FOR THE CLERK OF COURT DURING THE LAST QUARTER OF 1909, FOR THE PURPOSE OF COVERING DEFICIENCY IN THE CLERK'S FEE FUND FOR THE FIRST QUARTER OF 1910—FEE FUND.

Under the provision of section 2984, and the amendments thereto from December 31, 1909, to April 1, 1910, there was no authority given for transferring to the fee fund of county officers. This section conferred no authority upon the commissioners to make a transfer during the last quarter of 1909 for the purpose of covering deficiencies during the first quarter of 1910.

The county commissioners had authority to make transfers to the fee fund during the last quarter of 1909 for the last quarter of 1909, but were not legally obliged to make this transfer. County commissioners were not authorized to make transfer to the fee fund during the first quarter of 1910.

COLUMBUS, OHIO, July 24, 1913.

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

GENTLEMEN:—I have your letter of April 19, 1913, in which you ask my opinion upon the facts stated therein as follows:

"The legal salary of a clerk of courts for the term ending the first Monday of August, 1911, was $2,175.00 per annum, or $181.25 per month.

"Total amount for two years' term		$4,350 00
"Total amount drawn:		
"20 months @ $181 25	$3,625 00	
"1 month, November, 1909	175 21	
"2 months, January and February, 1910	200 00	
"1 month, March, 1910	174 34	
"7 days, August, 1911	35 75	
"Total		4,210 30
"Amount apparently due clerk		$139 70

"This amount was not paid the clerk for the reason that the fee

fund was exhausted. Transfers to the clerk's fee fund were made in the last quarter of 1909 as follows: Nov. 29, $700.00; Dec. 31, $104.10; but the aggregate of all the fees collected for the clerk's fee fund, and the transfers made to said fund was just equal to the aggregate amount paid for the salary of the clerk and his deputies to Dec. 31, 1910.

"It will be noted that the clerk did not receive his full salary for November, 1909, by the amount of $6.04, and that he drew $33.75 as pay for extra seven days in August, 1911, (thus drawing compensation for the day on which his successor's term began) by reason of the fiscal year being longer than the calendar year. Under the above statement of facts, does the county owe the clerk any balance of salary, and if so, how much? Or, on the other hand, does the clerk owe the county, and if so how much?"

Section 799 O. L. 208, carried into the General Code section 2984, provided as follows:

"As soon after the passage of this act as the aggregate compensation of the deputies, assistants, bookkeepers, clerks and employes of the various officers is fixed by the commissioners as provided in section 3, and on the first Monday of April, July, October and January, whenever necessary during three years after said original act took effect, but not thereafter, the said commissioners shall enter an order on their journal transferring to the county officers' fee funds from any other fund or funds of the county in their discretion, such sums as may be necessary to make good any deficiencies in said funds, found by them likely to arise during the next ensuing quarter in consequence of the payment of the respective officers, deputies, assistants, bookkeepers, clerks or other employes during such period, from the amounts then in or estimated to come into said funds for said period, derived from said respective offices."

This section was later amended so as to extend the time within which county commissioners might make transfers to county officers' fee funds from April 1, 1910 to April 1, 1911 (101 O. L. 199), but has since been repealed (102 O. L. 136).

This section authorized the commissioners to meet deficiencies in the clerk's fee fund arising during the last quarter of 1909, by making transfers to the fund whenever necessary during said quarter, the statutory provision as to the time of such act being merely directory. It is apparent from a reading of section 2984, and the amendment thereto before noted, that there was an interval of time between December 31, 1909, and April 1, 1910, in which there was no authority whatever given for transfers to the fee funds of county officers. And I am of the opinion that this section conferred no authority on the commissioners to make a transfer during the last quarter of 1909 for the purpose of covering deficiencies in the clerk's fee fund for the first quarter of 1910. Though the time designated by the statute for transfers in the last quarter of 1909, to wit: the first Monday in October was directory only, yet the authority granted as to such transfers was only to make good deficiencies arising during such *ensuing* quarter, to wit: the months of October, November and December, 1909. This is the only possible construction of the section as respects this question, and moreover, as before noted there was no legislative recognition whatever of deficiencies in the fee funds of county officers during the first quarter of 1910.

It clearly follows from the above that the clerk has no legal claim against the county on account of the shortage in his salary for the months of January, February and March, 1910. I am of the opinion that the same is true as to the shortage in his salary for November, 1909. As to this, shortage, though the com-

missioners had power during the last quarter of 1909 to provide by transfer for fee fund deficiencies then occurring, and in a sense it was their duty to do so, yet the statute made no provision for enforcing the exercise of this power or duty on the part of the commissioners by the sanction of liability in case of their failure to transfer to the fee fund enough to provide for the deficiency, or even in case of failure on their part to make transfer to such deficiency fund at all. The statute not having created such liability, it does not exist. (7 O. S. 109, 124.)

As to the other question embraced in your inquiry I am of the opinion that the salary of the clerk was measured by his official term regardless of whether it was a few days more or less than two calendar years, and therefore in this case he was not entitled to collect salary for the excess days mentioned.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

385.

CIVIL SERVICE—INCUMBENT AT TIME POSITION PASSED INTO CLASSIFIED SERVICE NOT REQUIRED TO TAKE EXAMINATION—REAPPOINTMENT—CLASSIFIED LIST—MAJORITY OF MEMBERS OF BOARD OF HEALTH CONSTITUTE A QUORUM.

Incumbents at the time when positions passed into the classified service are not required to take an examination or to be reappointed from the eligible list.

A plumbing inspector legally in the classified list cannot be discharged except in accordance with the provisions of the civil service act.

Under the provisions of section 4404, a majority of the members of a board of health constitute a quorum. In a board consisting of five members, three members constitute a quorum. A vote of a majority of the members constituting a quorum would be sufficient to carry a proposition.

COLUMBUS, OHIO, July 21, 1913.

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

GENTLEMEN:—Under date of April 19, 1913, you submit the following inquiries:

> "First. Is a plumbing inspector, as an employe of the board of health of a city, entitled to the protection of the civil service law if not appointed from the eligible list, provided that such inspector has been employed since April, 1895?
>
> "Second. The board of health consists of five members. If three be present at a meeting, may two of said members voting in the affirmative, discharge or remove a former inspector, or does it require the affirmative vote of three to legally enact the orders of a board of health?
>
> "Third. If said plumbing inspector reports from day to day for duty should the city auditor upon demand, make payment of his salary?"

The questions in this case arose before the amendment and repeal of the civil service law by the recent session of the legislature.

Section 4479, General Code, prior to said repeal, provided:

> "The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers

elected by the people or appointed to fill vacancies in offices filled by popular election, or whose appointment is subject to confirmation by the council, or who are appointed by any state officer or by any court, employes of the council, persons who by law are to serve without remuneration, persons who are appointed to positions requiring professional or technical skill as may be determined by the civil service commission; persons appointed or employed to give instruction in any educational institution, persons appointed by any board or officers supervising elections, persons who as members of a board or otherwise, have charge of any principal department of the government of any city, *the head or chief of any division or principal department relating to engineering,* waterworks, street cleaning, or *health,* the chief of the police department, the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise officers and places not included in the unclassified service."

This section placed in the unclassified service the "head or chief of any division or principal department relating to health."

It appears from the letter attached to your inquiry that the position of plumbing inspector has been established under the board of health. The plumbing inspector is not therefore the head or chief of any division or principal department relating to health.

The department of health came under the provisions of the civil service act by virtue of the Payne law which became effective August 1, 1909, as to parts thereof, but the civil service provisions became effective January 1, 1910.

The position of plumbing inspector is not placed in the unclassified service by section 4479, General Code, and it is therefore in the classified service.

The plumbing inspector in question was appointed before the Payne law became effective and he held the position at the time it came under the classified service.

The courts, and this department, have held that incumbents at the time when a position passed into the classified service are not required to take an examination or be reappointed from the eligible list. Such incumbents passed into the classified service without examination. It was not necessary that the plumbing inspector in question be appointed from the eligible list. He is legally in the classified service and cannot be discharged except in accordance with the provisions of the civil service act, and he is entitled to the protection of the provisions of said act.

Answering your second inquiry:

Section 4404, General Code, provides:

"The council of each municipality shall establish a board of health, *composed of five members to* be appointed by the mayor and confirmed by council who shall serve without compensation and *a majority of whom shall be a quorum.* .The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general

character and required to be published, made by such health officer, shall be approved by the state board of health."

This section makes a majority of the board of health a quorum. There are five members and three is a majority. If three members are present they may transact the business of the board and a vote of the majority of those present would be sufficient to carry a proposition.

The rule is stated at page 335 of 28 Cyc.:

"In the absence of charter or statutory provision to the contrary the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any ordinance, resolution, or order properly arising for the action of a municipal council or other municipal body."

The statute does not prescribe that a majority of the members of the board of health shall be required to pass a resolution or order.

At a meeting of the board of health of a city, consisting of five members, at which meeting three members are present, a vote of two members is sufficient to pass a resolution, such as a resolution to discharge an employe.

You ask if said plumbing inspector is entitled to his pay if he reports from day to day.

It appears that the board of health has just voted to discharge this employe when the above inquiry was submitted. His right to compensation would depend upon the future acts of the board of health and of the civil service commission. These facts are not given. It is seen that the employe has the protection of the civil service law. As a general rule an officer or employe who is wrongfully discharged is entitled to his pay if he reports for duty. Each case, however, must depend upon its particular facts.

The facts given in this case are not sufficient to answer this question. Upon submission of other facts it will be further considered.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

387.

ORDINANCE—FIXING THE SALARY OF THE CITY CLERK—EXTRA COMPENSATION FOR SERVING NOTICES—SALARY SHOULD NOT BE FIXED BY ORDINANCE.

Where it is the intention of the city council to give their clerk certain fees in addition to his salary, and an ordinance is passed on the same date on which the council elects its clerk, increasing his compensation by providing additional fees for serving notices, in view of the fact that the members had not undertaken to provide their clerk with compensation for performing his ordinary duties by reason of custom having grown up to permit preceding members of council to provide the same in the salary ordinance, the members of the present council should be considered as adopting such compensation for their clerk and in addition providing him compensation for serving notices. This would be fixing the salary of such clerk and would not be increasing his salary while in office.

COLUMBUS, OHIO, July 14, 1913.

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

GENTLEMEN:—Under date of December 7, 1912, you requested my written opinion upon the following question:

> "If an ordinance be passed on the same date on which the council of a city elects its clerk, increasing his compensation by providing additional fees for serving notices, when would such ordinance go into effect? The question is, would it apply to the incumbent of said office during his present term or would the inhibition contained in section 4213 control?"

The provisions relative to the fixing of compensation of the clerk of council is provided for in section 4210, General Code. Such section reads as follows:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem., a clerk and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

Section 4214, General Code, provides as follows:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of the bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

There is a clear distinction between the provisions of section 4214, General Code, and 4210, General Code. Section 4214, General Code, provides that except as otherwise provided in this title council by ordinance or resolution shall determine the

number of officers, clerks and employes and fix their salaries, whereas section 4210, General Code, which is found in the same title provides that the members of council shall elect a clerk of council.

In regard to fixing the salary of the clerk of council the legislature intended that such action should be taken by the members of council as individuals and not by such members sitting as a deliberative body. While it is true that the term "members of council" might be construed to mean council sitting as a deliberative body yet such is not the interpretation placed upon such words by the supreme court. In the case of State vs. Miller 62 O. S. 436 is clearly recognized the distinction between an action to be taken by the members of council as individuals and an action to be taken by council as a deliberative body. On page 445 Davis J., says in reference to section 1676 of the Revised Statutes which is in language similar to section 4210, General Code:

> "The council was engaged in the duty of electing officers, a duty imposed on the members therof, not on the body as a council. They were not engaged in the deliberative business which is the ordinary work of the council; but in the election of a city officer."

The provision of section 4210, General Code, is that within ten days from the commencement of their term, the members of council shall elect a clerk and fix his duties, bond and compensation. The time limit stated in the statute I do not believe to be mandatory but merely directory, and if the members of council do not act within the ten days mentioned in the statute they may still act although the ten days limitation has expired. If, however, council does not act at all until a payment period has arrived and the clerk of council has accepted the amount fixed for the salary of a former clerk I am of the opinion that the members of council would be considered as having adopted the compensation which was fixed for the prior clerk as the compensation which should be paid to the clerk which they have elected. The provisions of section 4210, General Code, as I view it, make it the duty of the members of each succeeding new council to fix the compensation, bond and duties of the clerk elected by them, and, consequently, such members should act each two years. I am aware that it has been the custom to fix the salary of the clerk in the manner as that provided in section 4214, General Code, by ordinance or resolution. However, I am of the opinion that since an ordinance or resolution as understood pertains solely to the legislative action of council as a deliberative body and subject to the veto of the mayor the action of the members of council in fixing the compensation of their clerk should be by motion rather than by resolution or ordinance.

As, however, it has heretofore been customary to fix the salary of the clerk in accordance with section 4214, General Code, I do not believe that any findings should be made against any clerk who has accepted a salary so fixed.

In your question you state that an ordinance has been passed on the same date on which the council of a city elected its clerk increasing his compensation by providing additional fees for serving notices. From your question I assume the members of council did not undertake on the date on which they elected their clerk to fix his ordinary salary relying on an ordinance theretofore passed under the provisions of section 4214, General Code, as providing for such compensation. In this I think the members of council were in error as it was their duty to fix such salary on said date, but having proceeded in a manner that had been customary I would assume that the members of council had thereby adopted the salary which had been received by the preceding clerk. Having, however, on the same date on which they elected their clerk provided a further compensation for serving notices I am of the opinion that such additional compensation fixed on the date mentioned would

not be considered as within the inhibition of section 4213, General Code, to the effect that "the salary of any clerk, officer or employe shall not be increased or diminished during the term for which he was elected or appointed." Although I do not undertake in this opinion to pass upon the question of whether or not the clerk of council would be within the inhibition of said section if the members of council in the future should undertake to increase or diminish the salary of such clerk, the members of council in the case in which you state were acting entirely within their statutory authority in providing compensation to their clerk for serving notices, and since I have held that not having fixed a compensation for the clerk in the performance of his ordinary duties they are to be assumed to have adopted the same rate of compensation as that paid to the preceding clerk, the compensation of the clerk would be the sum of the two compensations above mentioned.

The next question which arises would be in regard to whether or not such action of the members of council were within the initiative and referendum act, section 4227-2.

Section 4227-2, General Code, prior to amendment, 103 O. L. 211, provides that no ordinance, resolution or measure of any municipal corporation involving the expenditure of money shall become effective in less than sixty days after its passage. As I view section 4227-2, General Code, taken in connection with the entire act it refers to the action of council as a deliberative body and not to the action of the members of council as provided in section 4210, and therefore, that the referendum act would not apply.

In conclusion, therefore, I would state that the ordinance passed by council on the day it elected its city clerk should be considered by reason of the customary method of fixing the salary of the clerk of council to be the action of the members of council individually, and, therefore, although not properly speaking an ordinance is at least the action of such members of council, and would apply to the incumbent of said office during the term for which he was elected, and that since said action was taken on the same day on which said clerk was elected the inhibition of section 4213, General Code, even if it were to be considered as applying to a clerk of council would not control. In other words, as I view the situation, it is the duty of the members of the incoming council under section 4210, General Code, to provide the clerk with compensation. In view of the fact that they had not undertaken to provide their clerk with compensation for performing his ordinary duties by reason of the custom having grown up to permit the preceding members of council to provide the same in the salary ordinance the members of the present council should be considered as adopting such compensation for their clerk and in addition providing him compensation for serving notices. This would not be increasing the salary of the clerk during his term but would be fixing a salary for such clerk, no salary having been previously fixed or authorized to be fixed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

401.

REVENUES—WATER WORKS—FIRE HYDRANTS—TAXES AND TAXATION—APPROPRIATION—INCOME FROM WATER WORKS MAY NOT BE USED TO PURCHASE FIRE HYDRANTS.

Revenues resulting from the operation of a municipal waterworks plant may not be legally used to purchase fire hydrants to be installed for fire protection purposes. Such expense must be borne by funds raised by taxation and appropriated from the safety fund for that particular purpose.

COLUMBUS, OHIO, July 25, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of April 12th, requesting my opinion upon the following question:

> "May the revenues resulting from the operation of a municipal waterworks plant be legally used in payment of the purchase price of fire hydrants to be installed for fire protection purposes, or is such expense required to be borne by the funds raised by taxation and appropriation from the safety fund for that particular purpose? See sections 3961 and 4371 of the General Code."

The two sections of the General Code which you cite are as follows:

> "Sec. 3961. Subject to the provisions of this title, the director of public *service* may make contracts for * * * the furnishing and supplying with connections all necessary fire hydrants for fire department purposes * * *.
>
> "Sec. 4371. The director of public *safety* may make all contracts and expenditures of money for acquiring * * * fire cisterns, and plugs, that may be required, * * *"

Of course, if section 3961 governs the matter concerning which you inquire, money resulting from the operation of the municipal waterworks plant may properly be used for the purpose mentioned by you, under the provisions of sections 3959 and 3960, General Code. These sections are as follows:

> "Sec. 3959. After paying the expenses of conducting and managing the waterworks, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for waterworks purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of waterworks and for no other purpose whatever.
>
> "Sec. 3960. Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such

director shall sign all orders drawn on the treasurer of the corporation against such fund."

It seems to me to be equally obvious that if section 4371 controls, the waterworks funds may not be used for the purpose you mention. Upon that assumption the expenditure, as well as the contract, by virtue of which it is made, must be made by the director of public safety, whereas, under section 3960, waterworks moneys may only be expended upon the order of the director of public service.

Nor could council, in my judgment, alter the case by attempting to appropriate any waterworks moneys to the order of the director of public safety. I think it may safely be stated, as a general principle, that an appropriation from a fund can only be made to a purpose within the general object of the fund itself. Furthermore, council could not lawfully transfer any part of the money collected for waterworks purposes to any other fund of the city, because, under section 3799, the power to tranfer is limited to funds raised by taxation.

Even the proceeding to transfer through the agency of the common pleas court, under section 2296 et seq., General Code, would, in my judgment, not be available. There is no express check upon the power of the court to order a transfer under these sections, but it seems to me that, in the face of the unequivocal declaration of section 3960, supra, which constitutes the waterworks moneys a trust fund, a court would not authorize a transfer of any part of such moneys to any purpose not within the contemplation of the trust.

It is thus seen that the question ultimately resolves itself, from any angle of view, to that of the joint effect of sections 3961 and 4371, General Code.

Is there, then a conflict between these two sections? It must be borne in mind that every presumption is against such a conflict, and that the two will be harmonized if possible. However, I have been unable to harmonize them insofar as the matter of fire hydrants is concerned. It is true that the words used in one section is "hydrants," and that used in the other is "plugs." However, I take it that there is no doubt that these two terms are synonymous. I am, therefore, of the opinion that the two sections are in sharp conflict, and that one of them must control to the exclusion of the other.

A practical ambiguity thus arises, which may be, upon familiar principles, resolved by consideration of the legislative history of both of them. It appears that section 3961 was section 2415, Revised Statutes, and has not been amended since its original enactment. (70 O. L. page 11, section 342.) It was left undisturbed when the Municipal Code of 1902 was enacted, being indeed adopted by reference therein. It was carried into the General Code of 1910 in practically its original form.

Section 4371 was originally section 154 of the Municipal Code of 1902 and, so far as the use of the term now under discussion is concerned, it has not been since amended.

It appears, therefore, that when the Municipal Code of 1902 was adopted it contained two inconsistent sections affecting the matter of the installation of fire hydrants; but that one of these sections was simply reenacted from the previously existing law, while the other was in every respect the act of the legislature of that year. Both sections contain numerous other provisions, and it is only upon one point that they clash.

Under these circumstances I am of the opinion that section 4371, General Code, controls, to the exclusion of section 3961; and that it is the duty of the director of public safety to make contracts for the installation of fire hydrants, and to pay for the same out of the funds subject to his order. Inasmuch as the waterworks funds can, under no circumstances, be made subject to the order of the director of public safety, it follows that they may not be used for this purpose.

I may add that there are obvious reasons of policy which, while not exactly admissible in support of the view which I have taken, may properly be mentioned. In the first place, it is necessary that fire hydrants, in order to be utilized, be capable of being fitted to the fire apparatus used and managed by the department of public safety. In fact, these hydrants are essentially a part of the fire apparatus of the city and not a part of its water works.

Again, the expense of maintaining the fire department of the city and all of its proper appurtenances is one that ought to be borne by the taxpayers of the city. This is a governmental activity clearly to be distinguished from the proprietary functions of the municipality. It would not be, to say the least, fair to tax the users of water for the acquisition of apparatus intended to protect all the inhabitants of the municipality alike.

The legislation, the history of which I have described in a general way, seems to have been founded upon these reasons of policy.

I am, therefore, of the opinion that revenues resulting from the operation of a municipal waterworks plant may not be legally used to purchase fire hydrants to be installed for fire protection purposes; but that such expense must be borne by funds raised by taxation and appropriated from the safety fund for that particular purpose.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

403.

JUSTICE OF THE PEACE AND CONSTABLE—FEES—DEFENSE MUST BE MADE BEFORE THEY ARE ENTITLED TO FEES FOR HEARING OF CASE.

Neither a justice of the peace nor a constable is entitled to the fee of $1.00 *for sitting in the trial of a case, where no defense is made, or in a case where the person pleads guilty. There is no trial where no defense is interposed. This rule also applies to mayors of cities and villages and police judges.*

COLUMBUS, OHIO, July 28, 1913.

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

GENTLEMEN:—Your communication of May 28th, is received in which you request my opinion upon the following questions:

> "1. If a prisoner is arrainged before a justice of the peace on a misdemeanor charge and pleads guilty, is the justice entitled to the fee of $1.00 for sitting in trial, as provided by section 1746, G. C.?
>
> "2. In such case, is a constable entitled to the fee of $1.00 for attendance at criminal trial, as provided by section 3347, G. C.?
>
> "3. Whether or not the same questions are applicable to the cases mentioned in section 13423?"

In answer to your first question I desire to say that section 1746, General Code, provides in part as follows:

> "* * * sitting in the trial of a case, civil or criminal, where a defense is interposed, whether tried to the justice or to a jury, one dollar."

In an opinion rendered to your department on November 27, 1911, I answered your first question and now desire to call your attention to that opinion and in addition would say that in order to properly answer your question it is necessary to decide what a trial is, and in said opinion I cited the supreme court case of Palmer vs. State, 42 O. S. 596 in which it was held that:

> "A trial is a judicial examination of the issues, whether of law or of facts, in an action or proceeding."

Under the provisions of the General Code, above quoted, specifying the fees which a justice of the peace would be entitled to, as set forth in your question, it must be in a trial where a defense is interposed, and where a prisoner arraigned pleads guilty there is no trial where a defense is interposed, and, therefore, a justice of the peace would not be entitled to the fee of $1.00 for sitting in trial as provided in section 1756, General Code.

In reply to your second question I desire to say that section 3347, General Code, provides as to the fees of a constable in part as follows:

> "For each day's attendance before a justice of the peace on criminal trial, one dollar."

Under the authority above set forth there has been no trial where a prisoner is arraigned before a justice of the peace and pleads guilty, and the constable, therefore, would not be entitled to the fee of one dollar under said section 3347, General Code.

In answer to your third question relative to the same questions being applicable to cases mentioned in section 13423, I am of the opinion that the same sections of the code apply as to the fees to which justices of the peace, police judges and mayors of cities and villages and constables serving the writs of said courts in the cases specified in said section 13423, and that the same rule would apply as in the first two cases as to whether or not the fee of one dollar should be paid to a justice of the peace, police judge, mayor of a city or village and constables for sitting in trial as set forth in the rules laid down in the answer to your first two questions, and that unless there was a defense interposed they would not be entitled to said fee of one dollar referred to in your inquiry.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

410.

STATE AID COMMISSION—STATE AID TO WEAK SCHOOL DISTRICT—AMOUNT THAT MAY BE RECEIVED FROM THE STATE MAY COVER TEACHERS' INSTITUTE FEES AND ALSO PUPILS' TUITION.

A weak school district may not only receive enough money in the way of state aid to pay its required number of teachers $40.00 *per month for eight months, but it may also pay teachers for attending institutes and also the tuition of high school pupils and the tuition of other pupils, if the same has been paid from the tuition fund and not from the contingent fund.*

COLUMBUS, OHIO, July 22, 1913.

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

GENTLEMEN:—You have submitted to me my opinion of Feb. 26, 1912, to the Hon. E. M. Fullington, auditor of state, and desire to know whether or not teachers' pay for attending institutes, the tuition of high school pupils, and the tuition of other pupils may be considered in determining the amount to which a school district would be entitled under section 7595, General Code, as a "weak school district."

Section 7595, General Code, reads in part:

> "When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made a maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

In an opinion to the Hon. E. M. Fullington, auditor of state, under date of January 17, 1912, I considered the question under the so-called Smith one per cent. law whether the auditor of state is authorized to issue his warrant for state aid provided in section 7595, General Code, and secondly, if so, what the maximum levy (three-fourths of which shall be for tuition purposes) is to qualify a school district to receive state aid. I hold therein that the so-called Smith one per cent. law did not repeal by implication the state aid law for weak school districts, and that if three-fourths of the amount raised by taxation for all local school purposes went into the tuition fund and a deficit should occur the school district would be entitled to aid from the state.

In the opinion to Mr. Fullington referred to as having been rendered on February 26, 1912, I stated the sources from which the tuition fund of a school district were received, and also the purposes for which such tuition fund could be used. As for example, for the payment of teachers for attending institutes, for the payment of tuition of high school pupils, and for the payment of tuition of other pupils. I stated in said opinion in part as follows:

> "It does not mean, as it seems to me, that the board of education cannot pay other obligations which are placed either primarily or secondarily upon the tuition fund from such tuition fund, nor does it mean that it is restricted to the payment of the minimum salary to the various teachers of the school district, but merely that the state will only pay

to such school district the difference between the total amount of the tuition fund received and the amount which would have been necessary to pay its teachers the minimum salary.

In such opinion I was considering only the question of whether the board of education may use the tuition fund to pay teachers in excess of forty dollars per month and still be able to qualify for state aid. When I used the words "the state will only pay to such school district the difference between the total amount of the tuition fund received and the amount which would have been necessary to pay its teachers the minimum salary" I should have further stated that I was not considering then the question of payment of obligations other than the payment of teachers' salaries which were placed either primarily or secondarily upon the tuition fund. The payment of tuition of high school pupils (section 7751, General Code) and of the tuition of elementary pupils (sections 7735-7736, General Code) are chargeable either upon the tuition or contingent fund and the payment of teachers for attending institutes (section 7870, General Code) is in addition to the regular salary of the teacher. The payment for attending teachers' institutes is made obligatory upon the board of education from the tuition fund, and the payment of the tuition of high school pupils and elementary school pupils can be made from either the tuition or contingent fund, but if the contingent fund has not money sufficient therein with which to pay and the tuition fund has the payment would have to be made from the tuition fund.

Section 7595, General Code, simply provides that after the proper amount has been paid into the tuition fund if the school district has not then sufficient money to pay its teachers forty dollars a month for eight months the district may receive state aid. There is no provision of law that the entire amount must be used solely for the payment of teachers, and from the sections mentioned it is made obligatory upon the board of education to either primarily or secondarily pay the amounts from the tuition fund for tuition and for teachers' institutes.

I would give it as my opinion as supplementary to the opinion heretofore rendered and to explain the language in such opinion herein set out, that in order to arrive at the amount to which a weak school district would be entitled not only may the amount necessary to pay the requisite number of teachers forty dollars a month for eight months or $320.00 per annum, be deducted from the tuition fund, but also the pay of teachers for attending the institutes, and also the tuition of high school pupils and the tuition of other pupils if the same have been paid from the tuition fund and not the contingent fund.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

412.

SALE OF DELINQUENT LANDS—COST OF ADVERTISING SAME SHALL NOT EXCEED ONE-HALF THE TAXES AND PENALTIES THEREON.

The total amount that may be expended in advertising delinquent lands for sale, in order to collect the taxes due thereon shall not exceed on any tract, lot or part of a lot more than one-half of the taxes and penalties thereon.

COLUMBUS, OHIO, July 29, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 13, 1913, requesting my opinion on the following question:

> "Shall the provisions of section 5706, General Code, which provides that for the advertising of delinquent lands, there shall not be paid for any one tract, lot or part of lot, a greater sum than one-half the taxes and penalties thereon, be construed to mean that each newspaper in which such advertising is published may receive from each of such contracts one-half of the amount of taxes and penalties thereon, or that the aggregate sum paid to all newspapers in which such advertisement appears shall not be greater than one-half of the sum of the taxes and penalties thereon.
>
> "Section 5704, General Code, as amended in volume 101, page 164, Ohio laws, requires the auditor of each county to publish the list of delinquent taxes in his county weekly for two weeks between the 20th day of December and the second Tuesday in February, next ensuing, in one newspaper in the English language printed and of general circulation in the county and one newspaper of the German language, if there is such newspaper printed, published and of general circulation therein."

It is obvious that the question you propound could only arise in the county wherein a newspaper of the German language is printed, published and of general circulation, otherwise, publication would be required only in one newspaper.

Section 5706 which specifies the amounts to be paid for advertising delinquent lands is as follows:

> "The publishers of newspapers, for advertising delinquent and forfeited list of the several counties, and the notice of sale shall be entitled to receive a sum not exceeding the following rates: for the notice of sale, ten dollars; for designating the several school districts, townships, villages and cities, and the several wards in a city, fifty cents each; and for each tract of land, city or town lot, or part of lot, contained in each of such lists, thirty cents. A greater sum than one-half of the taxes and penalties, due on any tract, lot or part of lot shall not be allowed for advertising such tract, lot or part of lot. Such property shall not be published in a list, as delinquent, if the taxes and penalty thereon had been paid on or before the twentieth day of December."

The object of the advertisement and sale of delinquent lands is to collect into the county treasury the taxes due thereon.

By the provisions of section 5706, it is plain that no newspaper is to be paid more than thirty cents for advertising any one tract, lot or part of lot. I take it that it is not the intention of the legislature to cause to be expended in advertising

delinquent lands, all the taxes and penalties thereon, thus leaving no part of said taxes to be paid into the county treasury, for such a policy would defeat the very purpose for which the law regulating the advertising and sale of delinquent lands was enacted.

That part of section 5706 to which you refer, is intended as a limitation upon the amounts which may be expended in advertising delinquent lands and I am of the opinion that it would be construed to mean that the total amount paid for advertising any tract, lot or part of lot, shall not exceed one-half of the taxes and penalties thereon.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

421.

JUSTICE OF THE PEACE FEES—TREASURER OF CLEVELAND MAY RETAIN TEN PER CENT. OF FEES RECEIVED FROM JUSTICES OF OF THE PEACE AS HIS COMPENSATION FOR HANDLING SAME.

The treasurer of the city of Cleveland, under section 1752, is entitled to retain ten per cent. of fees received from each justice of the peace in the city, as his compensation for handling same. Such treasurer is not entitled to such per cent. on delinquent fees collected through county officers.

COLUMBUS, OHIO, July 24, 1913.

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

GENTLEMEN:—Under date of May 16, 1913, you requested my opinion as follows:

> "May the treasurer of the city of Cleveland, Ohio, legally retain the ten per cent. allowed under section 1752 of the General Code, or must he pay some into the treasury of said city as a fee 'pertaining to his office?'
> "Is said treasurer entitled to retain the percentage on such delinquent justices' fees when collected through the county offices?"

Section 1752, General Code, provides as follows:

> "Each justice of the peace mentioned in the preceding section shall collected all fees of his office as provided by law and make return and payment thereof to the city treasurer, quarterly, beginning on the first Saturday of each year. At the same time he shall make return to the city treasurer of all fees due and uncollected. Within five days after the expiration of his term of office, such justice shall make under oath, an itemized statement to the city treasurer of fees uncollected by him, and the treasurer shall collect them, retain ten per cent. of the amount collected as his compensation therefor, and account for the balance as other funds of the city coming into his hands as treasurer."

Section 4214 provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in

each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation."

Section 4213, General Code, provides as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

The two sections last noted were originally a part of section 126, Municipal Code, 1902 (96 O. L. 20, 61). Said section as enacted provided:

"Council shall fix the salaries of all officers * * * and, except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury."

Section 231 of the Municipal Code of 1902 (96 O. L. 106) provided:

"This act shall supersede all acts and parts of acts, not herein expressly repealed, which are in consistent herewith."

Section 1752 is a part of an act originally passed in 1886 (83 O. L. 168), making certain provisions as to justices of the peace in the city of Cleveland.

Giving effect to the language of section 4213, it is certain there is no provision anywhere in the "title" of which section 4213 is a part allowing a city treasurer to retain for himself fees or commissions on moneys collected by him as such and if the ten per cent. fee on moneys collected by the treasurer of the city of Cleveland under the provisions of section 1752 is to be construed as a fee pertaining to his office under section 4213, it may follow that section 1752 in so far as it authorizes such city treasurer to retain ten per cent. of the money collected by him under its provisions, must give way to the later statute, and all money so collected by him is to be paid into the treasury of the city.

"City of Cambridge vs. Smallwood, 6 C. C. (N. S.) 230, 232.
"Smallwood vs. City of Cambridge, 75 O. S. 339."

In the case of Portsmouth vs. Milstead, 28 C. C. 384 [8 C. C. (N. S.) 114]. The court held:

"The provision of 96 O. L. 61, section 126 requiring 'that all fees pertaining to any office shall be paid into the city treasury' has reference to municipal fees solely, or such fees as may be fixed by municipal authority."

If the syllabus above quoted correctly states the scope and effect of said section 126, Municipal Code (section 4213, G. C.), it follows that this section in nowise limits the operation and effect of section 1752, for the reason that the allowance to the treasurer of the city of Cleveland for making collections under its provisions is not fixed by municipal authority, but by the terms of the statute itself. The case of Portsmouth vs. Milstead, was one in which the city sought to recover of its mayor fees or costs in state cases taxed in his name and by him collected and retained; and the judgment of the circuit court denying the right of the city to recover was affirmed by the supreme court without report.

Now, whatever may have been the grounds upon which the supreme court affirmed the case of Portsmouth vs. Baucus, decided by the circuit court in the same report with the case of Portsmouth vs. Milstead, I am of the opinion that the latter case could have been affirmed only on the grounds stated by the circuit court; namely, that the mayor was entitled to have fees in state cases taxed in his name; and that for the reasons stated by the circuit court, section 126, Municipal Code (secion 4213, G. C.), did not require him to turn them into the city treasury when collected.

The construction given section 126, Municipal Code (section 4213, G. C.) seems clearly to control the question here presented and to require the conclusion that the provisions of section 1752 authorizing the treasurer of the city of Cleveland to retain a fee of ten per cent. on moneys collected under its provisions, are in nowise affected by the provisions of section 4213, and that he may still retain such fee. Possibly, the underlying reasons that might be advanced in support of the grounds taken by the circuit court in its decision in the Milstead case do not apply in their entirety to the question here presented, but on the other hand the conclusion reached on the question made in your inquiry is supported by considerations not pertinent to the circuit court case cited. As before noted, section 1752 is part of a special act applying only to the city of Cleveland, while section 4213 is a general law operating within its scope throughout the state. In the case of Fosdick vs. Village of Perrysburg, 14 O. S. 472 it was held:

> "It is an established rule in the construction of statutes that a subsequent statute, treating a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning."

In its opinion in this case the court says:

> "It is against reason to suppose that the legislature, in framing a general system for the organization and ordinary government of municipal corporations, intended to repeal, wholly or in part, pre-existing special acts which had been passed in view of the supposed interests and wants of particular localities, in respect to a subject matter not connected with their organization or ordinary government."

The rule of statutory construction recognized and applied in the case just cited has been followed whenever occasion for its consideration has been found.

> "Shunk vs. Bank 22 O. S. 508, 515.
> "State vs. Newton, 26 O. S. 200, 206.
> "Commissioners vs. Board, 39 O. S. 628, 632.
> "People vs. Quigg, 59 N. Y. 83.
> "McKenna vs. Edmundstone, 91 N. Y. 231."

As pointed out by the circuit court in the Milstead case full meaning can be given to the provisions of section 4213 requiring all fees pertaining to any office to be paid into the city treasury, by confining their operation to fees strictly municipal, or such as may be fixed by municipal authority. This being true, regard for the rule of construction laid down in the case of Fosdick vs. Village of Perrysburg and other cases cited, supra, leads to the conclusion that it was not the legislative intent in the enactment of section 4213 to repeal or otherwise affect the provi-

sions of section 1752 allowing the treasurer of this particular city to retain the fee therein provided.

I am not unmindful that the opinion of the supreme court in the case of Smallwood vs. City of Cambridge, supra, contains language that might suggest a different conclusion as to the scope of section 4213 with reference to the questions made here and in the Milstead case. But this opinion is to be read in the light of the facts of the case which presented, as the only matter for determination, the question whether or not the mayor of a city was entitled to fees in prosecutions for violations of penal ordinances of the city. The supreme court held that he was not entitled to such fees, but by force of the provisions of section 126, Municipal Code, the same were payable into the city treasury. Manifestly, this decision is consistent with the decisions in the Milstead case and with the conclusion here reached on the question presented by your inquiry; for the fees to be taxed in prosecutions for the violation of penal ordinances of a city are fixed by such municipality. (Sections 4555, 4556, G. C.) Moreover, the fact that the supreme court affirmed Milstead case after its decision in the Smallwood case is persuasive to the point that the language of the opinion in the latter case is to be confined to the precise question then before the court.

I am, therefore, of the opinion that the treasurer of the city of Cleveland is entitled to retain the ten per cent. allowed him by section 1752.

As to the second question submitted by you, I am of the opinion that the treasurer of said city is entitled to said ten per cent. allowance only on delinquent justices' fees returned or stated to him by such justice of the peace, and by him collected; and that he is not entitled to such allowance on justice of the peace fees collected through county offices.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

427.

COUNTY NOT LIABLE FOR THE EXPENSES INCURRED BY SHERIFF PROTECTING PRIVATE PROPERTY—COUNTY IS LIABLE FOR EXPENSES OF SHERIFF IN SERVING WARRANTS IN ARRESTING PERSONS WHO HAVE VIOLATED THE LAWS OF OHIO.

The county is not liable for the expenses incurred by the sheriff of Lorain county and his deputies in protecting the property of a certain stone quarry company in that county.

The county is liable for the expenses of the sheriff and his deputies, including fees of his deputies, in serving warrants upon and arresting persons who have violated the laws of Ohio. The expenses of the deputies who assisted the sheriff in making arrests and serving warrants may be met either by an allowance of the county commissioners or by the court making an allowance as provided by section 2980-1, *General Code.*

The expenses of the sheriff for transportation, automobile hire, etc., can be paid by the county only when application is made to the common pleas court for an additional allowance and the granting of such allowance by the court.

COLUMBUS, OHIO, July 2, 1913.

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

GENTLEMEN:—I desire to acknowledge the receipt of your letter of June 14th, wherein you inquire as follows:

"Enclosed please find letter from C. B. Biven, sheriff, of Lorain county, under date of May 27th, copy of our reply thereto and copy of a letter from this department to the prosecuting attorney of said county, June 3, his answer thereto, dated June 4, and another letter from the sheriff dated June 11. Kindly give us your written opinion in solution of the questions herein presented."

In the letter received by your department from Hon. C. B. Biven, sheriff of Lorain county, under date of May 27, 1913, to which you refer in the above inquiry, and which you enclose therewith, it appears that on the 9th day of April, the said sheriff received a call from South Amherst, from a certain quarry or stone company, notifying the sheriff that several of the employes of said company, who were then on a strike, were interfering with the electricians and the power house of said company and that said strikers succeeded in shutting off the steam and power. The sheriff further states in said correspondence, that he, together with two deputies went to the plant of the said quarry company, but that when they arrived at the plant, everything was quiet. The correspondence further states that on the following day the quarry company again called for protection and thereupon the sheriff took the matter up with the prosecuting attorney of Lorain county. In addition to the foregoing, the sheriff states that he had warrants for the arrest of several men, one for breaking open the door to the power house, one for shutting off the air or steam, one for pointing a pistol or revolver at one of the electrician foremen and several for other charges; that the sheriff and eleven deputies arrested all the men for whom they held warrants and that all who were so arrested were found guilty except one, who was bound over to the grand jury. The sheriff and his deputies continued to go to the plant every day until the 30th of April, upon which day the strike ended.

The foregoing contains a substantial statement of the facts disclosed in the letter of the sheriff above referred to, and I desire to say that I have made quite a complete statement of the facts stated in said letter so as to herein set forth all the facts upon which your inquiry is based. The questions presented by the above statement of facts are as follows:

First. Under the above circumstances, is the county liable for the entire or any part of the expenses incurred by the sheriff and his deputies in rendering protection to the property of the said quarry or stone company during the strike?

Second. Is the county liable for the expenses of the sheriff and his deputies, including the fees of the deputies in arresting several of the strikers for violating the laws of the state of Ohio?

There is no statutory provision authorizing the sheriff to appoint deputies to protect private property as in the case of the appointment of special counsel * * * * * * * * * * * * freeholders, as provided by section 1738, General Code, which provides as follows:

"Upon the written application of three freeholders of the township in which a justice resides, he may appoint one or more electors of the township special constables, who shall guard and protect the property of such freeholders, designated in general terms in such application from all unlawful acts, and so far as necessary for that purpose, a constable so appointed shall have the same authority and be subject to the same obligations as other constables."

The general powers of a sheriff are defined in section 2833 of the General Code, as follows:

"Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other process to him directed by proper and lawful authority. He shall attend upon the common pleas court and the circuit court during their sessions, and, when required, upon the probate court. In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of a county as may be necessary. Under the direction and control of the county commissioners, he shall have charge of the court house."

Section 2485 of the General Code provides that the county commissioners may allow a reasonable compensation to any person who is summoned to aid a sheriff in the execution of any writ or process *in favor of the state,* as follows:

"The county commissioners shall audit and allow a reasonable compensation to any person who is summoned to aid a sheriff or constable or other officer in the execution of any writ or process in favor of the state, but such compensation shall not exceed one dollar per day, and shall be allowed only upon certificate of such officer."

Although section 2830 of the General Code provides that with the approval of the judge of the court of common pleas, the sheriff may appoint in writing one or more deputies, as follows:

"The sheriff may appoint in writing one or more deputies. If such appointment is approved by a judge of the court of common pleas of the subdivision in which the county of the sheriff is situated, such approval at the time it is made, shall be endorsed on such writing by the judge. Thereupon such writing and endorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The clerk's fees therefore shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No justice of the peace or mayor shall be appointed such deputy."

nevertheless, if it was necessary for the purpose of performing the duties of his office, such as service of writs or warrants upon the violators of the law of this state, as in this case, then the sheriff may call to his aid such person or persons or power of the county as may be necessary, as provided by section 2833 of the General Code, supra, without the approval of the court of common pleas, as provided by section 2830 of the General Code, supra. In all probability it was necessary for the sheriff to call to his aid deputies in serving the warrants upon the violators of the law, as set forth in the above statement of facts as contained in the sheriff's letter to your department.

Therefore, it is the opinion of this department, in answer to the first question, that the county is not liable for the expenses incurred by the sheriff and his deputies in rendering protection to the property of the said stone or quarry company during the strike. In answer to the second question, it is my opinion that the county is liable for the expenses of the sheriff and his deputies, including the fees of his deputies, in serving warrants upon and in arresting parties who had violated the laws of the state of Ohio.

It is furthermore disclosed by the enclosed correspondence that there are insufficient funds in the fee fund by which to satisfy such liability, and the third question, therefore, arises as to how such liability can be satisfied.

Section 2980-1 of the General Code, provides as follows:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office or office of the clerk of courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; *provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same, said judge shall find that such necessity exists, he may allow such a sum of money as he deemed necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes, as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.*

"When the term of an incumbent of any such office shall expire within the year for which an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount aggregate sum which may be expended by his successor for the fractional parts of such year."

It is the opinion of this department that compensation to the deputies who assisted the sheriff in serving the warrants upon and in arresting the said violators of the law, can be made only in one of two ways, to wit, either by the county commissioners making a reasonable allowance as compensation to the persons who were summoned to aid the sheriff in the execution and service of said writs, in accordance with section 2485, supra, or, by the court making an additional allowance for such compensation of the deputies so incurred in the service of the warrants, as above set forth, in accordance with section 2980-1, of the General Code, supra.

It is further the opinion of this department that the expense of the sheriff for transportation, automobile hire, etc., in serving said warrants upon and in arresting said violators; can be paid by the county, only upon application to the court of common pleas for an additional allowance and the granting of such additional allowance by said court as provided by section 29801-1, General Code, supra, there not being sufficient funds in the fee fund to pay such expense, as disclosed by the correspondence attached to your inquiry.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

428.

RAILROAD POLICEMAN AN OFFICER IN SOME RESPECTS—CANNOT DRAW COMPENSATION UNDER SECTION 12385, GENERAL CODE.

A railroad policeman is an officer in so far as he has power to make arrests in the discharge of his duties for the railroad company for which he was appointed, and his compensation is paid by the railroad company which employs him. A railroad policeman cannot draw compensation from the public treasury under the provisions of section 12385, *General Code.*

COLUMBUS, OHIO, June 30, 1913.

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

GENTLEMEN:—Under date of January 8, 1913, you inquire:

> "Is a railroad policeman employed under the provisions of section 9150, General Code, such an officer as may receive the fees provided by section 12385, General Code, for transporting a prisoner to a workhouse?"

You call attention to the opinion of Hon. U. G. Denmann, attorney general, as given in report for 1909, at page 222. It was held in that opinion, after quoting section 3431, Revised Statutes:

> "I am unable to find any other provision in the statute relating to fees and compensation of railroad policemen, and I am of the opinion that the only compensation or fees to which a railroad policemen is entitled is that mentioned in section 3431."

Section 3431, Revised Statutes, is now known as section 9154, General Code, and reads:

> "The compensation of such policeman shall be paid by the company for which they respectively are appointed, and at such rates as may be agreed upon by the parties."

Section 12385, General Code, to which you refer, provides:

> "The sheriff, or other officer, transporting a person to such workhouse shall have the following fees therefor: six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and, in cases for the violation of the ordinances of a municipality, by such municipality on the order of the council thereof."

The question arises, do the words, "or other officer" in this section, include a railroad policeman.

Railroad policemen are appointed by virtue of sections 9150, et seq., General Code.

Section 9150, General Code, provides:

"Upon the application of a company, owning or using a railroad, street railroad, suburban or interurban railroad in this state, the governor may appoint and commission such person as the company designates or as many thereof as he may deem proper, *to act as policemen for and on the premises of such railroad or elsewhere, when directly in the discharge of their duties for such railroad.* Policemen so appointed shall be citizens of this state and men of good character. They shall hold office for three years, unless for good cause shown, their commission is revoked by the governor, or by the railroad company, as provided by law. Not more than one such policeman shall be appointed for each five miles of a street, suburban, or interurban railroad."

Section 9150, General Code, provides:

"Before entering upon the duties of his office, each policeman so appointed shall take and subscribe an oath of office, which shall be endorsed on his commission. A certified copy of such commission, with the oath shall be recorded in the office of the clerk of the common pleas court in each county through or into which the railroad runs for which such policeman is appointed, and intended to act. *Policemen so appointed and commissioned severally shall possess and exercise the powers* and be subject to the liabilities *of policemen of cities* in the several counties in which they are authorized to act *while discharging the duties for which they are appointed.*"

It appears from these sections that a railroad policeman is appointed by the governor and takes an oath of office. They are given the powers of policemen of cities "while discharging the duties for which they are appointed."

By virtue of section 9150, General Code, a railroad policeman is appointed "to act as policeman for and on the premises of such railroad or elsewhere, when directly in the discharge of their duties for such railroad."

Therefore, a railroad policeman is an officer in so far as he has power to arrest in the discharge of his duties for the railroad for which he was appointed. His compensation is paid by the railroad and not by the public.

He is not an officer in contemplation of section 12385, General Code, which would authorize a railroad policeman to draw compensation from the public treasury.

I, therefore, concur in the opinion of Hon. U. G. Denman.

A railroad policeman is not entitled to compensation from the public treasury under section 12385, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

432.

PER DIEM COMPENSATION TO BE PAID ONLY FOR DAYS SERVICE IS PERFORMED—A PERSON ACTING IN TWO CAPACITIES MUST ELECT ON WHICH PER DIEM HE WILL RECEIVE PAY.

Per diem compensation is intended to cover payment for days on which work is performed. A court constable hired at two and one-half dollars per day may receive pay only for such days as he is actually employed.

When an infirmary director acts as a court constable he may only receive his per diem in one capacity on the same day. A person acting in both capacities must elect on which per diem he will receive pay.

COLUMBUS, OHIO, August 7, 1913.

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

GENTLEMEN:—Under favor of July 30th you request my opinion as follows:

> "May court constables in counties where only one holds court be legally paid the per diem compensation fixed by section 1693 for days on which the court is not in session?
>
> "An infirmary director was appointed court constable and received per diem compensation as such for the same days on which he also received per diem compensation as infirmary director. What finding should be made by this department?"

The Century dictionary defined "per diem" as follows:

> "By the day; in each day; daily; *used of the fees of officers* when computed by the number of days of service."

This department has always followed the well settled rule that a per diem compensation is intended to cover payment for days on which work is performed.

Section 1693, General Code, has been amended slightly as it appears in 103 O. L. I quote the section, however, as it appeared prior to its change, that undoubtedly being the act under which your findings are to be made.

> "Section 1693. Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, such compensation shall not exceed twelve hundred and fifty dollars each year, in counties where more than one judge and not more than three judges hold court at the same time, not to exceed one thousand dollars each year, and in counties where one judge holds court, two and one-half dollars each day, and shall be paid monthly from the county treasury on the order of the court. Such court constable, when placed by the court in charge of the assignment of cases, may be allowed further compensation not to exceed one thousand dollars as the court by its order entered on the journal determines."

Under the act in this form and also under its present form the court constables referred to by you was to receive two and one-half dollars each day. "Each day" being but the English translation of the term "per diem," I hold in accordance with the rule universally adopted by this department and by the courts that the

constable may receive his two and one-half dollars for only those days upon which he performs work required by his position. Should he be required to perform any duties when the court is not in session he, of course, would be allowed his per diem for the days on which work is performed.

Answering your second question, permit me to refer you to section 496 of Throop on public officers and section 859 of Mechem on public officers, both of which authorities uphold the rule that where the compensation is a per diem allowance, the officer cannot have such an allowance for the same day's service in each of two or more offices held by him.

It seems well settled, therefore, that he may not receive a per diem on the same day for work in both the capacity of court constables and in the capacity of infirmary director. It is equally well settled, however, that the law disregards fractions of a day, and an individual is entitled to his per diem in one or the other of these capacities where he has substantially performed the duties of the position. An individual who is acting in both capacities must be required to elect which of the per diem he will retain, and a finding should be made against him for the other if he has received both.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

438.

TAXES AND TAXATION—CONTRACTS PAYABLE FROM PROCEEDS OF BOND SALES—OBLIGATIONS AGAINST WATERWORKS FUND PRODUCED BY OPERATION OF THE PLANT.

1. *Contracts payable from the proceeds of bonds sold for a specific purpose must be certified to by the city auditor before the same become a legal charge against said fund, but in the present state of the law such contracts are an equitable obligation of the city, payable from said fund in the sense that if the department having charge of the work approves a final estimate, and the city auditor is willing to issue his warrant thereon the city solicitor, or a taxpayer in his stead, cannot successfully enjoin the payment of the money.*

2. *Contracts payable from the waterworks fund arising from the revenue produced by the operation of the plant need not be certified to by the city auditor in order to become valid and enforceable obligations against said fund.*

COLUMBUS, OHIO, July 15, 1913.

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

GENTLEMEN:—In your letter of May 28th, receipt whereof is acknowledged, you request my opinion upon the following questions:

> "Must contracts payable from the proceeds of bonds sold for a specific purpose be certified to by the city auditor before the same becomes a legal charge against said fund?
>
> "Must contracts payable from waterworks fund arising from the revenue produced by the operation of the plant be certified to by the city auditor in order to become valid and enforceable obligations against said fund?"

These questions obviously concern municipal corporations, as such, and involve, therefore, the interpretation of sections 3806, 3807, 3809 and 3810 of the General Code, which I quote in full:

"Section 3806. No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force.

"Section 3807. All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or a board, officer, or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order.

"Section 3808. No member of the council, board, officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom.

"Section 3809. The council of the city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel.

"Section 3810. Money to be derived from lawfully authorized bonds or notes and in process of delivery, shall for the purpose of the certificate that money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund."

These statutes seem to me to be perfectly clear on their face, but their application has become doubtful by reason of three seemingly inconsistent decisions of the supreme court, viz.: Emmert vs. Elyria, 74 O. S., 185; Carthage vs Deik-

meier, 79 O. S., 323 and Akron vs. Dobson, 81 O. S., 66, and similar decisions of lower courts, in Bridge Co. vs. Toledo, 10 C. C. n. s. 137, and Conneaut vs. Strauss, 11 N. P. n. s. 277. As both the latter decisions, however, were rendered solely upon the authority of Emmert vs. Elyria, supra, it will be sufficient to discuss the three decisions of the supreme court to which I have referred.

As the supreme court is required by its rule to state its conclusions of law in the syllabi of its decisions, I shall first quote the head notes of each one of these three cases insofar as they relate to this question:

"2. Sections 45 and 45a of the Municipal Code (1526-205 and 1536-205a, Revised Statutes, Bates 5th ed.) providing in substance that no contract involving the expenditure of money shall be entered into unless the auditor of the corporation shall first certify to council that the money required for the contract is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, and that a contract entered into contrary to such provision shall be void and that the money to be derived from lawfully authorized bonds or notes sold and in process of delivery shall be deemed in the treasury and in the appropriate fund, do not apply to contracts for street improvements, when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement. Emmert vs. Elyria, 74 O. S. 185.

"1 Where a municipal corporation, by sale of its bonds, creates a fund for the improving of certain streets, and takes the necessary steps to receive and accept bids and to contract separately for the improvement of each of said streets, the following certificate filed by the clerk of the corporation at the time the bid is accepted and contract executed, to wit: 'I hereby certify that there is money in the village treasury in the fund from which the above fund is proposed to be drawn for payment of the village portion of the improvement and not appropriated for any other purpose sufficient to pay for the same. L. Hall, village clerk,' is not in compliance with section 2702 (old number), Revised Statutes, in that it is not certified that a special sum of money required for the contract to improve the street 'is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose.'

"2. Where the above defect in the certificate is discovered before the execution of the contract, and the clerk of the corporation, in the presence of the municipal council and with its knowledge and consent, amends the certificate by inserting therein, although in figures, the sum of money required for the tract and the certificate so amended is filed and recorded as required by said section, and the contract then executed, said certificate is a limitation on the amount to be paid on the contract for that street, beyond which the corporation is not liable to the contractor. Carthage vs. Deikeimer, 79 O. S. 323.

"3. Section 1536-205, Revised Statutes, providing that no contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or other order for the expenditure of money, be passed by the council or by any board or officer of the municipal corporation, unless the auditor of the corporation shall first certify to the council that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose does not apply to an ordinance ap-

propriationg the money obtained by council, from a sale of bonds made by it, to the purpose for which the bonds were sold. Akron vs. Dobson, 81 O. S. 66."

As I have already remarked, the three decisions, the law determined in which is supposed to be incorporated in the above quoted syllabi, seem at first blush, to be inconsistent.

In Emmert vs. Elyria, supra, the supreme court, lays down the broad proposition that money to be derived from the sale of bonds may be expended, and contracts let for this purpose, without the issuance of the auditor's certificate. The statement is simply made that sections 45 and 45a of the municipal code of 1902, now embodied in the General Code sections above quoted, does not apply to contracts expending the proceeds of a bond issue for specific purposes. Yet in Carthage vs. Deikmeier, supra, it appears on the face of the syllabus that the court had before it a case of this very sort, i. e., the expenditure, under contract, of the proceeds of an issue of bonds for a specific purpose. It was held by necessary inference that the issuance of the certificate was required, because the recovery of the contractor was limited to the amount certified to.

In Akron vs. Dobson, supra, the holding, so far as the syllabus discloses, was to the effect that the provisions now under consideration do not apply to an *ordinance appropriating* the proceeds of a bond issue for a specific purpose to one or more detailed purposes. Of course the distinction between the question as to whether or not the certificate must be issued as a prerequisite to the passage of such an appropriation ordinance, and the question as to whether or not its issuance is required before a *contract* is entered into, is perfectly obvious (although as I shall hereafter point out this distinction does not seem to have been clearly in the mind of the court in deciding the Dobson case).

So far, however, as the syllabus in the Dobson case is concerned it does not amount to a reversal of the court's position as indicated by the syllabus in the Deikmeier case; because the earlier case dealt with the contract and the later case with the appropriation ordinance.

On the face of the respective syllabi, the Deikmeier decision seems to be wholly inconsistent with the Emmert case. I would be unwilling, however, to state that the one case amounted to a reversal of the other upon such an inference as may be drawn from the syllabi. It is obvious, therefore, that in order to determine precisely what was decided in the Emmert case and in the Diekmeier case respectively recourse must be had to sources of information other than the syllabi.

In the effort to ascertain precisely what has been decided by the supreme court in these cases I have turned, first to the facts as stated in the respective reports.

In Emmert vs. Elyria, supra, the circuit court made a findings of fact which appear at pages 188-9. I shall quote sufficiently from these findings of fact to illustrate their bearing upon the question now under consideration:

"That * * *the certificate of the auditor of said city, that the money necessary for said improvement was in the treasury to the credit of the proper fund and unappropriated for any other purpose *was filed* with the clerk of the council and also in the office of the board of public service of said city * * * immediately before said contract was let, and not before that time, and that on the day of said filing * * * *all proceedings of council* with respect to said improvement *had already been had* * * *.

"III. At the time said certificate was filed there was no cash in the proper fund and unappropriated in said treasury for said improvement, but bonds of said city wherewith to provide such cash had been duly authorized. Said bonds had not been sold nor were there any notes of said city

then sold and in process of delivery, and said facts were all well known to all the defendants; who, however, in good faith, and pursuant to the advice of the solicitor of said city, proceeded with said improvement * * *."

It further appeared (pages 186-187 of the report) that there was a single improvement involved which was to be paid for partly by assessment upon abutting property and partly by general tax levy, and that the city's portion was provided for by the issue of bonds referred to in the circuit court's finding of fact. It still further appeared that the contract had been fully performed and that the city officials were willing to pay it, so that the city itself was not resisting the claim of the contractor. The action was in form of a taxpayer's action to enjoin the proposed payment.

The foregoing statement of facts will be sufficient to illustrate the case before the court in Emmert vs. Elyria.

In the case of Carthage vs. Deikmeier, supra, the action was quite different from that in Emmert vs. Elyria in that the village was there resisting payment to the contractor. In other words, the forum was a court of law and not a court of equity as in the Emmert case. The village defended solely on the ground of the Burns law, and, the case having been submitted to a jury, a special verdict was returned which is found on page 325 of the report, and which incorporates the following facts:

"No. 2. The defendant prior to June 7, 1900, took the necessary action for the issuing of bonds of the village in the sum of $40,000 for the improvement of the streets, which said action resulted in the creation of a fund in the treasury of said village on June 7, 1900, amounting to $40,480. Said fund of $40,480 was on August 10, 1900, and up to and including the date of the filing of the petition in this case on February 21, 1903, the only fund in the treasury of the said village raised for the purposes and available for the payment of any portion of the street improvements in said village.

"No. 3. Between April 9, 1900, and August 10, 1900, the council * * * took the necessary action and passed the necessary proceedings for the improvement of eighteen streets of the village. * * * It was provided in the proceedings for such improvement that the cost of the cement curb and gutters in each instance should be assessed against the abutting property owners.

"No. 4. Between the ninth day of April, 1900, and the tenth day of August, 1900, the council * * * took the necessary steps * * * to improve Linden street * * *.

"No. 5. On Tuesday evening, August 7, the council passed eighteen resolutions awarding the *various* street improvements to the lowest bidder in *each instance,* and among others was the resolution awarding the contract for the improvement of Linden avenue to the plaintiff, * * *. None of said resolutions including the Linden avenue resolution, had any certificate attached thereto * * *.

* * * * *

"No. 7. On Friday night, August 10, a special meeting of the council of defendant village was held, at which time the action of the council on Tuesday night, August 7, * * * was rescinded. Eignteen new resolutions to contract were presented. (Here follows a copy of the resolution awarding the plaintiff Diekmeier the contract for Linden avenue, to which is attached in the general form the certificate of the village clerk.)

"(The 8th special verdict is to the effect that the certificate as first

executed was corrected by inserting a specific amount as being the amount for the Linden avenue improvement.)"

It was further found that the principal contract was entered into for the amount covered by the certificate, and that subsequently a supplementary contract was entered into in all respects in the manner provided by the statute, excepting that no certificate was issued in connection with such supplementary contract. It was also found that the work was performed in accordance with the plans and specifications, and that the city engineer made a final estimate in favor of the contractor for an amount greatly in excess of the amount certified to.

The common pleas court had rendered judgment for the plaintiff on this contract and the circuit court on error modified the judgment so as to allow recovery upon the principal contract and in the amount certified to, but so as to exclude compensation for the work done and material furnished under the supplementary contract.

With these facts in mind the interpretation of the syllabus in the Deikmeier case, as above quoted becomes very clear. I will first point out the particulars in which the Emmert case and the Deikmeier case are similar to each other. They are as follows:

1. In both cases there was an issue of bonds to pay for the entire cost and expense of the improvement; and in both cases the bonds were to be met partly by special assessments and partly by the general tax levies of the corporation.

2. In both cases the contractor had fully performed his contract at the time the suit was instituted.

3. In both cases the question was as to the necessity of the issuance of the certificate as a condition precedent to the making of a valid *contract;* no question being made as to the necessity of such action as a condition precedent to the passage of an ordinance providing for the issuance of bonds or appropriating the proceeds of such bonds when issued.

On the other hand there are certain points of dissimilarity between the two cases as follows:

1. The Emmert case was a taxpayer's injunction suit, the object of which was to restrain the city officers from paying from the city treasury the amount claimed by the contractor and conceded to be due him by the city authorities, in the Dickmeier case the village authorities refused to pay the contractor the amount of his final estimate and he brought suit at law to compel payment.

2. In the Emmert case was involved, apparently a single improvement, although evidently there were, or must have been two issues of bonds, one to pay the city's portion and the other in anticipation of the special assessment. This appears, however, only by inference. In the Deikmeier case, on the other hand, there were eighteen street improvements, all of which were to be paid for out of one or two issues of bonds.

3. In the Emmert case a certificate had been actually issued before the contract was entered into, but its recitals were false in that there was actually no money in the treasury, and the bonds, though authorized, were not sold and in process of delivery. Nevertheless, the contractor, though cognizant of the actual facts, claimed the protection of the certificate and the opinion of the city solicitor as to the legality of the proceeding. This claim was set up as a *defense* in a suit in equity and not as a part of a *cause of action* in a suit at law.

In the Deikmeier case there was also a certificate which had not been issued until the contract was about to be awarded. This certificate was held to be valid and to render the part of the contract covered by it enforceable. There was no certificate at all, however, upon the supplementary contract entered into subsequently between the parties. The lack of this certificate was held to be fatal

to the claim of the contractor for work done and materials furnished under the supplementary contract, although the village had received the benefits of such work and material.

These points of similarity and distinction suggest the possibility of reconciling the two cases on more than one ground. In order, however, that this possibility may be further weighed it is necessary, in my judgment, to have regard to the opinion in each case. That in the Emmert case was delivered by Summers, J. He first traces the legislative history of the so-called Burns law and cites the leading case of Lancaster vs. Miller, 58 O. S. 558; Bridge Co. vs. Campbell, 60 O. S. 410; Comstock vs. Nelsonville, 61 O. S. 288 and Wellston vs. Morgan 65 O. S. 219. Then in the course of the opinion comes an observation which seems to attach some importance to the form of the particular action which is in the following language:

> "But, because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so *or that a court because it will not enforce payment will enjoin it.* The contract for paving this street is not *ultra vires.* If invalid it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a *court of equity* ought not, unless its failure to do so would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

It will be observed that the judge who wrote the opinion was not unmindful of the peculiar nature of the case before him. The principle which he suggests is analogous to that announced in Fronizer vs. State, 77 O. S. 7. In its particular application it is that a court of equity will not enjoin the payment of a technically void obligation, where to do so would result in an unjust enrichment.

This portion of the opinion, then, does seem to lay some stress upon the difference between the two cases already pointed out, which grows out of the fact that one is a suit in equity and the other an action at law. However, the judge who wrote the opinion in the Emmert case did not reach his conclusion upon the ground just discussed, but upon the reasons stated in the syllabus which has already been quoted. The language of the opinion on this point is as follows:

> "But in the view taken of the statutes a disposition of the case upon these considerations is not necessary.
>
> "* * * * *
>
> "In Comstock vs. The Incorporated Village of Nelsonville, supra, it is held that, in the absence of an exception, section 2702 applied to so much of the cost of the street improvement as was to be paid by the city out of a levy and that it did not apply to so much as was to be paid by special assessment, for the reason that the payment that was to be made by the city was included in the general levy which was subject to limitation. As the general law then was, the city was not authorized to provide for its part by a levy extending over a number of years and by bonds issued in anticipation of the collection of the levy. Section 51 of the code provides that bonds may be issued in anticipation of the collection of assessments and that the assessment may be payable in one to ten installments, and section 53 provides that any city or village is authorized to issue and sell its bonds as other bonds are sold to pay the corporation's part of any

improvement and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon, and in section 95 it is provided that municipalities shall 'have power to issue bonds in anticipation of special assessments, and such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement,' so that it would seem to follow now that a municipality may issue bonds in sufficient amount to pay the estimated cost and expense of the improvement and may levy taxes in addition to all other taxes authorized by law, to pay the bonds issued and sold to pay its part of the cost of the improvement, that sections 45 and 45a do not apply to improvements for which the city has authorized bonds to be issued to pay the entire estimated cost and expense.

"Having found that these sections are not applicable, their interpretation is not necessary."

It is easy to follow Judge Summers' reasoning here if certain qualifications are read into his language. He proceeds on the premise that the object of the Burns law is to prevent the incurring of floating indebtedness beyond the ability of the corporation to pay out of its current levies. He then reaches the conclusion quite easily that, when prior to the making of a contract a *funded* indebtedness has already been authorized to be created and funds thus provided, for the specific purpose, the statute, founded as it is upon such a public policy, has no application.

How this conclusion could have been reached in the face of what was section 45a, M. C., and is now section 3810, G. C., above quoted, I have been unable to apprehend. It seems very clear to me that whatever the court may have deemed to be the policy of the statute, the legislature evidently did not regard that policy as being one, the necessity for which ceased to exist when bonds had been authorized or issued. To say that section 45a, M. C., now section 3810 does not apply when bonds have been authorized or issued to pay the corporation's part of the improvement as is explicitly stated in the syllabus of Emmert vs. Elyria, is to say that the section means nothing. If it does not apply when bonds are lawfully authorized and issued, it does not apply at all. This may be merely a use of unfortunate terminology. It will be observed that section 3810 is capable of two meanings which can be easily seen in the section by reading it in two different ways, thus; (1) "money to be derived from lawfully authorized bonds, or (from) notes sold and in process of delivery, shall, etc." (2) "money to be derived from lawfully authorized bonds or notes (when bonds or notes are) sold and in process of delivery shall, etc."

Now, in the Emmert case, as it will be apparent from consulting the statement of facts as I have abstracted them, a certificate had actually been issued before the contract was entered into and after the bonds had been authorized, but *before* they were sold and in process of delivery. The court below had mooted the question as to the proper construction of the statute. See 6 circuit court (N. S..) 381.

If the court really meant, then, to hold upon this question, which was directly involved in the case, that a certificate may be lawfully issued against an issue of bonds which has been authorized, before the bonds are actually sold and in process of delivery, the court's judgment would have been that which was actually rendered, it would have decided a point which was directly raised in the case, and the decision would be less difficult to reconcile with the plain provisions of section 3810, General Code, then section 45a, M. C.

I feel that I would be unwarranted, however, in taking such liberties with the language which the court has actually used, both in the syllabus and in the opinion. The court lays down the broad principle that sections 45 and 45a, M. C., do not *apply* when a municipality has authorized its bonds to be issued and there is thus in

potential existence a fund from which the improvement can be paid for, so that the danger of exceeding limited revenues in any one year, and thus incurring a floating indebtedness is obviated. That the court in so doing, and in thus applying to the application of the statute the maxim *cessat ratio, cessat ipso lex,* ignores a plain and unequivocal legislative declaration which is inconsistent with the assumed policy of the law, is unfortunate and puzzling, but it does not explain a way this express language in the syllabus and in the opinion.

In passing, it might be remarked that it is difficult also to understand why the reason of the statute fails when bonds have been authorized to be issued for a specific improvement any more than it would fail when the design was to meet the corporation's portion of the cost of the improvement out of current levies under rate limitations. It would be just as possible for a floating indebtedness to be incurred when bonds have been issued in the absence of statutes like those under discussion by simply making the contract to call for the expenditure of an amount greater than the proceeds of the bonds when sold; just as it would be possible, as the court points out, for the floating indebtedness to be incurred by making a contract to be discharged out of general levies subject to limitation. It will be observed also, in passing, that while it is true in point of fact, that the bond issue involved in the Emmert case was for the purpose of making a single improvement, this fact is nowhere commented upon by the judge who delivered the opinion, nor by the court in the syllabus. When I speak of a single improvement in this connection, I mean that the entire issue of bonds was to be expended in paying a single contractor, yet, as will be seen it is possible to distinguish this case from the Deikmeier case on this ground.

In conclusion, then, as to the Emmert case, it may be stated that it might have been decided on the ground that it was a taxpayer's injunction suit and not an action on a contract or for work and labor; it might have been decided on the ground that a single contract was to be discharged by payment out of the proceeds of a single issue of bonds, or rather two issues of bonds, one for the city's portion, and one for that of the assessed property; it might have been decided on the interpretation of section 3810, and by holding that the word "or" as therein used is completely disjunctive, but it was not decided upon any of these grounds, but upon the announced ground that the sections to which your question relates do not apply at all to any step in the making of an improvement for which bonds have been issued—whether the suit it at law or in equity, and whether the proceeds of the bonds are to be expended under one contract or several.

The opinion in the Deikmeier case was written by Price, J. He first notices the fact that at the time the contract was entered into with Deikmeier the money derived from the sale of the bonds intended to provide for his contract and the seventeen other contracts involved *was actually in the treasury.* It seems pertinent for me here to remark that if the money was actually in the treasury and it had been provided by a sale of bonds, then on the theory of Emmert vs. Elyria, the danger of incurring a floating indebtedness was past and the statute would have to be held totally inapplicable. This, however, was not the conclusion of the court as expressed in the syllabus, nor did Judge Price employ any such reasoning. He proceeds to construe the statute, making use of the unmistakable terms found on its face, and reached the conclusion that on the facts as I have already abstracted them, the original certificate was not sufficient but the amended certificate as corrected by the clerk was proper. Then follows language, by the use of which, it is possible to distinguish the Deikmeier case from the Emmert case, which is as follows:

> "But we are dealing with the meaning of the section requiring the certificate. After the words of prohibition and the duty of filing and

recording the certificate, and their effect, it provided: *'and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of this section shall be void.'*

"*Whatever may be the correct view as to the meaning of this statute where a single contract is let,* it seems to be a reasonable construction that there be a definite sum certified for each contract where there are several of the same species entered into at the same time to be paid from a theretofore gross fund. It would seem conducive, if not necessary to the safety of each contractor, that a definite sum be certified, because it is on the performance of that act by the village clerk that money to discharge the obligation is set apart and appropriated, and which 'shall not thereafter be considered unappropriated, etc.' The two branches of the section must be construed together and when so construed, the entire section given its proper operation. Governed by this rule, we cannot say that the original certificate in question was drawn in compliance with said statute, and while *in case of a single contract in contemplation, to be satisfied from a single fund, such a certificate might be sufficient,* (but we do not so decide), it is quite clear to us that when the statute is to be applied to the subject-matter where several different streets are to be improved for which purpose separate contracts are let on different separate bids, the certificate should contain a specified sum set apart for each of such contracts."

Holding that the certificate, as corrected, was valid as to the principal contract Judge Price then proceeds to discuss the claim of the contractor under the supplementary agreement. After discussing other phases of the question makes use of the following language on page 345:

"Moreover, it was not within the power of the council or the village engineer to increase the liability of the corporation beyond the amount for which the certificate had been filed and thereby nullify section 2792. That would be striking down rather than obeying the statute. No mere final estimate of the engineer, no matter if it is correct in its terms, can increase the corporate liability, neither did the acceptance of the work by the public authorities accomplish that result. If the contractor found that he was deceived by the estimate as to quantities and work, and that the improvement could not be made on such terms, he should have acted promptly and had legal and proper action taken to relieve the dilemma rather than blindly or willingly, expecting that the law and action of council would be relaxed so he could get full compensation by putting another and unexpected burden upon the taxpayers."

On this point he cites Bridge Co. vs. Campbell, supra, Comstock vs. Nelsonville, supra and Wellston vs. Morgan, supra. Thereupon he makes use of the following language:

"If there was anything left in doubt or obscure in the former cases, it surely has been made plain and emphasized in the latter case. There are other decisions, but these are sufficient to establish the law of this jurisdiction. It seems to us that the present is a proper case for the application of the doctrine of the above cases. To hold otherwise would put it

in the power of a contractor to exhaust the people's money on a few streets, and leave the others wholly unimproved."

Can the Deikmeier case be distinguished from the Emmert case on the ground that several improvements instead of one improvement were involved therein, as already suggested?

Certainly there is this difference between the two cases, yet when Judge Price is discussing the interpretation of the statute and speaking of the case of a single contract to be satisfied from a single fund, he is discussing the *form* of the certificate required in such case, *and not the question whether any certificate is required at all or not.* Certainly it seems never to have occurred to Judge Price in spite of the decision Emmert vs. Elyria, in which he concurred, that *no certificate* would be required in the case of a single improvement to be paid for out of a single issue of bonds. One would suppose that in discussing the prior case decided under the section, reference would have been made to Emmert vs. Elyria; but while other cases are cited no mention is made of that decision in the opinion in the Deikmeier case.

I conclude, then, that while it is possible to distinguish the two cases upon the ground just discussed, the court certainly does not so distinguish them, but the unanimous court in each case has reached its conclusion upon grounds which, as announced, are quite inconsistent with each other.

If the distinction be drawn along lines other than those expressed by the court itself, then it is fair and reasonable to distinguish the two cases upon either of the two grounds already suggested, viz.: that the Emmert case was a taxpayer's injunction suit, while the Deikmeier case was an action at law; and that in the Emmert case, the certificate, as issued, may have been proper because the bonds had actually been authorized though not sold and in process of delivery; while in the Deikmeier case there had been no certificate whatever issued as to the supplementary contract.

As between these two cases then, I can only say that the Deikmeier case certainly *limits* the doctrine of the Emmert case; to the extent that it limits it, it must be regarded as falsifying the declaration that the Burns law "does not apply" to cases where the corporation has provided for the total cost of the improvement or contract by authorizing the issuance of bonds. Whether or not the latter case reverses the earlier case in its entirety might be an open question, were it not for the later decision in Akron vs. Dobson, supra, to which I am about to refer. If the question were an open one I might say, in passing, that I should certainly prefer the doctrine in the Deikmeier case to that of the Emmert case for reason which I have already pointed out.

I come now to a discussion of the Dobson case and its relation to the two decisions already discussed in detail. The syllabus has already been quoted. The facts are not abstracted by the reporter but are stated in the opinion of the court, which was rendered by Judge Summers, who also wrote the opinion in the Emmert case. I quote sufficiently from the opinion to show what the facts were:

> "In March, 1908, the council of the city of Akron passed an ordinance providing for a bond issue of thirty thousand dollars, for the purpose 'of purchasing real estate for public purposes, to wit, for erecting thereon and equipping a building necessary for the fire department, and for purchasing a fire engine, and for improving and equipping fire stations 2, 3, 5 and 7, all of said fire stations being buildings used for public purposes, to wit, for the fire department of said city.'"

I pause here to remark that this bond issue was like that in the Deikmeier case,

and unlike that in the Emmert case in that it was for several distinct purposes, and not for the purpose of meeting the expense of a single improvement. The funds produced thereby were to be used for the following distinct and separate objects: 1. purchasing real estate; 2. erecting a fire department building; 3. equipping a fire department building with miscellaneous apparatus; 4. purchasing a fire engine; 5. improving and equipping fire stations other than that to be erected on the real estate to be purchased. There were four separate stations to be equipped, just as there were eighteen streets to be improved in the Deikmeier case. The case, therefore, was directly on all fours, so far as this question is concerned, with the Deikmeier case, and if the Deikmeier case is to be distinguished from the Emmert case on the ground of plurality of improvements, then by a parity of reasoning the Dobson case might be distinguished from the Emmert case and likened to the Deikmeier case.

Judge Summers proceeds in the Dobson case to state the facts as follows:

> "Prior to the 6th day of April, 1908, the bonds were duly issued and sold, and the proceeds paid into the treasury of the city. Upon the 6th day of April, 1908, the council passed an ordinance authorizing and empowering the directors of public safety to expend the sum of thirty thousand dollars, realized from the sale of said bonds, for the purpose stated in the first mentioned ordinance. The last mentioned ordinance further authorized the directors to enter into contracts 'with the lowest and best bidder,' after advertisment according to law."

Various steps are then recited showing the acceptance of a bid from a certain motor fire apparatus company for furnishing a *part* of the equipment to be purchased out of the proceeds of the bond issue. In the course of these recitals, the statement is made that the defendant in error, the plaintiff below, was a taxpayer who had requested the city solicitor to enjoin the payment of any money to the motor fire apparatus company, and the solicitor failing to sue, the plaintiff brought suit in his own name, as provided by statute, to enjoin such payment.

In this respect, then, the case is like the Emmert case and unlike the Deikmeier case. That is to say, Dobson, like Emmert, was a taxpayer seeking to enjoin the payment of funds under a contract executed without a certificate having been issued, and was not like Deikmeier, who was a contractor seeking to recover from the municipal authorities, who were themselves resisting his claim. The statement is then made in the course of the opinion that:

> "It is contended, first, that the city council neither authorized nor approved the contract; second, that the city auditor did not certify to the council that the money was in the city treasury to meet the contract, and third, that the Municipal Code does not authorize the issuing of bonds for the purchase of such apparatus."

Speaking, at the end of the opinion, of the contention which is of interest in conection with your question, Judge Summers says:

> "It is also contended that the contract is void because the auditor did not certify to the council that the money required for the contract was in the city treasury as prescribed by section 1536-205, Revised Statutes. The supplemental petition avers that the auditor did not so certify. This is denied by the answer in the circuit court, and that court does not make any finding upon that issue. This contract cannot create an obligation against the city in the nature of a debt, to meet which no funds have been

provided. The council issued and sold the bonds and appropriated the proceeds to meet the expenditure it authorized, and any obligations incurred by the ordinance, under the authority conferred are payable only out of the appropriations, so that the section can have no application to such a case."

This confused language leaves the question more in doubt than ever. In the same paragraph Judge Summers speaks of the inapplicability of the Burns law to the *ordinance* appropriating the proceeds of the bonds, and states facts which show that the only question which could have been involved was the applicability of the statute to the *contract.* This confusion of ideas is carried into the syllabus, which speaks of the ordinance and says nothing whatever about the act of the directors of public service in entering into the contract as affected by the absence of a certificate.

Yet, although both the opinion and the syllabus speak of the ordinance, it is apparent that the court's judgment must have been predicated upon the assumption that the certificate was not required as a condition precedent to the making of the contract, for it appears that whether or not there was any certificate issued before the contract was entered into did not appear in the record, no finding of fact having been made thereon by the circuit court. If the supreme court had regarded that as a material fact it would not have given judgment for plaintiff in error as it did, but would have remanded the case to the circuit court for further proceedings. Therefore, by rendering final judgment, the supreme court, in effect, decided that the total lack of a certificate is not a fatal defect. The same language is used here as was used in the Emmert case, viz., that the section "can have no application to such a case."

The dilemma presented, then, is as follows; in the Emmert case the court declared that where payment for a single improvement, under a single contract was to be made from a single issue of bonds, the Burns law did not apply at all, although a certificate had been issued after the bonds were authorized, and before the contract was entered into, but before the bonds were sold and in process of delivery; in the Deikmeier case the court held that the issuance of the certificate was necessary and that, therefore, the statute did apply in a case where no certificate had been issued and there were several improvements to be made under different contracts and to be paid out of a single bond issue.

In the Dobson case the court declared that the statute "could have no application" in a case where the record did not show whether or not a certificate had been issued, but where there were several improvements to be made under separate contracts and to be paid for out of a single bond issue, and that, therefore, the question as to whether or not the certificate had been issued was immaterial, but when the syllabus was prepared the declaration was that the statute did not apply to the "ordinance" nothing being said about the making of the contract by the directors of public service.

So far as any of the elements referred to in the foregoing discussion are concerned it is absolutely impossible to reconcile these three cases. If it be urged that the Deikmeier case is distinguishable from the Emmert case on account of the number of separate contracts involved, then it must be answered that a multiplicity of contracts was also involved in the Dobson case, although a conclusion opposite to that reached in the Deikmeier case was announced in the Dobson case.

If it be urged that the Dobson case cannot be regarded as inconsistent with the Deikmeier case, because the *syllabus* refers only to the necessity of a certificate as a prerequisite to the passage of an *appropriation ordinance,* it must be answered that the facts in the cases show that no certificate whatever was issued, either before the contract was entered into or before the ordinance was passed.

Now it must be borne in mind that the supreme court has never expressly reversed itself in the course of this judicial history. The opinion in the Deikmeier case does not refer to that in the Emmert case; neither does the opinion in the Dobson case refer to the Deikmeier case, nor, for that matter, to the Emmert case.

The supreme court being presumed to know what it has itself decided, I take it that an effort ought to be made to reconcile these cases so conflicting when the elements to which I have just adverted are alone taken into consideration, upon some other ground if possible. The suggested ground of distinction as between the Emmert case and the Deikmeier case, based upon the possibility of giving a certain construction to what is now section 3810, General Code, will not serve for this purpose, because in the Dobson case the court regarded the question as to whether or not *any* certificate had been issued at *any* time as *perfectly immaterial.*

Although Emmert vs. Elyria is not referred to in the Dobson case, it is cited in one of the briefs, and it is to be presumed from the similarity of the language used in the two opinions that in applying the rule announced in Akron vs. Dobson to the facts before the court, the court interpreted its own decision in Emmert vs. Elyria to have been based upon the total inapplicability of the section of the statutes, as it purported to be and not upon the interpretation of section 45a, M. C., now 3410, G. C.

There remains, then, but one ground of reconciliation—I refer, of course, to the fact that the Emmert and Dobson cases respectively were taxpayers' injunction suits, while the Deikmeier case was an action at law on the part of the contractor against the village. If this be regarded as a true distinction, then the cases are perfectly reconciled. Unfortunately, however, though the distinction does exist in fact it was not referred to either in the Deikmeier case or in the Dobson case, and the distinction between an action at law and a suit in equity to enjoin, while referred to in the opinion in the Emmert case, was expressly not relied upon as a ground of decision.

Whatever might be the propriety of an attempt to rely upon the distinction which I have just discussed, the distinction itself insofar as your first question is concerned is not of great practical importance. That is to say, your first question is evidently asked from the standpoint, so to speak, of the city auditor and is, first, as to whether or not he should issue a certificate in the case of a contract, payable from the proceeds of bonds issued for a specific purpose, and, second, whether or not when he is not asked to issue any such certificate and none is issued before such a contract is entered into, the auditor should issue warrants on the treasurer upon estimates furnished to such contractor?

In my opinion the auditor, in order to create a valid obligation against the city and against a particular fund produced by the sale of bonds for a specific purpose, should issue his certificate that the money required for the contract is in the treasury, etc., as provided by section 3806. Said certificate should be issued as a condition precedent to entering into the contract. It is not required as a condition precedent to the passage of the ordinance. In so deciding I have given cognizance of the case of Cincinnati vs. Holmes, 56 O. S. 104 in which, in the course of the opinion, in holding that the Burns law did not apply to special preceedings authorized by a special act, Judge Minshall expressed the view that if the issuance of a certificate is necessary at all it must take place when the council passes the ordinance determining to proceed with the street improvement. Inasmuch, however, as this holding was not necessary to a decision of the case, and inasmuch as the reasoning is clearly faulty, and inasmuch too as the decision was rendered under old statutes, I have seen fit to ignore the dictum. It is certainly the uniform practice to issue the certificate as a part of the contract, so to speak, and this practice, in my mind, is justified by a fair reading of the statutes.

If no certificate is issued before a contract, payable from the proceeds of the bonds for the specific purpose, is entered into, and the contractor upon performance receives an estimate and presents the same for the issuance of a warrant to the city auditor, in my opinion he should refuse to issue the warrant. This opinion is stated as a strict conclusion of law and ignores any equitable considerations that may enter into such a situation. The supreme court has held in State ex rel. vs. Fronizer, supra, that failure to issue a certificate, while it renders the contract technically void, and deprives the contractor of any right of recovery upon the common counts for work done and material furnished, yet the city (or in that case the county) having received and utilized the efforts of the contractor's labor and the materials which he has furnished, is under a species of moral obligation. No such doctrine will be found to be explicitly stated in the Fronizer case, but it is believed that it follows as a fair inference from the conclusion therein reached.

Nevertheless, the city auditor, whose duty it is under the statutes to scrutinize every claim presented to him for payment and to allow such claims only as constitute legal charges against the funds subject to disbursement upon his warrant, will be acting in strict accordance with his powers and duties if he should refuse to issue a warrant under the circumstances stated in your first question.

In reaching this conclusion I have followed the Deikmeier case which, as before stated, was a case wherein suit was brought against the city by the contractor, and have regarded the other two cases discussed as inapplicable.

I have already pointed out that the other two cases are cases in which a willing city auditor was sought to be enjoined from paying claims under these circumstances. These cases would perhaps be in point and would govern if the action were brought by the city solicitor, under the statutes regulating his powers and duties, for the purpose of restraining the misapplication of the public funds, for it is clear that a taxpayer, upon the refusal of the solicitor to act, succeeds to whatever cause of action the solicitor might have had if he had used on his behalf; so that if the auditor should determine to issue the warrant under the circumstances which I have imagined and the solicitor should attempt to restrain him from so doing, it is *possible* that the Emmert case and the Dobson case would prevent him from prevailing in such an action; but if the auditor should refuse to issue the warrant, and should stand upon his legal rights so that an action at law would have to be brought against him then *apparently* the principles of the Deikmeier case would control and the auditor would prevail.

The answer which I have given is one of three possible answers, which are as follows, viz.:

1. The absence of a certificate *enables* the city auditor to resist the contractor's claim (the theory which I have taken); 2. the absence of a certificate *compels* the city auditor to refuse to pay the contractor's claim, and if he undertakes to pay it he may be enjoined; 3. the absence of a certificate is of no consequence whatever when bonds have been issued for the specific purpose of the improvement for which the contract has been let, and the city auditor is neither compelled nor enabled to refuse to honor an estimate presented by the contractor under these circumstances.

The second of the two possible answers must be rejected on account of the decisions in the Emmert and Dobson cases, although these decisions, and the reasoning upon which they are based are very unsatisfactory.

The third of these answers must be rejected on account of the decision in the Deikmeier case, which, to my mind, is well and conclusively reasoned. Only by regarding the Deikmeier case as reversed by the Dobson case could this hypothesis be sustained.

I find myself, therefore, in the last analysis confronted with the necessity of deciding whether or not the Dobson case reverses the Deikmeier case, because, for

reasons already pointed out the two cases cannot be distinguished except upon the first theory above laid down.

I cannot bring myself to the conclusion that the court in deciding the Dobson case intended to overrule the Deikmeier case. The two cases were decided in close temporal sequence. The same judges participated in both decisions. The Dobson case does not expressly reverse the Deikmeier case. Therefore, propriety demands that the two cases both be regarded as stating adjudicated law and that they be reconciled if possible. I have pointed out one ground of possible reconciliation. That this ground is not relied upon by the court in deciding the subsequent case is a point entitled to great weight; but as between giving this point controlling weight and giving such controlling weight to the presumption that the court did not intend to reverse itself in so short a space of time without at least expressly referring to the prior case, I have chosen the latter alternative.

I realize that the state of the law upon your first question is very unsatisfactory and confused. I feel even impelled to state that if the court should have the entire question under review again it might, on account of the conflict in decisions, ignore all three of these cases and consider the question *de novo*. If the questions were so considered it seems to me that the court would be obliged, in reason, to draw the distinction where I have drawn it as between injunction suits and actions at law or to reverse expressly the Emmert and Dobson decisions. I think the alternative lies between these two possible conclusions because of the express language of section 3810 which certainly, to my mind, removes the foundation from under the logic employed by the court in deciding the Emmert and Dobson cases on the grounds upon which they were said to have been decided.

Answering your first question then categorically, I am of the opinion that contracts payable from the proceeds of bonds sold for a specific purpose must be certified to by the city auditor before the same become a *legal* charge against said fund; but that in the present state of the law such contracts are an equitable obligation of the city, payable from said fund in the sense that if the department having charge of the work approves a final estimate, and the city auditor is willing to issue his warrant thereon the city solicitor, or a taxpayer in his stead, cannot successfully enjoin the payment of the money.

Your second question must be answered in the negative. The earliest decisions under the statutes, which were the predecessors of the present code sections, laid down the principle that because what was then section 2702, R. S., was a part of the machinery of taxation and the expenditure of money to be raised by tax levies under defined limits, it was to be given a narrow construction in the sense that its application was to be limited to contracts and other obligations payable from the proceeds of general taxation.

In Kerr vs. Bellefontaine, 58 O. S. 446, the question being as to whether or not section 2702, R. S., applied to contracts made by the trustees of gas works and payable from a fund derived from the operation of such works, Shauck J., delivering the opinion of the court, and reaching the conclusion that the section did not apply, used the following language on page 464:

> "Not only was this requirement of the statute designed to place a restriction upon the increase of municipal indebtedness but its terms are inapplicable to a contract of this character. The requirement is that the certificate must show that the money required for the contract is in the treasury to the credit of the fund and not appropriated for any other purpose. The fund from which the plaintiff is entitled to satisfaction of his demand is not raised by taxation. It is derived from the operation of the gas works and made subject to the order of the board whose authority is so limited that they can make valid contracts only for appliances and

supplies for the gas works to which the fund is devoted. The fund can be appropriated to no other purpose, and the trustees can contract for no other purpose."

In Comstock vs. Nelsonville, 61 O. S., 288 the following illuminating discussion of section 2702, R. S., was indulged in by Burket, J., in delivering an opinion on the question as to whether a certificate was required as to so much of the cost and expense of a street improvement as was to be paid by assessment upon the abutting property:

"The section is general in its terms, but the object of the general assembly evidently was to compel municipalities to have the money in the treasury before appropriating or spending it. This can only apply to money raised, or to be raised, by a levy on the general tax list of the municipality. If the money is to be provided, in the first instance, by taxation, it must be collected and in the treasury before it can be appropriated or expended either by ordinance, resolution, order, contract, agreement or other obligation. *If bonds are issued and sold, and the money provided in that manner, the bonds to be paid by a levy on the general tax list, money arising from the sale of such bonds must be in the treasury before it can be expended, the same as if it had been raised by taxation in the first instance.*

"In all such cases said section 2702 is applicable, unless there is an exception by some other provision of the statute; and then the section is applicable to any particular case, no liability can arise as against the municipality, unless the certificate required by the section shall be first filed and recorded; and whether the same has been so filed and recorded must be ascertained by all contractors for themselves at their peril. Lancaster vs. Miller, 58 O. S. 558; McCloud and Ceigle vs. Columbus, 54 Ohio St. 439; Buchanan Bridge Co. vs. Campbell et al., 60 Ohio St. 406. A municipality is not estopped from availing itself of the provisions of this section to defeat a claim brought against it, when the section has been violated, even though the contractor has performed his work. In such cases the contract as well as what is done thereunder, is void as against the municipality.

"In cases of street improvements the course of procedure is usually about as follows: A resolution is passed by the council to the effect that it deems it necessary that a certain named street should be improved in a certain manner, the cost and expense to be assessed in whole or in part upon the property bounding and abutting thereon, or adjacent thereto. After notice and other proceedings, an ordinance is passed to the effect that the improvement be made as provided in the resolution, plans, specifications, etc. The improvement is then advertised, bids received, and a contract made for the completion of the improvement. This bid, and the contract made thereunder, for the first time enables the council to ascertain the cost and expense of the improvement. With the cost and expense thus fixed, the council at the proper time makes an assessment of the amount to be paid by the property holders upon their property, and pays the balance out of money in the treasury raised by taxation, or by sale of its bonds, the bonds to be paid by a levy on the general tax list. Some of the property owners pay their whole assessment at once, and that money is paid over to the contractor. Others fail to pay, and for the amounts of their assessments with the interest thereon, the municipality issues and

sells its bonds and pays the money to the contractor and pays the bonds out of the assessments when collected.

"In such a transaction the only money which the municipality pays out of its treasury of money raised by levy on the general tax list, is so much of the cost and expense of the improvement as is not assessed against the property holders, and as to that part said section 2702 is applicable, and must be complied with in order to make the municipality liable for such part of the cost and expense.

"As to the part of the cost and expense to be assessed against the bounding, abutting or adjacent property, said section does not apply, and in the nature of the case cannot apply, because it is impossible for the council to ascertain the amount of money required, until after it knows who has paid and who has failed to pay his assessment, and by that time a large part, if not all, of the cost and expense will have been incurred.

"It does not apply for the further reasons, that by necessary implication said section has reference to money of the municipality, that is, money, raised, or ultimately to be raised, by a levy on the general tax list, and does not cover or refer to money of individuals, that is money to be raised by an assessment upon the property along the improvement. The municipality is limited and restrained by this section, as to the expenditure of its own money, but not as to the money of others. As to such assessments, it is competent for the contractor to agree to take the assessments in payment for his labor and materials, and collect the same as provided by law; and if he does so, the money never goes into the treasury, and no certificate can be filed as to the same.

"It is therefore clear, that as to the expenditure of money to be raised by such assessments, section 2702 is not applicable.

"This holding protects the treasury and the general taxpayer, and at the same time enables needed local improvements to be made without detriment to the municipality, and is in accordance with the intention of the general assembly in passing the Burns law."

The principles announced in these two decisions have become well settled and necessitate a negative answer to your second question. That is to say, contracts payable from revenues produced by the operation of a waterworks plant and which under statutes, which need not here be quoted, constitute a separate fund, subject to the disbursement of the director of public service, need not be certified to by the city auditor in order to become valid and enforceable obligations against said fund.

In passing I call attention to the first paragraph above quoted from Judge Burket's opinion and especially to the last sentence thereof which I have italicized. Comparison of this sentence with the subsequent decisions in the Emmert and Dobson cases is very interesting.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

463.

AUDITOR OF STATE MAY PAY AMOUNT ASKED FOR BY BOARD OF EDUCATION TO MAKE GOOD DEFICIENCIES DURING PAST YEAR—UNDER AMENDED LAW AS SOON AS THE AMOUNT OF THE DEFICIENCY IS ANTICIPATED, THE AUDITOR OF STATE SHALL ISSUE HIS VOUCHER.

The auditor of state may legally pay upon application dated after the amendment to section 7596, General Code, became a law, the amounts asked for by boards of education, to make good deficiencies in tuition funds for the past year.

The voucher of the auditor of state, under amended section 7596, must be issued upon the fact and information disclosed by the county auditor's certificate to him for the amount of an anticipated deficiency in the tuition fund of a school district for the current year. As soon as the auditor ascertains the amount of such deficiency, he shall issue his voucher for the amount.

COLUMBUS, OHIO, August 27, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of July 28th, the urgency of the request embodied in which was appreciated. I must apologize for my failure to answer sooner, the delay being due, however, to the importance of the question involved and the pressure of business in this office.

You ask for my opinion as to the effect of the amendment of section 7596, General Code, by the last session of the general assembly. This section provides for state aid to weak school districts, and in particular defines the duty of the auditor of state respecting the payment of deficiency applications. The change in the law is such, as will hereinafter be pointed out, as to require boards of education to anticipate deficiencies for the current year instead of permitting them to wait until the year is over and to make application for deficiencies incurred during the year. In this state of the law, and having regard especially to the date when the amendment became effective, you inquire whether the auditor of state can legally pay, on application dated after the amendment became effective, the amounts asked for by boards of education to make good deficiencies in tuition funds for the past year.

You also ask for a construction of the amended section, with a view to ascertaining whether the auditor of state should draw his warrant thereunder when the application is made, or after the deficiencies anticipated have actually been created.

Section 7596 of the General Code is amended, 103 Ohio laws, 267, so as to read as follows:

> "Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

The same section in the original law reads as follows:

> "A board of education having such a deficit must make affidavits to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of the deficit in the tuition fund."

The difference between the two sections is obvious. As already stated, the original section did not permit a board of education to make the affidavit to the county auditor until the deficit actually existed. The new section, however, permits the board, any time between the first day of October and the first day of January—that is to say, in the first half of the school year—to anticipate a probable deficiency in the tuition fund.

In this connection, however, I observe that section 7595, General Code, which is the actual operative section, remains unamended. That section provides as follows:

> "No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. Where a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

I characterize this section as the "operative section" because it, and not section 7596, creates the right in the school district to "receive from the state treasurer sufficient money to make up the deficiency. The function of section 7596 is to provide the machinery for the exercise of this right.

So long, then, as section 7595 remains in force, it is obvious that, in the academic sense at least, school districts lacking sufficient money in any year to pay their teachers the required amount for the specified period of service, under the necessary conditions, have the right to state aid, which could not be taken away by any change in the mere machinery provided by section 7596, although it might, in a strict view of the case, be rendered practically ineffective thereby.

It must also be observed that the old act providing for state aid, and consisting of sections 7595 and 7597, inclusive, General Code, is itself practically inoperative, in whatever form it may appear, in the absence of an appropriation by the general assembly. That is to say, section 7596, either in its original or in its amended form, is not sufficient to authorize the state auditor to issue his voucher on the state treasurer unless there has been an appropriation upon which the "voucher" can be drawn.

Such appropriations have been made from time to time, and the one now in force is found in 103 Ohio laws 261, which provides as follows:

> "Be it enacted by the general assembly of the state of Ohio:
>
> "Section 1. That there be and is hereby appropriated from any moneys raised or coming into the state treasury for the support of the common schools and not otherwise appropriated, to assist in the maintenance of weak school districts, the balance of former appropriation and the sum of seventy-five thousand dollars which shall be distributed by the auditor of state in accordance with the provisions of the act passed April 2, 1906."

This appropriation, being one for the current expenses of a department of the state government, to wit: the department of the auditor of state, in the discharge of the duties imposed upon that department by the statutes referred to, went into immediate effect under section 1d of article 2 of the constitution, as amended. Accordingly it became effective on May 2, 1913. The legislature evidently assumed as much when it used the language "the balance of former appropriation;" because, if the effectiveness of this appropriation was postponed until ninety days after the date when the law providing therefor was filed in the office of the secretary of state, which would be August 1, 1913, there would, on that date, have been no "balance of former appropriation" subject to reappropriation, because the "former appropriation" referred to is that found in 102 Ohio laws, page 10, approved February 20, 1911, and which, under the constitution, lapsed on February 20, 1913. It might be argued that the phrase "the balance of former appropriation," as used in 103 Ohio laws, 261, is simply of no effect whatsoever, inasmuch as on the day on which the appropriation law was passed there was no such "balance," the old appropriation having lapsed.

Nevertheless, this use of language, *whether or not of itself of no effect,* indicates with fair certainty the legislative understanding that it was appropriating as of the date when the bill was passed and not as of a date ninety days subsequently thereto. Language which is itself void may, nevertheless, indicate the legislative intention. Friend vs. Levy, 76 Ohio State 26.

From all these considerations, I am of the opinion that the appropriation fund in 103 Ohio laws, 261, although passed on the same date on which the amendment to section 7596 was passed, was intended to relate as well to the administration of the law providing for state aid to weak school districts as it originally existed; as to the same thing under the law, changed with respect to its machinery by the amendment to section 7596.

This conclusion is further strengthened by the fact that the appropriation directs the auditor of state to distribute the moneys set aside "in accordance with the provisions of the act passed April 2, 1906," without referring to any amendments thereto. I do not hold that it would be necessary to refer to such amendments in order to permit the moneys therein appropriated to be disbursed in accordance with the law as amended. But I am clearly of the opinion that there should be understood, in connection with the phraseology used by the general assembly, the additional verbiage "and its amendments," so as to permit the auditor of state to disburse the moneys appropriated for his use in accordance with the original act, so long as that remained in force, and thereafter in accordance with the amendment thereto. In other words, I am clearly of the opinion that the appropriation does not relate exclusively to the administration of the state aid law in accordance with the exact scheme embodied in amended section 7596, but authorizes the auditor of state to distribute the moneys at his disposal under the original act as well as under the amended act.

Now, section 7596, General Code, as amended, took effect on August 1, 1913. On that date, presumably, there were numerous school districts in the state fulfilling the requirements of section 7595, General Code, as above quoted, which had not yet acted in accordance with the provisions of original section 7596. That is to say, the right to state aid existed in such school districts by virtue of the provisions of section 7595. If this right was in any way affected by the amendment to section 7596 it was made ineffective and nugatory, because of the fact that the amended section, taking effect on August 1st, no longer authorized the boards of education to make affidavits as to past deficiencies.

I am of the opinion that the amendment to section 7596 did not have the effect of terminating the right of the school district to state aid for the relief of a previously incurred deficiency.

Section 26 of the General Code provides:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Now, because section 7595 remained in force on August 1, 1913, a board of education of a school district answering the description therein contained possessed on that date a right which, though statutory, nevertheless, was vested. For the satisfaction of this vested right, the machinery originally provided by former section 7596 was effective. The amendment to this section, then, if it be given effect as to such unsatisfied right to state aid would "affect pending causes of proceedings existing at the time of such amendment," within the meaning of section 26.

I am, therefore, of the opinion that as to school districts which had created deficiencies lawfully by virtue of section 7595, General Code, and had failed to initiate the necessary proceedings to receive state aid for their relief, on August 1, 1913, the provisions of original section 7596 were saved. The amendment expresses no intention to the contrary and, therefore, section 26 governs.

There being an appropriation, then, which is adequate to authorize the auditor of state to proceed under original section 7596, as to the school districts just referred to, I am of the opinion, in answer to your first question, that the auditor of state may legally pay, on application dated after the amendment to section 7596 became a law, the amounts asked for by boards of education to make good deficits in tuition funds for the past year.

Your second question calls for an interpretation of section 7596 as amended. Some difficulty arises here because the portion of the section directing the auditor to draw his "voucher" was not changed when the section was amended. The only change made therein was as to the date when the affidavit should be made, and the school year to which it should relate.

The choice is between two obvious alternatives in the interpretation of this section, viz.:

1. The state auditor is to draw his deficiency "voucher" for the amount shown to be necessary, in anticipation, by the facts set forth in the certificate made to him by the county auditor. That is to say, he is to pay the state aid money to the school district immediately.

2. The auditor of state is not to act upon the application made to him until the year is completed and the precise amount of the deficiency is ascertained.

In my opinion the second of these two possible constructions must be rejected. To hold otherwise would necessarily read into the statute something which is not there. That is to say, if the auditor of state is required to wait until the end of the school year and to verify the amount of the deficiency before issuing his "voucher," then, it would be necessary for him to receive other reports from the county auditor, or from the school districts, or to make inspection in order to verify the amounts of deficiency existing at the end of the school year in the tuition funds of the various weak school districts. There is no machinery provided for this. Obviously, the auditor of state can act only upon the information furnished him by the county auditor. If that information relates, as it must relate under the amended section, to anticipate needs of the tuition fund, then, the

voucher must cover these anticipated needs and not the actual needs subsequently appearing.

Looking at the amended section from the viewpoint of the evil probably intended to be remedied thereby, the choice of the first of the two suggested constructions becomes imperative. The obvious inconvenience to a board of education and its teachers in requiring the board to wait until the end of the school year to get its state aid money need not be more than suggested. It seems clear to me that it was the intention of the general assembly to obviate this inconvenience and to provide the means whereby the weak school districts might have the state aid money in their treasuries at the time at which it is needed.

Other considerations might be brought to the support of my conclusion; but space forbids an exhaustive discussion of the subject. I am of the opinion, in answer to your second question, that the voucher of the auditor of state, under amended section 7596, must be issued upon the facts and information disclosed by the county auditor's certificate to him, for the amount of an anticipated deficiency in the tuition fund of a school district for the current year; and must be issued as soon as the auditor of state has satisfied himself as to the amount of such anticipated deficiency.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General

490.

DEPUTY STATE SUPERVISOR OF ELECTIONS MAY RECEIVE COMPENSATION FOR ONLY SUCH PRECINCTS AS HOLD PRIMARIES.

Under the provisions of section 4990, *General Code, members of the boards of deputy state supervisors of elections may receive compensation only for the precincts that hold primaries and not for all precincts.*

COLUMBUS, OHIO, September 15, 1913.

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

GENTLEMEN:—Under date of July 30, 1913, you inquire:

> "It develops that in many counties of the state primaries will be held this year only in part of the precincts of the county. Under section 4990, are the members of the boards of deputy state supervisors entitled to receive the compensation per precinct therein provided, on the basis of the number of precincts in which primaries are actually held?"

This matter was under consideration by the Hon. Edward C. Turner, prosecuting attorney of Franklin county, and the conclusion at which he arrived, as well as his reasoning, so thoroughly meets my views that I am hereby adopting it. It reads as follows:

> "It seems clear to me that the basis of compensation under this statute is the *amount of services performed.* The intention of the legislature is to pay according to the amount of work. If this were work in a factory it would be called piece work system. If election *work* is required in a hundred precincts each deputy would be entitled to receive $200.00,

while if the *work* were confirmed to fifty precincts the compensation would be but a hundred dollars.

"If the legislature abolishes part of the work, I fail to see on what ground it can be maintained that election officers can still demand pay for work not performed.

"If the election authorities were paid so much a year based upon the number of precincts in their respective counties *for all work done,* then it would be clear that their salary would not be reduced by implication upon reducing the amount of their work. But where they are paid upon the basis of piece work they cannot claim compensation for anything except the work they actually perform. The statute does not authorize a contract to maintain a given number of precincts in any county * * * they may be increased or diminished at the will of the legislature.

"The statute does not say simply that each deputy shall receive two dollars each for each election precinct in his respective county, but that he shall receive such compensation *for services in conducting primary elections.* If by a subsequent law services in all or any portion of the precincts are dispensed with, the total compensation which is based upon the amount of work done is automatically reduced pro rata. The officer would still be entitled to claim compensation at the same rate but only for the precincts in which primary elections were held."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

492.

UNDER INITIATIVE AND REFERENDUM, ORDINANCES GO INTO EFFECT SIXTY DAYS FROM THE TIME OF APPROVAL BY MAYOR OR THE PASSAGE OF SUCH LAW OVER MAYOR'S VETO—A FINDING MAY BE MADE FOR SALARY DRAWN, AGAINST A PERSON WHO ASSUMES HIS DUTIES IN A NEWLY CREATED POSITION BEFORE SIXTY DAYS HAVE EXPIRED BEFORE THE PASSAGE OF THE ORDINANCE—WHERE A SALARY ORDINANCE PROVIDES SO MUCH PER WEEK, A PERSON SHOULD WORK THE NUMBER OF DAYS CONTEMPLATED BY THE ORDINANCE.

Under the provisions of the initiative and referendum law, sections 4227-1 *to* 4227-6, *General Code, as they existed before amendment, in computing the sixty days under said law, count should be made from the time an ordinance is approved by the mayor, or from the time of the passing of such ordinance over the mayor's veto.*

When a new position is created in a city government, by ordinance of council and the salary is fixed, in said ordinance, and the officer assumes his duties immediately upon the passing of the ordinance and received compensation at the rate fixed by ordinance, a finding may be made against him for the first sixty days' salary, as the ordinance does not go into effect until sixty days after its passage.

When a salary ordinance provides compensation at a stated salary per week, the person should work the number of days contemplated by the ordinance, and a reduction in the salary should be made for any days missed that he is supposed to work.

COLUMBUS, OHIO, September 15, 1913.

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

GENTLEMEN:—Under date of June 5, 1913, you submitted to this department

three questions on the I. and R. act (sections 4227-1 to 4227-6, General Code as they existed prior to amendment 103 Ohio Laws 211) upon which you requested my written opinion. I will take the questions up in the order stated by you:

First. Your first question is as follows:

> "In computing the sixty days under said law, should count be made from the date of passage by council, from date of approval by the mayor, or from date of passage over the mayor's veto in case an ordinance be vetoed and the council passes the legislation over the mayor's veto?"

Since ordinances passed by a village council are not subject to any power of the mayor I assume that you ask your question in reference to ordinances passed by a city council.

Section 4224, General Code, reads as follows:

> "The action of council shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by "yeas" and "nays" and entered upon the journal, but this shall not apply to the ordering of an election, or direction by council to any board or officer to furnish council with information as to the affairs of any department or office. No by-law, ordinance or resolution of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale or transfer of property, shall be passed unless it has been fully and distinctly read on three different days, and with respect to any such by-laws, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance, and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

Section 4234, General Code reads as follows:

> "Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its passage or adoption return it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. The mayor may approve or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited in this same manner as if he had signed it, unless council by adjournment prevents its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to the council with his objections, council may, after ten days, reconsider it, and if such ordinance, resolution or item, upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall then taken effect as if signed by the mayor. The provisions of this section shall apply only in cities."

The second paragraph of section 4227-2, General Code, provides in part as follows:

"No resolution, ordinance or measure of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to the use of the streets, or regulating the use of the streets for water, gas, electricity, telephone, telegraph, power or street railways, or other public or quasi-public utility shall become effective in less than sixty days after its passage."

Section 4224, General Code, specifies how ordinances shall be passed by council, but section 4234, General Code provides for the veto power of mayors in cities. It would, therefore, appear that the mayor of a city is as stated in McQuillan on municipal ordinances, section 149, "a constituent part of the legislative power" and that "his concurrence is essential to complete any given legislative act. This is as necessary to its validity as its passage by the council or governing body, unless it should be passed over his veto in accordance with the law governing the corporation."

The question which arises, of course is as to the meaning of the word "passage" as used in the second paragraph of section 4227-2, General Code; that it to say, as to whether such word "passage" as so used refers to the passing of ordinances by the council solely or whether it refers to the completed act necessary to give such ordinances validity.

Section 4227-3, General Code, provides that certain ordinances "may go into effect immediately." It would hardly be contended as far as cities were concerned that such a provision as is found in section 4227-3, General Code, intended to operate so as to not require presentation of such ordinance to the mayor under the provision of section 4234, General Code, yet if it were solely the action of council to which this matter referred such would be the case.

Since in cities the mayor is a part of the legislative power I am of the opinion that the word "passage" as used in the second paragraph of section 4227-2, General Code, refers to the completed legislative act which would include, of course, the provision of section 4234, General Code, and that, therefore, in computing the sixty days count should be made of the time such ordinance becomes a complete legislative act which would be after the action provided for in section 4234, General Code. That is to say, answering your question as stated count should not be made from the time of the passage of the ordinance by council but from the time of the approval by the mayor, or from the time of the passage of such ordinance over the mayor's veto in case an ordinance be vetoed, and council passes the legislation over the mayor's veto.

Second. Your next inquiry is as follows:

"If a new position in the city government is created by ordinance of council and compensation fixed in said ordinance, and the incumbent immediately enters upon his duties and receives compensation at the rate fixed in the ordinance, could a finding for recovery be made against said incumbent and his bondsmen?"

It has been held by this department and also by various courts of common pleas of this state that an ordinance creating a new position and fixing the compensation is an ordinance which involves the expenditure of money, and such being the case it must, of course, under the provisions of section 4227-2, General Code, remain inoperative until sixty days after its passage. Consequently, there was no authority for any person who was appointed to such a position to enter upon the duties thereof and receive the compensation therefor until the ordinance became operative. As I view it, any duties that were performed by one who

was to take the position at the time the ordinance went into effect but does so prior to the going into effect of such an ordinance would be considered as gratuitous upon his part and for which he would not be entitled to compensation. He is presumed to be familiar with the law and it is his duty to see to it that there is a valid ordinance which would entitle him to his money. Consequently, he having assumed his position before the ordinance goes into effect would not be entitled to the compensation which was provided by such ordinance until such ordinance would become operative, and any money received by him before the ordinance becomes operative was so received without authority. Consequently a recovery may be had against him for the money so received. But I do not think that the bondsmen of such a person could be held for the money so received for the reason that he not being at the time of the receipt of such money legally within the employe of the city government his bondsmen would not be bound.

The position in which the person finds himself in this instance it seems to me is clearly distinguishable from the case of State vs. Fronizer 77 O. S. 7, for in that case it appears that the bridge company therein had erected a bridge in Sandusky county and had received the money called for by the contract. It was objected, however, that because of the lack, through inadvertence, of the county auditor's certificate as required by section 2834b, Revised Statutes, the bridge company was not entitled to the money so received and that suit would be brought to recover it back. The court refused to allow such a recovery on the ground as stated in the opinion that "a county should not be permitted to retain both the consideration and the bridge," and left the parties where it found them.

In the Fronizer case, however, the county commissioners, had full authority to enter into the contract and it was only through inadvertence in not obtaining the auditor's certificate that the recovery was sought. In the facts stated by your request for opinion it would appear that there was not authority originally for the appointment of the incumbent to the new position fixed by council immediately. By reason of section 4227-2, General Code, there was no authority in anyone to appoint to the position at that time, and consequently, any act done by the incumbent so appointed prior to the ordinance going into effect was gratuitous and in contemplation of law of no value to the city until the ordinance went into effect. Furthermore, in the Fronizer case the money that was paid out of the county treasury to the bridge company in payment of the bridge in question was so paid by allowance of the county commissioners who are given authority to pass upon and allow claims against the county. It does not appear from your inquiry how the money was paid out which was received by the person in question, but I assume that it was not paid out through any action of the city council which could, if anybody, authorize the payment of such a claim.

Third. Your third inquiry is as follows:

> "If the salary ordinance provides compensation at a stated price per week, what deduction should be made if the employe only works five days?"

This is a matter which depends entirely upon the facts in each instance. When council provides in an ordinance compensation at a stated price per week it must have understood that the price so fixed is in reference to the amount of labor which is usually required for such a position. If it can be considered that it was intended that the employe should work six days out of each week and he only works five a proportionate reduction should be made, but if the ordinance contemplates that he should work only five days in the week no reduction should be made.

Your question, therefore, is as to how many days in each week it is contemplated that the employes should work and I have not facts before me sufficient to determine the particular question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

501.

COUNTY COMMISSIONER ACTING IN DITCH MATTERS IS TO RECEIVE COMPENSATION AT THE RATE OF $3.00 PER DAY UNTIL THE SUM OF $300.00 IS EXPENDED; $300.00 BEING THE SALARY ALLOWED BY LAW.

Where a county commissioner, after having rendered services to the county in ditch matters for nearly one hundred days, died, and a successor was appointed, of the $300.00 *per year allowed for such services, the first commissioner or the one who died would be allowed compensation at the rate of* $3.00 *per day for the number of days' service performed, and his successor would be allowed compensation at the rate of* $3.00 *per day until the remainder of the* $300.00 *allowed by law had been expended.* .

COLUMBUS, OHIO September 23, 1913.

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

GENTLEMEN:—Under favor of September 13, 1913, you request my opinion as follows:

> "After a county commissioner had rendered services to the county in ditch matters for nearly one hundred days in the official year, but had drawn no compensation therefor under section 3001, he died and his successor, up to the 1st of September, was required to render services in ditch matters for more than enough days to amount to one hundred days for the year. The total compensation for ditch services in any one year seems to be limited by said section to $300.00 and services have been rendered in this case amounting to more than that sum. How should the compensation be drawn? Can the appointee legally receive pay at the rate of $3.00 per day for the full number of days' services rendered by him in ditch matters?"

The question is a novel one and though I have made a careful investigation, I have been unable to uncover any authorities in point.

In the case of William Lawrence, Ex-parte, I Ohio St., 431, it was held:

> "Where the duties of an office are specified and limited in their character, and not continuous during the year, an annual salary prescribed by law, as the compensation, will be payable and apportioned with reference to the duties performed, and not to the lapse of time."

The second paragraph of the syllabus of the case of Trumbell vs. Campbell, 8 Ill. reports, page 502, is as follows:

> "The legislature made an appropriation for *certain services* to be rendered by the secretary of state. Having performed, as he alleged,

two-thirds of the services, he claimed and received, on retiring from office, two-thirds of the amount of the appropriation. His successor completed the services, claiming that his predecessor had performed but one-third of the service, and brought an action for money had and received against him to recover back the alleged excess: Held, that the successor had no right of action against his predecessor to recover the money; that if too much had been received, the state might recover back the excess; and if the former had not received his due proportion, that he had a valid claim against the state therefor."

These authorities establish that an apportionment between predecessor and successor in office will be declared where the salary is fixed for a definite time for services or for a definite amount of work.

The case of Iowa vs. Dyer, 106 Iowa reports, page 640, bears in more definite relation your inquiry. The opinion in this case, is as follows:

"The very point in controversy is whether an officer who is paid, in fees collected, a salary not exceeding a fixed sum, and whose entire time belongs to the state, in event there is work to do. shall receive a month's salary for a half month's service. The number of deputy oil inspectors must be approved by the board of health, and their compensation is fixed for each calendar month. The deputy is allowed certain expenses, and must report under oath to the state inspector *'at the beginning of each month for the calendar month preceding.'* Acts twenty-fourth general assembly, chapter 52. Section 3 of that chapter is in part as follows: 'Each deputy inspector shall collect all fees and commissions, now or hereafter provided by law for inspecting products of petroleum, earned by him, and each deputy inspector may retain for his services actually rendered, all fees and commissions earned by him until the same amount to fifty dollars per month; also twenty-five per cent. therafter: provided, that *no deputy inspector shall be allowed to receive as salary, fees or commissions exceeding one hundred dollars per month. It is plain that the legislature intended the maximum salary for a full month's labor.* But Morris was prevented by death from working longer than one-half month. He was entitled, then, at the most, to no more than one-half a month's salary. The same rule applies to defendant. The intention was that all fees received during the month in excess of the maximum salary fixed should go to the state. And the fact that the fee collected during the half month would warrant the full salary would not relieve the *officers from giving the entire month to the inspection of oils.* If two performing services during part of the same month may each receive the entire salary for that month, then any number may accomplish the same end. The number of these officers is limited, and one simply succeeds his predecessor in the work. Men change, but the office continues. *And to this office is attached a defined compensation for a calendar month.* Each was only entitled to the pro rata share of the maximum salary. See State vs. Frizzell, 31 Minn. 460 (18 N. W. Rep. 316), and Ex-parte Lawrence, 1 Ohio St. 431. We do not find it necessary to determine whether, after payment under protest, the defendant could insist upon his right to retain this money.—Affirmed."

In this case, the predecessor died in the middle of the month, after having made sufficient collections to entitle him to the maximum salary for his month's services, under the statutes, and the successor who assumed office upon the death of the predecessor made sufficient collections between that time and the end of the month to

entitle him also to the maximum monthly salary. I am of the opinion, however, that this case is clearly distinguished from the question presented in your letter.

Section 3001, General Code, upon which your inquiry based, is as follows:

> "The annual compensation of each county commissioner shall be determined as follows:
> "In each county in which on the twentieth day of December, 1911, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be nine hundred dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent. of the compensation paid to each county commissioner for the year 1911. *In counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each commissioner shall receive three dollars for each day of time he is actually employed in ditch work; the total amount so received for such ditch work not to exceed three hundred dollars in any one year.* Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed four thousand dollars per annum. Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

In this statute the limitation expressly extends not to the amount which shall be received by any special officer, but to the amount which may be *expended in one year.*

In the Iowa case the limitation was upon the amount which was received by a deputy inspector. The principal distinction, however, lies in the fact that in the Iowa case, the maximum salary fixed by the statute was intended by the legislature as the court construed the statue, to fix a *monthly salary,* as is evident from the italicized portion of the opinion, above quoted. And the opinion of Judge Ladd hinges upon the fact that the maximum salary permitted was intended by the legislature to cover services for the period of an entire month. Such is not the case with the provisions of section 3001, General Code. The services required are indefinite as well as the amount which may be earned within any year by a county commissioner performing the same. The only definite thing about this provision is the limitation of expenditures to $300.00, within any year and the provision of $3.00 payment for *each day's work performed.*

The compensation takes the form of a per diem payment. Per diem is defined in the Century dictionary, as follows:

> "By the day; by each day; daily; used of the fees of office when computing by the number of days at service."

The term per diem is but the Latin translation for each day, and this definition may be applied to the case at hand. The only distinction is presented by the fact that in the Iowa case, the salary was paid in lump sum after the period of performance which it was intended to cover. In the case here presented, however, the money is to be paid as earned.

Inasmuch, therefore, as the compensation of the county commissioner is fixed at a per diem, and as under the plan presented by the statutes, the same may be

allowed as earned, recovery could not in any event be justified against an official after he had received the same for actual services performed. The plan presented by the statutes, therefore, though not followed in the present instance, since the commissioner has not yet received his pay, indicates a legislative intent which militates against any apportionment of fees, for the reason that there would be no legal ground for recovery from any official who had received his per diem under the statute as earned.

The language of the statute limiting the amount of the expenditures for any year is clear and the successor accepted the office with knowledge of the limitations. I am, therefore, of the opinion that the predecessor is entitled to full compensation for each day's service performed in ditch work, as provided by this act, and that only the difference between that amount and $300.00 for the year in question, is available to the successor in office.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

502.

SURPLUS REVENUES DERIVED FROM A MUNICIPAL ELECTRIC LIGHT PLANT OR GAS WORKS SHOULD BE TRANSFERRED TO THE SINKING FUND OF THE CITY.

Surplus revenues derived from the operation of a munipical electric light plant and gas works of Hamilton, Ohio, should be transferred over to the sinking fund. The funds may then be used for the retirement of any indebtedness of any public utility, or for the retirement of the general indebtedness of the municipal corporation.

COLUMBUS, OHIO, September 23, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of June 27th, requesting my opinion upon the following question:

> "The city of Hamilton, Ohio, owns and operates a municipal electric light plant and a municipal gas works. May the surplus revenues resulting from the operation of the electric light plant be used by the sinking fund trustees, to meet the bonded indebtedness, and interest obligations thereon, created by the construction of the municipal gas works?"

The right of the city of Hamilton, as a municipal corporation, directly to reap a surplus profit from the operation of its electric light works, meaning thereby the collection of service charges in excess of an amount necessary to pay all expenses of the operation of the plant, and to retire any outstanding indebtedness of the city created by its construction, is of itself a very interesting legal problem. Your question does not, however, necessarily involve the answer to this question. The city is actually deriving surplus profits from the operation of its electric light plant, and so long as no user of its service is complaining, on account of being called upon to submit to this form of taxation, the activities of your department are not invoked.

The General Code will be searched in vain for any specific authority to appropriate surplus revenue arising from the operation of any public utility, other than

the waterworks, to the payment of any of the city's bonded indebtedness, even that incurred in the construction or extension of the utility itself. As to the waterworks there is a special provision found in section 3959, General Code. As to all other utilities, however, the statutes are silent.

There is no principle of law requiring the reading into the statutes of any provision for the automatic transfer of surplus profits from the operation of a utility to the sinking fund, for the retirement of outstanding bonds or other indebtedness created in the construction of that utility.

On the contrary, the silence of the statutes in this particular gives rise to an entirely different inference, namely: that in the contemplation of the legislature it is the policy of the state that the taxpayers shall bear the entire cost of the construction of a municipally owned public utility, including the interest which the municipality has to pay in order to secure the necessary funds for its construction.

This inference arises, not alone from the mere silence of the statute upon the subject, but from the peculiar provisions respecting the maintenance of a sinking fund. I do not quote these statutes. Suffice it to state that their purport is that all bonded indebtedness of a municipal corporation shall be retired and the interest thereon paid through the agency of the sinking fund, administered by the board of trustees of the sinking fund. These trustees, for this purpose, are to command certain specific sources of revenue, which are defined in section 4512, General Code, as follows:

> "Upon demand of the board, the city auditor or village clerk shall report to it balances belonging to the city or village, to the credit of the sinking fund, interest accounts, or for any bonds issued for or by the corporation, and all officers or persons having them shall immediately pay them over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall select."

This statute of itself does not define in turn the sources of the "sinking fund and interest accounts," of which it speaks. These must be sought for elsewhere in the statutes. In the case of waterworks bonds, as I have already pointed out, one source of the funds which the city auditor is to turn over to the sinking fund trustees is the surplus profits from the operation of the plant. The only other sources enumerated in the statutes are those of tax levies for the specific purpose and special assessments. In other words, the statutes on their face—and they are unambiguous—authorize the city auditor to turn over to the sinking fund trustees the proceeds of any and all levies for sinking fund and interest purposes, the proceeds of any and all assessments when there are bonds issued in anticipation of special assessments, and the surplus revenues produced by the operation of a municipal waterworks, and these moneys only.

The legislation of the state is found to be consistent, in that in the Longworth act, so-called, and in particular in section 39449 thereof, there are exempted from certain of the limitations imposed by law upon the bonded indebtedness of a municipal corporation "bonds issued for the purpose of purchasing, constructing, improving and extending *waterworks,* when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges, and to pass a sufficient amount to a sinking fund to retire such bonds when they gecome due." This statute—the last enacted, in point of time—confirms the supposition that the legislature has intended that the waterworks bonds shall be primarily the obligation of the plant, and that all other public utility bonds of a municipal corporation shall be the general obligation of the corporation as such.

In strict law, therefore, it would have to be held, in the case submitted by you, that not only could not the city of Hamilton directly use the surplus revenue resulting

from the operation of its electric light plant in the retirement of the bonded indebtedness created by the construction of the municipal gas works, but could not even use any surplus revenues produced by the operation of the gas works itself for that purpose.

Reduced to the final analysis, the question is one of funds. A fund is the proceeds of a tax levy for a specific purpose, or the income from any special source of revenues. The contents, so to speak, of the sinking fund, out of which all bonds must be retired, are specifically defined by statute; therefore, no other moneys than those included within the definition belong in that fund.

Now, an appropriation and an expenditure from a fund can only be made out of the moneys to the credit of that fund. Conversely, moneys in one fund cannot be directly used for the purposes of another fund.

Considerations of equity and sound business management, however, induce search for some method of lawfully circumventing the strict rule just laid down. The general assembly has not been unmindful of the occasional propriety of using the proceeds of one fund for a purpose within the purview of another fund, and to that end has provided for methods of transferring moneys from one fund to another. One of these methods is that found in section 3799, General Code; but this method is only available to transfer "among funds raised by taxation." In the instance stated by you the sinking fund might be regarded as one raised by taxation, but the moneys produced by the operation of the electric light plant do not constitute such a fund; therefore, in my opinion, this method of transfer is not available, to accomplish the end sought.

In my judgment the only lawful method of making the surplus profits referred to in your available for sinking fund purposes, in the retirement of the debt in question, is to the common pleas court under favor of sections 2296, et seq., General Code, with which you are familiar. Such application, however could only be made periodically, as to the moneys then actually in the fund produced by the surplus revenues, and the process would have to be repeated from time to time.

In my judgment, not only is this the only method whereby the revenues in question may be transferred to the sinking fund, but when so transferred the moneys thus derived may be used for any purpose of the sinking fund, if the court so orders. That is to say, not only may the surplus revenues of a municipal public utility, when so transferred to the sinking fund, be used for the purpose of retiring bonds issued on account of the construction of that particular utility, but the same may also be used for the retirement of indebtedness incurred on account of any other public utility, or even for the retirement of the general indebtedness of the municipal corporation as such.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

505.

CONTRACTS FOR LIGHTING STREETS AND FURNISHING WATER TO MUNICIPAL CORPORATION ARE EXEMPT FROM THE REQUIREMENT OF CERTIFICATES THAT MONEY IS IN THE TREASURY, AND SUCH CONTRACTS MAY BE ENFORCED BY PROCEEDING IN COURT IF THEY ARE NOT COMPLIED WITH.

Contracts for lighting streets and for furnishing water to corporation for fire protection are exempt from the requirement of certificates that the money is in the treasury, and may be enforced by proceedings in court if they are not paid. Unless contracts come within the exception provided in section 3809, *General Code, there is no authority in the court to render judgment against a municipal corporation upon contracts entered in violation of section* 3906, *General Code.*

COLUMBUS, OHIO, September 13, 1913.

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

GENTLEMEN:—Under date of April 7, 1913, you inquire:

> Is it a legal use of moneys collected under levy for sinking fund purposes of a city to be used in payment of final judgment taken in the common pleas court for amounts due and unpaid on contracts for lighting the streets of the city or in payment of like judgments taken in said court on contract for furnishing water supply for fire protection?
>
> "The question is, may the proceeds of a levy for general sinking fund purposes be legally used for current expenses of operation and maintenance of the city government in case final judgment is taken in court?"

Final judgments against a municipal corporation are paid from the sinking fund by virtue of the provisions of sections 4506, 4513 and 4517, General Code.

Section 4506, General Code, provides:

> "Municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all 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 in condemnation of property cases, and the taxes so raised* shall be used for no other purpose whatever."

Section 4513, General Code, provides:

> "On or before the first Monday in May of each year, the trustees of the sinking fund shall certify to council the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation *for the payment of final judgments,* except in condemnation of property cases, for the payment of interest on bonded indebtedness, and the rents due on perpetual leaseholds of the corporation not payable from a special fund, and the expense incident to the management of the sinking fund. The council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full

amount certified. Such taxes shall be in addition to all other taxes authorized by law."

Section 4517, General Code, provides:

"*The trustees of the sinking fund shall have charge of and provide for the payment of all* bonds issued by the corporation, the interest maturing thereon and *the payment of all judgments final against the corporation, except in condemnation of property cases.* They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession.

By virtue of these sections the trustees of the sinking fund are authorized to pay from the sinking fund "all judgments final against the corporation, except in condemnation of property cases." It would appear, therefore, that if the judgments in question are final they may be legally paid from the sinking fund.

The purpose of a sinking fund is to provide means for payment of the indebtedness and interest thereon as it matures and not to pay current expenses.

The statutes provide a method for the issue of deficiency bonds. Section 3931, General Code, provides:

"Council may issue deficiency bonds in such amount and denominations, for such periods of time, not to exceed fifty years and such rate of interest not to exceed six per cent. as it deems best when in the opinion of council it is necessary to supply a deficiency in the revenues of the corporation. The total amount of deficiency bonds issued by a corporation, outstanding at any time, shall not exceed one per cent. of the total value of all property in the corporation as listed and assessed for taxation. The issuance of such bonds shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation voting upon such question at a regular or special election to be provided for by council."

This section should be followed when the revenues are not sufficient to meet current expenses.

It is apparent from the nature of your inquiry that the money to pay the consideration of these contracts was not in the treasury at the time the obligaion was entered into, or it has been otherwise expended. The statutes which require a certificate of the auditor or clerk that the money is in the treasury and not otherwise appropriated before a contract may be entered into for the expenditure of money should be considered in this connection.

Section 3806, General Code, provides:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditue of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of

the fund from which it is to be drawn and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement, or obligation, or so long as the ordinance, resolution or order is in force."

Section 3807, General Code, provides:

"All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or a board, officer or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order."

Section 3806, General Code, prohibits the creation of an obligation for the expenditure of money without first securing a certificate of the auditor or clerk that the money is in the treasury and section 3807, General Code, makes a contract entered into in violation of the provisions of section 3806, General Code, void.

Section 3809, General Code, exempts certain contracts from the requirement of such certificate. Said section reads:

"The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company *for lighting the streets,* alleys, lands, lanes, squares and public places in the municipal corporation, *or for furnishing water to such corporation,* or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or company therein situated, for a period not exceeding ten years, *and the requirement of a certificate that the necessary money is in the treasury shall not apply to such contract, and such requirement shall not apply to street* improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel."

Contracts "for lighting the streets" of a municipal corporation and "for furnishing water to such corporation" may be entered into without such certificate. There are other exceptions.

It appears, therefore, that valid contracts may be entered into when the money to pay the obligation thereof is not in the treasury. If the municipality fails to pay such obligation when due, judgment may be had against it and such judgment, when final, could be paid from the sinking fund.

Your specific inquiry is as to contracts for lighting the streets and for furnishing water to the corporation. Such contracts are exempt from the requirement of a certificate that the money is in the treasury, and they may be enforced, if not paid, by proceedings in court.

You also make a general inquiry as to the legality of payment of current expenses for operation and maintenance from the sinking fund where final judgment is secured. Unless the contracts come within the exceptions provided in section 3809, General Code, there would be no authority in a court to render judgment

against a municipal corporation upon contracts entered into in violation of section 3806, General Code. It is to be presumed that the courts will render judgments only upon valid claims. Cases may arise in which judgments may be rendered upon an invalid claim, by reason of default in making defense by the officers of the corporation. Until such a question is presented it need not be further considered.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

525.

LEGAL ADVERTISING TO BE SET UP IN COMPACT FORM—EXPENSES OF ADVERTISING TO BE PAID OUT OF THE GENERAL FUND OF CITY.

Legal advertising shall be done according to section 6254, *General Code, which provides that advertising shall be set up in compact form. Display ads. not complying with this section are unlawful.*

The rates for advertising as provided in section 6251, *General Code, are the maximum rates, and work may be contracted for at a lower rate.*

The expenses for advertising the sale of bonds should be met from the appropriation for legal advertising for the city generally, which should be paid from the general fund.

In case of the sale of special assessment bonds, the expenses of advertising may be met out of the proceeds of the sale.

COLUMBUS, OHIO, September 24, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 20th requesting my opinion upon the following questions:

> "1. May city officials insert display ads. in a local paper, advertising the sale of municipal bonds at popular sale, said bonds to be sold at par and accrued interest?
>
> "2. If such display ads. are legal, are the newspapers required to carry same at the regular legal rates provided by section 6251, G. C.?
>
> "3. May the expense of such display ads. be paid from the general funds of the city raised by taxation or must such expense be paid from the proceeds arising from the sale of the bonds?
>
> "4. May the proceeds arising from the sale of municipal bonds be depleted by charging the cost of advertising and other preliminary expenses to the issue, or is the administrative officer to be given the full par value authorized by the ordinance of council for the particular improvement without any depletion whatsoever?"

That the sale of municipal bonds by popular subscription must be advertised in the same manner that the sale of municipal bonds in the regular way is required by law to be advertised is explicitly provided by section 3926, General Code.

Section 3924, General Code, then governs such advertisement and its provision is as follows:

"After thirty days' notice in at least two newspapers of general circulation in the county * * * additional notice may be published outside of such county by order of the council."

I do not understand your question to involve the expression of an opinion upon what newspaper may be employed by the city officials in making the advertisement, nor do I understand you to inquire what the procedure of entering into an advertisement contract is. I assume that your question involves particular consideration, then, of section 6254, General Code, which provides in part as follows:

"Legal advertising shall be set up in compact form, without unnecessary spaces, blanks or head lines, and printed in type not smaller than nonpareil."

This section is part of the chapter of the General Code relating to legal advertising in general. By explicit provision in section 6251, which is in pari materia with section 6254, the chapter as a whole excepting where otherwise provided, applies as well to the officers of a municipal corporation as to those of any other political subdivision. As the meaning of section 6251 is involved in answering one of your questions I quote it in full:

"Publishers of newspapers may charge and receive for the publication of advertisements, notices and proclamations required to be published by a public officer of the state, county, city village, township, school, benevolent or other public institution, or by trustee, assignee, executor or administrator, the following sums, except where the rate is otherwise fixed by law, to wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work, fifty per cent. may be charged in addition to the foregoing rates."

Returning to section 6254, I am of the opinion that this statute is directory merely, in the sense that the determination of what form is "compact," what spaces, blanks or head lines are "necessary" and what type larger than "nonpareil" shall be employed must be lodged somewhere, and is presumably lodged in the municipal authorities having power to make the contract with the newspaper. The power being discretionary its exercise will not be disturbed by the courts unless it has been clearly abused. This proposition is elementary.

I do not find in the statutes relating to the powers and duties of the bureau of inspection and supervision of public offices any provision expressly, or by inference, authorizing your department to prescribe forms of legal advertisement which shall be followed by the authorities of the various subdivisions to the exclusion of all others.

I do not know, of course, what constitutes, in the technical sense, a "display ad." I assume, however, that it means an advertisement set up in large type with heavy head lines, blank spaces and otherwise than in compact form. That is in form not as compact as a regular advertisement would be set up in. If, as a matter of fact, the display features of the advertisement are so pronounced as to constitute a complete deviation from the required compactness, such an advertisement would seem to involve necessarily an abuse of whatever discretion is imposed in the local authorities by section 6254 above quoted.

The question as to the necessity of the use of head lines and blank spaces

would have to be similarly determined. In short, the question in each instance would be one of fact and not one of law. The fact to be determined would be whether or not a given form of advertisement were "compact," and whether or not any blanks, spaces or head lines were, under the circumstances, "necessary." If, as a matter of fact, a "display ad." could under no circumstances be "compact," that is if the idea of compactness is foreign to the very nature of a "display ad.," as such, then as to this feature, the question would no longer be one of fact, but the conclusion of law would follow that the advertisement is unauthorized and unlawful.

I do not answer your first question more directly because of lack of knowledge as to what constitutes a "display ad."

Assuming, for the purpose of your second question, an affirmative answer to your first question I beg to state that in my opinion section 6251, General Code, controls the rates at which such "display ad." may be inserted. It was decided in McCormick vs. Niles, 81 O. S. 246, that these are maximum rates and that the municipal authorities may lawfully contract for advertising at smaller prices.

Your third and fourth questions really involve the same proposition of law and will be considered together. The Municipal Code is silent upon the question which you here submit.

Section 2295, General Code, contains the following provision which, however, does not apply to municipal corporations:

> "All moneys from both principal and premiums on the sale of such bonds, shall be credited to the fund on account of which the bonds are issued and sold."

The only similar provision in the Municipal Code is that of section 3932, General Code, which, however, relates to the disposition of premiums and accrued interest only.

I am of the opinion that the silence of the Municipal Code upon the subject at hand is to be interpreted in the light of the express provisions of closely related statutes. The purposes for which a municipal corporation may issue bonds are specifically set forth in the statutes. Thus section 3939, General Code, mentions a large number of specific objects for the accomplishment of which bonds may be issued. The whole subject is fully treated of in the chapter of the Municipal Code which is entitled "Borrowing Money." This chapter will be searched in vain for any provisions expressly authorizing a municipal corporation to borrow money for the purpose of paying the expenses of legal advertising. In each instance, for example, in which a specific improvement is contemplated, the thing for which the money is borrowed, is the making of the improvement. When bonds are sold their proceeds constitute one of the *funds* of the municipality. This fund is available only for the purposes properly within the purview of the improvement itself. Similarly, when money is borrowed and bonds are issued for an object other than the making of a specific improvement, a fund is thereby created which is available only for the object stated. Unless, therefore, the payment of the expense of advertising the sale of the bonds can be regarded as one of the purposes of the improvement, or as related to and a part of the object for which the money is borrowed, such an expenditure is not a proper one to be made from such a fund.

Furthermore, there are statutes specifically disposing of balances of such funds when the object for which they were created is satisfied without the expenditure of the total amount borrowed. I refer to section 3915, General Code, which disposes of unexpended balances in a fund created by the issuance of bonds in anticipation of special assessments and to section 3804 which makes similar disposition of the unexpended balances of a fund created by the issuance of general bonds of the municipality.

Section 3896, General Code, provides what may be included in the cost of an improvement for which special assessments are to be levied and specifically authorizes the inclusion therein of "the expense of * * * printing and publishing the notices and ordinances required," together with "any other necessary expenditure." Under this language it would seem that the expense of advertising special assessment bonds may be included in the assessment.

Inasmuch, then, as the bonds themselves are issued in anticipation of the assessment, such bonds are not required to be limited in amount to the cost of construction alone, but the amount thereof may include all the items of expense mentioned in said section 3896. In other words, special assessment bonds are not bonds issued for the purpose of a specific improvement in the technical sense; but they are bonds issued in anticipation of the assessment.

The inference then to be drawn from the provisions of section 3896, considered in connection with the other sections referred to, is that in the case of the issuance of the general bonds of the municipality, the expense incident to their issuance are not a proper charge against the fund created thereby. The conclusion which I have reached, then, is that the expense of advertising the sale of the general bonds of a municipal corporation, as distinguished from its special assessment bonds, is not an item chargeable against the fund created by the sale of such bonds. The obligation to advertise the sale of the bonds is one imposed upon the municipality as such by the provisions of the statutes and is a general current expense of the municipality, the same as the making of any and all other legal publications except those connected with the making of improvements by special assessments. It is no part of any improvement for which a municipal corporation is authorized to borrow money, nor is it an object within the scope of the other purposes for which bonds may be issued by a municipal corporation. All such expenses should be paid from the appropriation for legal advertising of the city generally which I think should be met from the general fund. That is to say, the advertisement of the sale of municipal bonds is not an expense of the service department or safety department as such, but an expense of the city generally. The proceeds of the bonds when sold, however, for a purpose within the purview of the service department, for example constitute a trust fund which can under no circumstances be used for the general purposes of the city. Whether or not the further action of the council, appropriating the proceeds of such bonds is necessary, the fund created by their sale can be used only by the department of public service. Council is even without power to transfer the unexpended balance of any such fund, as that must go into the sinking fund. The care taken by the general assembly to safeguard the proceeds of bonds issued for any specific purpose is such as to indicate clearly the legislative intention that no such money should ever be used for any other purpose. Therefore, it being established—as I think it must be—that the advertisement of the sale of bonds is a general municipal duty, and not one pertaining to a particular department, it follows as a matter of course that the payment of such expense, in the case of bonds issued for the purpose of a department cannot be made from such a fund. The principle thus established by consideration of the case of bonds issued for a purpose within the purview of a given department holds good, in my opinion, when applied to any and all bond issues.

For all the foregoing reasons, then, I am of the opinion that your last two questions must be answered by the general statement that the expense of advertising the sale of an issue of bonds is not legally chargeable against the fund created by their sale; and council is without discretion in the matter, and must pay such expense out of the general revenues of the municipality.

In case of the sale of special assessment bonds, however, the advertising ex-

penses may, in my opinion, lawfully be paid out of the proceeds of the bonds, which are, in theory, issued, not for the use of a particular department or the purpose of a particular improvement as such, but in anticipation of special assessments which in turn are made to compensate the municipal corporation as a public entity for all expenses incurred by it in connection with the making of the improvement.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

528.

A PERSON EMPLOYED IN THE CITY AUDITOR'S OFFICE IS NOT PERMITTED TO ENGAGE IN THE BUSINESS OF FURNISHING SUPPLIES TO THE CITY.

An employe in the city auditor's office who is interested in a private business to sell supplies to the city would come within the provisions of section 12910, *General Code, which provides a penalty for such employes engaging in such business.*

COLUMBUS, OHIO, September 25, 1913.

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

GENTLEMEN:—Under date of June 13th, you request my opinion as follows:

> "We ask an interpretation of the provision of section 12910, General Code, which is expressed by the words 'or as agent, servant or employe of such officer or of the board of such officers.' Does this make it a penal offense for an employe (clerk) in the city auditor's office who is interested in a private business to sell supplies to the city of which he is an employe, or does it relate only to agents, servants or employes in the private employment of a public official?"

Section 12910, General Code, is as follows:

> "Whoever, holding an office of trust, or profit by election or appointment, or *as* agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which *he* is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

It is evident that the unlimited scope which this statute would be afforded by an interpretation extending its terms to private agents, servants or employes would not be within the bounds of reason. Such a construction would necessarily include every person who, in any capacity, performs service or in any way acts for a public official. In brief, a servant in a household, or even a lawyer, or a doctor, who is accustomed to be retained by a public official, would come within the prohibition of the statute.

I am of the opinion that such an intent could not have existed in the legislative mind. These words evidently refer to agents, servants or employes of such

officer in his official capacity. The fact that the statute speaks of agents, servants or employes of a board of officers, further supports this conclusion.

I am, therefore, of the opinion that an employe in a city auditor's office, who is interested in a private business to sell supplies to the city, would come within the terms of this statute.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

529.

A MEMBER OF THE SINKING FUND TRUSTEES MAY RECEIVE PAY FOR FURNISHING BALLOTS FOR A MUNICIPAL ELECTION AS THESE SUPPLIES ARE FOR THE USE OF THE STATE.

Where a member of the sinking fund trustees of a city was the lowest bidder for the furnishing of ballots at a primary election, it would not be a violation of section 12910, *General Code, for him to receive payment for same from the city treasury, as said supplies are not for the use of a municipality, but for the use of the state.*

COLUMBUS, OHIO, September 25, 1913,

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

GENTLEMEN:—Under date of September 20th you request my opinion as follows:

> "A member of the sinking fund trustees of a city was the lowest bidder for the furnishing of ballots at the recent primary election for municipal officers. Is it a violation of section 12910 for him to receive payment for such supplies from the city treasury?
>
> "Inasmuch as this contract was awarded by state officials, viz.: the board of deputy state supervisors of elections, and payment is originally made from the county treasury and afterwards deducted from the amount due to the city, would such payment be legal under those circumstances?"

Section 12910, General Code, is as follows:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Under date of February 27, 1913, I rendered an opinion to your board, in which I concluded:

> "The expense of printing and distributing ballots, cards of explanation to officers of the election and voters, and blanks for general, primary and special elections shall be paid from the county treasury, and in odd-numbered years, such expenses for the November and primary elections shall be charged to the political subdivision in which such election is held."

Section 12910 and the section immediately following are given a very broad scope in their effect by the legislature; the one prohibiting officers from being interested in contracts involving the political subdivision with which the officer is connected, and the other prohibiting such contracts with any other political subdivision of the state. Contracts on behalf of the state itself, or rather to be more definite, contracts for the purchase of property, supplies or fire insurance, for the *use* of the state, are not comprised within the terms of either statute.

In State vs. Craig, 8 O. N. P. 148, the court said (at page 150):

> "From an examination of the election laws in this state it seems apparent that the legislature intended that the conduct of elections should belong to the state and be under the control of state officers. Section 2966-2 (Revised Statutes) provides that: 'By virtue of his office the secretary of state shall be the state supervisor of elections, and in addition to the duties now imposed upon him by law shall perform the duties of such office as defined therein.' We have then the secretary of state as the principal election officer and the deputy state supervisors, as subordinate officers, for *carrying out the agencies of the state* for the conduct of elections."

The question presented, therefore, is whether or not the supplies purchased in this case, which are used for municipal purposes, their use being managed and controlled by state agencies, and payment made in the first instance by the county, reimbursement being made therefor by the municipality, are supplies for the use of the municipality as is comprehended by the language of section 12910, General Code.

I am of the opinion that these supplies are for the use of the state, in the conduct of its general duties with reference to election matters. It is true they are used in behalf of the municipality. The municipality, however, has nothing to do with the actual use, conduct and management of these supplies. The *control of their use* is vested in state agencies. Were it not for the statutory provision providing for a reimbursement of the county from the municipal treasury, this question would not have arisen; and I am of the opinion that the mere fact that reimbursement from the municipal treasury, is provided for the service of the state, administered in a case of municipal benefits, does not afford sufficient ground for holding that such supplies are for the use of the municipality as is intended by section 12910, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

530.

THE PROCEEDS OF THE AUGUST DISTRIBUTION FOR WEAK SCHOOL DISTRICT ARE NOT AVAILABLE FOR THE USE OF THE YEAR CLOSING AUGUST 31st, BUT ARE ALL TO BE APPLIED FOR THE USE OF SUCH DISTRICTS DURING THE YEAR FOR WHICH THE APPROPRIATION IS MADE.

Under the weak school district law the proceeds of the August distribution are intended by the law to be used to operate the school for the succeeding half year, and are not available for the use and purpose of the year closing on the 31st of the same month. Such proceeds should not be taken into consideration in determining the existence or amount of a deficiency in the tuition fund when the amount therein available for payment of teachers' salaries during the year ending on August 31st is compared with the needs of the fund for the same period of time under the requirements of section 7595, General Code.

COLUMBUS, OHIO, September 25, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 20th requesting my opinion upon the following question:

> "In estimating the amount due a school district for the years ending August 31, 1913, under the weak school district laws, section 7595 to 7597, as they were before the last amendment, is it proper to include in the receipts in the tuition fund the August, 1913, distribution of said common school funds and the August, 1913, distribution of local taxes?"

The original sections referred to by you provided as in part as follows:

> "Section 7595. No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers forty dollars per month for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient to make up the deficiency.
>
> "Section 7596. A board of education having such a deficit must make affidavits to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of the deficit in the tuition fund."

Clearly, under these provisions, the amount of a deficiency in the tuition fund of a given school district is ascertained annually. The question is as to whether or not the tuition fund is sufficient to meet the year's requirements if salaries had been paid as therein provided.

The first question which suggests itself, then, in this connection is as to what year is indicated by the statute. I think it is reasonably obvious that the answer to this question must be that the school year beginning on the first of September constitutes the year for and as of which the deficiency is to be as-

certained; that is to say, the question for the annual determination of the authorities authorized to act under the sections just quoted is as to whether or not the tuition funds, available for expenditure during the year beginning on September 1st and ending on the succeeding August 1st, are sufficient to pay the requisite number of teachers the minimum salary of $40.00 per month for eight months during that period.

I do not think this conclusion is sufficiently doubtful to require citation of specific statutes upon which it is based. The question, then, simply is as to whether the proceeds of an August distribution are considered a part of the funds available for the use of the year ending August 31st, or whether such moneys, when received, are to be used for the purpose of the year beginning on the first of September following.

This question might have been, and doubtless was, an interesting and difficult one under the provisions of the taxing laws of the state applicable to boards of education as they existed prior to the enactment of the so-called Smith one per cent. law, being section 5649-1 to section 5649-5b inclusive of the General Code. By the enactment of that law, however, and in particular by that of section 5649-3d thereof the question became greatly clarified. Said section provides as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, *from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof,* but no appropriation shall be made for any purpose not set forth in the annual budget for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Collateral to the main question here involved there are a number of very difficult questions which, however, may be avoided as not necessarily material to the solution of the main question which is presented by consideration of the situation of a board of education meeting at the beginning of its school and fiscal year for the purpose of making appropriations. Such appropriations can only be made from the moneys known to be in the treasury, and when made must provide for all the expenditures of the succeeding six months. Now at a given September appropriation period the moneys in the treasury must consist solely of the proceeds of the August distribution of state and local taxes with any balances remaining over from the last semi-annual distribution. Such moneys when so appropriated must be used to run the schools or rather to provide for the needs of the tuition fund for the next succeeding six months.

The converse of this proposition is illustrated by imagining a case of a school board meeting in March for the purpose of appropriating for the needs of the last half of the school year. The appropriation may only be made from the moneys known to be in the treasury. Therefore, it cannot include the proceeds of the August distribution which are not in the treasury when the March appropriation is made.

I think that when the considerations which I have mentioned are taken into account by themselves, the conclusion clearly follows that it is not lawful to anticipate the proceeds of the August settlement in appropriating for the needs of the last half of the school year, but that such proceeds under the Smith law must be used for the needs of the first half of the year beginning on September 1st.

The collateral questions to which I have referred earlier in this opinion need not all be mentioned, but their character can be understood by reference to one of them, which is that the conclusion which I have reached creates a seeming incongruity in that the first half of the school year is required to be provided for by the last half of the taxes, thus running counter to the seeming requirements of section 5649-3a, General Code, which I do not quote, and making it a very difficult matter to adjust the transition from the old law to the new law embodied in the Smith law as applied to school districts.

For the purposes of your question, however, I have preferred to ignor these technicalities and to consider the necessary operation of section 5649-3c by itself.

For the reasons stated I am of the opinion that inasmuch as the proceeds of the August distribution are intended by the law, to be used to operate the schools for the succeeding half year and are not available for the use and purpose of the year closing on the 31st of the same month, such proceeds should not be taken into consideration in determining the existence or amount of a deficiency in the tuition fund when the amount therein, available for the payment of teachers' salaries during the year ending on August 31st is compared with the needs of the fund for the same period of time under the requirements of section 7595, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

537.

NOTICE OF AN ELECTION FOR THE SUBMISSION OF A PROPOSED LAW OR CONSTITUTIONAL AMENDMENT SHALL BE MAILED OR DELIVERED TO EACH VOTER.

The sheriff is not authorized to issue a proclamation for an election for the submission of a proposed law or constitutional amendment, to a vote of the electors of the state. The constitution and statutes provide that notice of such election shall be given by mailing or delivering a copy of the proposed law or amendment to be submitted to each voter of the state.

COLUMBUS, OHIO, October 7, 1913.

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

GENTLEMEN:—You submit to this department for opinion the following inquiry:

> "Shall the sheriffs of the counties of the state give public notice by proclamation of an election at which a proposed constitutional amendment or a proposed law, either by the initiative or by referendum, is to be voted upon by the electors?"

Your inquiry calls in question the method of giving notice to the public of the submission to a vote of such proposed laws and constitutional amendments, as provided for in the recent constitutional amendments.

Article two section 1g, of the constitution of Ohio, provides a method of giving notice as follows:

"* * * The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and shall mail, or otherwise distribute, a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. * * *"

The legislature at its recent session passed an act in accordance with the above provision as set forth in 103 Ohio Laws 831.

Section 1 of said act, to be known as section 5018-1, General Code, provides:

"The secretary of state, at least thirty days before any election at which any proposed amendment to the constitution or proposed law is to be submitted to the people, shall cause to be printed in pamphlet form a copy of the title and text of each measure to be submitted, with the form in which the ballot title thereof will be printed on the official ballot. Such pamphlet shall also contain an explanation of any proposed measure, not exceeding a total of three hundred words for each, to be filed as hereinafter provided."

Section 5 thereof to be known as section 5018-5, General Code, reads:

"The secretary of state shall, at least twenty days before any such election, transmit one copy of such pamphlet to every voter in the state by mail with postage fully prepaid. If the secretary of state shall at or about the same time be mailing any other pamphlets to voters, he may, if practicable, bind the matter herein provided for and enclose any and all pamphlets under one cover. For the purpose of securing a mailing list of voters outside of cities having a registration of voters, the secretary of state shall prescribe the forms of books to be used by all local election officials in keeping a record of the postoffice address of all voters residing outside of such cities. The latest available registration lists shall be used in such cities."

Section 6 of said act to be known as section 5018-6, General Code, provides:

"When more copy is offered to the secretary of state than herein provided for, the secretary of state shall cause such additional copy to be incorporated in the pamphlet provided for in section 1 of this act, if the parties submitting such additional copy deposit with it a sum of money sufficient to pay for the printing thereof. *When any constitutional amendment or other measure has been published in pamphlet form in accordance with the provisions of this act, the same shall be in lieu of any other method of advertising provided by law.*"

The notice given by the pamphlet as provided for in the foregoing sections "shall be in lieu of any other method of advertising provided by law."

Is the notice given by the proclamation of the sheriff to be considered as "advertising" such proposed measure or amendment?

The sheriff's proclamation of an election, such as he is authorized to make, is provided by law and not by the constitution.

Section 4824, General Code, provides:

"On the first Tuesday after the first Monday in November in the year 1912, and every four years thereafter, the qualified electors shall elect a number of electors of president and vice president of the United States equal to the number of senators and representatives this state may be entitled to in the congress of the United States. No senator or representative in congress or other person holding an office of trust or profit under the United States or any law thereof shall be eligible as elector of president or vice president."

Section 4825, General Code, provides:

"At least fifteen days before the time for holding the election provided for in the preceding section, the sheriff shall give public notice by proclamation through his county of the time and place of holding such election and the number of electors to be chosen. A copy of such proclamation shall be posted at each of the places where elections are appointed to be held and inserted in a newspaper published in the county."

These sections authorize the sheriff to issue a proclamation for the election of presidential electors. It does not apply to the present question.

Section 4826, General Code, as amended in 103 Ohio Laws, 23, provides:

"All general elections for elective state and county offices and for the office of judge of the court of appeals shall be held on the first Tuesday after the first Monday of November in the even numbered years. All votes for any judge for an elective office except a judicial office, under the authority of this state, given by the general assembly, or by the people, shall be void."

Section 4827, General Code, provides:

"At least fifteen days before the holding of any such general election, the sheriff of each county shall give notice by proclamation throughout his county of the time and place of holding such election and the officers at that time to be chosen. One copy of the proclamation shall be posted at each place where elections are appointed to be held, and such proclamation shall also be inserted in a newspaper published in the county."

These sections apply to elections of officers. They do not apply where a question is submitted to the electors.

Sections 4828 and 4829, General Code, provide for the election of congressmen and the proclamation therefor.

None of the foregoing sections authorize the sheriff to issue a proclamation in the case now in question.

Section 4840, General Code, provides:

"Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be called.

> The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, *and notice that such question is to be voted upon shall be embodied in the proclamation for such election.*"

This section applies when a question is submitted to the voters of a "county, township, city or village."

The questions to be submitted under your inquiry are to be submitted to the voters of the state. They are submitted, it is true, to the voters of the county, for the counties make up the state. They are not, however, county questions which are submitted.

Section 4840, General Code, was passed before the provisions for the initiative and referendum as contained in the constitution were adopted. These questions were not in contemplation when this section was enacted.

It will be observed that by virtue of section 4840, General Code, notice of the submission of such questions as therein provided for is to be contained in the sheriff's proclamation for such election, and by section 4827, General Code, such proclamation is to be published in a newspaper in addition to being posted at each voting place.

Does this constitute advertising under section 6 of act of 103 Ohio Laws 831?

In case of Montford vs. Allen, 111 Ga., 18, Cobb, J., in delivering the opinion, on page 19, quotes from Webster's international dictionary and defines the word "advertise," as follows:

> "'Advertise' means 'to give public notice of; to announce publicly, especially by a printed notice."

This definition is quoted in volume 1, page 235, of words and phrases.

At page 1155, volume 1 of cyc., the words "advertise" and "advertisement" are defined:

> "Advertise. To publish notice of; to publish a written or printed account of.
>
> "Advertisement. A notice published in handbills or a newspaper."

In case of Murray vs. Auglaize county, 13 Low. Dec. 723, Mathers, J., says on page 726:

> "The court was at first inclined to believe that the publication of the commissioners' annual report was not an 'advertisement' within the meaning of that section, but that it was a notice; but upon a thorough investigation the court is satisfied that the term 'advertisement' is a generic term, and includes 'notice,' Anderson's law dictionary confirming this view, so that the legislature, in using the word 'advertisement' here, probably meant to include notice."

The sheriff's proclamation of an election has the characteristics of an advertisement. It is put up in posters and is also published in a newspaper.

The purpose of the sheriff's proclamation is to give public notice of the election. This is stated in volume 15 of cyc. at page 320:

> "The object of a proclamation is to give notice to the electors that an election will be held, and this notice lies at the foundation of any public elective system and must be given in some form in order to hold a valid election."

Also on page 321, it is said:

> "The purpose of the prescribed notice is to give greater publicity to the election, but the authority to hold it comes directly from the statute; * * *"

The constitution and the statutes required the proposed law or proposed constitutional amendment to be printed in pamphlet form and mailed or sent to each elector as far as possible. This is a method of giving notice that such law or amendment will be submitted to a vote of such electors. In fact it is a far more complete and comprehensive means of giving notice than a notice by proclamation of a sheriff.

This method of giving notice is to be in lieu of all other advertising provided by law. The notice given by the sheriff is "advertising" of such election and it is provided by law.

I am of the opinion, therefore, that the sheriff is not authorized to issue a proclamation for an election for the submission of a proposed law or constitutional amendment to a vote of the electors of the state.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

545.

WHERE A CONTRACT IS ENTERED INTO FOR LEGAL SERVICE UNDER THE PROVISIONS OF SECTION 845 AND 1274 BATES R. S., THE CONTRACT IS LEGAL AND THE BILL FOR SUCH SERVICE SHOULD BE PAID.

Where the commissioners of Jefferson county on the 19th day of August, 1915, employ counsel for legal services to the county treasurer for the collection of taxes, under the provisions of sections 845 and 1274 Bates R. S. in force at the time, the contract is legal and the bill for such service ought to be paid by the commissioners provided they are of the opinion that the charge is reasonable.

COLUMBUS, OHIO, July 29, 1913.

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

GENTLEMEN:—On June 20th your department submitted for our opinion the following request:

> "Enclosed herewith please find copy of an original bill for legal service rendered by Henry Gregg to Jefferson county, and a letter from the prosecuting attorney in regard to the same.
>
> "Inasmuch as this bill has not yet been paid and it will be the duty of this department at some future time to pass upon its legality, if paid, we respectfully request that you render us your opinion whether or not the county can legally pay said bill.
>
> "We are in receipt of a letter from Miss Clara B. Gregg, 413 Washington St.,Steubenville, stating that her father, Henry Gregg, died in May, 1912, and that she is administratrix of his estate. She states that no payment has been made on the fees and that they feel that they are rightfully due them."

The account for legal services referred to in the above inquiry, and which is attached thereto, is as follows:

"STEUBENVILLE, OHIO, May 19, 1911.

"Jefferson county,

"To Henry Gregg, Dr.

"For legal services rendered said county in cases No. 7245, 9636 and 7059 in the court of common pleas of Jefferson county, Ohio. 7245, P. C. C. & St. L. Ry. Co. vs George McCracken as treasurer of Jefferson county and George Harden as county auditor. Injunction suit.

"Filed separate answer for county, treasurer and auditor in court of common pleas of Jefferson county, Ohio. Disposition of on demurrer. $150 00

"9636. Charles Foreman as treasurer of Jefferson county vs. William G. McCullough. Action to collect $16,980.00 back taxes, cause removed from common pleas court of Jefferson county, Ohio, to the U. S. circuit court at Columbus, Ohio, case heard by Judge Sater of that court and ordered remanded to court of common pleas of Jefferson county, Ohio.

"Heard before Judge Richards and disposed of on demurrer. $250 00

"7059. George P. McCracken as treasurer of Jefferson county, Ohio. vs. William G. McCullough. Action to collect $41,000.00 of back taxes, cause removed from common pleas court of Jefferson county, Ohio, and removed to U. S. circuit court, Columbus, Ohio.

"Over 65 depositions taken in Cleveland, Youngstown, Pittsburgh, Sewickley, East Liverpool, Wellsville, New Philadelphia, Steubenville and Alliance, Ohio.

"Heard by Judge Thompson in Cincinnati and by him ordered remanded to court of common pleas because defendant McCullough was a resident of Jefferson county, Ohio. Reheard by Judge Thompson at Columbus.

"Heard and reheard by Judge Sater in federal court at Columbus and was by him ordered remanded to the court of common pleas of Jefferson county, Ohio, for the reason that said defendant was a bona fide resident of Jefferson county, Ohio, and not of Sewickley, Pa.

"Tried twice in court of common pleas to a jury each time.

"Time taken at each trial three (3) days.

"Balance due on this case---------- $1,900 00

"Total."

Enclosed with your inquiry is a copy of an entry of the date of August 19, 1905, from the journal of the county commissioners of Jefferson county, employing Hon. Henry Gregg to act as legal counsel in the cases mentioned in the account as above set forth, as follows:

STEUBENVILLE, OHIO, August 19, 1905.

"Commissioners' Office of Jefferson County, Ohio.

"Pursuant to adjournment the board of county commissioners met today with Mr. Thompson and Simpson present, minutes of last meeting read and approved.

"No entry having been made by the board at the time of the employment of Henry Gregg as attorney for the county treasurer and to represent the interests of the county in the suit of the P. C. C. & St. L. R. R. Co. vs. George P. McCracken as treasurer of Jefferson county now pending in the court of common pleas of this county and said George P. McCracken as treasurer vs. William G. McCullough in the court of common pleas but now removed to the circuit court of the United States for the southern district of Ohio.

"Such entry is now made and said Henry Gregg is directed to act as counsel in suits to be brought by the treasurer of Jefferson county against both of the above parties for taxes for the years 1904 and 1905.

"Board adjourned to meet August 19, 1905.

"G. P. HARDIN, R. M. THOMPSON,
"Auditor. *President of Board.*

"Commissioners' journal No. 5, page 109."

Section 1259, Bates Revised Statutes, as it now exists, as sections 5697 and 5698 of the General Code, passed March 31, 1877 (74 O. L. 69) and which was in force at the time the transaction occurred about which you inquire, provides that the county treasurer may enforce the collection of personal taxes by instituting suits therefor, as follows:

"That when any personal taxes heretofore or hereafter levied, shall stand charged against any person or corporation, upon the tax duplicate of any county in this state, for state, county, city or any other purposes, authorized by law, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy providing by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the lien of such taxes by commencing in any of the courts of the state having jurisdiction of the subject matter, a civil action in the name of the treasurer of such county against such person or corporation, for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his petition, that the said taxes stand charged upon the said duplicate of said county against such person or corporation, that the same are due and unpaid thereon, and that such person or corporation is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in this said petition, any other or further special matter relating thereto, and said tax duplicate shall be received as prima facie evidence on the trial of said suit, of the amount and the validity of such taxes appearing due and unpaid thereon, and of the nonpayment of the same, witout setting forth in his said petition any other or further special matter relating thereto; and if, on the trial of said action, it shall be found that such person or corporation is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting said action as in other cases; and the judgment debtor shall not be entitled

to the benefit of the laws for stay of execution or exemption of homestead, or any other property from levy or sale or execution in the enforcement of any such judgment."

Section 2862, Bates Revised Statutes, now sections 5700 and 5701 of the General Code, enacted on April 8, 1881 (78 O. L. 120), provides as follows:

"Whenever an action has been commenced, or may hereafter be commenced, against any person holding the office of county treasurer or county auditor, or other county office, for performing or attempting to perform, any duty authorized by or directed by any statutes of this state for the collection of the public revenue, such treasurer, auditor or other officer *shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending such action or suit,* and the amount of any damages and costs adjudged against him, which said fees, expenses, damages and the costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and by the said auditor shall be deducted from the shares or portions of revenue at any time payable to each, including, as one of the said parties, the state itself, as well as the counties, townships, cities, villages and school districts and organizations entitled as aforesaid: provided, that in every county in which there is a county solicitor or a board of control having a solicitor to said board, it shall be the duty of the county solicitor and of the solicitor of said board of control, to take charge of and attend to all actions against any of the officers above named in such county for performing, or attempting to perform, any of the duties aforesaid; and it shall be unlawful for any of said officers in such county to employ any other counsel to defend such action or suit."

Section 2907 of Bates Revised Statutes, as it existed at the time the transaction herein inquired about occurred, and as the same now exists in sections 5756, 5757 and 5758 of the General Code, provides as follows:

"Whenever any tract or parcel of land shall be hereafter sold, under the provisions of this chapter, at forfeited sale, any person desiring to do so, may redeem the same at any time within six months from the sale thereof, by depositing with the county treasurer, as is provided in chapter seven of this title, with reference to the redemption of lands sold as delinquent, the amount of said sale, together with fifty per centum thereon, and by paying all other expenses incidental to, and arising from said sale: provided, however, that if any of said forfeited lands shall be sold for a greater sum than the tax, interest, penalty and costs, it shall be the duty of the auditor to charge said treasurer separately in each case, in the name of the supposed owner, with the excess above said tax, interest, penalty and costs; and such treasurer shall retain in the treasury of his county the said excess for the proper owner of said forfeited lands, and upon demand by such former owner, within six years from the day of such sale, pay such excess to said former owner; and in case said treasurer, upon such demand, shall not be fully satisfied as to the right of the person demanding the same to receive it or in case of different claimants, it shall be the duty of said treasurer to commence a civil action by filing a petition of interpleader, in the court of common pleas of the county where such land was sold, wherein he shall make the person or persons claiming such excess, and the state, defendants and such action

shall be proceeded in as other civil actions; and, in all cases, the costs of such proceedings shall be paid by the person or persons claiming said excess, as the court shall order; *and it shall be the duty of the prosecuting attorney of the county to attend to the same, in behalf of the treasury.*"

Said section 2907 of Bates Revised Statutes specifically requires the prosecuting attorney, in case the purchase price paid for lands sold at a forfeited land sale exceeds the accrued taxes, interest, penalty and costs—to bring the action for or on behalf of the county treasurer to determine to whom such excess shall be paid, if the treasurer is in doubt as to whom such excess should be paid.

Likewise, the county treasurer is required to collect all personal taxes even to the extent of filing suit if necessary, for the recovery of such taxes, as provided by section 2859, Bates Revised Statutes, supra, but in the last mentioned statute there is an absence of any specific provision, *requiring* the county treasurer to employ the prosecuting attorney, which is similar to the provision contained in section 2907, Bates Revised Statutes, supra. In construing the statutes similar to and which were in force prior to the passage of section 2859 of Bates Revised Statutes above quoted, the court in the case of state ex rel. vs. board of commissioners of Hamilton county, 26 O. S. 364, at pages 367 and 368 of the opinion, says:

"This proceeding is instituted against the board of commissioners of Hamilton county, to compel the allowance of a claim of the relator against the county for expenses incurred as attorney's fees in prosecuting sundry suits for the collection of taxes. The relator was treasurer of Hamilton county for two years, commencing September 5, 1872, and these expenses were incurred by him as treasurer, during his term.

"The first question arising in the case is, whether the allowance of a claim of this character is authorized by law.

"By section thirty-eight of the tax law of April 5, 1859 (S. & C. 1454), it is made the duty of the treasurer, when he shall be unable otherwise to collect certain taxes, to institute legal proceedings for their collection. The services in question were rendered in prosecuting proceedings under this section.

"By section four of this act of April 2, 1859, (S. & C. 1476), in case of default in the payment of taxes, it is provided, that 'the county treasurer shall proceed to collect the same by distress or otherwise, as may at the time be prescribed by law, together with a penalty of five per centum on the amount of taxes so delinquent, which penalty shall be for the use of the treasurer as a compensation for such collections.'

On the 6th of April, 1870, an act was passed limiting the compensation of certain officers in Hamilton county, and, among others, the treasurer,

"Section one declares that the fees, costs, percentages, penalties, allowances, and all other perquisites, which the officers therein named may by authorized to charge, receive and collect for official services, shall thereafter be received and collected by them respectively, to and for the sole use of the county treasury, as public moneys belonging to the county, and not otherwise, and shall be accounted for and paid over in the manner therein provided.

"The third section, after providing for the number and compensation of all deputies, clerks, bookkeepers and all other assistants employed by the several officers, declares as follows: 'The county commissioners shall allow and order to be paid as other claims against the county all other reasonable expenses necessary to the proper discharge of the duties of any of the above named officers.* * *'

"Section five prescribes the maximum annual compensation to be allowed to the several officers. This compensation is to be paid out of the county treasury, from the cost, fees, percentages, allowances, perquisites and penalties by them respectively collected, after having first deducted therefrom the amounts allowed for the payment of deputies, clerks, bookkeepers and other assistants, and the 'other necessary expenses of said officers.'

"Section seven provides, that the act shall not be construed so as to make the county or the county commissioners liable to any of the officers, of their deputies or other assistants named, 'for the payment of any salary or compensation, except out of the fees, costs, etc.' collected by such officers respectively.'

"In view of this statute and the change in the former law which it was designed to effect, we are satisfied that expenses reasonably incurred by the treasurer in employing attorneys for prosecuting suits which it is his duty to bring for the collection of taxes, come within the reasonable expenses which the commissioners are required to allow him under the act."

In the above instituted cases, the court holds in the first syllabus thereof, as follows:

"Expenses reasonably incurred as attorney fees by the county treasurer, in prosecuting suits which it is his duty to bring for the collection of taxes, come within the expenses which the county commissioners are required to allow undersection 3 of the act of April 6, 1870, limiting the compensation of certain officers in Hamilton county (67 Ohio Laws 37)."

Section 845, Bates Revised Statutes, as amended April 22, 1904 (97 O. L. page 305) provides as follows:

"(Legal counsel) Whenever the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal advisor of the board of county commissioners and the board of control, where there is such board, and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above named direct, or, to which it or any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys under sections 799, 1277, 1278a and 3977 of the Revised Statutes, and as may at any be required by said board of county commissioners."

Section 1247, Bates Revised Statutes (now sections 2917 and 2918 of the General Code, prior to its amendment on March 31, 1906) provided as follows:

"The prosecuting attorney shall be the legal advisor of the county commissioners and other county officers, and any of them may require of him written opinions or instructions in any matters connected with their

official duties; and for these services the county commissioners shall, annually, at their December session, make him such allowance as they think proper; but this section shall not apply to any county having a county solicitor."

It is to be noted that both of said sections 845 and 1274 of Bates Revised Statutes, as above quoted, were in full force and effect at the time the contract between the county commissioners of Jefferson county and the Hon. Henry Gregg was entered into on August 19, 1905. In the case of State of Ohio ex rel. vs. Commissioners of Hamilton County, 8 N. P., N. S. 281, beginning at page 285 of the opinion, the court traces the history of said sections 845 and 1274 of Bates Revised Statutes, as follows:

"The history of section 845 during such time as can possibly pertain to the present case is as follows:

"March 12, 1853, 51 vs. 422, section 7, the county commissioners were authorized to sue and be sued, and were required to demand and recover by suit or otherwise, money or property due the county. (There was no express provision for the employment of legal counsel.)

"March 30, 1868, 65 vs. 35, amendment immaterial.

"April 27, 1877, 74 vs. 133, amendment expressly authorizes county commissioners to employ legal counsel.

"The revision of 1880, section 845, amendment limits legal counsel to two and limits compensation thereof to $250.00 in any one case.

"April 8, 1881, 78 vs. 120, amendment immaterial.

"April 13, 1894, 91 vs. 142, amendment immaterial.

"April 22, 1904, 97 vs. 304, amendment provides for the employment of clerks, engineers, etc., and legal counsel who shall be the legal advisor of county commissioners and other county officers, and shall prosecute and defend all suits to which the commissioners or county officers are parties, and perform the duties of prosecuting attorneys provided in sections 799, 1277, 1278a, and 3977. (No referance to 1274.)

"May 9, 1908, 99 vs. 337, amendment provides that 'upon written request of the prosecuting attorney legal counsel may be employed' with same duties as above.

"As so amended, section 845 is now in force as follows:

"'The board of county commissioners shall be capable of suing and being sued, pleading and being impleaded, in any court of judicature; and of bringing, maintaining and defending all suits either in law or in equity involving,' etc. * * *"

"(Legal counsel) Whenever upon the written request of the prosecuting attorney, the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal advisor of the board of county commissioners and of all other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matter connected with their official duties.

He shall prosecute and defend all suits and actions, which any of the board above named may direct, or, to which it or any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys, under sections 799, 1277, 1278a and 3977 of the Revised Statutes, and as may at any time be required by said board of county commissioners."

The history of section 1274 is as follows:

"Prior to 1880, there was no statute making the prosecuting attorney either legal advisor or legal counsel of county officers.

"The revision of 1880, section 1274: The prosecuting attorney was made the legal advisor of county commissioners and other county officers and his compensation therefor was provided.

"March 31, 1906, 98 vs. 160, amendment—prosecuting attorney shall be the legal advisor, etc., and shall perform the duties of legal counsel under section 845, and 'no county or township officer shall have authority to employ any other counsel or attorney at law at the expense of the county, except,' etc.

"As so amended section 1274 is now in force as follows:

"'Section 1274. The prosecuting attorney shall be the legal advisor of the county commissioners and all other county officers and any and all of them may require of him written opinions or instructions in any matters connected with their official duties; he shall also perform all duties and service as are required to be performed by legal counsel under section 845 and he shall further be the legal advisor for all township officers, and no county or township officer shall have authority to employ any other counsel or attorney at law at the expense of the county except on the order of the county commissioners or township trustees according as the services engaged are to be rendered for a county or township board or officer, duly entered upon its journal, in which order the compensation to be paid for legal services shall be fixed; but this section shall not be construed to affect the provisions of sections 1271 and 7196 nor to prevent any board of township trustees or any school board from employing counsel to represent them; and such counsel if employed by the township trustees shall be paid from the township fund, and if employed by the school baord, shall be paid from the school fund. * * * The statutes seem to have always recognized a differance between legal advisor and legal counsel; the former being charged with the giving of opinions and the latter with the prosecution and the defense of action. This distinction was recognized in the earliest form of sections 845,1274, 3862 and 3977, and is judicially recognized in the cases of State of Ohio vs. Stafford, 11 D., 720 (8 N. P. 470); State ex rel. vs. Taylor, 3 N. P., n. s., 505.* * *

"In order to asertain the legislative intent expressed in section 1274 as now amended and in force, it is necessary to understand the relative rights and duties of the county commissioners and prosecuting attorney, when such section was amended by making the prosecuting attorney the legal counsel of the commissioners and adding the inhibitory clause.

"Prior to that time; to-wit March 31, 1906, as will be seen from the history of sections 845 and 1274, the prosecuting attorney was the legal advisor of the county commissioners and not their legal counsel. *The com-*

missioners had the express power unconditionally to employ and compensate legal counsel and such legal counsel if employed then became their legal advisor with many of the duties of the prosecuting attorney."

It therefore follows, under section 2859 of Bates Revised Statutes, as above quoted, that the county treasurer in case No. 7245 was within his legal rights in employing counsel other than the prosecuting attorney, and in accordance with the provisions of section 2862 B. R. S., as above quoted, such treasurer is entitled to counsel fees therefor, the same to be paid out of the county treasury. I am furthermore of the opinion, under provisions of sections 845 and 1274 of Bates Revised Statutes as they existed at the time the contract between the said county commissioners and the said Henry Gregg was entered into on August 19, 1905, that the said contract for such legal services so entered into by the said Henry Gregg and the commissioners of Jefferson county—is legal, and that the bill for the same ought to be paid by the commissioners of Jefferson county, provided they are of opinion that the amount thereof is reasonable.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

547.

AN OFFICER SERVING WRITS IS ENTITLED TO MILEAGE FOR THE ACTUAL NUMBER OF MILES TRAVELED IN SERVING EACH WRIT.

Where an officer serves more than one writ in either civil or criminal cases on the same trip, he is entitled to receive mileage for the actual number of miles traveled and is to receive this mileage on each writ served.

COLUMBUS, OHIO, October 8, 1913.

HON. SAM A. HUDSON, *Bureau of Inspection and Supervision of Publice Offices, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 12, 1913, in which you inquire:

"May a sheriff serve two writs such as subpoenas, summonses, writs of conveyance to workhouse, either in civil or criminal cases, on the same trip and charge mileage upon each of such writs?

"If you hold that mileage is limited to the distance actually traveled, how should it be taxed?

"May it be apportioned to the several writs in taxing costs?

"Bureau of Inspection and Supervision of Public Offices,
By Sam A. Hudson.

"P. S. We call attention to opinion rendered to the auditor of state, February 2, 1905, page 51, of the attorney general's report January 1905-6."

In your postscript, you refer to an opinion given by my predecessor, Hon. Wade H. Ellis, on February 2, 1905, which reads:

"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 1230b 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 vs. 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 1230b contains this provision:

"'For the service of every writ or summons and return therof * * * 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 milage 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 for only the miles actually traveled, it could only be accomplished by reducing the milage to one-half upon each subpoena. This, Ithink, the law would not permit. I am, therefore, of the opinion that the only construction to be placed upon the language of section 1230b, as above quoted, is to allow the statutory mileage upon both writs."

I think the conclusion reached by Mr. Ellis is correct, especially in light of the fact that the part of section 2845, G. C., applicable to your question, reads:

"In addition for the fee for service and return the sheriff shall be *authorized to charge on each summons,* writ, order or notice, except as otherwise specifically provided by law, a fee of eight cents per mile going and returning, provided, that where more than one person is named in such writ, mileage shall be charged for the shortest distance necessary to be traveled.

Consequently, the rule laid down by Mr. Ellis should be followed until otherwise provided by law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

582.

THE RULES AND ORDERS OF THE BOARD OF HEALTH ARE NOT WITHIN THE PROVISIONS OF THE INITIATIVE AND REFERENDUM.

The rules and orders of the board of health enacted increasing the compensation of their employes or creating positions which will involve the expenditure of public money do not come within the provisions of the initiative and referendum act.

COLUMBUS, OHIO, October 21, 1913.

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

GENTLEMEN:—Under date of August 6th you inquire:

> "Do rules or orders of board of health enacted previous to the recent amendment, increasing the compensation of their employes or creating positions which will involve an expenditure of public money, come under the provisions of the I. and R. law?"

I assume that you ask your question with reference to section 4227-2, General Code as found in 102 Ohio Laws 521. As you are well aware the entire initiative and referendum act as found in 102 Ohio Laws 521, was repealed and a substitute therefor enacted in 103 Ohio Laws 211.

Section 4227-2, General Code, (102 O. L. 521) provides in part as follows:

> "Any ordinance, resolution or other measure of a municipal corporation, granting a franchise, creating a right, involving the expenditure of money or exercising any other power delegated to such municipal corporation by the general assembly, shall be submitted to the qualified electors for their approval or rejection in the manner herein provided, if within thirty days after the passage or adoption of such ordinance, resolution or measure by the council, there be filed with the clerk, etc."

The second paragraph of said section provides that:

> "No resolution, ordinance or measure of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to the use of the streets, or regulating the use of the streets for water, gas, electricity, telephone, telegraph, power or street railways, or other public or quasi-public utility shall become effective in less than sixty days after its passage, etc."

In both paragraphs of said section it is provided that a petition for referendum shall be filed with the clerk of the municipal corporation, and I have heretofore held that the person designated by "clerk" in such section means the clerk of council in cities; in villages the clerk of council is also the clerk of the corporation.

While the language "ordinance or resolution of a municipal corporation" might if given its broadest scope refer to such an order of the board of health as referred to in your question, yet the section goes on to speak of the time within which the referendum petition may be filed, to wit within thirty days after the

passage or adoption of an ordinance, resolution or measure *by the council.* The use of such language clearly shows that the intention of the act is to apply the referendum solely to actions of council and not to those of other bodies or officers which might be considered as a part of the municipal corporation. Furthermore, the filing of a referendum petition is with the clerk of the council. For the reasons above given, I am of the opinion that the rules and orders of a board of health are not within the provisions of the initiative and referendum.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

583.

A MATRON OF A COUNTY CHILDREN'S HOME OR OF AN INFIRMARY MAY NOT BE REIMBURSED FOR EXPENSES INCURRED IN ATTENDING THE CONFERENCE OF STATE OFFICIALS OF BENEVOLENT INSTITUTIONS.

Matrons are not responsible for the distribution of public funds used for the relief and maintenance of the poor, their responsibility being for the care and welfare of the inmates, and they are not within the list of those subject to invitation to the state conference of officers of benevolent institutions, and if invited, are not entitled to reimbursement for expenses.

COLUMBUS, OHIO, October 30, 1913.

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

GENTLEMEN:—I have your letter of June 27, 1913, in which you inquire:

> "Section 656a, R. S., provided for state conferences of officials of benevolent institutions, etc., and provided that all officers duly invited thereto should be entitled to actual expenses incurred while in actual attendance at the sessions of such conferences.
>
> "The codifiers carried this section into the General Code as sections 1356 and 1357, and changed the language of the last paragraph of the original section somewhat.
>
> "*Query.* May a matron of a county children's home or a county infirmary be reimbursed for expenses actually incurred under those two sections?
>
> "Does section 1357 authorize the state board of charities to invite to such conferences any persons or officials other than those mentioned in original section 656a, R. S.?"

Section 656a, Revised Statutes reads as follows:

> "The board of state charities may, at such times and places as they deem advisable, hold conferences of officers of state, county and municipal benevolent, penal and reformatory institutions, officials responsible for the administration of public funds used for the relief and maintenance of the poor, and boards of county visitors to consider in detail questions of management, the methods to be pursued and adopted to secure the eco-

nomical and efficient conduct of such institution, the most effective plan for granting public relief to the poor, and similar subjects. All officials duly invited to such conference shall be entitled to actual necessary expenses, payable from any funds available for their respective boards and institutions, provided they procure a certificate from the secretary of the board of state charities that they were invited to and were in actual attendance at the sessions of such conferences."

Sections 1356 and 1357, General Code, read:

"Section 1356. At such times and places as it deems advisable, the board of state charities may hold conferences of the officers of state, county and municipal benevolent and correctional institutions, officials responsible for the administration of public funds used for the relief and maintenance of the poor, and members of boards of county visitors. Such conferences shall consider in detail questions of management of such institutions, the methods to secure their economical and efficient conduct, the most effective plans for granting public relief to the poor, and similar subjects.

"Section 1357. The necessary expenses of all the persons invited to such conferences shall be paid from any fund available for their respective boards and institutions provided they shall first procure a certificate from the secretary of the board of state charities that they were invited to and were in attendance at the sessions of such conferences."

The rule of construction of revised statutes is that in the absence of any change of language necessarily evincing a change of meaning or of legislative intent, the revision shall receive the same construction as the acts carried into it.

State ex rel. vs. Commissions, 36 O. S. 326.
Inst. Co. vs. McBee 85 O. S. 173.

and numerous other cases, including State vs. Toney, 81 O. S. 130, which furnishes an illustration of what may be considered a material change in a statute.

It cannot be claimed that the difference in language found in sections 1356 and 1357, from that in 656a can be held to call for a change of meaning. Consequently I think the only question left is whether the matron of a children's home is entitled to an invitation and reimbursement of expenses. This can only be solved by a construction of sections 1356 and 1357 of the General Code.

The language used as descriptive of the persons who may be invited for conference is "the officers of state, county and municipal benevolent and correctional institutions, officials responsible for the administration of public funds used for the relief and maintenance of the poor and members of boards of county visitors" which, it must be conceded does not, in terms, include matrons of children's homes.

The duties of matrons of children's home, are prescribed in section 3085 as follows:

"Section 3085, General Code. Subject to such rules and regulations as the trustees prescribed, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the recommendation of the superintendent, the trustees may appoint a matron, assistant matron, and teacher, whose duties shall be the care of the inmates of the home and to direct their employment, giving suitable physical, mental and

moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matron and teacher shall perform such other duties, and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed at the pleasure of the trustees, or a majority of them."

That this does not bring the matrons within the descriptive part of section 1356 is not debatable and I am therefore of the opinion, that because matrons are not responsible for the administration of public funds used for the relief and maintenance of the poor, their responsibility being for the care and welfare of the inmates, they are not within the list of those subject to invitation, and if invited are not entitled to reimbursement of expenses.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

594.

TOWNSHIP TRUSTEES MAY NOT PAY JUSTICES OF THE PEACE, TOWNSHIP CLERKS, ETC., A REASONABLE AMOUNT FOR THE USE OF THEIR DWELLINGS AS OFFICES—NOR MAY THEY PAY RENT FOR SUCH OFFICES FROM TOWNSHIP FUNDS.

Township trustees have no statute authority to pay office rent for township clerks, justices of the peace or treasurers.

COLUMBUS, OHIO, October 29, 1913.

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

GENTLEMEN:—In yours of August 5, 1913, you ask:

"May township trustees pay justices of the peace, township clerks or township treasurers a reasonable amount for the use of their dwelling as offices?

"May said trustees pay rental charges for offices, for use of justices of the peace and other township officers, from the township funds?"

The answers to your questions are determined by an examination of the statutes relative to the subject concerning which you inquire.

If there are no express provisions of law covering such matters, and the statutes are silent thereon, then such payments cannot be made.

There is no *implied* authority in this state, for any person or officer to draw money from a public treasury. It is illegal to pay out or receive public funds in Ohio, unless the same is *expressly* provided for, or authorized, by statute. I have carefully examined the General Code relative to justice of the peace chapter 11, title 4, sections 1712, et seq.; chapters 2, 3 and 4 of division 2, title 11, sections 3268 to 3326, inclusive, relative to township trustees, clerk and treasurer; also chapter 1 of the same division and title, containing general provisions as to civil townships.

I find no authority in any statute on these subjects, authorizing the trustees to pay rent for offices for any township officers. In certain cities, the law provides

that offices, fuel, etc., shall be furnished justices of the peace. They, however, are paid a salary and turn their fees into the treasury, through their clerks. The other justices receive, outside of their fees, only copies of the laws, dockets and a desk, all of which go to their successors in office. Clerks are paid a salary and fees, and nothing else. Treasurers receive a percentage on the funds paid out, and no more.

Until additional legislation is enacted, permitting township trustees to pay said rents for township officers, the same cannot lawfully be done.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

595.

WHERE A VILLAGE CLERK RECEIVES COMPENSATION IN ADDITION TO HIS SALARY RECOVERY MAY BE HAD AGAINST HIM AND HIS BONDSMEN.

Where a village council in fixing the salary of the village clerk provided for an annual salary and then later council during the term for which said clerk has been elected passed a motion to allow said clerk compensation of $25.00 *for each special improvement, thus compensating him in addition to his regular salary for what was considered to be extra clerical work, the amounts paid beyond the annual salary were paid without authority of law and are proper subjects of recovery against the clerk and his bondsmen.*

COLUMBUS, OHIO, November 6, 1913.

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

GENTLEMEN:—I have your letter of October 13, 1913, in which you inquire:

> "A council of a village in fixing the salary of the village clerk, who is ex-officio clerk of council, simply provided for an annual salary, which has been paid monthly or quarterly. Council later, and during the term for which said clerk had been elected, passed a motion to allow said clerk a compensation of $25.00 for each special improvement. Thus compensating him, in addition to his regular salary, for what they considered to be extra clerical work in recording the minutes and ordinances authorizing such improvement, preparing the bonds, and serving necessary notices. Quite a large sum of money has been paid to said clerk under said motion of council. Can a finding for recovery be maintained against said clerk and his bondsmen for the public funds thus received by him?"

In reply to which I desire to say:

Section 4279, General Code, provides for the election of a village clerk as follows:

> "The clerk shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of a corporation."

The compensation of the clerk and his bond is fixed by council under authority of section 4219.

> "Section 4219. Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

The language here used—"The compensation so fixed shall not be increased nor diminished during the term for which any officer, clerk or employe may have been elected or appointed," is plain and unequivocal.

In view of this provision, I am of opinion that the addition of $25.00 for each special improvement, to the salary of the clerk, is without authority of law, and that the amounts received by him in virtue thereof, are proper subjects of recovery against him, *and his bondsmen.*

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

605.

IT IS NOT LEGAL TO PAY THAT PART OF THE SHERIFF'S PROCLAMATION WHICH FOLLOWS THE HEADING "NOTICE TO JUDGES AND CLERKS OF ELECTIONS"—THAT PART OF THE PROCLAMATION WHICH DESIGNATES THE COUNTIES OF THE SEVERAL JUDICIAL, SENATORIAL AND CONGRESSIONAL DISTRICTS MAY BE PAID FOR—WHERE THE SHERIFF DOES NOT FURNISH A COPY OF HIS PROCLAMATION BUT AUTHORIZING THE MAKING AND PUBLICATION OF SUCH PROCLAMATION, THIS WOULD BE REGARDED AS HIS OWN ACT AND WOULD NOT IN ANY WAY AFFECT THE ELECTION.

1. *The sheriff of Greene county in making his proclamation has exceeded his authority. and the payment for that part thereof which follows the said heading "Notice to judges and clerks of elections" will not be legal.*

2. *While that part of the proclamation which designates the counties of the several judicial, senatorial and congressional districts, and the repetition of the phrase "the state of Ohio" and "Greene county, Ohio," are undoubtedly superfluous and unnecessary, it would not be illegal to pay for their publication.*

3. *Where the sheriff does not furnish a copy of his proclamation for publication, but authorizes the making of such copy and adopts it as his own, this would be regarded as his own act and would not affect the election of which it gives notice.*

COLUMBUS, OHIO, July 18, 1913.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 2, 1912, enclosing sheriff's proclamation of election, as published in Greene county, Ohio, and requesting my opinion upon the following questions:

"1. Is it legal to pay for that part of the said proclamation which follows the heading "notice to judges and clerks of elections," being the second column thereof?

"2. Also, whether it is legal to pay for that part of the proclamation which designates the counties of the several judicial, senatorial and congressional districts.

"3. Whether it is legal to pay for repeating the phrase 'the state of Ohio' after each officer on the state ticket, and the phrase 'Greene county, Ohio," after each officer of the county ticket.

"4. What would be the effect if in fact, it should develop that the sheriff did not furnish the copy for this proclamation, but that the same was made up by one of the newspapers?"

Answering your first question, I beg to state that the authority for the sheriff's proclamation of elections is found in sections 4825 and 4827, General Code. Section 4825 relates to the election of electors of the president and vice president of the United States, and section 4827 relates to any general election within the state, and except for these distinctions, are substantially the same. Section 4827 provides that "at least 15 days before the holding of any such general election the sheriff of each county shall give notice by proclamation throughout his county of the time and place of holding such election and the officer at that time to be chosen. One copy of the proclamation shall be posted at each place where elections are appointed to be held and such proclamation shall also be inserted in a newspaper published in the county."

Section 6252, General Code, which is to be read in connection with sections 4825 and 4827, although a consideration of that section is not necessary to a determination of the question presented here, provides that:

"Such publication shall be published in two newspapers of opposite politics at the county seat, if there be such newspaper published thereat, and in counties having cities of 8,000 inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such counties."

Sections 4825 and 4827 make the publication of the proclamation of elections mandatory upon the sheriff of each county and expressly prescribe what such proclamation shall contain. That part of said proclamation which follows that heading "notice to judges and clerks of elections" is clearly not within the provisions of either sections 4825 and 4827, and unless included therein by implication, the payment therefor would not be legal.

I take it that the only object of the legislature in requiring the sheriff to make a proclamation of the time and place of holding elections and the officers at that time to be chosen, was to give to every elector notice of the time and places that elections are to be held and the officers to be elected, and not to instruct the clerks and judges of elections in their duties.

That part of said proclamation which follows the heading "notice to judges and clerks of elections" is merely for the purpose of instructing said judges and clerks in their duties and includes therein nearly exact copies of section 5082 to section 5091, General Code, inclusive.

The judges and clerks of elections, both in precincts where the voters are and are not registered, are appointed by the deputy state supervisors and are under their control.

Sections 4875 and 4876 provide that, the board of deputy state supervisors shall instruct the judges and clerks of elections in their duties and said sections are as follows:

"Section 4875. From time to time the board of deputy state supervisors may make and issue such rules, regulations and instructions not inconsistent with law as it deems necessary for governing and guiding the clerk, his deputies and assistants and the registrars of electors, judges and clerks of elections or other persons under the control of the board in the proper discharge of their respective offices and duties. No order, resolution or action of the board shall be valid without the vote of three of the four members.

"Section 4876. Subject to the control of the board, the clerk shall keep a full and true record of the proceedings of the board, file and preserve in its office all orders, rules and regulations pertaining to the adminstration of registration and elections, prepare and furnish, under the orders of the board, the registers, lists, books, maps, forms, oaths, certificates, instructions and blanks for the use and guidance of registrars, judges and clerks of elections and the board of canvassers; provide for timely furnishing of such officers therewith, and with the necessary supplies provided for them; to receive and keep close custody of the registers and copies returned to such office, as herein provided, of records, papers and certificates of every kind, relating to the offices or administration of the board. He shall have the care of the ballot boxes while deposited at the office of the board, and perform such other or further duties pertaining to such office and affairs as are prescribed by the board."

Although the law does not require the publication of notices to the judges and clerks of elections and of instructions relating to the duties of their office, I am of the opinion that if such publication were necessary it would be the duty of the deputy state supervisors of elections and not of the sheriff to make it, and that the sheriff of Greene county, in making the publication referred to in your letter, has exceeded his authority and that the payment for that part thereof which follows the said heading "notice to judges and clerks of election," would not be legal.

Questions number two and three are similar and can be answered together. While that part of the proclamation which designates the counties of the several judicial, senatorial and congressional districts and the repetition of the phrases "the state of Ohio" and "Greene county, Ohio," are undoubtedly superfluous and unnecessary, I am of the opinion that it would not be illegal to pay for their publication.

While it would be the wise course for every sheriff in his official publications to follow closely the forms prescribed by your bureau, it is not mandatory for him to do so. No two persons would employ the same language in stating the same thing, and since the legislature has not made it mandatory upon the sheriff to follow any prescribed forms, it has undoubtedly intended to leave to him some discretion in these matters. That part of the proclamation referred to in question No. 2 and the phrases referred to in question No. 3 undoubtedly can be said to be within the limits of section 4827 in that they make definite what officers are to be elected; and although they may be said to be superfluous and unnecessary, I do not believe that payment for their publication would be illegal.

Answering your fourth question, I will say that although it develops that the sheriff did not furnish the copy for this proclamation and that the same was made up by one of the newspapers, if he authorized the making of such copy and adopted it as his own, I am of the opinion it would be regarded as his own act, and would not in any way affect the election of which it gave notice.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

608.

THE STATE IS NOT LIABLE FOR ANY PART OF THE COST OF ADVERTISING DELINQUENT LAND FOR SALE.

Under the provisions of the General Code, the state is not liable for any part of the cost of advertising for the sale of delinquent land. The same may not be charged against the proper subdivision of the county, nor is the county entitled to any reimbursement therefor from the taxing district. The county alone is obliged to bear the expense of this advertising.

COLUMBUS, OHIO, August 15, 1913.

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

GENTLEMEN:—Under date of July 9, 1913, you request my opinion as follows:

> "In accordance with the form of semi-annual settlement prescribed by the auditor of state, county auditors have, for many years past, been appropriating the cost of advertising delinquent and forfeited lands to all the funds entitled to share in the distribution of taxes collected thereon, including the state."

You then ask:

> "Is the state liable for any part of the cost in such advertising? If not, should the same be charged against the proper civil subdivisions of the county, or should it be charged to the county fund and not reimbursed by the taxing district?"

Under sections 2596, a list of the delinquent lands is taken by the county auditor from the county treasurer and returned to the duplicate to be collected by the treasurer under 2608, with their penalty, as other taxes are collected.

Under 5704, 5705 and 5706, General Code, the auditor is authorized to cause a list of delinquent lands to be advertised as therein provided, preparatory to their sale by the county treasurer, under 5711, General Code.

No where in the statute can I find any express direction with regard to the payment of the cost of advertising of such delinquent lands. The general scheme provided for the collection of such taxes, is the same as that provided for the collection of ordinary taxes. Such collection being a county activity, however, and there being an undisputed duty on the part of the county auditor to provide for such advertisement, it is clear that such expense must be borne by the county. I have been unable further to find any provision in the statute for the apportionment of this expense, either as regards the state or with respect to any of the subdivisions of the county which receive portions of the fund accruing from the sale of delinquent lands.

The procedure for the sale of forfeited lands is somewhat different. Forfeited lands are advertised for sale by the auditor, under section 5751, General Code and under section 5752, General Code, the auditor himself is required to make the sale. Section 5771, General Code, is of material interest as regards forfeited lands, to the inquiry as presented by you. This section provides as follows:

> "The county auditors shall apportion to their several funds, and pay over to the county treasurer of the proper county, the amount of moneys received from the sale of lands and town lots forfeited to the state for the non-payment of taxes."

This statute, as it now appears and as it was enacted in 102 O. L. page 280, presents a marked departure from the language of the statute as it appeared prior to this enactment. As it formerly appeared, the statute read as follows:

> "The county auditor shall apportion to their several funds and pay over to the county treasurer of the proper county, the amount of moneys received from the sale of lands and town lots forfeited to the state for the non-payment of taxes, after deducting the expense of advertising and distributing the amount to the several funds for which the taxes were originally levied. * * *"

In the statute prior to its amendment, 102 O. L., as above stated, provision was made for the deduction of the expenses of advertising. This fact probably accounts for the long established custom referred to by you with reference to forfeited lands. While this language would justify the custom as regards forfeited lands, there is not, nor can I find that there ever has been, any provisions in the statutes for such a deduction and consequent apportionment of these expenses among the state and subdivisions of the county with reference to taxes received from the sale of delinquent lands. The change in this statute with respect to forfeited lands is clear and its import unmistakable, and since this change there now exists no authority for the apportionment of such expenses in this manner.

As I have held in reference to delinquent lands, so I must conclude with respect to taxes received from the sale of forfeited lands. Both being duties incumbent upon the auditor of the county and there being no other direction prescribed by the statutes, it is clear that the expense of such advertisement must be paid from the county treasury, and since there is no provision for the apportionment of this expense to either the state or to any of the subdivisions which receive apportionments of the fund accruing from either the sale of delinquent or forfeited lands, I am of the opinion that such apportionment must not be made and that the county alone is obliged to bear the expense of advertising.

The statutes throughout these chapters, setting forth the duties of the county auditor and county treasurer and other officials having to do with the collection of taxes and the handling of funds accruing therefrom expressly provide for each step taken in the procedure and nowhere is there any authority which commits to the discretion of the auditor of state the power to describe any method of apportionment of funds in this respect.

In many instances, the legislature has taken pains to set forth that a certain deduction of collected taxes shall be apportioned to the funds entitled to receive therefrom. Thus, under section 2590, General Code, when taxes are refunded, a portion of the amount of the refunder must be deducted from the amount due the state.

Under section 2597, General Code, prior to the auditor's apportionment to the respective subdivisions of the amount due them, the fees due the treasurer must be deducted.

Under section 2624, General Code, the fees allowed to the auditor on semi-annual settlements must be apportioned and deducted accordingly from the amounts due the state and subdivisions.

Under section 2672, General Code, the expense of paying collectors of tax, employed by the county treasurer, must be apportioned ratably by the county auditor among the funds entitled to share in the distribution of such taxes. The same is true, under section 2685, General Code, of the fees apportioned upon semi-annual settlements to the county treasurer.

Since the legislature has taken the precaution to expressly provide the instances when expenses incurred in the collection of taxes are to be borne ratably by the

state and other funds entitled to benefit therefrom, and since such express provision is not made as regards the cost of advertising with reference to which you inquire, it seems unquestionably that such expense is to be borne by the county, and that reimbursement therefor is not to be charged ratably against the shares of the state and the subdivisions of the county.

This view is supported by a consideration of section 2648, General Code, which requires the treasurer to publish notice of rates of taxation prior to the collection of ordinary taxes. There is no provision for the apportionment of this expense and no question has arisen as to the right of the county to expect payment of respective shares of such expense from the state and county subdivisions. I see no difference in principle between the practice of requiring the county to bear the expense of advertisement prior to the collection of ordinary taxes and the practice of requiring the county to bear a kindred expense in the collection of delinquent taxes.

I do not attempt to set forth the reasons for this policy adopted by the legislature, but a consideration of the fact that the county officials receive fees for their duties in the collection of taxes, which fees accrue to the county treasury, would seem to go some length in explaining the practice of requiring the county to bear the expense of certain parts of the procedure of collection.

I am of the opinion, therefore, that the state is not liable for any part of the cost of such advertisement and that the same may not be charged against the proper subdivisions of the county, nor is the county entitled to any reimbursement therefor from the taxation district.

Your next question is as follows:

"May a person desiring to redeem real estate (sold at delinquent or forfeited land sale) as provided in sections 5734, 5735 and 5756, be required to pay a pro rata share of the cost of advertising as 'costs' (sections 5734-5) or as 'other expenses incidental to and arising from the sale' (section 5756)?"

Sections 5734, 5735 and 5756, General Code, are as follows:

"Section 5734. A person desiring to redeem land or town lots sold at a delinquent tax sale within the year after the sale thereof, or within one year after the expiration of any of the disabilities named in the next preceding section, may deposit with the county treasurer, upon the certificate of the county auditor particularly describing and specifying such land or town lot, an amount of money equal to that for which such land or town lot was sold, and the taxes subsequently paid thereon by the purchaser, or those claiming under him, together with interest, and fifteen per cent. penalty on the whole amount paid, *including costs,* and one dollar to pay the expenses of advertising as hereinafter provided.

"Section 5735. A person desiring to redeem any land or town lot at a delinquent tax sale, after the expiration of one year from the sale thereof, and within the time limited by law for such redemption, may deposit with the county treasurer, upon the certificate of the county auditor, particularly describing and specifying such land or town lot, an amount of money equal to that for which such land lot was sold, and the taxes subsequently paid thereon by such purchaser, or those claiming under him, together with interest and twenty-five per cent. penalty on the whole amount paid, *including costs,* and one dollar to pay the expense of advertising, as hereinafter provided.

"Section 5756. When a tract or parcel of land is sold, under the provisions of this chapter, at forfeited sale, any person, desiring to do so, may redeem it, at any time within six months from the sale thereof, by depositing with the county treasurer as *provided in the next preceding chapter of this title,* the amount of such sale with fifty per cent. penalty thereon, *and paying all other expenses incidental to, and arising from the sale.*"

For a proper understanding of the import of these statutes, a view of sections 5737 and 5738, providing for the reimbursement to the original purchaser by the person redeeming of the amount paid by the purchaser, is necessary.

Under said section 5737, General Code, when a party desiring to redeem, has deposited, the funds specified by said sections 5734 and 5735, with the county treasurer upon the surrender of the tax certificate by the original purchaser, said original purchaser, under section 5738, General Code, is entitled to receive *all* of the funds so deposited with the exception of course of the one dollar prescribed "to pay the expense of advertising as hereinafter provided," such advertisement being the notice of redemption in section 5737, General Code.

There can be no dispute that under these sections the amount of money deposited is to be received by the original purchaser and is intended to reimburse that party for the expense incurred by him in connection with the purchase and the tax sale. I can find no provision in the statutes requiring such purchaser to bear any part of the expense of advertisement of delinquent or forfeited lands as above stated and since that expense is to be borne by the county, it is clear that costs intended to reimburse the purchaser cannot by any means be presumed to include expenses borne by the county.

The procedure of section 5756, General Code, with reference to the redemption of forfeited lands is by express reference to that section patterned after the procedure with reference to the sale of delinquent lands, to wit; sections 5737 and 5738, General Code.

For the same reason, therefore, advanced with respect to the procedure of redemption of delinquent lands, I am of the opinion that the terms "all other expenses resulting to and arising from the sale" as they appear in section 5756, General Code, comprise expenses incurred by the purchaser, and by no means can be attributed to the expenses borne by the county, as I have held is the case with the advertisement of forfeited lands.

It would scarcely seem necessary to add that the expenses so incurred by the purchaser are the costs of the deed and the cost of the transfer on the books of the auditor, as prescribed by sections 2626, 5731 and 5762, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

612.

WHERE THE COUNTY COMMISSIONERS HAVE CONTRACTED WITH THE CLERK OF COURTS AND PAID HIM FOR REARRANGING AND REFILING PAPERS, AND FINDINGS HAVE BEEN MADE AGAINST SUCH PERSONS, THE MONEY PAID OUT ON SUCH CONTRACTS CANNOT BE RECOVERED.

Where the commissioners of Erie county have entered into contracts with the clerk of courts for indexing certain records, and renumbering, rearranging and refiling certain papers, records, and cases in the common pleas court, and under orders from such court, and findings have been made against said parties for recovery, the money paid out on such contracts may not be recovered.

COLUMBUS, OHIO, November 14, 1913.

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

GENTLEMEN:—I have your letter of September 10, 1913, in which you inquire as to the validity of the contracts made between John F. Hertlein, as clerk of courts, with the commissioners of Erie county, Ohio, on July 25, 1906, and Jerome J. Stoll, also clerk of courts, with said commissioners, on July 31, 1909, for indexing certain records, and renumbering, rearranging and refiling certain papers, records and cases in the common pleas court, and under orders from such court, findings having been made against said Hertlein & Stoll for recovery, and whether recovery could be had under said findings.

Dustin J., in Stloz vs. Selz, treas., 12 O. D., 664, holds:

> "* * * The commissioners did not in fact order the clerk to do the work, but by removing the old wooden file cases and putting metal cases in their stead, they were bound, therefore, to refile them in at least as good order as they were before the change. They decided to go further and thoroughly overhaul, arrange and classify all the old records and papers. In this way, therefore, it became competent for them to contract for the work. They were obliged to rebuild what they had torn down. * * *"

This explicitly recognizes the right of the commissioners to make such contract, at least when, as in these cases, it appears to have been done in pursuance of an order of the court. Says Judge Dustin, "It was not the province of the commissioners to order it done, but the duty of the court upon its attention being called to the matter."

However, it does not appear that concurrently with the making of these contracts, or either of them, a certificate was filed that there was money in the treasury applicable to their satisfaction. This, if true, would render both contracts invalid, and the right to recover would be relegated to a consideration of the Fronizer case, and whether is was controlling or not.

In the Fronizer case a contract was made for the furnishing of material and construction of certain bridges, but no certificate as to money being in the treasury was made or filed. The claim was made that the contract was secretly made, fraudulent, for an excessive price (double value) and made by two members of the board who concealed the same from the other members and that no minute or record of the contract was made. The contracts were fully performed and the money paid thereon, $1,931.00, and suit was brought to recover the amount thereof.

The defense claimed the county had received, accepted and was still using the bridges and should not be permitted to recover the money and keep the bridges.

At the close of said opinion, 77 O. S., 18, Spear, J., says:

> "* * * Buchanan Bridge Company vs. Campbell, 60 Ohio St., 406, is cited. That case simply holds that a contract for a bridge made in violation or disregard of the statutes on the subject, is void, and no recovery can be had against the county for its value. Courts will leave parties where they have placed themselves and refuse relief. It is difficult to see that this case aids the plaintiff's contention.
>
> "The county should not be permitted to retain both the consideration and the bridges. And as in the case above cited, the court left the bridge company where it found it, so in this case the court leaves the county of Sandusky where it finds it."

I feel that this case precludes a recovery back of the amount paid under either of said contracts, conceding their invalidity for the reason controlling in Stolz vs. Selz, treas., and if they are not invalid for that reason, then I can see no reason for their invalidity, and in that event, no recovery might be had.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

613.

THE CLERK OF COURTS MAY NOT REQUIRE PAYMENT FOR OFFICIAL SERVICES IN CIVIL CASES BEFORE SUCH SERVICE IS RENDERED. HE MAY CHARGE IN ADVANCE FOR TRANSCRIPTS MADE FOR TAKING CASES ON ERROR TO A HIGHER COURT AND FOR TRANSCRIPTS MADE FOR THIRD PERSONS.

Clerks of courts may not demand prepayment of costs in cases, as they are made or as the litigation proceeds, nor can they insist upon prepayment for transcripts for appeals in civil cases, but may do so for transcripts made for taking cases on error to a higher court, or for transcripts made for third persons.

COLUMBUS, OHIO, November 15, 1913.

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

GENTLEMEN:—I have your letter of November 4, 1913, in which you inquire;

> "May clerk of courts require payment for official services in civil cases before they are rendered, or as soon as they are rendered, and may he refuse to render further services until such fees are paid?
>
> "May the clerk of courts require the payment of fees for transcripts before delivering the same, (a) in an appeal case; (b) in a case carried to the higher court on error?"

Section 2900, General Code, formerly section 1260, Revised Statutes, insofar as applicable here, reads:

"For services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more."

Judge Bigger in Franklin county, Ohio, common pleas court holds that the words "when rendered" cannot be construed to mean "before rendered." See State ev rel. vs. McCafferty, 6 N. P. N. S. 558, and Judge McIlvaine in Abbey vs. Fish, 23 O. S. 413 has used this language:

"It is said in argument, that officers and others entitled to taxable fees may, in all instances, demand payment in advance, and therefore it should be inferred that the legislature did not intend to secure to them any interest or equity in the judgment for costs. Whether the premise in this argument be correct, is a question of some doubt; but whether it be or not, it is quite clear that it never has been the policy of the legislature to compel prepayment in all cases, as is manifest from the many provisions made for their collection after credit given."

From the language of Judge McIlvaine, the decision of Judge Bigger, and the fact that it has been held that prepayment of costs could not be imposed as a condition precedent to entering a decree in a divorce case, it must be held to be the law of Ohio, that a clerk cannot require payment for official service in civil cases before they are rendered.

Section 12236, General Code, reads:

"Forthwith, upon the perfecting of an appeal, the clerk of the common pleas court shall make a true transcript of docket and journal entries, including the final judgment in the cause, which, with the original pleadings and other papers he shall deliver at the office of the clerk of the circuit court, not later than the first day of its next term thereafter. At his own costs, either party may require a full record of the case in the court below, to be made."

This, to my mind, places the making of transcripts for appeals in the same category with other costs in the case, and prepayment for the same may not be demanded.

Section 12264, General Code, reads:

"Probate judges, justices of the peace, and other judicial tribunals having no clerk, and the clerks of every court of record, upon request, and being paid the lawful fees therefor, shall furnish an authenticated transcript of the proceedings, containing the judgment or final order in such courts, to either of the parties or to any person interested in procuring such transcript."

This section, as I construe it, compels the clerk to furnish the transcript upon request, and upon "being paid the lawful fees" which gives him the right to demand prepayment, and to make it a condition precedent to his delivering the transcript.

To summarize, my answer is: Clerks of courts cannot demand prepayment of costs in cases, as they are made or as the litigation proceeds, nor can they insist upon prepayment for transcripts for appeals in civil cases, but may do so for transcripts made for taking cases on error to a higher court, or for transcripts made for third persons.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

616.

A PERSON HOLDING AN OFFICE OF TRUST OR PROFIT BY ELECTION OR APPOINTMENT, OR AS AGENT, SERVANT OR EMPLOYE OF SUCH OFFICER OR OF A BOARD OF SUCH OFFICERS, MUST NOT BE INTERESTED IN CONTRACTS FOR FURNISHING SUPPLIES FOR THE USE OF THE MUNICIPALITY.

Where a man has been employed by a park commission of a city to look after the improvement of city parks, at a salary paid from the park fund, and is a member of a firm in the city from whom the commission desires to purchase materials for the park, it would be illegal for the commission to make purchases from this firm.

COLUMBUS, OHIO, November 6, 1913.

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

GENTLEMEN:—Under favor of July 11, 1913, you inquire whether when a man has been employed by a park commission of a municipality to look after the improvement of city parks, at a salary paid from the park fund, and who is a member of a firm in the city, from whom the commission desires to purchase materials for the parks, it would be legal for the commission to make purchases from such firm.

Section 12910 of the General Code, is as follows:

> "Whoever, holding an office of trust or profit by election or appointment, *or as agent, servant, or employe of such officer or of a board of such officers,* is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

I have heretofore ruled that the prohibitions of this statute extend to any agent, servant or employe who acts for such board of officers in a public capacity. The contemplated purchase would, therefore, be a clear violation of the terms of this statute and a contract so entered into would be void.

(Goblet Co. vs. Findlay, 5 O. C. C. 418.)

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

617.

THE LORAIN COUNTY LAW LIBRARY ASSOCIATION IS NOT ENTITLED TO FINES ASSESSED AND COLLECTED IN THE CRIMINAL COURT OF LORAIN, OHIO.

Where a criminal court is established in the city of Lorain, Ohio, under special act 101 *O. L.*, 385, *and was constituted a court of record and was given jurisdiction of offense and misdemeanors under the state law, the Lorain county law library association is not entitled to the fines assessed and collected in said court, and such fines should be credited to the general revenue fund.*

COLUMBUS, OHIO, November 5, 1913.

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

GENTLEMEN:—I have your letter of October 2nd in which you ask:

> "Under special act 101 O. L. 385, a *criminal* court was established in the city of Lorain, Ohio, which court was styled the criminal court, and was constituted a court of record and gave jurisdiction of offenses under city ordinances and misdemeanors under the state law.
>
> "Query. Is the Lorain county law library association entitled to the fines assessed and collected in said cases in prosecutions made in said criminal court? Or should said fines be deposited in the county treasury to the credit of the general fund of the county?"

The organization of police courts is provided for in sections 4567 et seq., General Code. The powers and jurisdiction thereof are specifically set forth in the statutes, but it is not believed necessary to a solution of your question to fully set them out. However, it is thought best to call attention to section 4577 which reads:

> "The police court shall have jurisdiction of, and to hear, finally determine, and to impose the prescribed penalty for, any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city, or within four miles thereof. The jurisdiction of such courts to make inquiry in criminal cases shall be the same as that of a justice of the peace. Cases in which the accused is entitled to a jury trial, shall be so tried, unless a jury be waived."

The act to which you call attention is entitled "an act to establish a criminal court in the city of Lorain, Lorain county, Ohio," and the first section thereof reads:

> "Section 1, 101 O. L. p. 385. There is hereby established in the city of Lorain, Lorain count, Ohio, a criminal court held by a judge, which court shall be styled the criminal court and be a court of record, and shall have jurisdiction of any offense under any ordinance of the said city of Lorain and of any misdemeanor committed within the limits of said city, to hear and finally determine the same and impose the prescribed penalty; but cases in which the accused is entitled to a trial by a jury, shall be so tried unless a jury is waived in writing by the accused."

Section 3056, General Code, reads:

"All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court, in state cases, shall be retained by the clerk, and be paid by him quarterly to the trustees of such law library association, but the sums so paid shall not be less than five hundred dollars per annum, if there be such an amount. The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

It will be observed that it is "fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except, etc." and "fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state," are included as those going to support of libraries.

That the court created in 101 O. L. 385, is neither a police, common pleas or probate court, and is not possessed of all the jurisdiction of either; requires neither argument nor citation; it is a different court from either of them, and cannot come within the definition of either. In fact, if it had been intended to organize this court with a view to keep it out of the provisions of section 3056, it is difficult to imagine how a better mode could have been selected, or how it could be more clearly expressed except by an exclusion in apt and unmistakable language.

In my opinion there is no right to pay fines and the like collected by the Lorain criminal court into the library fund, and they must, therefore, go into the general fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

620.

A CITY COUNCIL MAY NOT ENACT A SUPPLEMENTARY APPROPRIATION INCREASING THE AMOUNT APPROPRIATED IN THE REGULAR SEMI-ANNUAL APPROPRIATING ORDINANCE—WHERE AN APPROPRIATION FOR FURNITURE AND FIXTURES BECOMES EXHAUSTED, THE AMOUNT APPROPRIATED IN THE REGULAR ORDINANCE FOR SUCH PURPOSE MAY NOT BE INCREASED.

1. *The city council may not legally enact supplementary appropriations increasing the amount appropriated in the regular semi-annual appropriating ordinance.*

2. *If the particular subject is not contained in the regular appropriating ordinance, council may with certain restrictions legally pass a supplementary ordinance making specific appropriations for such subject.*

3. *The mere fact that an item may not have been provided for in the budget of the administrative officer, as revised by council for its own purposes, at the time of making up the tax levying ordinance, does not of itself preclude council from making a subsequent appropriation for that purpose, either at the time of making the regular semi-annual appropriation or at a subsequent date.*

4. *If an appropriation for furniture and fixtures becomes exhausted, council may not legally pass a supplementary appropriation for a desk for such office, thus indirectly increasing the amount appropriated in the regular ordinance for furniture and fixtures.*

COLUMBUS, OHIO, September 19, 1913.

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

GENTLEMEN:—Your letter of August 7th, receipt whereof is acknowledged, is in full as follows:

> "1. May city councils legally enact supplementary appropriations increasing the amount appropriated in the regular semi-annual appropriating ordinance?
>
> "2. If the particular subject is not contained in the regular appropriating ordinance may council legally pass a supplementary ordinance making specific appropriation for said subject?
>
> "3. If said item so provided for in the supplementary ordinance had been included in the estimate of the administrative officer and refused by council may council later in the period make specific appropriation for the particular subject not appropriated for in the regular ordinance?
>
> "4. If an appropriation for furniture and fixtures has become exhausted, may council legally pass supplementary appropriation for desk for said office, thus indirectly increasing the amount previously appropriated in the regular ordinance for furniture and fixtures? (See attorney general's opinions dated March 2, 1910 and May 24, 1911.)"

I have considered the opinion of my predecessor, to which you refer, and that of my own, and have reached the conclusion that both of them ought to be modified in certain respects. In them the broad conclusion is stated that no appropriation can be made by a municipal council after the passage of what is known as the semi-annual appropriating ordinance. This conclusion is, in my judgment too broad and requires qualification.

The sections of the General Code, the interpretation of which is involved in each of your four questions are as follows:

> "Section 3787. On or before the first Monday in March of each year the several officers, boards and departments in each municipal corporation, shall report an estimate, in itemized form, to the mayor and auditor, or clerk, of the corporation, stating the amount of money needed for their wants for the incoming year and for each month thereof.
>
> "Section 3790. To enable the mayor to make up his annual budget, each director or board and each officer, provided for in this title, on or before the last Monday in March of each year, shall make and file with the mayor, and also with the auditor, a carefully prepared and itemized estimate of the amount of money needed in such department or office for all purposes for the ensuing fiscal year, such estimate to be given for each month.
>
> "Section 3791. On the first day of April of each year the mayor shall submit to council the annual budget of current expenses of the municipality, any item of which may be reduced or omitted by council, *but the council shall not increase the total of such budget.* In the making of the annual budget, the mayor may revise and change any and all items in the annual estimates furnished for him by the directors and officers as herein prescribed, but shall not increase the total of any such estimate when including it in his annual budget to council. On such date, and at such other

times as he deems expedient, he shall report to council concerning the affairs of the corporation, and make such recommendations to council as he deems proper for the welfare of the municipality.

"Section 3793. The council shall examine and revise each annual budget submitted by the mayor. After it has determined by ordinance the percentage to be levied for the several purposes allowed by law upon the real and personal property in the corporation returned on the grand duplicate the levies shall be submitted by the council to the board of tax commissioners, which board shall examine and return them, as provided by law, with such suggestions and recommendations as it deems proper.

"Section 3794. On or before the first Monday in July, each year, council shall cause to be certified to the auditor of the county, the rate of taxes levied by it on the real and personal property in the corporation returned on the grand duplicate, who shall place it on the tax list of the county in the same manner as township taxes are by law placed thereon. The ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made and the per cent. thereof, and if he finds that the tax levy so certified to him exceeds the aggregate limit allowed by law, the county auditor shall not place it on the tax list, and the levy for such municipal corporation shall not be valid or collectible against any real or personal property in the corporation. * * *

"Section 3795. The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. * * * Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council.

"Section 3797. At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from 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. All expenditures within the following six months shall be made from and within such appropriations and balances thereof.

"Section 3800. In making the semi-annual appropriations and apportionment herein required, council may deduct and set apart from any moneys, not otherwise appropriated, such sum as it deems proper as a contingent fund to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforeseen emergency happen. Such contingent fund or any part thereof may be expended for any such emergency only by ordinance passed by two-thirds of all the members elected to council, and approved by the mayor. Any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other moneys belonging to the corporation. This section shall not interfere with the provisions of law authorizing the transfer of funds by the court of common pleas.

"Section 5649-3d. At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the col-

lection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

(As to the application of the last quoted section, which is one of those constituting the so-called Smith one per cent. law, there may be a question whether the council of a municipal corporation, which is mentioned in section 5649-3a, is a "board" within the meaning of section 5649-3d. However, this question is only indirectly involved in the answer to your specific question, and in previous opinions of this department, and in general practice, the application of the appropriation provisions of the Smith law to municipal corporations has been generally conceded. Therefore, for the purpose of this opinion section 5649-3d will be assumed to be applicable to the council municipal corporations.)

It seems to me that your third question is the most fundamental of those which you ask, in that it involves the operation and effect of the first group of sections above quoted to the exclusion of the other questions asked by you. Therefore, I shall consider it first.

A fundamental question is here presented involving the theory of the separation of powers into legislative and executive or administrative. It is to be observed that in the machinery of government under our Municipal Code, the executive department thereof, which may be termed the administration, prepares, as the first step in the operation of its fiscal machinery, a budget. This budget is made up by the mayor or head of the administration with the assistance of all his subordinates and the other elective officers of the municipality. These other officers are required to submit estimates to the mayor, setting forth in detailed form their probable needs for the next succeeding year which is to begin, say, ten months after the date of the estimate. The mayor is given authority to revise these estimates in making up his budget and may increase the amounts asked for specific purposes, just so he does not increase the total of an estimate submitted by any one officer. Thus, if the director of public safety estimates that in the succeeding year his department will need ten thousand dollars for the compensation of all members of the police force, itemizing each salary item, and ten thousand dollars for salaries of the fire department, and five thousand dollars for general salaries of the department of public safety, then an aggregate of twenty-five thousand dollars for contingent expenses, materials, apparatus, repairs, etc., for the department, making a total of fifty thousand dollars for all, the mayor may increase any salary of any position in the police department, or he may increase the item of police department salaries as an entirety. He may decrease any item anywhere in the estimate. In fact he may change the figures as he pleases, provided he does not change the total of fifty thousand dollars, which is the "total of any such estimate" referred to in section 3719, supra.

In this manner, then, the mayor makes up his "annual budget." For what purpose then, is this done? The answer is suggested by the provisions of section 3793, General Code. Council is to "examine and revise" the annual budget, and under section 3791 may take any liberties with it excepting to increase its total. Council then proceeds to determine the rates of levy for the different funds of the corporation, and in so levying it is not limited by any provision of law save as to the aggregate amount of the budget. In fact the "examination and revision" of the budget by council is with this exception a mere formality. Council might, if it chooses, ignore the mayor's budget entirely, save as to the total in estimating the rate of tax necessary to provide for the corporation's needs during the ensuing year.

I realize that this is a radical statement in view of the underlying spirit of the Municipal Code. Nevertheless, I believe it to be strictly accurate. The right to levy taxes is of the essence of legislative power. While it would be perfectly constitutional, perhaps, for the general assembly to vest local functions connected with levying taxes in administrative officers as it does in the case of township trustees and county commissioners who are in no sense legislative functionaries, yet under a code or plan of government providing as to sections 4206 and 4215, General Code, that the legislative power of a municipality shall be vested in and exercised by council; and further providing by sections 4246 and 4248, General Code, for the vesting of executive power in other designated officers, it must be assumed that the makers of the Code used these words in their exact sense. Therefore, in the fundamental view of the case the power to determine what taxes shall be levied is prima facie vested in council as the legislative body. This impression is in no wise weakened by consideration of the sections above quoted and discussed.

Section 3793, General Code, which provides for council's part in the scheme of levying taxes, does limit the council by express words to the gross amount of the mayor's budget as the amount which may be made the basis of the tax levy, but not otherwise.

In short, I am of the opinion that the duties of the mayor and his subordinates, in the preparation of the so-called "budget" are largely advisory. Council is entitled to the discharge of these duties in order to be possessed of the necessary information upon which to act in the exercise of its legislative power, but the detailed conclusions of the mayor are not binding upon the council in levying by O. K., for its own convenience merely. If in "revising" the budgets it eliminates an item therefrom, that is a mere matter of convenience which is not binding upon council itself with respect to its final action. The revision is merely for the purpose of enabling council to compute what the net result would be, for example, if more money than allowed by the mayor were raised for one purpose and perhaps less for another.

All of this so-called "budget machinery" has nothing whatever to do directly with the matter of appropriation. It all relates to the levying of taxes. Council is to determine the rate necessary for each of the purposes allowed by law. There may be as many purposes in logic as there are different estimates in the mayor's budget, for example, and as council may, in its wisdom, determine within the scope of the objects allowed by law. I understand, however, that your bureau has prescribed a general form of tax levy for municipal corporations contemplating the making of five specific levies, viz.: service, safety, health, general and sinking fund. This is a mere matter of convenient accounting. The result of it, however, is to provide five "funds" in the manner described in section 3795. That is to say, if council levies a rate of one mill for "service," the proceeds of that levy, together with the miscellaneous revenues of the service department, become the "service fund."

Now the council passes its levying ordinance sometime between the first day of April and the first Monday in July, having submitted it in the meantime to the board of tax commissioners—except that by virtue of section 5649-3a this ordinance probably must be certified to the auditor of the county on or before the first Monday in June instead of on or before the first Monday in July as prescribed by section 3794.

After such revision of the levies is made effective through the agency of the budget commission, which also has such revisionary power in order to enforce, if necessary, the limitation of the Smith one per cent. law, without power, however, to increase the amount of any item, the rates specified in the ordinance or, conversely, the amounts produced by such rates as revised by the budget commis-

sion, are again certified to the county auditor, whose duty it is to compute the rate necessary to produce the amounts as so revised, and to extend them on the duplicate of the property of the city. This act may take place at any time after the convening of the budget commission and up to the first of October, when the duplicate is supposed to be delivered to the county treasurer for collection of taxes. The first half of the taxes is collected in the succeeding December and distributed at the next February settlement.

In the meantime the fiscal year for which the taxes were levied, and for which the mayor's budget was made up, has begun, and on the first of January, that being the "beginning of the fiscal year," council is ready to appropriate. In making this appropriation at this time council is subject to such checks upon the exercise of its general legislative power as are set forth in the statutes and no other. These checks are as follows:

1. The appropriation must be limited to the money actually in the treasury from the proceeds of taxation and all other sources of revenue. That is to say, if there is in the treasury to the credit of the service fund, for example, a certain gross amount of money, the aggregate appropriation for purposes within the purview of the service fund must not exceed that sum.

2. If the "budget" of council, i. e. the thing certified by it to the county auditor, is particularized by items, then the appropriation of moneys raised by taxation may not exceed, as to such items, singly or in the aggregate, the amount so specified. That is to say, if council instead of certifying to the county auditor an estimate for the service fund as such, chooses to itemize the needs of the service fund (which is not the practice) then no single appropriation or aggregate of appropriation on any such item as fixed by council may be made in excess thereof from the proceeds of the levy for that purpose. But if there are available in the service fund moneys arising from other sources of revenue than taxation, such other moneys if available for the specific purpose may be appropriated in addition to the returns from taxation.

These are all the limitations upon the power of council to appropriate, save only the general limitation that the appropriation must be for some object for which the municipal corporation may lawfully provide money, and that an appropriation from a fund must be for a purpose within the proper purview of that fund. The word "budget," as used in the Smith one per cent. law does not mean the same thing as the "mayor's budget" referred to in the sections of the Municipal Code now under consideration.

When council passes its levying ordinance it adopts a new budget, presumably based upon the mayor's budget, but in nowise limited by it. But the budget of council consists merely of an estimate of the needs of the various funds in the aggregate. The particular items within these funds which will eventually become appropriation accounts need not be specified.

It follows, therefore, that when council is appropriating at the "beginning of the semi-annual period" it may, subject to the limitation hereinbefore described, set aside money from the proceeds of taxation and other sources of revenue at the time available for any lawful purpose within the purview of a particular fund, whether or not that purpose is one specified in the mayor's budget, and regardless of the action of council at the time the mayor's budget was presented to it by way of "revising" the same. In short, though council may have rejected an item in the mayor's budget for its own purpose in making up the levy, yet it has not thereby precluded itself from subsequently, at the time of making the semi-annual appropriation, providing for the rejected purpose.

The conclusion thus reached is strengthened by consideration of the provisions of section 4526, General Code, relating to the powers and duties of the

trustees of the sinking fund as a board of tax commissioners. The section in full is as follows:

> "Upon receipt of the levies made by the council, as provided by law, the board of tax commissioners shall consider them and within ten days after such receipt shall return them to the council with its approval or rejection, and, in case of rejection giving its reasons therefor. It may approve or reject any part or parts thereof, and the parts rejected by such board shall not become valid unless the council of such municipality shall thereafter, by three-fourths vote of all members elected thereto, adopt such levy or part thereof. If the board of tax commissioners approve such levies, or if it neglects to return them with its approval or rejection within such ten days, they shall be valid and legal. In no case shall the board of tax commissioners have authority to increase such levy."

So far as I have been able to ascertain this is the only section in which any positive check upon the full exercise of the legislative power of council in making tax levies is imposed. The section expressly states the consequences of the rejection by the board of any part of any levy. Even in the event of such rejection council it not deprived of such authority to levy as to such purpose except that the authority must be exercised by a three-fourths vote of all members elected to the council.

If it had been the intention of the general assembly in enacting the Municipal Code to give to the mayor's budget an effect similar to the action of the board of tax commissioners, such intention would have been expressed, in my judgment, in language as direct as that found in the section last above quoted.

What has been said thus far relates only to the power of council to ignore the determination of the administration in its budget and its own prior action in connection with the levying of taxes at the time it makes the appropriation. My opinion is that the power exists. From this point the answer to your third question is to be developed along lines identical with those involved in answering your first two questions.

The question now arises as to what is meant by the phrase "at the beginning of each fiscal half year" as used both in section 3797 and section 5649-3d, General Code.

In my opinion this provision is directory merely. In the first place it is not definite—that is to say, there is no time limit fixed by law, after which, in any fiscal half year, an appropriation for that half year may not be made. Therefore, I am of the opinion that the word "beginning" is of no mandatory effect whatever, and that council may at any time within the fiscal half year appropriate for the needs of that period in a given particular.

In the second place there is nowhere in the statutes found any provision from which it can be inferred or implied that the appropriations of council must all be included in a single ordinance. Council may pass one, two or a dozen appropriating ordinances without violating any of the provisions of the related statutes, and in strict execution of the power therein conferred upon it. This seems to be clear. Council is required and authorized merely to "make appropriations." Each appropriation may be a separate and distinct legislative act if it is so desired.

From this it naturally follows that the various "appropriations" may be made at different times. The mere fact that council has made one appropriation at its first meeting in the half yearly period does not, in my judgment, so fix the "beginning" of that period as to preclude council from making another appropriation at a subsequent date.

As at matter of course, however, the later one made is operative only for the remainder of the half yearly period, or if that period be the remainder of the first half of the year, for the remainder of the whole year.

Both of the sections pertaining to the making of appropriations require that all expenditures shall be made from and within the appropriations and balances thereof. This is equivalent to a limitation to the effect that no expenditure shall be made in excess of the appropriations and their balances. In the light of what has already been said this language requires some interpretation.

I am of the opinion that it means that no expenditure for a purpose within the purview of a given appropriation may be made in excess of the sum appropriated. That is to say, if council has exercised its legislative discretion in setting aside from a certain fund an amount for a definite purpose then all expenditures within the purview of that purpose must be made from that appropriation account, and the balance remaining over at the end of the half yearly period. But if council has failed to make any appropriation, the purpose of which includes a given expenditure, and there is money in the fund, then at a date subsequent to the making of other appropriations council may lawfully appropriate for the payment of obligations of this sort.

In this connection it is perhaps necessary to consider the meaning of the statute relating to the setting aside of a contingent fund. It is not necessary to quote this statute. Suffice it to say that it authorizes council to set aside an amount for the purpose of meeting deficiencies in the detailed appropriation which may by any unforeseen emergency arise. It will be observed that under this provision it is essential to the lawful expenditure of the contingent fund in the manner provided in the statute, that the deficiency exists in an appropriation account already created. If the required expenditure is of such a nature as to not be included within the purview of any of the appropriations theretofore made it is not a deficiency in a detailed appropriation account and, therefore, cannot be met out of the contingent account.

While, therefore, all of the related sections must be liberally construed as an expression of the legislative will that the public moneys belonging to the municipal corporation shall be appropriated in advance and expended with extreme care, and under strict limitations, it is apparent that if it be held that council has no authority to make appropriations for objects not included in the detailed appropriations already made, there being money in the fund at the time, such objects though lawful in the sense that the municipal corporation as such may provide for them, cannot be met at all during the half yearly period.

For, by virtue of section 3806, General Code, construed in connection with the appropriation sections, no contract involving the expenditure of money can be entered into by the municipal authorities unless there is money to the credit of the fund from which the expenditure is to be made, appropriated for that purpose, or for a general purpose inclusive of that specific purpose. Hence, the municipal officers would be without authority to enter into a contract for the making of the proposed expenditure, however necessary, in the absence of an appropriation.

Furthermore the statutes relating to the power to borrow money by a municipal corporation, while very liberal, do not authorize the exercise of the power for the purpose of meeting the *current expenses* of the municipality, save by vote of the people. All of these considerations make it apparent that unless council be held to have authority to make an appropriation for an overlooked object at a date subsequent to the making of the usual semi-annual appropriation ordinance no expenditures within the purview of that object may lawfully be made or contracted for until the new half yearly period. So to hold might, in a conceivable case, seriously interfere with the operation of the municipal government.

These considerations, then, though not admissible by themselves to support the conclusion which I have reached, may properly be taken into account in con-

nection with the more direct reasons already adverted to, as supporting the conclusion already stated. That is to say, a fair construction of the sections already quoted on their face indicates that council is not bound by the details of the so-called "budget" submitted to it by the administrative officers of the city in making its appropriations; that council is not bound by the budget which it submits to the county auditor save with respect to the purposes therein mentioned, which in practice are likely to be very general in their nature; that council is not bound to make its appropriation for a half yearly period in one ordinance, nor to pass the appropriating ordinances on the same day.

The conclusion reached by consideration of the primary meaning of the statutes involved is not militated against by any considerations of inconvenience or public policy, but on the contrary all such considerations support it.

Your particular questions, then, may be answered as follows:

Your first question must be answered in the negative. I interpret your question as meaning an inquiry as to whether or not a city council having appropriated a definite sum for a specific purpose may, at a subsequent date, appropriate another sum for the same purpose. For reasons already pointed out, I am of the opinion that this may not be done.

Your second question must be answered in the affirmative, with certain qualifications. That is to say, if the detailed appropriations made by council in one or more so-called "regular appropriating ordinances" fail to include within their scope all of the objects for which the corporation lawfully may provide money, then the council, at a date subsequent to the passage of such "regular appropriating ordinance" may legally make an appropriation for this purpose, provided the purpose itself is within the purview of the purposes of the fund from which it is to be set aside; the purview of the fund, in turn, being determined, not by the provisions of the "budget" prepared by the administrative officers and submitted to council for its revision but by the terms of the thing of the same name, viz.: the "budget" submitted by council to the county auditor for the use of the budget commission. For illustration, if the council submits to the auditor a statement merely of the amounts deemed by it necessary to be levied for the sinking fund and interest, service, safety, health and general purposes of the municipality, there being no other details, then the amounts allowed by the budget commission are separable into these funds and these only, and any specific purpose within the fair purview of the general fund may become the subject of a subsequent appropriation. But if the estimate submitted by the council to the budget commission is in greater detail and mentions a specific purposes instead of the general purposes of the various "funds" created for the sake of convenience, then any such specific purpose in order to be the subject of a lawful appropriation, must, so far as the returns from taxation are concerned, be within the purview of one of the objects mentioned in the council's budget. This does not, of course, apply to the expenditure of revenues other than those received from taxation.

With the qualifications just made, then, I am of the opinion that if a particular subject is not contained in the "regular appropriating ordinance" council may legally pass another ordinance of subsequent date (whether the same be designated as "supplementary" or not) making a specific appropriation for that subject.

The answer to your third question has already been suggested by the discussion in which I have indulged myself. The mere fact that an item may not have been provided for in the budget of the administrative officer, as revised by council for its own purposes, at the time of making up the tax levying ordinance, does not of itself preclude council from making a subsequent appropriation for that purpose, either at the time of making the regular semi-annual appropriation or at a subsequent date.

Your fourth question is clearly a specific application of your first question. An

appropriation for "furniture and fixtures" amounts to a legislative determination by the council that all expenditures for furniture and fixtures for the particular office designated shall be made from and within the amount set aside. If council were subsequent to pass another appropriation for a desk for the same office, such action would not constitute appropriating for an object omitted from the earlier ordinance, but would constitute an attempt to increase a specific or detailed appropriation already made, which, for reasons already stated cannot lawfully be done.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

629.

JUDGES OF ELECTIONS IN THE CITY OF CINCINNATI ARE NOT ENTITLED TO MILEAGE IN MAKING RETURNS OF THE ELECTION—DEPUTY CLERK AND ASSISTANTS ARE NOT ENTITLED TO EXTRA COMPENSATION IF THEY ARE RECEIVING THE MAXIMUM COMPENSATION ALLOWED BY LAW.

1. *The presiding judges in the city of Cincinnati, which is also the county seat, are not entitled to mileage in delivering election returns under section* 5043, *General Code.*

2. *Where a deputy clerk of elections and assistant clerks are receiving the maximum compensation allowed by law, there is no authority to exceed this maximum. The compensation is fixed by the month and not on a per diem basis, and extra work done cannot be taken into consideration. Extra allowances are not authorized by law.*

COLUMBUS, OHIO, November 6, 1913.

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

GENTLEMEN:—Under date of October 29, 1913, you state:

> "Enclosed please find copy of letter from state examiners, C. E. Brotten and M. Blau, making certain inquiries as to the mileage of judges of elections in registration cities, also payment of extra salary to certain deputy and assistant clerks of the board."

In the letter enclosed it is stated:

> "In regard to the mileage and fees paid to presiding judges of elections, in the city of Cincinnati.
>
> "The question arises as to whether or not judges of election in registration cities may legally be paid a fee of five cents per mile for delivering returns.
>
> "In going over the accounts of the board, I find that F. A. R., deputy clerk, J. K., E. A., and J. E. J., assistant clerks are each paid the sum of $50.00 for an allowance to cover work done at night, and to reimburse them for meals while performing such extra services.
>
> "In the case of Mr. R., I know personally that ten times this amount would not compensate him for the extra work performed, but we are up against

the proposition how an extra allowance can be made when he is receiving the maximum fixed by statutes for such services, the same thing applies to the assistant clerks."

Section 5043, General Code, to which reference is made in the letter attached, provides:

"The judge of elections called by the deputy state supervisors to receive and deliver ballots, poll books, tally sheets and other required papers, shall receive two dollars for such services, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he lives one mile or more therefrom.

"The judge of elections carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, or clerk or auditor of the municipality, shall receive like compensation.

"In cities where registration is required, the chairman selected at the meeting for organization shall receive one dollar for calling for the sealed package of ballots."

The question has been raised as to what constitutes a "county seat" as used in the foregoing section.

Attention has been called to the citation in 7 Am. and Eng. Enc. of Law, second ed., page 1013, wherein a county seat is defined, as follows:

"A county seat may be defined as the seat of government of a county; the town or municipality in which the county and other courts are held, and where the county officers have their offices, and where the county business is transacted.

"When a city or town is selected as the county seat, the boundaries of such city or town, *as they then exist,* become the boundaries of the county seat, and the subsequent inclusion of more territory in such city or town does not enlarge the county seat."

In support of the second proposition contained in the above citation, three cases are cited, to wit: State vs. Smith, 46 Mo. 60; State vs. Harwi, 36 Kan. 588 and State vs. Atchison County, 44 Kan. 186.

These cases have been examined. The leading case is that of State vs. Smith, 46 Mo. 60, which is cited and followed in State vs. Harwi, 36 Kan. 588.

In the Missouri case the question was as to the right of the county court to remove the clerk's office, or the "seat of justice" from the territory originally selected as the county seat to a subsequent addition to the municipality wherein the county seat was located.

On page 64, the court says:

"The commissioners are then to make report of their proceedings, accompanied by such deeds and abstracts, to the circuit court of the county at its next term; and if the court approve the title, it shall cause the decision to be certified to the tribunal transacting county business, and the title of the land so conveyed vests in the county, and *the place selected shall be the permanent seat of justice thereof.* (Wagn. Stat. 395-6, secs. 6-8.)"

It appears therefore that this case was decided upon the terms of the statutes of Missouri.

This case was decided in 1870 and in 1875 a new constitution was adopted, and it was specifically provided in section 2 of article 9, thereof, that "all additions to a town which is a county seat shall be included, considered and regarded as part of the county seat."

This was a modification of the former constitution and it is fair to assume that this provision was inserted to annul the effect of the decision in State vs. Smith, supra.

In the two Kansas cases the question was as to the right of the county commissioners to remove the county buildings from the original site selected as the county seat, to a subsequent addition thereto. The selection of the county seat in these cases was made by vote of the electors. In each of the three cases cited the business section of the town had changed to the new additions.

In each of the above cases the court held that the removal could be made in the manner provided by statute.

The foregoing cases are not in point as to the present question. We are not now concerned with the removal of county buildings or county offices.

It appears from the letter enclosed that the county seat of Hamilton county was established by Alexander Hamilton in 1790 at Losantiville, which cite is now but a few squares in the city of Cincinnati.

Section 5043, General Code, was first enacted in 89 Ohio Laws 452, which was considerably later than 1790. When this section was first enacted the legislature evidently had reference to the municipality wherein the business of the county was carried on and generally known as the county seat. The term "county seat" as used in section 5043, General Code, still has reference to the territory of such municipality and any additions thereto.

The right to draw mileage should be clearly expressed and should not be founded upon a technical construction of the term "county seat."

Therefore, any person living within the boundaries of the municipality known as the county seat, is not entitled to mileage under section 5043, General Code.

In connection with this question it might be well to call attention to the following provision of section 4944, General Code:

> "* * * In registration cities having a population of three hundred thousand or more by the last preceding federal census, the judges of election, including the registrars as judges and clerks of election, shall each be allowed and paid ten dollars for each general election and five dollars for each special election, at which they serve and no more, either from the city or county."

In the second question it appears that the deputy clerk and the several assistant clerks are receiving the maximum compensation allowed by law and that $50.00 in addition has been paid them for extra work and meals.

Section 4877, General Code, as amended in 103 Ohio Laws, 544, provides; in part:

> "When necessary, the board may employ a deputy clerk and one or more clerks as temporary assistants of the clerk at a salary of not to exceed the rate of one hundred dollars per month each and prescribe their duties. * * *"

This section fixes the maximum amount to be paid the deputy clerk and the assistant clerks. There is no authority to exceed this maximum. The compensation is fixed by the month and not upon a per diem basis. So extra work done at night cannot be taken into consideration.

A part of the excess payment is for meals. The amount for meals is not specified. It is not good policy to charge the public for meals which are taken in the place of an employe's regular employment. In the present case it is presumed that the meals were taken in the employe's home town.

I am of opinion, therefore, that the extra allowance to the deputy clerk and assistant clerks was not authorized by law.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

630.

WHERE A COUNTY TREASURER'S TERM EXPIRED ON LABOR DAY, AND HE HOLDS OVER UNTIL THE FOLLOWING DAY, THE SALARY OF EITHER THE TREASURER OR HIS SUCCESSOR WOULD NOT BE AFFECTED BY THE FACT THAT THE OUTGOING TREASURER HELD THAT OFFICE ONE DAY AFTER HIS TERM HAD EXPIRED.

An outgoing county treasurer's term expired on Labor Day and the change was made the day after. The holding over for one day under the circumstances must have been done with the tacit consent of both officers, and the compensation for this office being an annual salary, the manner in which the change was made would not affect the salary of either the outgoing or the incoming treasurer.

COLUMBUS, OHIO, November 5, 1913.

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

GENTLEMEN:—I have your letter of October 21, 1913, in which you state:

> "The term of a county treasurer expired the first Monday of September, 1906. He was elected to succeed himself, and received the appointment as treasurer for the year ending September 1, 1907, when he began his second term, which ended the day preceding the first Monday of September, 1909. That being Labor Day the county commissioners did not appear to perform their duties under sections 2404, 2684 and 2700, and therefore the treasurer did not surrender his office until the following day. The treasurer elected had given bond which had been accepted by the board of county commissioners, and had taken the oath of office, and presented himself at the office of the county treasurer prepared to assume his duties.
>
> "Under the foregoing conditions was the retiring treasurer entitled to pay in addition to his full annual salary for serving the first Monday of September, 1909?
>
> "Was his successor entitled to his full annual salary for the first year of his term?"

In reply to which I desire to say:

As I understand, the outgoing treasurer was ready to surrender, and the incoming one was qualified, ready to accept and presented himself at the office to assume his duties, but it being a legal holiday, the law closed the office, and for that reason alone the exchange was not made.

There is neither wrong, neglect nor failure to comply with the law here, and in the light of the decision of our supreme court that it is lawful to hold court on Labor Day, and that a grand jury may be impanelled on Labor Day.

(State vs. Thomas, 61 O. S. 444.)

and that a court may meet and adjourn on Sunday. (Jones vs. State, 14 C. C. R. 357, C. D. 305.) I must conclude that the fact that the outgoing treasurer's term expired on Labor Day, did not prevent the making of the change, but that the holding over for one day, under the circumstances mentioned, must be held to have been done with the tacit consent (at least) of both officers, which cannot be held to add to the compensation of the one or deduct from that of the other; the compensation being by an annual salary under section 2991.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

635.

GARNISHMENT PROCEEDINGS CANNOT BE INSTITUTED AGAINST A DEBTOR WHO HAS GIVEN AN ORDER IN GOOD FAITH FOR TEN PER CENT. OF HIS WAGES TO A CREDITOR, UNTIL AFTER A PERIOD OF THIRTY DAYS HAS ELAPSED.

If a debtor, upon the receipt of or upon being served with notice or demand for ten per cent. of his personal earnings, thereupon gives an order to a creditor for ten per cent. of such wages or earnings due such debtor, other creditors are thereby barred from filing attachment and garnishment proceedings within thirty days after the date of such order, provided the debtor acts in good faith in giving the said order.

COLUMBUS, OHIO, November 21, 1913.

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

GENTLEMEN:—On October 23, 1913, your department submitted to this department a request for an opinion, as follows:

> "If a debtor, upon receipt of notice, gives order to a creditor for ten per cent. of wages due said debtor, are other creditors estopped from filing attachement and granishee within thirty days after the date of said order?"

In reply thereto, section 10253 of the General Code provides that personal earnings can be attached for necessaries, as follows:

> "* * * If attachment of the personal earnings of the defendant be sought, the affidavit also must state that he is not the head or support of a family nor in good faith the support of a widowed mother wholly dependent upon him for support; or that such earnings are not for services rendered

within three months before the action was begun, or that, if earned within that time, they amount to more than one hundred and fifty dollars, and only the excess over that sum is sought to be attached; or that the claim sued on is for work, labor or necessaries, * * *."

Section 10271 of the General Code, as amended April 11, 1913, (103 O. L. 567) provides that personal earnings now exempted by statute, in addition to the 10 per cent. for necessaries, shall be further liable to the plaintiff for the actual costs, as follows:

"The personal earnings now exempted by law, in addition to the ten per cent. for necessaries, shall be further liable to the plaintiff for the actual costs of any proceeding brought to recover a judgment for such necessaries, in any sum not to exceed two dollars, and the necessary garnishee fee. Such garnishee may pay to such debtor an amount equal to ninety per cent. of such personal earnings, less the sum of two dollars and the necessary garnishee of fee not to exceed fifty cents, if the same is demanded by the garnishee, for actual costs as herein provided, due at the time of the service of process or which may become due thereafter and before trial and be released from any further liability to such creditor, or to the court or any officers thereof, in such proceeding, or in any other proceeding, brought for the purpose of enforcing the payment of the balance of the costs due in said original action. Both the debtor and the creditor shall likewise be released from any further liability to the court or any officers thereof in such proceedings or in any other proceeding brought for the purpose of enforcing the payment of the balance of the costs due in said original action."

Section 10272 of the General Code provides that any person bringing an action for necessaries, must first make a demand in writing for 10 per cent. of the personal earnings of the debtor, as follows:

"The person bringing an action for necessaries first must make a demand in writing for the excess over and above ninety per cent. of the personal earnings of the debtor, and such demand shall be made at least three days and not more than thirty days before such action is brought by delivering such demand to the debtor personally, or by leaving it at the debtor's usual place of residence. No cost or expense shall be chargeable to the defendant debtor in such action if upon such demand he tenders payment in money or duly accepted order, within three days after such demand, for the excess of his personal earnings above ninety per cent. thereof."

Section 10273 of the General Code, provides that more than one such demand shall not be made by the same creditor and that the amount demanded may be for the excess above ninety per cent. earned during the interval of thirty days, as follows:

"More than one such demand by the same creditor shall not be made at closer periods than thirty days. The amount demanded may be for the excess above ninety per cent. earned during the interval of thirty days. Any voluntary payment or payments made by the debtor during such interval shall be deducted from the amount which might be demanded had no payment or payments been made."

By virtue of the procedure provided by said sections 10271, 10272 and 10273 of the General Code, ten per cent. of the personal earnings of the head of a family can be attached, plus the actual cost of such procedure.

The first step in such procedure is the serving of the demand in accordance with section 10271 of the General Code, supra. If such debtor upon whom such demand is served, gives an order in accordance with said section 10271, supra, then the personal earnings of such debtor are thereby subjected to the claim for necessaries of the creditor by the first step in the procedure, for such attachment of ten per cent. of the personal earnings of such debtor. The provisions of the said sections 10271, 10272 and 10273 of the General Code, supra, are exceptions to the exemption of personal earnings, which are given to the heads of families by section 11725 of the General Code, which provides as follows:

> "Every person, who has a family, and every widow, may hold property exempt from execution, attachment or sale, for debt, fine or amercement, as follows:
>
> "* * * The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear by affidavits of the debtor, or otherwise, that such earnings are necessary to the support of the debtor or of his or her family. Such period of three months shall date from the time of issuing an attachment or other process, the rendition of a judgment, or the making of an order, under which the attempt may be made to subject such earnings to the payment of a debt. If the claim, debt or demand for the payment of which it is sought to subject personal earnings, is one for necessaries furnished to the debtor, his wife or family, only ninety per cent. of such earnings shall be so exempt, as against such claim, debt or demand. Nothing herein contained shall render the personal earnings of such debtor's minor child or children, for three months subject to its payment; * * *."

The attachment proceeding of ten per cent. of the personal earnings of a debtor for necessaries, who is the head and support of a family, is an exception to the general exemptions provided by section 11725. In this connection I desire to cite the case of King vs. Laws, 5 Ohio N. P. Rep., N. S., page 414, wherein the court held as follows:

> "An order given against his wages by a debtor to a creditor for necessaries furnished, does not, where the order is for a period longer than thirty days, defeat an attachment for necessaries against wages earned after the thirty day period."

The facts in the last cited case are stated as follows:

> "This is a proceeding in error from a justice of the peace. The case below was one in attachment of wages under the provisions of Revised Statutes, section 6501, known as the ten per cent. law. On February 22, 1906, the plaintiff, King, brought suit against the defendant on a bill for necessaries furnished, and sued out an attachment and garnisheed his wages due from the board of education of Union township. The defendant moved the court to dissolve said attachment upon the ground that ten per cent. of his wages was then and at that time being retained by said board in payment of an order for necessaries given to another.
>
> "Upon the hearing of this motion, it appeared that the defendant was a married man, etc., and that theretofore on January 3, 1906, he had given

an order on said board for necessaries to one L. B. May for the sum of $53.40, payable in four equal monthly installments of $13,35 each, two of which had already been paid. Upon this showing, the justice granted said motion and dissolved said attachment. Was this right?"

At page 414 of the opinion, the court says:

"Section 6489, Revised Statutes, sets forth the several grounds of attachment in actions before justices of the peace. By this section it is provided that, for any claim for which judgment is sought for work or labor or for necessaries, an attachment may issue without specifying any other ground (K. B. Co. vs. Batie, 2 C. C.—N. S., 358). The question then is simply one of exemption. In this behalf it is provided by Revised Statutes, section 5430, 5441, that the personal earnings of the debtor, head of a family, for three months prior to the attachment are exempt, if necessary for the support of himself and family, except where the claim sued on is also for necessaries; in which case ninety per cent. only is exempt. It may be conceded to be the law, that the general exemptions provided by said last two sections are exemptions which apply in favor of the debtor as against any and all creditors against whom the debtor may wish to claim them. And as the ten per cent. of the debtor's personal earnings made liable to attachment under the provisions of said Revised Statutes, section 6501, on a claim for necessaries is merely an exception to the amount of the general exemption in favor of a claim of this character, *it must follow that the ninety per cent. remaining is also exempt as to any and all creditors against whom this claim is made.*"

In the case of Mitchell vs. Bradshaw, 15 Ohio Decisions 353 (2 O. L. R. 353), it was held that personal earnings are not exempt from garnishment under Revised Statutes 6501 (sections 10271, 10272 and 10273 of the General Code), by the debtor making voluntary payments to another creditor as follows:

"A proceeding in attachment to reach and subject ten per cent. of the personal earnings of the head of a family to the payment of a claim against him for necessaries, cannot be defeated by the debtor paying ten per cent. of his earnings to another creditor who had previously, but without commencing proceedings in attachment, made a written demand upon him therefor under Lan. R. I. 10078, (R. S. 6591); to have such effect it is essential that the payments should follow a prior action in attachment."

The case of Walt vs. Kant, 15 O. D., 643 (2 O. L. R. 493), holds to the same effect as follows:

"The voluntary payment of 10 per cent. of a debtor's monthly earnings to a creditor who had obtained judgment against him for 10 per cent. of his salary for a previous month will not operate to exempt his wages from the lien of a garnishment under the provisions of Lan. R. L. 10078 (R. S. 6501), sued out by another creditor prior to such voluntary payment."

It will be noted, however, that in both of said cases, the debtor made a voluntary payment of 10 per cent. of his personal earnings, and that he did not sign an order upon his employer for such 10 per cent., thereby assigning the ten per cent. of his personal earnings to his creditor. Such order undoubtedly operates as an assignment of 10 per cent. of such personal earnings which is accomplished

by the first step in the procedure provided by said sections 10271, 10272 and 10273, for the attachment and garnishment of 10 per cent. of a debtor's personal earnings, who is the head and support of a family.

In the case of Hackett vs. Zuendel, 15 O. D. 498, it has been held that only 10 per cent. of such personal earnings are subject to attachment at any one time, as follows:

> "Under favor of Lan. R. L. 8958 and 10078 (R. S. 5430 and 6501), 90 per cent. of the personal earnings of a head of a family are absolutely exempt from attachment, garnishment or execution, except that certain costs may be taxed against him for resisting a claim for necessaries. Hence, when 10 per cent. of the personal earnings of the head of a family have been set aside for, and are being applied toward the payment of certain claims against him for necessaries, *an attachment, garnishment or execution to reach and subject an additional* 10 *per cent. of such personal earnings towards the payment of other claims for necessaries, cannot be had.*"

In the statement of facts in the above case, it appears that the defendant had made an assignment of ten per cent. of his personal earnings in order to satisfy claims against him for necessaries, as follows:

> "This suit was commenced in the court of a justice of the peace to recover $18.75 for necessaries sold and delivered, to wit, groceries. The plaintiff recovered a judgment for the full amount, and in attachment issued for 10 per cent. of the personal earnings of the defendant in possession of the Akron Brewing Company. The case was appealed to this court, and a motion has been filed to dissolve the attachment.
>
> "It appears that Zuendel, the defendant, is the head and support of a family, and that on August 6, 1904, in order to avoid process of garnishment and to comply with the demands of creditors, who were urging claims against him for necessaries, he made an assignment to J. H. Adams of 10 per cent. of his earnings then due him from the Akron Brewing Company for services rendered and to be rendered for the period of fifty weeks."

At page 499 of the opinion, the court says:

> "Under Lan. R. L. 8958 and 10078 (R. S. 5430 and 6501), 90 per cent. of the personal earnings of the head of a family are expressly exempt from attachment, except the costs that may be taxed to him through his own resistance of a claim for necessaries. Therefore, while 10 per cent. of the defendant's earnings is being subjected to the payment of claims for necessaries, no attachment can issue. *If it were not so, then successive attachments might issue and earnings necessary for the support of the family which are declared exempt, might be entirely subjected.* The motion to dissolve the attachment is sustained and judgment is entered for defendant."

In the case of King vs. Laws, supra, at page 416 of the opinion, the court says.

> "Again, it may be said that the statute itself, Revised Statutes, section 6501, provides that no demand or attachment shall be made by the same creditor at closer periods than thirty days, and then only for ten per cent. of wages earned during the interval of thirty days. *This, we have seen, excludes all other creditors for the same period,* * * *."

If several creditors of a debtor, who is the head and support of a family, were all entitled to an order for ten per cent. of the personal earnings of such debtor, then it might follow that such debtor, of the head and support of a family, would be entirely deprived of the exemption of his personal earnings, which are reserved to him by the exemptions provided by section 10271 of the General Code.

By virtue of the provisions contained in said section 10271, 10272 and 10273 of the General Code, 10 per cent, of such personal earnings are subject to attachment for the purpose of being applied on a claim for necessaries, and that purpose being accomplished by the first step in the procedure provided by section 10271, supra, it therefore follows as my opinion, in direct answer to your inquiry, that if a debtor, upon the receipt of or upon being served with notice or demand for ten per cent. of his personal earnings, thereupon gives an order to a creditor for ten per cent. of such wages or earnings due said debtor—other creditors are thereby barred from filing attachment and garnishment proceedings within thirty days after the date of such order, provided that such order for said ten per cent. is given by the debtor in good faith and not merely to enable such debtor to defeat his creditors, and without any collusion between said debtor and creditors to evade attachment by other creditors.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

651.

THE EXPENSES OF TEACHERS, MEMBERS OF THE BOARD OF EDUCATION, OR PERSONS NOT MEMBERS OF THE BOARD OF EDUCATION, INCURRED IN ATTENDING THE EDUCATIONAL CONGRESS HELD IN COLUMBUS, DEC. 5, 1913, MAY NOT BE PAID FROM SCHOOL FUNDS.

1. *The expenses of a teacher, appointed by the board of education as delegate to the educational congress at Columbus, December* 5, 1913, *may not legally be paid out of the township, village, or special school district treasury.*

2. *When a teacher is appointed by a board of education of a city district, such expense may not be paid from the school treasury, nor can the expenses of members of a board of education to such convention be paid out of the city fund. The expenses of persons not members of a board of education or teachers, incurred in attending the above named congress, may not be paid from the school fund. Before such expenses can be paid, an appropriation for this purpose must be made by the legislature.*

COLUMBUS, OHIO, December 17, 1913.

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

GENTLEMEN:—I herewith acknowledge the receipt of your communication of December 5, 1913, wherein you inquire:

> "1. Can the expense of a teacher, appointed by a board of education as delegate to the educational congress at Columbus, December 5 and 6, 1913, held under recommendation made in the proclamation of Gov. Jas. M. Cox, under date of October 21, 1913, legally be paid out of a township, village or special school district treasury?

"2. When the teacher is appointed by a board of education of a city district, can such expenses be paid from the school treasury?

"3. Can the expenses of a member of the board of education of a township, village or special school district, incurred in attending the above mentioned congress, be paid out of the treasury of the district?

"4. Can the expenses of a member of a board of education from a city district attending the above mentioned congress be paid out of the city school treasury?

"5. Can the expenses of persons, not members of boards of education or teachers, incurred in attending the above mentioned congress, be paid out of school funds?

"6. Can the expenses of a delegate not appointed by the board of education, incurred in attending the above mentioned congress, be paid out of the school funds?"

In reply thereto, section 3 of article 6 of the newly adopted constitution, provides as follows:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts."

Before making provision by law under the above amendment for the organization, administration and control of the public school system of the state supported by public funds; the legislature deemed it advisable to make a thorough study and survey of the existing conditions of the schools of the state, and accordingly on February 26, 1913, (103 O. L. p., 69) passed an act entitled—"An act to create a commission to conduct a *survey* of the public schools, normal schools, and the agricultural schools of the state, defining its powers, and providing appropriations therefor."

Section 1 of said act provides as follows:

"That *the governor be and is hereby authorized to appoint a commission of three members to make a survey of the public schools, the normal schools, and the agricultural schools of the state,* and the state administration of the same, to determine with what efficiency they are being conducted, and to report to the governor *with recommendations. Such report shall be transmitted by the governor to the present general assembly of Ohio.*"

It is apparent to every one that this action on the part of the legislature was commendable, for it discloses that the legislature was sincerely trying to formulate the best legislation possible for the government of the schools and for the improvement of the school system of the state. By learning the actual conditions and needs of the schools and defects existing in the present laws governing the school system of the state, through a commission appointed for that purpose— the legislature thereby would be better enabled to *intelligently* and *efficiently enact legislation,* to the end that existing defects could be cured; furnish better school facilities; and provide a better code of laws for the government of the school system of the

state. To further aid this very commendable purpose of the legislature, the governor of the state of Ohio, the Hon. James M. Cox, on October 24, 1913, issued a proclamation wherein he suggested that:

> "Friday, November 14, 1913, be observed by every school district in Ohio as School Survey Day, and that teachers, pupils, parents and patrons assemble during the afternoon and particularly the evening. Speakers will be supplied and literature prepared, with such general supervision by the superintendent of public instruction and the school survey commission that conditions throughout the state will be known and remedies can be suggested."

and further suggested that:

> "An educational congress be held in Columbus on December 5 and 6, 1913, and that the community meetings select lay delegates to the congress. The teachers' institute organizations will designate delegates from the teaching forces within the counties."

The reason for so designating a school survey day and the holding of an educational congress is well expressed in the proclamation of the governor, as follows:

> "The opinion was expressed that there was disorder and incongruity in our present *archaic school structure,* and that it would be useless to attempt to make laws *intelligently and efficiently* without first having the most comprehensive appreciation of the conditions existent."

The holding of such school survey day and the holding of the educational congress, in accordance with the suggestions contained in the governor's proclamation, and the knowledge thereby acquired, undoubtedly will greatly aid the legislature in its endeavor to enact better and more efficient laws for the government of the schools of the state.

Prior to the holding of the congress above referred to, the commission to conduct a survey of the public schools, as provided by the act above referred to, has prepared a partial report of tentative, constructive suggestions, which said report was subject to change upon suggestions that might be made by the said congress recently held at Columbus, Ohio, December 5 and 6, 1913. I am informed upon verbal advice received from the state supervisor of public instruction, that the suggestions so made by said commission met with the general approval of the delegates attending said congress. Said report in substance recommends and suggests the following provisions:

> "Provision for agricultural supervision.
> "Provision for the publishing of statistics by the state department of public instruction.
> "Provision for high and elementary school inspection.
> "Provision for the administration of the office of the state superintendent of public instruction.
> "Provision for school supervision.
> "Provision for the certification of teachers.
> "Provision for the academic training of teachers.
> "Provision for teaching experience, and the tenure of office of teachers now in service.

"Provision for the professional training of teachers now in service.
"Provision for the administration of school laws in Ohio.
"Provision for the consolidation and centralization of schools.
"Provision for the standardization of schools rather than of pupils and students."

From all that precedes, and as gathered from the provision contained in section 3 of article 6 of the Ohio constitution, supra: and as gathered from the provisions contained in the act passed February 26, 1913, entitled, "an act to create a commission to conduct a survey of the public schools, normal schools and the agricultural schools of the state, defining its powers and providing appropriations therefor," supra; and as gathered from the proclamation of the governor, and from the tentative constructive suggestions contained in the report of the school survey commission; it is at once apparent that the sole and only purpose thereof is to provide better and more adequate laws for the organization, administration and control of the public schools of the state.

In some instances this department has held, that a board of education may pay transportation and the expenses of the teachers in visiting schools of other cities, provided such visitation is for the instruction of the teachers and that a city board of education, under section 7872 of the General Code, may pay from the school funds of such school district, the expenses incurred by superintendents in attending the institute of the national association of school superintendents, provided that such board of education is of the opinion that the meeting is such that will afford valuable instruction to its teachers and provided that such superintendents attend such institute for the purpose of conveying the information therein, to the treasurers of their respective districts.

Section 7872 of the General Code, supra, provides as follows:

"The expenses of such institute shall be paid from the city institute fund hereinbefore provided for. In addition to this fund the board of education of any district annually may expend for the instruction of the teachers thereof. In an institute or in such other manner as it prescribes, a sum not to exceed five hundred dollars, to be paid from its contingent fund."

The first opinion above referred to, was rendered on June 20, 1911, to your honorable bureau, and in construing said section 7872 of the General Code, said opinion holds as follows:

"By the authority vested in the respective boards of education of the state, as prescribed in the above section, I am of the opinion that a board of education may pay the transportation of teachers in visiting schools of other cities, provided such visitation is for the instruction of the teachers."

The second opinion above referred to was rendered to the bureau of inspection and supervision of public offices on April 24, 1913, and in construing said section 7872 of the General Code, the opinion holds as follows:

"This statute would in no sense empower a board of education to allow the expenses incurred by a superintendent in attending such institute for his own personal benefit, or for the mere purpose of maintaining his membership in such an association, or of providing a representative for the city

board at such a meeting. This statute, however, in providing that the board of education may expend school funds for the instruction of its teachers in *such other manner as it prescribes* confers upon such board a broad and controlling discretion as to the methods which it may desire to pursue in obtaining the end of instructing its teachers; and I am of the opinion that if such board sends its superintendent to the meeting of this national association, in pursuance of a well-defined plan for providing instruction for its teachers, by enabling the superintendent to carry the information obtained from such meeting to the teachers, the same would be authorized under the terms of this section.

"In brief, I see no reason why the board may not make the superintendent an instrument for the purpose of conveying to its teachers the benefits of the meeting. In the letter enclosed by you, which is signed by the president of the board of education in question, that official says:

" 'We desire to pay the necessary expenses of our superintendent for we consider such visitation on his part is instruction which will be of material benefit to him in administration of our public schools.'

"From the terms of this letter I take it that the meeting is one whereby modern methods of instruction are discussed, and wherein it is designed that each board of education be able to partake of the benefits of innovations and advanced methods which may have been installed in other schools throughout the country. Such is manifestly a valuable instruction, which it may well benefit any school to keep its teachers in touch with.

"I am therefore of the opinion, that if the board of education is of the opinion that the meeting is such as will afford valuable instruction to its teachers, and if they send their superintendent to such meeting for the purpose of conveying the information acquired therein to its teachers, they may allow the expense of travel incurred by the superintendent in making such trip."

It is to be noted, as hereinbefore pointed out, that when the holding of the said educational congress was for the purpose of suggesting and approving better and more adequate laws for the organization, administration and control of the public school system of the state supported by public funds, and was not for the instruction of the teachers who attended said congress and was not for the instruction of the teachers who did not attend such congress, by having such instruction transmitted to the said teachers remaining at home by those who did so attend said educational congress.

Therefore, in answer to your first two questions, I am of the opinion that the expenses of the teacher appointed by the board of education, as a delegate to the educational congress, at Columbus, December 5 and 6, 1913, held or special school district treasury and that the expense of a teacher appointed by a board of education of a city district, cannot legally be paid from the school treasury of such district.

In this opinion which this department rendered to the bureau of inspection and supervision of public offices, of the date of November 22, 1911, I held that there was no statutory authority for paying the expenses of a member of the board of education or its clerk, for attending a meeting of the state association of school boards.

In accordance, with, and for the same reason as expressed in said opinion, I am of the opinion, in answer to your third and fourth questions, that the expenses of a member of a board of education of a township, village, special or city school district, incurred in attending the above mentioned congress, cannot legally be paid out of the treasury of the district.

Certainly if the expenses of superintendents, teachers and members of boards of education, incurred in attending such convention, cannot legally be paid out of the treasury of their respective school districts, therefore in answer to your fifth and sixth questions, it follows upon like reasoning, and the further facts that there is no statutory authority therefor, that the expenses of persons not members of boards of education or teachers, and expenses of a delegate not appointed by the board of education, incurred in attending the above mentioned congress, cannot legally be paid out of the school funds.

In conclusion, I desire to say, that before such expenses referred to in your inquiry can be paid, it will be necessary for the legislature to provide for the same by further legislative enactment.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

656.

A CHIEF OF POLICE OF A CITY MAY NOT LEGALLY SERVE AS A DEPUTY SHERIFF.

The chief of police of a city may not serve as a deputy sheriff, as the duties of the chief of police are such as to require all his time, or to require him to be in readiness to respond to call at any time.

COLUMBUS, OHIO, December 18, 1913.

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

GENTLEMEN:—I have your letter of November 21, 1913, in which you inquire:

> "May the chief of police of a city legally serve as deputy sheriff of a county?"

In reply to which I desire to say:

The duties of chief of police of a city are such as to require all his time, or if not, require that he hold himself in readiness to respond to call of duty at any time during night or day, which, of necessity, precludes him from accepting appointment to the position of deputy sheriff or devoting any of his time thereto, which even possibly might interfere with the lawful performance of his duties as chief of police.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Treasurer)

237.

CONSTITUTIONALITY OF VONDERHEIDE BILL PROVIDING FOR DEPOSIT OF STATE FUNDS IN BUILDING AND LOAN ASSOCIATIONS ON ACCOUNT OF FLOOD EMERGENCY—DUTIES OF STATE TREASURER IN CONNECTION THEREWITH.

COLUMBUS, OHIO, May 7, 1913.

HON. JOHN P. BRENNAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—On April 12, 1913, you made the following request for my opinion:

> "Will you be kind enough at your earliest opportunity to advise me as to the constitutionality of the Vonderheide bill (better known as H. B. 650), and as to my duty under said bill. Also please advise me as to the proper procedure to follow in the matter of the approval of the governor as to deposits made under said bill."

House bill 650, to which you refer, is entitled as follows:

> "A bill to make building and loan associations, organized under the laws of the state of Ohio and located in those portions of the state of Ohio affected by the floods of March, 1913, depositories of state funds for a period not to exceed two years."

This title, together with the first section of the bill, which is as follows:

> "That in order to meet the emergency arising from the devastation caused by the unprecedented floods of March, 1913, in portions of the state of Ohio, and in order to conserve and preserve the life, health and peace of the people of those portions of the state of Ohio, the state treasurer of the state of Ohio, with the approval of the governor, is hereby authorized to deposit funds of the state of Ohio, not exceeding in the aggregate three million dollars, with building and loan associations organized under the laws of the state of Ohio and located in those portions of the state of Ohio so affected by the said floods, said sums to be deposited with said associations for a period not to exceed two years from the passage of this act."

clearly expresses the object of the bill.

Answering your inquiry, first, as to the constitutional question—upon this point I do not think you need to give yourself any concern; as long as you follow strictly and carefully the provisions of the act you will be protected. Some constitutional objections might possibly be raised to the bill, but it is my policy to assume that all acts of the legislature are constitutional unless such acts, upon their face, are beyond doubt contrary to the provisions of our constitution. If there is any doubt at all, the matter should be left to the court. Therefore, as all of your acts, so long as you follow the requirements of the bill, cannot be questioned, I deem it unnecessary at this time to enter into a discussion of hypothetical constitutional objections that might be raised to the bill, but which, on account of the great public emergency which it is intended to partially meet by this bill, will probably never be raised.

Now, outlining briefly the course which you are to follow in making the deposits authorized by this bill, I would suggest the following:

1. Building and loan associations desiring to obtain deposits of money of the state must apply to be designated as state depositories.

2. The state board of deposits must, in writing, designate such associations as it deems to be proper depositories.

3. Before any money whatever is deposited you should obtain from the governor his approval of the same. This approval need not be obtained for each specific deposit, but if the governor simply gives his approval to your depositing a certain lump amount, not to exceed the sum of three million dollars, with building and loan associations approved by the state board of deposits in compliance with said act, such approval would be sufficient.

4. As to the amount to be awarded to the different building and loan associations, that is a matter which is left to your discretion, under the bill, except that no such association shall have on deposit at any one time more than the amount of its paid-in capital stock, and in no event more than three hundred thousand dollars.

5. All such deposits must be in the form of inactive deposits, bearing interest at the rate of four per cent. per annum, payable quarterly, and must be secured by surety company bonds acceptable to you, which bonds must be in amount equal to the amount deposited plus five per cent.; or such deposits may be secured by deposits of state, county, or municipal bonds of the state of Ohio, or United States government bonds, acceptable to you as state treasurer. The value of such bonds must be equal to the amount deposited plus five per cent.; and such bonds must be conditioned as provided in the act.

6. Such deposits must be evidenced by certificates of deposit made by such building and loan associations to you as state treasurer, in amount equal to the total amount deposited. These certificates of deposit must specify the payment of interest as provided in the act, and must be signed by the secretary or some other officer of such association duly authorized. Such associations must have the option of redeeming said certificates of deposit at any interest paying period, by repaying into the state treasury the amount so deposited, or any part thereof, in sums of not less than one thousand dollars, with interest thereon to the date of such payment.

7. You are authorized by the act, for the purpose of making such deposits with building and loan associations, and you are also directed, to withdraw from the inactive depositories of state funds the funds therein deposited in an amount not exceeding three million dollars. Such withdrawals must be made, as far as possible, from inactive depositories not located in territories affected by the floods of March, 1913; but in all other respects such withdrawals shall be made in conformity with the provisions of section 330-2, General Code of Ohio, which is as follows:

> "The treasurer of state may withdraw any or all of the state funds on deposit for the purpose of paying the appropriations and the obligations of the state; when necessary to withdraw funds from the inactive depositories it shall be withdrawn from the banks and trust companies paying the lowest rates of interest and in proportional amounts as near as practicable."

This act does not limit in any way the authority and power given you in the matter of the withdrawal of funds from inactive depositories by the above quoted section; and banks located in the districts affected by the floods, as well as in other districts, are all still subject to have funds withdrawn as provided by said section 330-2. This provision of house bill No. 650 is in a large measure directory,

and it directs you that the withdrawing of funds from inactive depositories, in order to redeposit in building and loan associations as provided by the act, is to be made by you, so far as possible, from banks not located in territories affected by the floods of 1913.

8. This act is an emergency act and went into effect as soon as it was filed with the secretary of state, after being signed by the governor.

I have examined and approved the applications, bonds and certificates of deposit to be used by you in carrying into effect the provisions of this act.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Department of Public Works)

123.

SALE OF ABANDONED CANAL LANDS IN EXCESS OF $500.00 BY SUPERINTENDENT OF PUBLIC WORKS AT PRIVATE SALE.

Under the act of 102, *Ohio Laws, canal lands therein described may be sold in accordance with this act, and under section* 218-231 *of the Revised Statutes, since the superintendent of public works is now clothed with all the powers of the old board of public works, by virtue of the constitutional amendment, lands coming within the description of these statutes exceeding* $500.00 *in value may be sold at private sale by said superintendent.*

COLUMBUS, OHIO, February 21, 1913.

Department of Public Works, Columbus Ohio.

GENTLEMEN:—I have your inquiry of February 19th in which you ask:

> "Under the act of May 31, 1911, the board of public works and the chief engineer of public works, under the provisions of section 3 of said act, were authorized to sell certain portions of the abandoned Ohio canal in 'strict conformity with the various provisions of the statutes relating to the leasing and selling of state canal lands.' The statute referred to was sections 218-231 of the Revised Statutes, which is not included in the General Code, but like all the statutes relating to the work of the canal commission was to have been included in a supplementary volume, but the work of the code commission was terminated before this supplementary volume was even commenced. This statute, however, was not repealed, and we would respectfully request an opinion as to whether or not portions of this abandoned canal the value of which does not exceed $500.00 can be sold at private sale by the superintendent of public works, as provided for in section 218-231. If this can be done it will save a great deal of expense and the state will obtain one-fourth more for the land in most cases, as when the lands are appraised and offered for sale at public vendue a three-fourths bid usually secures the tract."

The act of May 31, 1911, 102 Ohio Laws, provides:

> "Section 3. As soon as such surveys and plats have been completed, the state board of public works and the chief engineer of public works, acting as a joint board, shall proceed to appraise, and lease or sell, as they may deem for the best interest of the state, subject to the approval of the governor and attorney general, said canal lands, except as hereinafter noted, in strict conformity with the various provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, except that the grant of such leases shall be for a term of not less than fifteen nor more than twenty-five years, and that the bed and banks of said abandoned canal property may be included in any lease of such canal lands."

This specifically authorizes a sale (subject to the approval of the governor and attorney general) of canal lands, except as "hereinafter noted 'in strict conformity with the provisions of the statutes of Ohio relating to the leasing and selling of state canal lands, etc.'"

The exceptions referred to are:

That portion of the canal between Raccoon creek and Buckeye lake in Licking county which is reserved for hydraulic purposes. (Section 4.) That portion between the flume at Buckeye lake and a short distance south of Lockbourne. Certain reservations of rights of way, road and street crossings and the like as made in section 6.

Section 218-231 to which you refer provides: (See 88 Ohio Laws 507 for original act).

> "Any land or lands belonging to the state of Ohio near or remote from the line of any canal in this state that cannot be leased so as to yield six per cent. on the valuation thereof as determined by said commission may be sold by said commission at not less than three-fourths of such valuation, upon such terms of payment as may be fixed by the commissioners of the sinking fund and such land shall be offered for sale. * * *; provided, however, that said commission together with the governor and attorney general of the state of Ohio, shall have power to sell any of said lands which are appraised af five hundred dollars or less at private sale at a price not less than the appraised value thereof; the governor executes deeds, etc."

The act of March 28, 1888, 86 Ohio Laws 127 provided for the appointment of a canal commission, but I take it that the purposes of the same have been accomplished, or if not that the powers and duties of the same have been abrogated by legislative act, and the late constitutional amendment, so that it might well be concluded that the "strict conformity with the various provisions of the statutes relating to the leasing and selling of canal lands" does not imply any act on the part of that commission after the passage of the act as a condition precedent to a sale.

My opinion is that under the act of May 31, 1911, *the superintendent of public works,* who now possesses all the powers of the former board of public works, may sell any land answering the description found in section 218-231 where valued at $500.00 or less at private sale, upon such terms and conditions as he deems best, reporting such sale, terms and conditions, together with any other facts necessary to a complete understanding of the transaction to the governor and attorney general for their approval.

Great care, of course, in making the sale should be exercised in determining whether the lands come within the description of lands authorized to be sold, that they do not fall within any of the reservations, and the report should present these conditions to the governor and attorney general, briefly, but clearly.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

138.

DAMAGES FROM OVERFLOW AND BREACHES IN CANAL BANK—SPECIAL APPROPRIATION NECESSARY FOR COMPENSATION OF COMMISSION AND FOR DAMAGES.

Under section 457, and following, General Code, the damages awarded by the commission to ascertain damages resulting from the overflow and breaches in canal banks, and also the expenses of such commission, are to be paid from moneys specifically appropriated for that purpose. Such appropriation may be made after the damages are awarded and the services have been performed. Such moneys may not be paid from any other fund.

COLUMBUS, OHIO, March 24, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Your favor of March 22, 1913, is received, in which you inquire:

> "In sections 457 and following, of the General Code of Ohio, provision is made for the appointment of a commission consisting of three persons to arbitrate damages which arise from overflow and other causes due to breaches in the canal banks, etc.
>
> "Provision is made in this connection for the payment of certain compensation to these commissioners and other expenses which are incurred in the course of their duties. The act provides also that 'if no damages are awarded the complainant shall pay the costs of the hearing.'
>
> "In section 461 it states—'the board of public works shall cause each decision of commissioners upon an application for damages to be recorded in a book kept for that purpose. The award of the commissioners together with all records pertaining thereto, shall be submitted to the general assembly at their next regular session. Payments of compensation for damages so awarded shall be made from moneys specifically appropriated for that purpose.'
>
> "We have had a commission to file a report recently on certain damage claims arising in Mercer county. Later there will be another such report filed in this office, which will doubtless be after legislature has adjourned.
>
> "I wish you to notice that there are two different accounts to be settled by the state in the recommendations of such commissions, viz., the expense account of the commission itself, including all the necessary costs of the hearing, office rent, etc., and the award that the commission recommends to be paid to the complainants for the settlement of the damages. It is clear that this latter account can be paid only 'from moneys specifically appropriated for that purpose.'
>
> "Now, my query is this: Has the appropriation committee of the house the authority to set aside an approximate sum for the purpose of paying the expenses of such commissions? If we cannot have such an appropriation made, it will work hardships on persons who will be deprived of their money for two years, or until the next legislature meets. Again, we would have trouble often in securing a proper commission, if they knew that they were to be deprived of their pay for so long a time."

The act to which you refer is a special provision of statute by means of which claims for damages caused by the negligent management of the public works may

be inquired into by a special commission to be appointed by the superintendent of public works. The provisions under which a commission is appointed and acts, are found in sections 455 to 461, inclusive, of the General Code.

Section 455, General Code, provides:

"When private property is injured by a break, leakage or overflow of a canal, slack water, pool, reservoir or other public work, or by the insufficiency or filling up of a culvert thereof, or by the washing away of earth caused by a dam under the control of the board of public works, the owner of such property may apply in writing to the board for damages, within one year from the occurrence of the injury, but no such application shall be received after such period."

Section 457, General Code, provides:

"Upon the filing of such application, the board of public works may appoint three disinterested persons as commissioners to consider the claim. If the board fails to agree in the selection of commissioners, it may apply to the governor, who shall appoint them. Before entering upon the discharge of his duties, each commissioner shall take an oath faithfully and impartially to discharge the duties of his appointment. A majority of the commissioners shall be necessary to a decision upon a matter before them. They may summon and qualify witnesses, issue subpoenas and direct the service and return thereof in the manner provided by law for like service in the probate court."

Section 460, General Code, provides:

"Each commissioner shall receive three dollars for each day of service and mileage at the rate of three cents per mile. The costs incurred by the commissioners shall be paid after the presentation of their award and report, upon the approval of the board of public works from moneys appropriated for that purpose, but if the damages awarded do not exceed the costs of the hearing, no payment of such damages shall be made. If no damages are awarded, the complainant shall pay the costs of the hearing. At any time before the decision of the commissioners, the board of public works may tender a claimant such sum of money as it deems him entitled to, and if he accepts it, his claim shall be discharged. If he refuses to accept the tender, the applicant shall pay the costs incurred thereafter unless a larger sum is awarded him by the commissioners as damages."

Section 461, General Code, provides:

"The board of public works shall cause each decision of commissioners upon an application for damages to be recorded in a book kept for that purpose. The award of the commissioners together with all records pertaining thereto, shall be submitted to the general assembly at their next regular session. Payments of compensation for damages so awarded shall be made from moneys specifically appropriated for that purpose."

The statute fixes the compensation of the commission which is appointed by the superintendent of public works. The commission is authorized to subpoena witnesses and it must necessarily create some expense in order to perform its duties.

Section 460, General Code, contains this provision:

> "The costs incurred by the commissioners shall be paid after the presentation of their award and report upon the approval of the board of public works from moneys appropriated for that purpose."

This provision specifies that payment shall be made after the presentation of the report of the commissioners and the award. It does not limit the time when an appropriation shall be made.

Section 22 of article 2 of the constitution of Ohio, reads:

> "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

This provision of the constitution does not limit the legislature to making appropriations after the bills are incurred, but on the contrary it contemplates that appropriations may be made for bills to be incurred in the future, provided that such appropriations shall not be made for a longer period than two years.

The commission now in question acts in the nature of a court of inquiry and the legislature would have the same right to appropriate a fund to pay the expenses of such a commission as it has to appropriate a fund to pay the expenses of the supreme court, or any other department of the state.

The legislature has full power to appropriate an approximate sum to pay the expenses of a commission appointed by virtue of sections 455, et seq., General Code. No money could be paid from such fund for the purpose and in the manner provided by said sections of the General Code, or as may be provided by the provision making such appropriation.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

196.

CANAL LANDS—RIGHT OF PROPERTY HOLDERS ABUTTING ON RACEWAY ON NORTH SIDE OF EGGLESTON AVENUE IN CINCINNATI TO CONSTRUCT ARCH OVER SAME—ADDITIONAL BURDEN —RIGHTS OF CITY AND STATE—UNIVERSITY OF CINCINNATI.

The courts have decided that the grant of canal lands in Eggleston avenue to the city of Cincinnati by the state of Ohio, reserved the fee title to the same in the state of Ohio, subject to the right of the city of Cincinnati to use the same for a public highway and for sewerage purposes.

One of the conditions provided in the grant was that the use made of the strip should not obstruct the flow of water through said canal, nor destroy water supply for milling purposes.

Under the right which a city has to use state property for highway purposes, an abutting property holder may be granted leave to construct an archway over said raceway, when the conditions of the grant are safeguarded and the approval of the board of public works is obtained.

The use of any part of the proposed arch for buildings, swithches, overhead projections or similar structures would constitute an additional burden of said premises and such use could not be made, therefore, without the consent of the state of Ohio.

COLUMBUS, OHIO, April 2, 1913.

Department of Public Works.

GENTLEMEN:—Under date of March 22, 1913, you submit the following to this department for opinion:

"Mr. Smith Hickenlooper, as attorney for the University of Cincinnati, has filed an application with the superintendent of public works requesting permission to arch over the hydraulic raceway in front of its property on the north side of Eggleston avenue in the city of Cincinnati.

"In order that you may thoroughly understand the question which we submit for your consideration, we relate a portion of the history of the canal property that is now occupied by Eggleston avenue.

"As originally constructed the Miami and Erie canal terminated at the Ohio river on the site now occupied by the Pennsylvania depot at the foot of Eggleston avenue, the descent of 110 feet between Broadway, at the end of the main level of the canal through the city, and the Ohio river was effected by a series of ten locks.

"By the act of the general assembly of Ohio, passed March 24, 1963, (see Ohio Laws Vol. 60, page 44) the portion of the canal between Broadway and the Ohio river, without any formal abandonment, was turned over to the city of Cincinnati to improve and occupy forever as a public highway and for sewerage purposes.

"One of the conditions provided in section two of the act was that the use to be made of the strip should not obstruct the flow of water through said canal nor destroy the supply of water for milling purposes.

"The intention was to enable the state to get rid of the surplus water in the canal when it reached the new terminal at Broadway, and at the same time provide a supply of water for lessees of the state who operated water power mills along the line of the canal prior to its abandonment. This was a very important condition, and in connection

with the stipulation in section one of the act that required the city authorities to first obtain the approval of the board of public works for any plan of improvements before commencing the same, furnished the basis for the plans of improvement that were subsequently carried out.

"This plan provided for carrying the water in underground conduits and sewers for the greater portion of the distance, but between Third and Fifth streets, an open conduit about 14 feet in width, and walled with stone on each side, was adopted.

"Instead of the city filling, grading and providing the means for conveying the water from Broadway to the river, the city granted the Little Miami Railway Company a perpetual easement in the canal strip for railway purposes on condition that it fill the canal bed and construct a public highway thereon. The rights of the railway company subsequently passed into the hands of the P. C. C. & St. L. Co., and in 1894 the canal commission became convinced that the railway company had no legal rights in the street, and through the attorney general, commenced an action in quo warranto in the supreme court to recover the property for the state. The court decided that the location, maintenance and operation of a railroad upon the lands granted to the city was an additional burden not contemplated by the act and ordered the company to either remove its tracks within 130 days or make a satisfactory arrangement with the state for continuing the use of the premises.

"The company purchased a portion of the ground and leased the remainder. This brings us to the consideration of the question raised by Mr. Hickenlooper viz.: Has an abutting property owner the right to arch over the race with or without the consent of the city authorities?

"The questions upon which an opinion is desired are:

"First. Can an abutting property owner, with the approval of the superintendent of public works, make such an improvement either with or without the consent of the city?

"Second. In case such an improvement is made, either with or without the consent of the city, and either with or without the approval of the superintendent of public works, and any portion of the same is used for commercial purposes by the construction or buildings or the laying of switch tracks thereon or the extension of overhead projections from building on adjacent lots, would not the state be entitled to remuneration for the additional burden imposed on the ground?"

Said act of 60 Ohio laws 44, under which that part of the canal lands now known as Eggleston avenue was granted to the city of Cincinnati, provided:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that authority and permission shall be granted, in the manner hereinafter pointed out, to *the city of Cincinnati, to enter upon, improve and occupy forever, as a public highway and for sewerage purposes,* all or any of that part of the Miami and Erie canal which extends from the east side of Broadway, in said city, to the Ohio river, including the width thereof, as owned or held by the state.

"But the said grant shall be made subject to all outstanding rights or claims, if any, with which it may conflict: *Provided, that no work shall be done by said city authorities on the premises hereby granted until the plan of improvement shall be approved of by the board of public works.*"

"Section 2. The said grant shall not extend to the revenues derived from the water privileges in said canal, which are hereby expressly reserved; and the said grant shall be made upon the further condition that the said city, in the use as aforesaid of all or any of said portion of said canal, shall not obstruct the flow of water through said canal, nor destroy nor injure the present supply of said water for milling purposes, and that said city shall be liable for all damages that may accrue from such obstruction or injury; but it is not intended hereby to relieve the lessees of said canal, or their assignees, from any responsibilities imposed upon them by 'an act to provide for leasing the public works of the state, passed May 8, 1861, or by the instrument of lease executed in pursuance of said act, except as and to the extent that they may be interfered with as said city may, from time to time, enter upon, improve and occupy any part of said grant.

"Section 3. Whenever the council of said city by a vote of not less than two-thirds of the whole number of members thereof, shall decide to use said canal as herein authorized, the said council shall make known its decision to the governor, and thereupon the governor, in behalf of the state, shall execute and deliver to the city of Cincinnati a grant of the part of said canal herein described for the uses and purposes before mentioned, and upon the terms and conditions specified in this act. The attorney general shall prepare the form of said grant.

"Section 4. This act shall not be construed to confer upon said city any new power of taxation, or to borrow money, or to contract debts in the use as aforesaid of said canal.

"Section 5. This act shall take effect from and after its passage."

The council of the city of Cincinnati duly accepted said grant and on the 28th day of April, 1863, the governor of Ohio executed a deed therefor on behalf of the state.

The above act was under consideration by the supreme court in case of Ohio ex rel. vs. Railway Company, 53 Ohio St., 189, wherein it is held:

"By force of the provision of section 8 of the act to provide for 'the internal improvement of the state of Ohio by navigable canals,' 23 O. L., 57, whenever the state actually occupied a parcel of land for canal purposes, a fee simple title thereto at once and by virtue alone, of such occupancy, vested in the state.

"By the act of March 24, 1863, 60 Ohio laws, and the conveyance afterwards executed by the governor pursuant thereto, *the only right granted to the city of Cincinnati was to enter upon, improve and occupy the land described therein forever as a public highway and for sewerage purposes, the title to the lands remaining in the state subjected only to such use.* The city acquired no right or interest that it could transfer to another; and if the city, after entering upon the occupancy of such lands under the deed, abandoned them in respect to either of the uses specified, the right of the city to that extent became forfeited."

In this case the court has decided that the title to the canal lands in Eggleston avenue is in the state of Ohio, subject to the right of the city of Cincinnati to use the same as a public highway and for sewerage purposes.

Under this act the city of Cincinnati was required to provide a means of

carrying the water of the state. The open raceway now in question is used for that purpose and was provided in accordance with plans approved by the board of public works.

Both the city of Cincinnati and the state of Ohio have rights and interests in this raceway, and in order to alter the same or to make further improvement thereof, the rights and interests of the state and of the city must be taken into consideration and protected.

It appears from the plat attached that there is no direct means of ingress and egress from Eggleston avenue to the lots which border on this raceway. The lots, however, have an outlet upon another street.

The application to build an arch over this raceway is made by an owner of abutting property. Such owner has no right or interest in the raceway except insofar as it may be a lessee of water to be secured therefrom.

At the time Eggleston avenue was opened and improved as a street, the city of Cincinnati could have covered this raceway and dedicated the entire width of the street to public use as a highway. That right has not been taken from the city of Cincinnati, provided it does the work in a manner approved by the superintendent of public works, and so as to fulfill the obligations of the city to the state of Ohio.

No private person or corporation would have a right to cover this raceway, without first securing the consent of the city of Cincinnati. If such approval is secured, the plan to cover the raceway must be approved by the superintendent of public works as required by section one of said act.

This land is granted to Cincinnati for highway and sewerage purposes. The state could not, therefore, grant any right in said strip of land or any part thereof which would interfere with the above rights of the city of Cincinnati to use the same for highway or sewerage purposes.

The fee to this land is in the state of Ohio, subject to the right of the city of Cincinnati to use it for highway and sewerage purposes, and the city of Cincinnati has no power to use said land for any other purpose.

Your specific questions are answered:

First. The abutting property owners can, with the approval of the superintendent of public works and with the consent of the city of Cincinnati, arch over the raceway in question so as to make it a part of the public highway.

Second. The abutting porperty owners cannot use said raceway or the proposed arch for private purposes without first securing the consent of the state of Ohio and the city of Cincinnati. They may use the covering of the raceway for purposes of ingress and egress to and from their property.

The use of any part of the proposed arch for buildings, switches, overhead projections or similar structures would constitute an additional burden on said premises and such use could not be made thereof without a grant from the state of Ohio.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

312.

OFFICES COMPATIBLE—PATROLMAN UPON PUBLIC WORKS AND FOREMAN ON REPAIRS.

Since the duties incumbent upon either officers are not incompatible, a person appointed patrolman on public works may also be legally appointed to serve as foreman on repairs and receive an added compensation therefor.

COLUMBUS, OHIO, May 24, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of May 1, 1913, you inquire as follows:

> "Is it legal to engage a man for the position of patrolman at say $60.00 per month and then allow the same man an extra compensation per month for acting as foreman on repairs? The duties of such a position are further extended by the fact that our patrolmen at the various reservoirs grant the boat licenses and keep the account of moneys collected and report the same into this department. He is required to give a bond of $500.00."

You call attention to sections 472 and 475 of the General Code as amended by amended senate bill No. 29 of the 80th general assembly. All of the sections herein quoted are as they were amended by said bill.

Section 420, General Code, provides:

> "The superintendent of public works of Ohio shall appoint such foremen, patrolmen, lock tenders, inspectors, engineers and all other employes as may be necessary for the improvement, maintenance and operation of the public works. They shall be assigned to duty under the supervision of the superintendent of public works, under rules and regulations prescribed by him. Any such employes, when deemed necessary by the superintendent of public works, shall be required to give proper bond to the state of Ohio, conditioned for the faithful performance of his duties. The salary and compensation of such employes shall be fixed by the superintendent of public works and paid from money appropriated for the maintenance of canals."

The duties of the foremen are not fixed by statute but are to be prescribed by the superintendent of public works.

Section 472, General Code, provides:

> "All lakes, reservoirs and state lands heretofore or that may hereafter be dedicated and set apart for the use of the public for park or pleasure resort purposes shall be under the control and management of the superintendent of public works. The superintendent of public works shall maintain such police regulations and enforce all needed rules for the government of the public parks, as shall be prescribed by law."

Section 475, General Code, provides:

"The superintendent of public *works may appoint police patrolmen to preserve order and protect the public at any such reservoir and adjacent state land and prescribe their compensation not to exceed sixty dollars per month,* and such police patrolmen shall have the same power and authority as constables in the discharge of their official duties, and their jurisdiction shall be coextensive with the counties touching or including any portion of such public park or pleasure resort."

Section 476, General Code, provides:

Before entering upon the duties of his office, each police patrolman shall give bonds to the state of not less than five hundred dollars, nor more than one thousand dollars, to be fixed by the superintendent of public works and approved by him, conditioned for the faithful and diligent discharge of his duties, and take an oath of office, which oath shall be endorsed on the back of the bond. Such bond shall be filed and safely kept in the office of the treasurer of state."

Section 482, General Code, provides:

"Every police patrolman appointed by the superintendent of public works to preserve order and protect the public, in accordance with these provisions may arrest on view or warrant and bring to justice a person violating any of the foregoing provisions, and if, in making an arrest, it is necessary for such patrolman to take possession of and hold a boat or boats or other property, he shall not be held liable for the loss of or any damage done such boat or boats or other property taken and held by reason of the failure of the owner or owners thereof to comply with the provisions hereof, provided ordinary care is exercised in the handling of such property, and no person shall take possession of a boat or other property which has been taken in charge by a police patrolman or other officer as herein provided, until such patrolman or officer has released it. Any person violating any of the provisions of this section shall be fined in any sum not less than five dollars nor more than twenty-five dollars, and shall stand committed until such fine and costs are paid."

The foregoing are the statutory duties of a police patrolman, such as you desire to appoint. As the duties of a foreman are not fixed by statute there can be no conflict in the respective duties of the two positions as prescribed by statute.

The rule of incompatibility of public office or employment is stated by Dustin, J., on page 276 of the opinion in case of State vs. Gebert, 12 Cir. Ct. N. S. 274, where he says:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

Neither of the positions in question is a check upon the other nor is one subordinate to the other.

The other ground of incompatibility is that of physical impossibility for one person to perform the duties of both positions.

The rule is stated at page 1381 of 29th Cyc., as follows:

> "Holding other office or employment. It may be laid down as a rule of the common law that the holding of one office does not in and of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question."

From the statement of the duties of each position as given by you it appears that it is physically possible for one person to perform the duties of both offices.

A question of public policy might arise as to the propriety of appointing the same person to two distinct positions. In the situation presented I know of no principle of public policy that may be violated in appointing the same person as foreman and as police patrolman, so long as such person is able to, and does, perform the duties of both positions. In order to draw the compensation fixed for him as foreman he must perform the duties thereof. The same is true as to the position of police patrolman. He cannot draw pay twice for the same work.

The statute, section 475, General Code, limits the amount of compensation to be paid a police patrolman. This limit is as to the position of police patrolman and would not be a limitation upon the aggregate amount to be paid a person who holds two positions, provided he is not paid more than the amount fixed by statute for a police patrolman, as such police patrolman.

The positions in question are not incompatible, and if one person can physically perform the duties of both positions, he can fill both positions. In such case it would be legal to pay such person a salary as foreman and a salary as police patrolman. The salary as police patrolman must not exceed sixty dollars, per month, but the combined salaries of the two positions may exceed sixty dollars per month.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

372.

REPAIRING AND DREDGING CANALS—SPECIAL APPROPRIATION FOR SUCH WORK—CONTRACT MUST BE LET.

The superintendent of public works may employ laborers to dredge canals and keep them in repair, even though the cost exceeds $500.00 *provided that the cost of such labor is to be paid out of money appropriated for the maintenance of canals. This is also true of all cement work to be done on canals. When a special appropriation is made for such work, then it must be let on contract by competitive bidding if the cost exceeds* $500.00.

COLUMBUS, OHIO July 9, 1913.

HON. JOHN L. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have requested an opinion of this department as to the construction of section 428, General Code, as amended in 103 Ohio Laws 121. You inquire:

> "Can this department employ laborers to dredge the canal, where needed, when the cost of such dredging will exceed five hundred dollars?

"Can this department employ laborers and construct a cement wall, or other work, when such improvement or repair will cost to exceed five hundred dollars?

"For example, we have certain dredging to be done at Akron, the cost of which will exceed five hundred dollars. The state has at Akron a dredge suitable for this work and this department is in a position to do this dredging without contract and at a less cost and in better time.

"The state also has a concrete mixer and the necessary apparatus to do cement work more economically than may be done by contract.

"This kind of work has heretofore been done by this department."

Section 428, General Code, as amended in 103 Ohio Laws, 121, provides:

"*The superintendent of public works of Ohio may enter into contracts with proper persons for the performance of labor, or for the furnishing of materials, or for the construction of any or all structures and buildings necessary to the maintenance, control and management of the public works of the state or any part thereof.* The superintendent of public works shall require bonds, of not less than one-half the contract price, from said contractors, payable to the state of Ohio, and conditioned on the faithful performance of said contract. *Except in cases of extreme public exigency or emergency and when the cost of any proposed improvement or repair exceeds five hundred dollars, the superintendent of public works shall cause notice to be given in a newspaper of general circulation in or contiguous to the county where the contract* is to be let and where the work is to be done and may also advertise in such trade journals as will afford full information to the public of the terms of the contract and the nature of the work to be performed and the character of materials required, together with the time of letting and place and manner of receiving proposals. *Such contracts shall be awarded to the lowest and best bidder, and shall be in writing,* and shall contain specific prices for each kind of work to be performed, and for materials to be furnished by the parties thereto."

Section 420, General Code, as amended in 103 Ohio Laws 121, reads:

"*The superintendent of public works of Ohio shall appoint such foremen, patrolmen, lock tenders, inspectors, engineers and all other employes as may be necessary for the improvement, maintenance and operation of the public works.* They shall be assigned to duty under the supervision of the superintendent of public works, under rules and regulations prescribed by him. Any such employes when deemed necessary by the superintendent of public works, shall be required to give proper bond to the state of Ohio, conditioned for the faithful performance of his duties. *The salary and compensation of such employes shall be fixed by the superintendent of public works and paid from money appropriated for the maintenance of canals.*"

Section 428, General Code, prior to the passage of the above amendatory act provided:

"When the board of public works deems it necessary to let a contract for the performance of labor or the furnishing of materials, or for the construction of feeders, dikes, reservoirs, locks, dams and other work for the repair of the public works, it shall cause notice thereof to be

given by publication in such newspapers and for such time as it deems necessary. Such notice shall contain a statement of the time, place and manner of receiving proposals, the character of the work to be performed and the materials to be furnished. Such contracts shall be awarded to the lowest responsible bidder, shall be in writing, and contain specific prices for each kind of work to be performed or articles to be furnished by the parties thereto."

Under the former law it was left to the board of public works to determine whether an improvement or repair should be made by contract or otherwise.

The provisions of section 428, General Code, as amended should be read in connection with those of section 420, General Code.

Section 420, General Code, authorizes the superintendent of public works to

"appoint such foremen, patrolmen, lock tenders, inspectors, engineers and all other employes as may be necessary for the improvement and operation of the public works."

It is further provided in said section that the compensation of such employes, shall be "paid from money appropriated for the maintenance of canals."

The dredging of the canals would be a part of the maintenance and operation of the public works. And under the above provision the superintendent of public works would be authorized to employ foremen and employes to do such dredging, provided their compensation may be paid "from money appropriated for the maintenance of canals."

Section 428, General Code, provides that "the superintendent of public works of Ohio may enter into contracts" "for the performance of labor, or for furnishing of materials, or for the construction of any or all structures and buildings * * *."

This provision standing alone would leave it to the superintendent of public works to determine whether he should have the labor performed directly under his charge, or whether he should secure the same by contract.

The legislature has seen fit, however, to further provide:

"Except in case of extreme public exigency or emergency, and when the cost of any proposed improvement or repair exceeds five hundred dollars, the superintendent of public works shall cause notice to be given in a newspaper * * *. Such contract shall be awarded to the lowest and best bidder * * *."

This provision was inserted to secure competitive bids on all contracts which exceed five hundred dollars. It was not intended to, nor does it, deprive the superintendent of public works of the right given him under section 420, General Code, to appoint foremen and employ laborers to improve, maintain and operate the public works.

The right, however, of the superintendent of public works to employ laborers under section 420, General Code, is limited to the work which may be paid for from the appropriations for the maintenance of the canals. It does not apply to an appropriation made for a specific improvement or repair.

Where an appropriation has been made for a specific improvement, and the cost thereof exceeds five hundred dollars, it must be let on competitive bids.

I am therefore of the opinion that the superintendent of public works may employ laborers to dredge the canals, or any part thereof and keep them in repair,

even though such dredging and repairs cost to exceed five hundred dollars, if the cost of such labor is to be paid from money appropriated for the maintenance of the canals. This will also be true as to any cement work to be done.

But if such improvement, repair, dredging, or cement work is to be paid for by a specific appropriation for the particular work, then it must be let on contract by competitive bidding, if the cost exceeds five hundred dollars.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

451.

THE SUPERINTENDENT OF PUBLIC WORKS IS NOT OBLIGED TO ENTER INTO THE CONTRACT FOR LABOR IN MAINTENANCE OF PUBLIC WORKS, BUT HE MAY USE MACHINERY AND EMPLOYES OF THE STATE DOING THE WORK REQUIRED.

Under the provisions of section 428, General Code, the superintendent of public works is not required to enter into contracts for the construction, management or control of public works of the state, but he may do so. The superintendent of public works may enter into contracts for dredging the canal at Akron, or he may at his discretion use the machinery of the state and the force employed under his charge and do the work under his direct supervision.

The cost of such work can be paid out of the appropriation made especially therefor.

COLUMBUS, OHIO, September 5, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of September 4, 1913, you inquire:

> "Concerning proposed improvement on the Summit Level of the Ohio canal through the city of Akron, an appropriation of $25,000.00 was made by the 80th general assembly for the dredging of this level and the building of a protection wall along the towing path bank.
>
> "After preparing plans and estimates for this improvement, the same was advertised for the receipt of proposals August 19, 1913. On that day we received two bids for the work, one of which, on tabulation, was found to be irregular in form and the other bid was considered excessive in price. Therefore, all the bids were rejected and the work was re-advertised to be let on Tuesday, September 2, 1913. Upon the latter date but one bid was received for the work, which did not include a proposal for doing the dredging. The bid received was for the construction of a protection wall and alternate prices were made for concrete construction and timber construction, as per the advertisement. The bid for the timber wall, received on the date set for the last letting, is excessive in price. If the contract is awarded it will be for the concrete wall.
>
> "The work contemplated in this improvement is of so important a nature that if not done it will prevent the state performing its contracts with a number of important water consumers and it will also jeopardize the city of Akron because the sand bars and fills of various kinds, which

have accumulated in the aforsaid Summit Level, have almost excluded the water from passing down through the city of Akron, and if not removed, will entirely shut off the water supply.

It is an emergency and I wish to know if we cannot proceed with our own machinery and forces to remove the deposits from this canal level at once, since time has become the most important element in the consideration of this improvement."

The appropriation for this work is set forth in 103 Ohio Laws 614, in these words:

"Repairs and improvements on Summit Level of Northern Division, Ohio Canal ---------- $25,000.00."

This appropriation is not made "for the maintenance of canals." While the repairs and improvements are not specified, it is nevertheless made for a special purpose, though general in character.

Appropriations for maintenance are made in these terms at page 614 of 103 Ohio Laws:

"Miami and Erie canal maintenance---------- $20,000.00.
"Ohio and Erie canal maintenance---------- 15,000.00."

Section 420, General Code, as amended in 103 Ohio Laws 121, provides:

"The superintendent of public works of Ohio shall appoint such foremen, patrolmen, lock tenders, inspectors, engineers and all other employes as may be necessary for the improvement, maintenance and operation of the public works. They shall be assigned to duty under the supervision of the superintendent of public works, under rules and regulations prescribed by him. Any such employes, when deemed necessary by the superintendent of public works, shall be required to give proper bonds to the state of Ohio, conditioned for the faithful performance of his duties. *The salary and compensation of such employes shall be* fixed by the superintendent of public works and *paid from money appropriated for the maintenance of canals.*"

The appropriation in the present case does not come within the provisions of section 420, General Code, as it is not made "for the maintenance of canals."

Section 428, General Code, as amended 103 Ohio Laws 121, reads:

"The superintendent of public works of Ohio may enter into contracts with proper persons for the performance of labor, or for the furnishing of materials, or for the construction of any or all structures and buildings necessary to the maintenance, control and management of the public works of the state or any part thereof. The superintendent of public works shall require bonds, of not less than one-half the contract price, from said contractors, payable to the state of Ohio, and conditioned on the faithful performance of said contract. *Except in cases of extreme public exigency or emergency,* and when the cost of any proposed improvement or repair exceeds five hundred dollars, the superintendent of public works shall cause notice to be given in a newspaper of general circulation in or contiguous to the county where the contract is to be

let and where the work is to be done and may also advertise in such trade journals as will afford full information to the public of the terms of the contract and the nature of the work to be performed and the character of materials required, together with the time of the letting and place and manner of receiving proposals. Such contracts shall be awarded to the lowest and best bidder, and shall be in writing, and shall contain specific prices for each kind of work to be performed, and for materials to be furnished by the parties thereto."

The cost of doing the dredging in question will exceed five hundred dollars and it comes within the terms of this section requiring the letting of a contract on competitive bids, unless it may be considered a case of "extreme public exigency" or an "emergency."

You state that two attempts have been made to secure bids for this work. On the first attempt, only two bids were received, one was irregular, and the other was excessive in price. It is the duty of a public officer to protect the interests of the public and if he is satisfied that a bid, though the lowest and best, is excessive in price, it is his duty to reject it. The purpose of asking for bids is to secure a fair price upon competition. This purpose would be nullified if the officer was required to let a contract upon a bid which he knew to be excessive.

On the second attempt to secure bids, none were received for the dredging, and the time is now late to readvertise and complete the work before winter. Then there would be no assurance of securing bids.

It appears to me that a reasonable effort has been made to let this work after advertising for bids.

You state that if the work is not done the water supply for the city of Akron may be shut off. The waterworks of the city of Akron gets its water from the state under a lease.

The failure to secure bids after two efforts, and the possiblity of shutting off the water supply of a large community, create in my opinion an emergency and the repairs are urgent. Such an emergency will be sufficient to except such work from the requirements of section 428, General Code, supra, that the work be done by contract let on competitive bids.

In such case the letting of a contract of the doing of the work would be governed by the first part of section 428, which reads:

"The superintendent of public works of Ohio may enter into contracts with proper persons for the performance of labor, or for the furnishing of materials, or for the construction of any or all structures and buildings necessary to the maintenance, control and management of the public works of the state or any part thereof."

This provision states that the superintendent of public works "may enter into contracts." He is not required to enter into contract, but he may do so.

The superintendent of public works may, therefore, enter into a contract for this dredging, without asking for additional bids, or new bids, or he may, at his discretion use the machinery of the state and the force employed under his charge and do the work under his direct supervision. The state, I understand, has a dredge on the Summit Level and that you can proceed with the work without delay.

Under the circumstances presented the compensation of the employes and the cost of such work can be paid out of the appropriation specially made therefor.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

452.

IN CASE OF AN EMERGENCY THE SUPERINTENDENT OF PUBLIC WORKS MAY TAKE PRIVATE PROPERTY FOR THE USE OF THE STATE WITHOUT CONDEMNATION PROCEEDINGS.

Where because of the March floods, the condition of the Miami river, north of Middletown is such as to jeopardize the city, the superintendent of public works, because of the necessity of quick action, may proceed with the work of repair without entering proceedings to appropriate the property needed. The superintendent of public works may subscribe the certificate provided for in section 437, General Code, and deliver a copy thereof to the owner or owners of the property as prescribed by section 438, General Code.

COLUMBUS, OHIO, September 3, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Your favor of August 28, 1913, through Mr. E. E. Booton, engineer land department, is received, in which you inquire:

> "May the department of public works immediately proceed with the construction of the extension of the Middletown dam, the levee embankment and other improvements contemplated in the vicinity of the dam across the Miami river about two miles above Middletown, Ohio, without waiting to condemn the land upon which these improvements must be made?
>
> "The March floods washed away most of the old levee embankment, a portion of the dam, and the head gates to the hydraulic, so as to jeopardize the city of Middletown should a rise of six feet occur in the river. Emergency repairs have been made, but we have been advised that the owner of the land where these improvements are to be made is expecting extravagant prices for the land.
>
> "We do not want to submit to extortion, but we cannot afford to jeopardize the lives and property of the citizens of Middletown by waiting on condemnation suits.
>
> "Can we proceed on the theory that an emergency exists and permit him to collect his damages whenever he desires to take the initiative?"

Article 1, section 19 of the constitution of Ohio, provides:

> "Private property shall ever be held inviolate, but subservient to the public welfare. *When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases* where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

This section of the constitution generally requires compensation to be made first in money, or secured by deposit of money before private property can be taken for a public use. There are three exceptions to this rule.

First. When taken in time of war.

Second. When taken in "other public exigency, imperatively requiring its immediate seizure."

Third. When taken for the purpose of "making or repairing roads which shall be open to the public, without charge."

The situation now presented must come under the second exception if any. It does not come under either the first or third exceptions.

Is your situation a "public exigency, imperatively requiring" the "immediate seizure" of the property in question?

The general assembly has defined a "public exigency" in reference to the public works.

Section 435, General Code, as amended in 103 Ohio Laws 123, provides:

> "A public exigency shall be deemed to exist if an injury or obstruction occurs in any of the public works which materially impairs their immediate use, *or places in jeopardy property adjacent thereto,* or there is immediate danger of such occurrence, or such injury, obstruction or danger occurs during the process of construction of such public works."

The words "or places in jeopardy property adjacent thereto," were inserted by the above amendatory act of said section 435.

In the case presented an injury occurred to the public works by reason of the floods of last March. This injury has placed in jeopardy not only property adjacent thereto, but the lives of the residents as well. This would be especially true if a sudden rise of the river should occur at night.

Black in his law dictionary defines, "exigence, or exigency,"

> "Demand, want, need, imperativeness."

In Webster's dictionary, "exigency" is defined:

> "State or quality of being exigent; urgent or exacting want; pressing necessity; need; a case demanding immediate action, supply or remedy; as, an unforeseen exigency."

Also "exigent" is defined.

> "Exacting or requiring immediate aid or action; pressing, critical."

There is a demand, a need for this property. The imperativeness or urgency of the need arises from the fact that the winter season is now fast approaching with resultant floods of winter and spring. The danger should be averted before the winter season sets in.

A proceeding to appropriate this property before beginning the improvements would mean considerable delay, and if the case should be taken to a higher court on error, would mean that the improvement could not be commenced this fall.

This situation creates an imperative and immediate need for this property. It is in my opinion an exigency.

The exigency must be public. The welfare of a considerable community is placed in jeopardy. The construction of levees has been held to be a public use.

At page 594 of 15 Cyc, it is said:

> "Drains and levees necessary for public health, convenience, and welfare are a public use, for which private property may be taken."

This property is therefore wanted for a public use. It is needed to protect a large community from the danger of flood, and this makes it a public need.

The situation is, therefore, a "public exigency." It needs immediate remedy.

It might be urged that the flood occurred four months ago and that with reasonable diligence appropriation proceedings could have been terminated by this time. That might be true if it had been known in March what property would be needed to make the improvements.

The flood occurred the latter part of March and paralyzed business for a considerable time. Temporary repairs had to be made. An appropriation of money had to be secured from the general assembly for permanent repairs. The nature of the improvement had to be determined and plans and specifications prepared. All this was necessary to be done before it could be determined what property would be needed.

The time which has elapsed since the flood is but a reasonable time in which to do these things. It cannot be successfully urged that due diligence has not been made.

I am of opinion, therefore, that a public exigency exists which imperatively requires the immediate seizure of this property.

The statutes prescribe the manner in which this property may be taken and compensation made in case of public exigency. The sections herein quoted are as amended in 103 Ohio Laws 123:

Section 436, General Code, provides:

> "When a public exigency exists, the superintendent of public works, or his representative, may take possession of lands and use them, or materials and other property necessary for the maintenance, protection or repair of the public works. The superintendent of public works or any officer or employe in his service may enter upon lands for the purpose of taking levels or making surveys, when necessary in the discharge of the duties of his office."

Section 437, General Code, provides:

> "If the superintendent of public works and the owner of the property taken or used under the preceding section are unable to agree upon the amount of the compensation to be paid therefor, the superintendent of public works shall immediately make and subscribe a certificate containing the following:
>
> "1. A description of the property, date when it was taken, name of the owner or owners, and whether taken absolutely or for temporary use; if for temporary use, the extent thereof.
>
> "2. An offer of such compensation as the superintendent deems reasonable as compensation for the property taken."

Section 438, General Code, provides:

> "A copy of such certificate shall be delivered to each owner of the property taken, or left at his usual place of residence within the state. If such owner is a minor, idiot or insane person, such certificate may be delivered to his guardian. If the owner or guardian is not a resident of the state, or his place of business is unknown, notice may be given him by the publication of the certificate for four consecutive weeks in a news-

paper of general circulation in the county in which the property is situated. The original certificate, with the date, and proof of service of a copy thereof shall be filed in the office of the superintendent of public works."

Section 439, General Code, provides:

"The owner of the property, or his guardian, may elect to take the compensation named in the certificate, or his portion thereof, within one year from the service or last publication of such certificate. If he so elect, the superintendent of public works shall pay him the amount of such compensation and take his receipt therefor."

Section 440, General Code, provides:

"If the owner or guardian is unwilling to accept the compensation named in the certificate, he must notify the superintendent of public works within one year and file the copy of the certificate served on him in the probate court of the county in which the property is situated. If the property is situated in two or more counties, he may file such copy in the probate court of either county."

The provisions of these statutes are to be followed. The superintendent of public works must subscribe the certificate provided for in section 437, General Code, and deliver a copy thereof to the owner or owners of the property as prescribed in section 438, General Code. It is then up to the property owner to accept or reject the offer.

It is my opinion that the superintendent of public works may proceed with the work in question without first entering proceedings to appropriate the property needed. A remedy is provided by which the owner may secure proper compensation for his property so taken.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

467.

IF RAILROADS HAVE COMPLIED WITH THE STATUTES REGULATING THEIR CROSSING OF CANALS, THEY HAVE AN EASEMENT WHICH WILL CONTINUE SO LONG AS THE ROADS CONTINUE TO CROSS THE CANALS.

The state, having the fee simple title to canal lands has the right to sell the canal for railroad purposes and to grant a continuous right of way, subject to the right of the crossing railroad to cross the canal on the land in the manner provided by sections 8775 and 8776, General Code. The fee would be in the grantee of the state subject to the easement of the crossing road.

COLUMBUS, OHIO, August 26, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Your inquiry of April 3, 1913, through Mr. E. E. Booton, engineer canal land department, is received in which you state:

"Since the abandonment of portions of the Ohio canal, an important question has arisen as to the rights of railway companies to occupy and use the rights of way occupied by the bridges prior to the abandonment of the canal for purposes of navigation.

"Upon one of the short sections of the canal property in Newark sold by the state to A. H. H., a railway company has a bridge carrying a double track that it has occupied for at least thirty years. When this tract was advertised for sale, it was expected that the railway company would bid on it, but H., on the day of sale, was the only bidder, the property selling for three-fourths the appraisement.

"Mr. H. has asked the railway company to reimburse him for the proportion of the ground occupied by the railway company and the latter has refused to comply with the request, stating that the company has an easement for crossing purposes.

"Section 4 of the act of May 1, 1852, (1 S. C. 318 and 319), provided the method by which railroads could cross canals. One of the principal restrictions was that the board of public works or acting commissioners should approve the plan of any proposed bridge before the construction of the same was commenced, and no plan was to be approved that did not provide at least ten feet clearance above the top water line of the canal, and that abutments should not interfere with the navigation of the canal.

"The state never received a cent for the use of the ground occupied and as the railroads were often competitors with the canal, the state suffered by this competition, while the railroads actually were exempted from taxation so far as the ground occupied by the railroad crossings were concerned.

"In selling these abandoned canal strips, the best bidders for much of the property are likely to come from railway corporations desiring to acquire them for rights of way for railway purposes, but if these rights of way are not continuous for considerable distances, they are of no practical value for railway purposes, and must be sold for one-third what they would otherwise bring.

"Under the statutes the railway company might have used à draw bridge, instead of an overhead structure, but the plans approved were for a crossing with ten feet clearance above the top water line of the canal. Can the company now change the style of bridge, or going further, fill in the prism of the canal so as to have a solid earth roadbed as is now proposed by some of the railroads?"

The acts to which you refer and under which railroads secured the right to cross the canals of the state were first passed in 50 Ohio Laws 274, section 20, and 50 Ohio Laws, 205, sections 4 and 5. The provisions of these acts to be considered in the present inquiry were carried into the Revised Statutes as sections 3317 and 3318. These sections were carried into the General Code as sections 8775, 8776 and 8777. In these revisions there has been no substantial change in the provisions of the acts. The sections as now found in the General Code will be quoted.

Section 8775, General Code, provides:

"When the line of the road crosses a canal or any navigable water, the company shall file with the board of public works, the plan of the bridge, and other fixtures therefor, which shall designate the place of crossing. If the board approves such plan, it shall notify the company, in writing,

of such approval. If the board disapproves such plan, or fails to approve it within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation, and upon reasonable notice being given to the members of the board, upon good cause shown, the court or judge shall appoint a competent, disinterested engineer, not a resident of a county through which the road passes, to examine such crossing, and prescribe the plan and conditions thereof, *so as not to impede navigation. Within* twenty days from his appointment, such engineer shall make his returns to the common pleas court of the county wherein such crossing is to be made, subject to exceptions by either party. At the next term after filing the return, the court shall examine, approve, and confirm it, unless good cause be shown against such approval. Its order of confirmation shall be sufficient authority for the erection, use, and occupancy of such bridge, in accordance with such plans."

Section 8776, General Code, provides:

"No company shall construct over a canal any permanent bridge less than ten feet in the clear above the top water line of the canal, and the piers and abutments of such bridge must be placed so as not in any manner to contract the width of the canal, or interfere with free passage on the tow path. This section shall not prevent the construction or continuance of draw bridges which do not interrupt navigation."

Section 8777, General Code, provides:

"All railroad bridges erected prior to May 1, 1852, over any navigable canal, feeder, slack water improvement, river, stream, lake or reservoir, not less than ten feet in the clear above the top water line, shall remain undisturbed by the board of public works."

The road referred to in these sections is that of a railroad as is shown by section 8774, General Code, and also by the title under which these sections are placed.

The railroad secured its right to cross the canal by virtue of the foregoing provisions and at a time when the canal was maintained for the purposes of navigation.

In State ex rel. vs. The Cincinnati Central Railway Company, 37 Ohio St., 157, Johnson, J., on page 173, after referring to the original act and to the provisions of section 1, 2 and 3 thereof, says as to section 4 of said act:

"Section 4 provided that all bridges that had *therefore* been erected across the canals, etc., which did not obstruct or impair navigation, and were not less than ten feet above top water line, should be permitted to stand. By section 3317 of the Revised Statutes the right of railroads to cross the canal is restricted so as not to impair navigation thereon. The plan of the bridge and other fixtures for crossing the canal, and the location, must be approved by the board or acting commissioner, but if they disapprove it, then application must be made to the court of common pleas or judge thereof for such approval but even the court has no power to approve the plan, where the bridge is less than ten feet above the top water line of the canal, or where the piers or abutments interfere with navigation.

"These provisions clearly show the care the legislature has taken to preserve the canals.

"They show further, that as between the two public uses, that for purposes of navigation is paramount over public uses for railroads, even as against the right to cross."

The state of Ohio granted by the foregoing acts to a railroad company, the right to cross the canals of the state in a certain manner. The railroad company had the right to cross either by draw bridge, or by a stationary bridge. In the present case a stationary bridge was constructed. Such a bridge was to be constructed upon plans approved by the board of public works, or by court order if the board failed to approve.

The statute fixes certain restrictions. Such bridge must be at least ten feet in the clear above the top water line of the canal. The abutments must be constructed so as "not in any manner to contract the width of the canal, or to interfere with the free passage on the tow path. These were the conditions upon which the railroad company constructed its bridge. So long as the canal is open for navigation, the railroad company can cross the canal with its railroad only in accordance with the above restrictions.

The canal in question has been abandoned for navigation purposes and the state has sold the fee simple title to a part of the land. It is conceded that the state had the fee simple title.

The act abandoning the canal in question is found in 102 Ohio Laws 293, and is known as sections 14203-12 to 14203-19, inclusive, appendix to the General Code.

Section 14203-17, General Code, (section 6 act 102 Ohio Laws 293), provides:

"The county commissioners of any county, likewise the council of any municipality, through which said abandoned canal passes, shall have the right to remove all existing bridges crossing any portion of said abandoned canal over which public highways or the streets of any municipality pass, and to grade such highways and streets by filling and grading across the channel and banks thereof, but must provide for all necessary drainage underneath the same; there is, however, reserved to the state of Ohio, its lessees, grantees, and their assigns, an unobstructed right-of-way, for any and all purposes, across the land occupied by the highways and streets extending across said abandoned canal, as provided for above."

This section grants to counties and municipalities the right to remove bridges and to fill in the channel of the canal where the same is crossed by highways and streets. No such right is granted to a railroad company and this omission is significant.

This section further reserves to the state, its lessees, its grantees, and their assigns "an unobstructed right of way, for any and all purposes," across that part of the canal occupied by highways and streets. It might be urged that no such unobstructed right-of-way is reserved as against a railroad. As railroads are not granted the privilege to remove bridges and to fill in the channel, no such reservation was necessary.

Section 14203-19, General Code, (section 8 of 102 Ohio Laws 293), provides:

"Nothing in this act shall interfere with any leases, rights or privileges heretofore granted by the state of Ohio and in force at the date of approval of this act."

By virtue of this section the right of the railroad company to continue its track across the canal is preserved. It will be observed that the rights retained by this section are those which are "in force at the date of the approval of this act."

The right which the railroad company had when the act was approved and which was then in force was to cross the canal by a bridge constructed upon plans approved by the board of public works, said bridge to be at least ten feet in the clear of the top water line, and the abutments to be so constructed as not to contract width of the canal, or to interfere with free passage on the tow path.

This was the right which the railroad had when the canal was abandoned. The abandonment of the canal and the sale of the canal land by the state has neither diminished, nor increased the right of the railroad company to cross the same with its tracks. The right to cross, and the conditions thereof, attached when the railroad first crossed the canal, and it will continue so long as the railroad crosses the same. In other words, the railroad company has an easement to cross the canal, or the land in which the canal was constructed, in the manner prescribed by sections 8775 and 8776, General Code, and in no other manner.

The purchaser of this land took it subject to the easement of the railroad company. The railroad company was in possession and that is notice as to its rights, and the purchaser was thereby put upon his inquiry.

The fact that the railroad company received this easement without compensation does not affect the situation. The grant was made by act of the legislature and the railroad has acted upon said grant.

In answer to your specific questions:

The purchaser has no right of reimbursement against the railroad company for the land occupied by it at the time of his purchase.

The railroad company has no right to fill in the prism of the canal at its crossing. It has an easement to cross only in the manner prescribed by sections 8775 and 8776, General Code.

The railroad company cannot change the style of its bridge so as to take more of the canal land. It cannot now change the style of its bridge so as to leave less than ten feet in the clear.

The state, having the fee simple title to the canal land, has the right to sell the canal for railroad purposes and to grant a continuous right-of-way, subject only to the right of the crossing railroad to cross the canal, or the land, in the manner provided by sections 8775 and 8776, General Code. The fee would be in the grantee of the state, subject to the easement of the crossing railroad.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

486.

THE STATE MAY REGULATE THE CONSTRUCTHION OF BRIDGES OVER NAVIGABLE STREAMS, SUBJECT TO THE APPROVAL OF THE SECRETARY OF WAR.

The state has the right to regulate the construction of bridges across navigable rivers in Ohio. Such bridges must, in addition, have the approval of the secretary of war, by virtue of section 10 *of the act of congress, March* 3, 1889.

The right of the state to regulate such structures does not apply to bridges authorized by acts of congress, but applies to all other structures.

COLUMBUS, OHIO, September 16, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of May 27, 1913, you submit the following inquiries to this department:

"In matters pertaining to the proper action to be taken for the prevention of floods along and down the Miami river in this state, the question has been raised as to whether that stream is a navigable river, under the control of the national government, or whether it is a stream belonging to and under the absolute authority of the state of Ohio. This proposition has been the cause of considerable division in the matter of planning for flood prevention. It leads to a waste of energy and the crossing of purposes in dealing with the most complete surveys and investigations necessary to a perfect solution of the problem.

"The following questions have arisen and I should like to have your opinion on the same at your earliest convenience:

"First. When original plats show that government patents for land conveyed only to low water mark and not to the middle of the stream, will usage or prescription and claiming to the middle of the stream in later conveyances give title as against the original grantor?

"Second. When the grants of land were made to the state of Ohio by the national government of lands adjacent to the Miami river, did the grant include the river?

"Third. If the national government owns the Miami river, should it not regulate by law all structures which are placed across it, such as railroad bridges, piers, abutments and levees or embankments which approach such piers and abutments?

"Fourth. If the state of Ohio owns the Miami river, then to what extent, if any, has it the power under the law to regulate the construction of bridges, piers, abutments and embankments approaching said structures?

"Fifth. The state of Ohio has built dams across the Miami river at various points. The slack water, which is formed by said dams, may extend several miles upon this stream in various parts. Has the state only an easement for so much water as it may desire to take from the various slack waters thus created, or does the erection of these dams and the forming of slack waters give to the state in fee so much of the land as forms the bed and sides of the river, thus within the precincts of the various dams and slack waters?"

Your fifth question has been answered in an opinion given to you under date of February 8, 1912, in reference to the state dam in the Scioto river near Circleville. In that opinion it was held that the state had only an easement in the land covered by the back water. The nature of the right of the state will depend, in a measure, upon what was taken when the dam was built. This is considered in the opinion above referred to and covers the matter.

Your other questions arise as to navigable and non-navigable streams.

In Ohio, the rule is that navigability of a stream is determined by the fact of its use, or capability of being used, for useful navigation.

In Hickok, et al., vs. Hine, 23 Ohio St., 523, it is held:

> "The rivers of this state, to the extent that they are in fact navigable, are public highways.
>
> "A river is regarded navigable which is capable of transporting the products of the country, or upon which commerce may be conducted; and its character as a highway is determined by its navigable capacity rather than by the frequency of its use for navigation."

Day, J., says on page 527:

> "Having no tidal waters in the state, the word 'navigable,' as applied to our rivers, is not used in the technical sense of the common law; but it is applied, as in the popular sense, to all rivers that are navigable in fact.
>
> "A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes in law a public river or highway. The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce."

The foregoing authority follows the rule generally held in the United States.

In 29 Cyc at page 289, it is said:

> "Water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation, that is, for trade and travel in the usual and ordinary modes. This rule is not only the one which prevails in nearly all of the states in this country but was also the rule under the civil law."

A stream is to be considered navigable when it is capable of being used for useful purposes of navigation. The manner of making government surveys does not determine the navigability of a stream.

In Ohio the rule is well established that the owners of the land bordering a navigable river own the thread or middle of the river, subject to the rights of the public in the waters thereof.

The leading case in Ohio is that of Gavit vs. Chambers, 3 Ohio, 496, wherein it is held:

"In Ohio, owners of lands situate on the banks of navigable streams running through the state, are also owners of the beds of the rivers to the middle of the stream, as at common law."

This case is followed in a number of later decisions. The decisions of different states, however, are in conflict upon this proposition.

In June vs. Purcell, 36 Ohio St., 396, it was held:

The principle decided in Gavit vs. Chambers (3 Ohio, 496), that the owners of lands situate on the banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law, has become a rule of property, and, irrespective of the question of its original correctness, ought not to be disturbed."

The government survey of the land in controversy in the above case was made to points on the bank and was meandered on the bank of the river.

White, J., says on page 407 of June vs. Purcell, supra:

"It is admitted in the agreed statement that 'none of the subdivisional lines of the survey extend to, or embraced the bed of the river, but that, on the contrary, all of the subdivisional lines approaching the river were so run as to extend only to certain points on the bank of the river, at greater or less distances from the margin of the water, which points are designated by the survey as corners to the respective subdivisions of the reservation. And also that the river was meandered on the bank thereof, to and from said respective corners.

"That the meandering lines run in surveying portions of the public lands bordering upon navigable rivers, are run, not as boundaries of the tract, but as a means of ascertaining the quantity of land to be paid for by the purchaser, was decided in Railroad Company vs. Schurmeir, supra. The meander line, therefore, in the present instance, not being a boundary line, the only boundary was the river; and the question is when the boundary line of a riparian owner is thus described, where is it to be located? Gavit vs. Chambers answers, at the middle of the stream, as at common law."

In Railroad Company vs. Platt, et al., 53 Ohio St., 254 it is held:

"A conveyance of lands situated upon a navigable stream, the description being by courses and distances from a fixed monument and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the central thread of the stream."

In Walker vs. Board of Public Works, 16 Ohio, 540, it is held:

"The legislature cannot, by declaring a river navigable which is not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation.

"He who owns the land on both banks of a navigable river, owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement."

The rule in Ohio is that the owner of land on the banks of a navigable river owns to the thread of the stream. This rule applies to lands owned by the state as well as to lands owned by private persons.

There are cases where the title to the bed of the river is separate from the title to the bank. In these cases special reservation has been made, or the bed of the river has been sold by the owner of the bank. It follows from this that the national government could reserve the bed of the river when making a grant of the land. It does not appear that any reservation has been made and this will not be further considered.

The rule as to non-navigable streams is stated in 5 Cyc. at page 897, as follows:

> "A grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center, unless a contrary intention is manifest from the grant or conveyance itself."

In case of Benner's Lessee vs. Platter, et al., 6 Ohio, it is held:

> "A call in a survey, for a stream not navigable, is a call for the main branch of such stream, and the boundary is the middle of the stream."

In Ohio, therefore, in both navigable and non-navigable streams, the owners of the banks own to the middle of the stream.

The national government has reserved the right to regulate the construction of bridges, piers, and other obstructions in navigable streams. This right is exercised under its power to regulate interstate and foreign commerce.

Section 10 of the act of congress of March 3, 1899, 30 Statutes at Large 1121, 1151, provides:

> "That the creation of any obstruction not affirmatively authorized by congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, wier, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, *navigable river* or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States,* unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same."

This section is considered and authorities cited in the opinion rendered by this department to Hon. E. K. Wilcox, city solicitor of Cleveland, under date of April 16, 1912. However this section will now be considered in reference to navigable rivers. In the above opinion it was considered in reference to its application to Lake Erie.

The section above quoted is an amendment of a similar provision contained in an act of congress passed September 19, 1890. The provisions of the act of 1899, supra, are substantially the same as similar provisions contained in the act of 1890.

The act of 1890 was construed by the supreme court of the United States in a case coming to it on error from the supreme court of Ohio, in Lake Shore & Michigan Southern Ry. Co. vs. Ohio, 165 U. S. 365, wherein it was held:

> "The provisions in sections 4, 5 and 7, of the act of September 19, 1890, c. 907, conferring upon the secretary of war authority concerning bridges over navigable waterways, do not deprive the states of authority to bridge such streams, but simply create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce."

The court through Mr. Justice White, discusses the statutes of the United States and their application, and then says in conclusion on page 369 of the opinion:

> "It follows, therefore, that even conceding *arguendo* that the words 'navigable waters' as used in the act were intended to apply to streams wholly within a state, its obvious purpose was not to deprive the states of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, *but simply to create an additional and cumulative remedy to prevent such* structures, although lawfully authorized, from interfering with commerce."

The supreme court of Ohio did not report its decision but the ruling of the circuit court is referred to in 33 Bull. at page 169.

In construing the act of 1890, the attorney general of the United States, said:

> "The statute is revisory and defensive in its nature, it clears the way for interstate and foreign commerce, but does not assume the police power or local control. (1891) 20 Op. attorney General 101."

The foregoing is taken from Federal Statutes Annotated at page 808 of volume 6.

The provisions of the act of 1890, construed in the foregoing authorities are substantially the same as those of the later act of 1899, above quoted.

The purpose of this act is to grant to the secretary of war a supervisory power over structures in navigable waters, to prevent such structures from interfering with commerce. The power granted to the secretary of war is not exclusive, but is "an additional and cumulative remedy to prevent such structures—from interfering with commerce."

The state still has the right to regulate and authorize such structures, and in addition to the authority of the state the approval of the secretary of war must be secured.

The state of Ohio has made provision in reference to the construction of railroad bridges:

Section 8775, General Code, provides:

> "When the line of the road crosses a canal or *any navigable water,* the company shall file with the board of public works, the plan of the bridge, and other fixtures therefor, which shall designate the place of crossing. If the board approves such plan, it shall notify the company, in writing, of such approval. If the board disapproves such plan, or fails to approve it within twenty days from the filing thereof, the company may apply to the court of common pleas, or a judge thereof in vacation,

and upon reasonable notice being given to the members of the board, upon good causes shown, the court or judge shall appoint a competent, disinterested engineer, not a resident of a county through which the road passes, to examine such crossing, and prescribe the plan and conditions thereof, so as not to impede navigation. Within twenty days from his appointment, such engineer shall make his returns to the common pleas court of the county wherein such crossing is to be made subject to exceptions by either party. At the next term after filing the return, the court shall examine, approve, and confirm it, unless good cause be shown against such approval. Its order of confirmation shall be sufficient authority for the erection, use, and occupancy of such bridge, in accordance with such plans."

This section covers railroad bridges over navigable waters which must be approved by the board of public works, which is now the department of public works. If such approval of the plans is not secured, provision is made to determine the matter in the court of common pleas.

The general rule as to building bridges across navigable streams is stated in 29 Cyc. at page 311:

"A bridge across a navigable stream is an obstruction to navigation tolerated only because of necessity and the convenience of commerce on land, the right of navigation of the stream being paramount. *Unless authorized by congress or the state, or the officer or board to whom the federal or state power has been delegated, a person or corporation has no right to build a bridge across navigable waters.* And this rule applies equally well to a riparian owner. Likewise, neither county commissioners nor supervisors nor town boards, in the absence of a statute authorizing it, have power to construct a bridge over navigable waters; although there are cases holding that statutory power to lay out highways includes the power to construct bridges necessary for crossing navigable streams."

Also at page 307 it is said:

"Obstructions not materially injuring free navigation, which are temporary and reasonable, are not nuisances. On the other hand, except where authorized by statute, any 'material' obstruction is unlawful and a nuisance; and this rule applies not only to obstructions by the public but also by riparian owners, or by a city. It applies to waters navigable in fact as well as to tidal waters, although it has been held that it does not apply to streams valuable only for floatage of logs."

The state, therefore, has a right to regulate the constrution of bridges across navigable streams. Such bridegs must in addition, have the approval of the secretary of war by virtue of section 10 of the act of congress of March 3, 1899, supra. The right of the state to regulate such structures would not apply to bridges authorized by act of congress, but it applies to all other structures.

I find no statute in Ohio, except section 8775, General Code, supra, regulating the construction of bridges across navigable streams. The right to cross navigable streams by means of a bridge must first be secured from the state, unless authorized by congress, as laid down in 29 Cyc. 311, supra. When such right is granted the method of exercising it can be determined.

The foregoing, I believe, covers your specific inquiries. If it does not I will gladly give the matter further consideration upon further submission.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

652.

IN LEASING OF ABANDONED CANAL LANDS, THE AUDITOR OF STATE IS ALLOWED TO CREDIT BACK A SUM NOT EXCEEDING $5,000.00 TO THE FUND FROM WHICH THE MONEY HAS BEEN SPENT TO PREPARE THIS LAND FOR LEASING.

Where a portion of the abandoned Hocking canal has been leased, and the sum of $6,000.00 *has been spent in surveying, platting and monumenting said abandoned canal, and also in advertising, selling and leasing said canal, the auditor of state is authorized to credit the sum of* $5,000.00 *back to the fund or funds from which such payment has been made.*

COLUMBUS, OHIO, December 17, 1913.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of November 6, 1913, you inquire:

"A lease has been granted to James Sharp and James M. Dollison for the portion of the abandoned Hocking canal between Main street in Lancaster and the south end of the lower lock in Nelsonville, Ohio.

"Section 5 of the act abandoning the Hocking canal (see O. L. 102, p. 491) provided that the expenses of surveying, platting and monumenting said abandoned canal lands. together with the necessary expenses of advertising and selling and leasing the same should be verified and approved by the chief engineer and the board of public works (succeeded by the superintendent of public works), and paid out of the canal funds, or other funds provided for the survey of canal lands.

"Approximately $6,000.00 has been expended from the appropriations accredited to the land department in carrying on this work. The act directs that the auditor of state credit back to the fund or funds from which such payments were made, a like sum not to exceed $5,000.00 from the receipts derived from the sales and leases of said lands.

"Since the act of May 31, 1911, was passed, the department has been entirely reorganized under the act of March 6, 1913, (See O. L. 103 p. 119).

"The lease to Sharp and Dollison provides for an advance payment of $5,000.00, and we would like to be in a position to have this accredited to the land department."

Section 5 of act of 102 Ohio Laws 491, provides:

"All accounts of expenses, incident to surveying, platting and monumenting said abandoned canal lands, together with the necessary expenses of advertising, selling or leasing the same, shall be verified and approved by the chief engineer and the board of public works, and paid out of the canal funds, or other funds provided for the survey of canal lands, *and the auditor of state is hereby directed to credit back to the fund or funds from which such payments are made, a like amount in any sum not to exceed five thousand* ($5,000.00) *dollars from the receipts derived from the sales and leases of said lands.*".

This section authorizes the auditor of state to credit back to the canal funds a sum not to exceed five thousand dollars from the receipts derived from the sale or lease of said lands.

It appears that a lease has been entered into, or is to be entered into, for a part of this land and that the sum of five thousand dollars is to be paid thereon. Approximately six thousand dollars has been expended in the survey of this land.

When the foreging act was passed the public works were in charge of a board known as the board of public works. The superintendent of public works, by constitutional amendment has succeeded this board.

Section 464, General Code, as amended in 103 Ohio Laws 127, provides:

> "The superintendent of public works shall exercise all the powers and duties heretofore conferred by law upon the board of public works and the Ohio canal commission in the selling or leasing of canal or state lands, but no land lease, or sale of canal or state lands, shall be made except upon the written approval of the governor and the attorney general."

The reorganization of the department of public works did not repeal or modify the provisions of section 5 of 102 Ohio Laws 491, supra. This section is still in force, and by its provisions the auditor of state is directed to credit back to the fund or funds from which the expenses enumerated therein have been paid, "a like amount in any sum not to exceed five thousand dollars from the receipts derived from the sales and leases of said lands."

Approximately six thousand dollars has been paid from the funds and the sum of five thousand dollars is to be received from a lease of a part of said lands. I am of the opinion that the auditor of state would be authorized to credit said sum of five thousand dollars back to the fund or funds from which such payments have been made.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Commissioner of Common Schools)

54.

BOARD OF EDUCATION—PAROCHIAL PUPILS MAY NOT RECEIVE DIPLOMAS FOR PASSING OF BOXWELL-PATTERSON EXAMINATIONS—SUCH PUPILS MAY BE ADMITTED TO HIGH SCHOOL WITHOUT DIPLOMAS—EXAMINATION REQUIRED OF BOARD.

Inasmuch as parochial pupils are not pupils of township, special or village districts, they do not come within the terms of sections 7740 and 7744, General Code, providing for the examination of pupils of such district and the presentation of the successful applicants with a diploma which shall entitle its holder to enter any high school in the state.

Under section 7681, General Code, which provides that schools of each district shall be free to all youth of the district, pupils of parochial schools are entitled to admission in to the high school of the city in which they live, upon compliance with such examination requirements as the school authorities may provide.

COLUMBUS, OHIO, February 1, 1913.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of September 10, 1912, wherein you inquire as follows:

> "In the city of Cambridge, pupils from a parochial school of that city and who live in that city took the Boxwell-Patterson examination, made passing grades and were given diplomas by the county examiners. Have the county examiners legal authority to grant such diplomas and must the board of education of Cambridge admit the holders of these diplomas to their high school?"

In reply thereto I desire to say that section 7740 of the General Code provides for an examination of the pupils of the township, special and village districts as follows:

> "Each board of county school examiners shall hold examinations of pupils of township and special districts, and of village districts in the subjects of orthography, reading, writing, arithmetic, English grammer and compensation, geography, history of the United States, including civil government, and physiology. Two such examinations must be held annually, on the third Saturday of April, and one on the third Saturday of May, at such place or places as such board designates."

Section 7744 of the General Code provides for a county commencement and granting of diplomas, as follows:

> "The board of county school examiners shall provide for the holding of a county commencement not later than August 15th, at such place as it determines. At this commencement an annual address must be delivered, at the conclusion of which a diploma shall be presented to each successful applicant who has complied with the provisions hereof. Such diploma shall entitle its holder to enter any high school in the state."

Section 7747 of the General Code provides that the tuition of pupils holding such diplomas and residing in the township and special district in which no high school is maintained shall be paid by the board of education of such district, as follows:

> "The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other nonresident pupils."

In your inquiry you state that the pupils in question live in the city of Cambridge and are therefore pupils who live in the Cambridge city school district. Section 7681, General Code, provides that the schools of each respective school district shall be free to all the youth between six and twenty-one years of age who live therein, subject to the rules and regulations of the local boards of education, as follows:

> "The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district children's home located in such a school district, at the discretion of its board of education, but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

The provision of the said statute in and of itself gives them the undoubted right to attend the Cambridge high school without any other qualification, excepting to take and successfully pass such entrance examination for entering the said Cambridge high school as may be required by the school authorities. Usually the school authorities and those in charge of the parochial schools have an arrangement whereby the pupils of parochial schools are admitted to the high school without further examination, and in some cases as a matter of comity between the high school and parochial school the courses of study in the respective schools are made similar so that the pupils from such parochial schools can become qualified to take the high school entrance examination, if any such examination is required, or at least that the high school entrance examination of parochial school pupils shall be similar to and not more difficult than the examination given to pupils who pass from the lower grades of the public schools to the high school. As I have before stated these arrangements between the high school and parochial school authorities are usually entered into as a matter of comity between those in charge of the respective schools. It is not necessary for them to take the so-called Boxwell-Patterson examination for the purpose of attending the Cambridge city high school. This follows by virtue of section 7681, General Code.

Furthermore, the county examiners are without authority to grant such diplomas to such pupils for the reason they do not come within the provisions of section

7740 of the General Code, supra, not being pupils of the township, special or village districts, and for the further reason that such pupils do not come within the provisions of section 7747 of the General Code, supra, inasmuch as they are not residents of the township or special districts in which no high school is maintained.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

126.

BOARD OF EDUCATION—VILLAGE AND SPECIAL DISTRICT—SPECIAL ELECTION FOR BOARD OF EDUCATION IN NEWLY INCORPORATED VILLAGE UNAUTHORIZED—THE FILLING OF VACANCY WHEN ALL BUT TWO MEMBERS OF BOARD ARE DISQUALIFIED BY FORMATION OF SPECIAL DISTRICT—MANDAMUS UNAVAILABLE TO ENFORCE CORPORATION TO ORGANIZE AS A VILLAGE DISTRICT.

When a newly incorporated village is formed with a tax duplicate of more than $100,000, *such village becomes ipso facto a village school district, but when such village fails to elect a board of education when the village officers are elected, a special election for members of such board of education is not authorized by law. Such members can only be elected in the odd numbered years.*

When in a township there exists two or more districts unconnected and the village school district and the further special district is organized, the two subdistricts and the part of the township not included in the village district or the special district, will all comprise parts of the township school district and will still remain under the jurisdiction of the township board of education. The village district also will remain under the control of the township board of education until such time as it is properly organized after its members are elected.

Under section 4748, *General Code, when three out of five members of a township board of education become disqualified for that office by reason of the formation of a special school district, the two remaining members may fill such vacancies in the township board.*

Inasmuch as there are no officers upon whom rests the ministerial duty to organize the village district or to call an election for members of its board of education, such election may not be enforced by mandamus. The organization may be brought about by a sufficient number of electors taking steps to become candidates for the village board of education at the November election and the board of elections would be required to place their names upon the ballots and hold an election therefor.

COLUMBUS, OHIO, February 24, 1913.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of February 5, 1913, you submit the following facts and questions to this department for opinion:

> "Kirkersville, Licking county, is located in the southern part of Harrison township. The B. & O. and Pennsylvania railroads pass through the entire length of Harrison township cutting it into about equal parts. The people on either side of these railroads have petitioned the probate judge to grant them a special district, excluding Kirkersville on the south and a subdistrict in the northeastern corner of the township, and a subdistrict in the northwestern corner of the township. Also a small portion of land surrounding the corporations of Kirkersville.

"Kirkersville is an incorporated village and has been such for at least three years, but has failed to elect a board of education up to this time. The entire township has been considered a township district and a township board has maintained the school at Kirkersville the same as its township schools. The people of the proposed special district are opposed to maintaining the Kirkersville school longer than this school year.

"Questions:

"First. If the special district is allowed, under whose jurisdiction will the remaining schools of the township be? (Three members of the township board of education live in the special district). Is it possible for two members of the township board to appoint the other three members of the board if three vacancies should occur at the same time?

"Second. Is it possible to hold a special election for the election of the members of the board of education in a village district, when the village district has been previously incorporated and the officers of the incorporation have been elected previously?

"Third. It is possible to enforce the corporation of Kirkersville to organize as a village district?"

It appears further that the village of Kirkersville has a tax duplicate of more than one hundred thousand dollars and it is therefore, by virtue of section 4681, General Code, as construed in Buckman vs. State, 81 Ohio St. 171, a village school district by operation of law.

Said section 4681, General Code, provides:

"Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars, shall constitute a village school district."

This is fully discussed and determined in an opinion given to Hon. James E. Bell, prosecuting attorney, London, Ohio, under date of April 18, 1912, of which opinion your department has a copy.

In that opinion it was held, as shown on page 5 thereof, that:

"There is no provision of statute which authorizes the holding of a special election, for the election of the members of a board of education for a village school district, when such village school district comes into existence by reason of its increase in tax valuation which requires it under section 4681, General Code, to become a village school district. In the absence of such provision no special election could be held for such purpose, even at the general election in the even numbered years. Such members can only be elected in the odd numbered years."

Attention has been called to the provisions of sections 4709 and 4710, General Code.

Section 4709, General Code, provides:

"At the first election in such district, a board of education shall be elected, two members to serve for two years and three to serve for four

years. At the proper municipal election held thereafter, their successors shall be elected for a term of four years."

Section 4710, General Code, provides:

"In villages hereafter created, a board of education shall be elected as provided in the preceding section. If such election is a special election, the members elected shall serve for the term indicated in such section from the first Monday in January after the last preceding election for members of the board of education, and the board shall organize on the second Monday after the special election."

The special election referred to in section 4710, General Code, is the special election authorized by section 3536, General Code, which may be called for the election of the first officers of a newly created village. There is no authority in any officer or board to call a special election for the purpose of electing members of a board of education for a village school district.

Said section 3536, General Code, provides:

"The first election of officers of such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. The election shall be conducted, and the officers chosen and qualified, in the manner prescribed for the election of township officers, and the first election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election."

The village has already elected its officers and the time for holding such special election has passed.

A special election cannot be held for the election of the members of a board of education of a village school district where the village has been previously incorporated and the officers of the village have been elected, and where such village school district failed to elect a board of education at such municipal election. This is in answer to your second inquiry.

It appears in the case you submit that if the formation of the special school district is allowed by the probate judge it will leave three separate and distinct parts of the township remaining in the township district. None of these parts are contiguous to any of the others. This part of the township would not be under the jurisdiction of a properly organized board of education of a city, village or special district.

The statutes provide for four classes of school districts known as city, village, township and special school districts, as shown by section 4679, General Code, which reads:

"The school districts of the state shall be styled, respectively, city school districts, village school districts, township school districts and special school districts."

The territory remaining in the township, after the formation of the proposed special school district would still remain under the jurisdiction of the township board of education.

Section 4683, General Code, provides:

> "Each civil township, together with the territory attached to it for school purposes, and excluding the territory within its established limits detached for school purposes, shall constitute a township school district."

This section takes care of all the territory in a township which has not been taken to form a city, village or special school district.

While the village of Kirkersville is in contemplation of the statute, now a village school district, it has not yet been organized as a village school district. It is a village school district in name but not in fact. Until it becomes a village school district by the proper election and organization of a board of education for such village school district, it remains under the jurisdiction of the township board of education.

This matter is also considered in the opinion to Hon. James E. Bell, referred to above. In that opinion it was held on page 9 thereof:

> "It is my conclusion that the village became a village school district at the time it reached the required tax valuation, but that it remains a part of the township school district and is under the jurisdiction of the township board of education until the village school district can be properly organized after the election in November, 1913."

This conclusion applies directly to your case.

It appears further that of the five members of the present board of education of the township school district, three of them reside in the territory which is to become a part of the proposed special school district, which would leave only two members of the township board eligible to act for the township district.

Section 4748, General Code, provides:

> "A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the oganization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

By virtue of this section the three members who reside in the special school district will be ineligible to act as members of the township board of education upon the proper organization of the proposed special district. This would cause three vacancies in the township board and such vacancies would occur at the same time.

Section 4748, General Code, authorizes the board of education to fill a vacancy

at its next meeting. And in order to obviate all doubt as to how many members shall constitute a quorum for the purpose of filling such vacancy, or vacancies, said section further provides that

> "A majority of all the remaining members of the board may fill any such vacancy."

In your case there would be but two remaining members of the township board and these two members may fill the three vacancies.

In your third inquiry you ask:

> "Is it possible to enforce the corporation of Kirkersville to organize as a village district?"

The usual and proper remedy to enforce the performance of a duty by a corporation or an officer is by mandamus.

Mandamus is defined by section 12283, General Code, which reads:

> "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board or person, commanding the performance of an act, which the law specially enjoins as a duty resulting from an office, trust or station."

A school district can act only through its officers, and in order to enforce a duty of the school district, the writ of mandamus must be issued against the officer or board of the school district that has failed in the performance of some duty enjoined by law.

The village school district of Kirkersville has no officer or officers upon whom a writ of mandamus could be issued.

The first step necessary in the organization of the village school district is the election of a board of education. This election cannot take place until the coming November election.

The statutes provide for notices of elections to be given. Section 4839, General Code, provides for notices of election for school districts as follows:

> "The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, or the nature of the question to be voted upon."

The duty of giving notice devolves upon the clerk of the board of education. The only clerk now having jurisdiction over this territory is the clerk of the township board of education. The clerk of the township board is not authorized to give notice of an election for members of a village board of education.

As seen by section 3536, General Code, supra, provision is made for notice of an election for the municipal officers of a newly created village.

Section 4739, General Code, provides for notices when a special school district holds its first election, as follows:

"When a special district is created, a mass meeting of the electors of such district shall be called by the posting of notices in five public places in the district, setting forth the time and place of such meeting, and signed by at least three electors of the district. The electors assembled at such meeting shall elect a chairman and secretary and fix the time of holding the first election for members of the board of education. The time so fixed shall not be within twenty-five days of the time of holding such mass meeting. The chairman and secretary of the meeting shall immediately post notices in five public places within the district, giving the date of election, and shall notify the deputy state supervisors of elections of the county or counties of the names of the voting precincts having territory in such special school district and the probable number of electors in each precinct, in order that such deputy state supervisors may prepare ballots, poll books and tally sheets at the time and in the manner provided by law."

A writ of mandamus will not lie in the absence of any provision of statute making it the duty of some officer to give notice of an election for members of a board of education of a newly created village school district.

The statute contemplates that each village with a tax duplicate in excess of one hundred thousand dollars shall constitute a village school district, but it does not provide a means by which this duty can be enforced, if the residents of such district refuse to act.

The situation can be met by a sufficient number of electors of the village taking proper steps to become candidates for the village board of education at the coming November election.

For example, if five electors of the village desired the organization of the village school district, they could present themselves as candidates for members of the board of education to the proper election officials, and the board of elections would be required to place their names upon the ballots and hold an election therefor. This would bring the question at issue and some one would necessarily be elected as members of the board even though a large majority of the electors refused to vote for members of the board of education. The persons elected could proceed to organize the village district.

The organization of the village school district and of the special school district would leave three pieces of territory in the township school district. If the township district would be so scattered as not to make it feasible to continue the township district, the territory could be attached to some adjacent school district for school purposes.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

164.

BOARD OF EDUCATION—POWER OF WOMAN TO SERVE AS CLERK OR TREASURER IN TOWNSHIP AND OTHER DISTRICTS.

Under article 15, section 4 of the constitution, a woman may not be elected to or appointed to any office in this state. Under article 6, section 2 and article 1, section 7 of the constitution, however, through the powers therein conferred upon the general assembly to secure a thorough and efficient system of common schools and to encourage schools and the means of instruction, the provision of section 4862, General Code, permitting a woman to serve as member of a board of education and to vote for members thereof, is held to be valid and constitutional.

Since, therefore, women may serve on the board of education and since, furthermore, section 4747, General Code, provides that in any district other than the township school district, a member of a board of education may be elected clerk of the board, a woman in this district may be so elected clerk, under authority of this statute.

The statutes do not confer the right, however, of a woman to serve as clerk of a township, and since the statutes require such clerk to act as clerk to the school board, a woman may not serve in the latter capacity. The statutes, furthermore, have not made provision for service as treasurer of a school board by a woman and she may, therefore, not serve in that capacity.

COLUMBUS, OHIO, April 3, 1913.

HON. FRANK W. MILLER, *State Commissioner Common Schools, Columbus, Ohio.*

DEAR SIR:—In your letter of March 4, 1913, you inquire as follows:

> "First—Can the wife of the president of the board of education be chosen to the office of clerk of that board of education?
>
> "Second—Can the wife of a member of a board of education be chosen to the office of treasurer of that board?"

In reply thereto would say article 5, section 1 of the constitution prescribes the qualifications of an elector as follows:

> "Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector and be entitled to vote at all elections."

Article 15, secion 4 of the constitution provides who are eligible to be elected or appointed to office as follows:

> "No person shall be elected or appointed to any office in this state, unless he possess the qualifications of an elector."

By virtue of the above quoted sections of the constitution women are not entitled to be electors at school board elections, or to be elected as members of school boards or to hold the offices of clerk and treasurer of school boards, unless it is found that they can be put in possession of such qualifications by virtue of legislative enactment in accordance with the constitutional provisions of article 6, section 2, and article 1, section 7 of the constitution of Ohio. Article 6, section 2 of the constitution provides as follows:

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state."

Article 1, section 7 of the constitution provides as follows:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship against his consent; and no preference shall be given by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; * * *. Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of his own mode of public worship, and to encourage schools and the means of instruction."

Section 4862 of the General Code as originally enacted by the legislature, April 24, 1894 (91 O. L. 182), and as subsequently amended April 24, 1904 (97 O. L. 354) provides that women may not only vote for members of the board of education but also provides that women may be voted for for members of the board of education as follows:

"Section 4862. Every woman born in the United States or who is the wife or daughter of a citizen of the United States, who is over twenty-one years of age and possesses the necessary qualifications in regard to residence hereinafter provided for men shall be entitled to vote and to be voted for for member of the board of education and upon no other question."

In the case of State ex rel. Mills vs. Board of Elections, et al., 9 Circuit Court Rep. page 134, which was an action in mandamus against the board to test the constitutional right of women to vote for members of the school board, the court held as follows:

"The act of April 24, 1894, conferring upon women the right to vote and be voted for at any election held for the purpose of choosing any school director, member of the board of education or school council under the general or special laws of the state is valid, *it being within the power to provide for the establishment and maintenance of common schools which the constitution confers upon the general assembly, and not within the limitation contained in section one of article five.*"

At pages 138 and 139 of the opinion the court says:

"In none of the state constitutions to which our attention has been called is there a broader grant of power to provide for public schools

than in ours. Section 1, article 2, contains a grant of all legislative power. Section 7, article 1, provides that 'it shall be the duty of the general assembly to pass suitable laws * * * to encourage schools and means of instruction.' Section 2, article 6, enjoins upon the general assembly the duty of making such provisions 'as will secure a thorough and efficient system of common schools throughout the state.' *In the provisions relating to the subject of schools, there is neither limitation upon the powers conferred, nor direction as to the modes of its exercise.* The offices to be filled at the election contemplated in this act, and the districts in which such elections are to be held are alike unknown in the constitution."

If the legislature by virtue of article 6, section 2 and article 1, section 7 of the constitution has the power, as held by the court in the case of State ex rel. Miles vs. Board of Elections, et al., supra, to grant to women the right to vote and to be voted for for members of the board of education, then it clearly follows by analogy that the legislature can by legislative enactment grant the right to women to hold the offices of clerk and treasurer of school boards.

In regard to the office of clerk of the board of education, the legislature enacted section 4747 which provides as follows:

"The board of education of each school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president and in township school districts the clerk of the township shall be clerk of the board. The president and vice-president shall serve for a term not to exceed two years. In all other districts a person who may or may not be a member of the board shall be elected clerk. The board shall fix the time of holding its regular meetings."

It is to be noted that said section provides that in township school districts the township clerk shall be the clerk of the board. Such township clerk being elected as a township officer must be an elector as required by article 15, section 4 of the constitution, and must possess the qualifications prescribed by article 5, section 1, supra, which said qualifications are limited so as to include only white male citizens of the United States. Not being qualified to be elected township clerk it follows that women are not eligible to the office of clerk of the school board of township school districts, and furthermore, women being electors only for the purpose of voting for members of school boards, and for no other purpose as provided by section 4862, supra, it necessarily follows that a woman cannot legally be elected township clerk and therefore is disqualified to hold the office of clerk of a township school board. Therefore, the wife of the president of a township school board could in no event be chosen to the office of clerk of such township school board of education under the present status of the constitution and laws.

Said section 4747 of the General Code further provides that in all other districts "a person who may or may not be a member of the board shall be elected clerk."

As above stated, under section 4862 of the General Code, and by virtue of the holding of the court in the case of State ex rel. Mills vs. Board of Education, supra, a woman has the legal right to vote for and to be voted for for member of the board of education provided, of course, she possesses the other requisite qualifications as set forth in said section 4862.

In other words, in all school districts, a woman, if she possesses the qualifications enumerated in section 4862, can be elected as and become a member of the board of education of her respective school district.

By virtue of section 4747, General Code, boards of education in all districts, except in township districts, may elect one of their own members as clerk of said board of education. It follows, therefore, that if a woman is a member of such board she can be elected clerk thereof by virtue of said section. There is no statutory provision whereby a woman other than a member of such board of education can be elected clerk thereof, and inasmuch as the legislature has not yet seen fit by legislative enactment to grant the right to women to be elected clerk other than to such women as happen to be elected as members of school boards of village, city and special school districts, it is my opinion that a woman who is not a member of such board of education cannot be elected clerk thereof. The statute is to be strictly construed in this regard, and goes no further than its plain terms purport.

Therefore, in direct answer to your first question for the reasons above given this department is constrained to hold that the wife of the president of a school board, other than a township board of education, cannot be elected clerk thereof unless she is a member of such board of education, and for the reasons above stated she could in no event be elected clerk of the township school board.

In answer to your second question I desire to say that section 4763 of the General Code provides as follows:

> "In each city, village and township school district, the treasurer of the city, village and township funds, respectively, shall be the treasurer of the school funds. In each special district the board of education shall choose its own treasurer, whose term of office shall be for one year beginning on the first day of September."

The treasurer of a city, village or township is an officer of the respective city, village or township wherein he is elected and in order to qualify as such treasurer he must be an elector as provided by article 15, section 4, supra, and must possess the qualifications prescribed by article 5, section 1, supra, which said qualifications are limited so as to include only the white male citizens of the United States. Not being qualified to be elected treasurer of a city, village or township who is made treasurer of the school funds of the board of education of the city, village or township school district respectively by virtue of section 4763, supra, it follows that women are not eligible to the office of treasurer of boards of education of city, village or township school districts. And as heretofore suggested women being electors only for the purpose of voting for members of school boards, and for no other purpose as provided by section 4862, supra, it necessarily follows that a woman cannot legally be elected to the office of city, village or township treasurer. Said section specifically provides that a "special district board of education shall choose its own treasurer," etc.

Although it is stated in the opinion in the case of State ex rel. Mills vs. Board of Education, supra, that "in the provisions (constitutional) relating to the subject of schools there is neither limitation upon the power conferred nor direction as to the modes of its exercise," nevertheless the legislature has not as yet seen fit to grant authority to boards of education of special school districts to elect women as treasurers of such boards by virtue of the said constitutional provisions contained in article 6, section 2 and article 1, section 7 to which said provisions the court had reference in the above cited case.

Said section 4763 General Code, supra, does not, nor does any other section of the General Code, grant the right or authority to school boards of special school districts to elect women as treasurers of their respective boards.

Therefore, this department is constrained to hold that the wife of a member of a board of education cannot be elected to the office of treasurer of that board under the law as it exists at the present time.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

168.

TAXES AND TAXATION—TEACHERS' PENSION FUND TECHNICALLY LIABLE FOR TAXATION.

The provision of the statutes providing for exemption from taxation of insitutions of purely public charity, is intended to apply to private institutions as distinguished from an official or public agency. Inasmuch as the board of trustees of a teachers' pension fund constitutes a public agency rather than a private corporation, pension funds may not be exempted from taxation under this head.

Under article 12, section 2, of the constitution, the legislature would be empowered to exempt such funds under the provision for the exemption of "public property used exclusively for any public purpose." Not having done so, however, such pension funds must be held to be technically subject to taxation.

COLUMBUS, OHIO, March 24, 1913.

HON. FRANK W. MILLER, *State School Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 4th, requesting my opinion upon the following question:

> "Are the funds of the pension fund taxable if deposited in a bank drawing interest, or if invested in taxable bonds?"

It would be burdening this letter to an undue extent to quote all the tax exemption statutes and constitutional provisions of this state. You are aware, of course, that the rule in this state is that all property is subject to taxation, except only that which is expressly exempted therefrom. It is necessary, therefore, in order to sustain an exemption of moneys and investments such as those inquired about, to find some express provision authorizing such exemption.

Without quoting all the sections and constitutional provisions which enumerate the exemptions from taxation, suffice it to say that if the teachers' pension fund may be regarded as an "institution of purely public charity," the exemption may be sustained, it being the rule in this state that moneys and credits appropriated solely to sustain and belonging exclusively to such institutions are exempt from taxation. Section 5353, General Code, paragraph 6, Revised Statutes, section 2732, Little vs. Seminary, 72 O. S., 417.

Having established the principle, its application must be made through an examination of section 7875, General Code, et seq., which provide for teachers' pension.

Section 7875, General Code, already referred to, provides in effect that the board of education may provide for a school teachers' pension fund "under the management and control of a board to be known as 'the board of trustees of the school teachers' pension fund.'" The same section provides for the personnel of this board and the manner of the election of the members thereof.

Section 7876 provides for the manner of electing members and for their term of office. The provision is that such members shall "serve not less than one nor more than three years." They shall serve until their successors are elected and qualified and without compensation."

Section 7877 provides for the contribution to the pension fund. It appears that the acceptance or rejection of the provisions of the pension fund law is optional with teachers who were in employment on the day when the law went into effect, but becomes an element of the contract of all those subsequently accepting employment, so that, virtually, as to such teachers, it is compulsory.

Section 7878, General Code, authorizes the acceptance of donations, legacies, gifts, bequests, etc., by the board of trustees.

Section 7879, General Code, provides the manner of investing the funds of the board of trustees and vests in the board the power to make and establish rules and regulations for the administration of the fund.

Sections 7880 to 7884, inclusive, provide for the retirement of teachers.

Section 7889 makes the treasurer of the school district the custodian of the pension fund, and the previous section provides the manner in which he shall pay out orders against it.

Section 7895 provides for the partial support of the pension fund by general taxation.

The word "institution," as used in the phrases "institution of purely public charity," has obtained a very definite meaning. That meaning has not been worked out as thoroughly in the decisions of the courts of this state as it has in some other jurisdictions, but I think I may venture, without citing numerous authorities, to state that the word means a *private corporation or organization* of some kind as distinguished from an official or public agency. This must have been what the framers of the constitution of 1851 and of the legislation thereunder had in mind, because, in all cases, they have separately provided for the exemption of property belonging to the public itself as distinguished from that belonging to some private organization.

On careful consideration of the sections which I have just outlined, I am of the opinion that the board of trustees thereby created is a public agency and not a private organization. The funds themselves are in the custody of a public officer, the treasurer of the district. I am, therefore, of the opinion that the board of trustees of the teachers' pension fund does not constitute an "institution" within the meaning of that term as used in the exemption statute.

A further serious question might be raised as to whether or not the charitable purposes of the teachers' pension fund are "purely public" within the meaning of the constitutional provision. The conclusion which I have reached as to the meaning of the term "institution" precludes the necessity of considering this question.

In conclusion I may state that probably the legislature of this state has the power to exempt teachers' pension funds from taxation under that portion of article XII, section 2, of the constitution, which authorizes the exemption of "public property used exclusively for any public purpose." It is true that in State ex rel. vs. Hubbard, 22 C. C., 252-265, the question is mooted as to whether or not the purpose of providing pensions for retired teachers is a public one. Inasmuch, however, as the policy of the state has continued to favor teachers'

pensions, I think it may now be regarded as settled that the object of such laws is public in its nature and, therefore, it would follow that such property might with propriety be regarded as "public property used exclusively for a public purpose," within the meaning of the constitution.

However, it does not follow that because the legislature is authorized to exempt such property from taxation, it is therefore exempt. This provision of the constitution is not self-executing and, in fact, is in form permissive only. Certain other public property used exclusively for public purposes has been expressly exempted. Teachers' pension funds have not been so exempted; until the legislature acts they must be regarded as technically subject to taxation.

I may add that there are other kinds of public property used exclusively for public purposes which have never been expressly exempted from taxation but which, in practice, have never been taxed. The truth is that our tax exemption statutes are archaic and should be overhauled. As the law stands at present, for example, the furniture in a city hall, and the moneys and investments in the custody of the sinking fund trustees of a city district are technically subject to taxation; no effort has ever been made to tax such property nor should an effort be made to tax it, from the standpoint of policy. While, therefore, I can return but one answer to the question which you have asked, from the standpoint of technical law, I do not anticipate there will be any attempt on the part of the taxing officers to place property of the kind mentioned in your letter upon the tax duplicate.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

306.

CENTRALIZATION OF SCHOOLS DOES NOT BEGIN UNTIL SCHOOLS ARE READY FOR BUSINESS—DOES NOT DATE FROM TIME OF ELECTION.

Under section 4726, General Code, when a township election has been held upon the question of centralization of schools and the result is in favor of such centralization, the board of education is required at once to proceed to the centralization of schools of the township and such centralization is not to be deemed accomplished until the schools are ready for business.

Until such centralization has been effected, under section 4716 and 4717, General Code, the subdistricts of the township shall continue to exist and a director shall be elected for each subdistrict.

The centralization dates from the time the buildings are completed and the time the schools are first in actual operation as centralized schools, and therefore under section 4727, General Code, such centralization may not be discontinued until three years after the full accomplishment of the same.

COLUMBUS, OHIO, June 9, 1913.

HONORABLE FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of the date of April 2, 1913, wherein you inquire as follows:

"We desire your opinion on the following point. The facts are as follows:

"'GOOD HOPE, FAYETTE COUNTY, O., March 24, 1913.

"'FRANK W. MILLER, *State Superintendent of Public Instruction, Columbus, Ohio.*

"'DEAR SIR:—The president of our board of education has asked me to put the situation that exists here up to you and ask your opinion of a question now before us.

"'1. Three years ago, this coming May, this township (Wayne) voted to centralize.

"'2. Then followed a two years' battle in the courts with the standpatters.

"'3. The last year has been spent in building school houses. Now the question arises, can another vote be forced in May? The buildings are not yet completed, let alone having a chance to centralize the schools.

"'The question in another form might read: Does centralization begin when the election is certified or when the schools are ready for business?

"'HENRY HUGHES, Good Hope, Ohio.'

"Further facts in addition to those stated in the above quoted request are as follows:

"The question of the centralization of the schools of Wayne township, Fayette county, Ohio, was submitted to the electors of said township on May 31, 1910, the majority of the electors voting in favor of centralization, the returns of said elections being certified to the clerk of the board of education. On January 11, 1911, some of the electors opposed to the centralization of said township schools, filed a petition in the common pleas court of Fayette county, asking that the board of education be enjoined from issuing or selling bonds for the construction of the school buildings. The common pleas court sustained a demurrer to said petition. The case was then carried on appeal, to the circuit court and then on error to the supreme court, where on March 19, 1912, it was decided against those opposed to the centralization of said schools. As stated in the above quoted request, the school buildings are not yet completed and consequently the schools are not yet in operation, as centralized schools. Under the above statement of facts, does the above centralization of said schools date from the time the result of the election was certified to the board of education, or does the centralization date from the time the case in the supreme court was decided, to wit, on March 19, 1912, or from the time the buildings are completed and the said schools are in actual operation as centralized schools? Also, when do the three years expire, after which another election can be held under section 4727 of the General Code."

In reply thereto section 4726 of the General Code provides as follows:

"A township board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such township districts, must submit such question to the vote of the qualified electors of such township district, at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such elec-

tion, such board of education shall proceed at once to the centralization of schools of the township, and, if necessary purchase a site or sites and erect a suitable building or buildings thereon.

"If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such township district for a period of two years."

Section 4727 of the General Code provides as follows:

"When the schools of a township have been centralized, such centralization shall not be discontinued within three years, and then only by petition and election, as herein required. If at such election more votes are cast against centralization than for it, the division into subdistricts as they existed prior to centralization, shall thereby be reestablished at the next regular election and subdistrict directors shall be elected as herein provided."

It is to be noted that said section 4726 of the General Code above quoted, provides, first, that the township board of education may submit the question of centralization and upon petition of not less than one-fourth of the qualified electors of said township, the board of education must submit such question to the vote of the qualified electors of such township, at a general or special election. Second, if the majority of the votes are in favor of centralization, then such "board of education shall proceed at once to the centralization of the schools of such township." Said section 4726, by the language therein employed, seems to indicate that the election therein provided for was intended merely for the purpose of determining the will of the majority of the electors, upon the question of centralization, and even though a majority of the electors vote in favor of centralization, such result or the certifying thereof to the board of education, does not accomplish such centralization, for section 4726 of the General Code clearly indicates that something further must be done to complete such centralization, even after the majority of the electors have voted for it, when it provides that thereupon "such board of education shall proceed at once to the centralization of the schools of the townships." The supreme court record in the case of Garinger, et al., plaintiff in error, vs. Board of Education of Wayne township, Fayette county, Ohio, et al., defendant in error, which said case you mention in your inquiry, discloses the fact that after a majority of the electors in said Wayne township had voted in favor of said centralization, the board of education of said township at once proceeded to the centralization of the schools thereof and to that end proceeded to issue bonds to raise the necessary funds with which to build the necessary buildings and secure the necessary equipment for the accomplishment of such centralization, when a suit to enjoin the issuing and selling of said bonds was interposed by those opposed to centralization, in the manner as set forth in your inquiry. On March 19, 1912, said suit was finally decided by the state supreme court against those so opposed to centralization. During all the time said suit, to so enjoin, was pending, the board of education was delayed in performing the duty enjoined upon it by said section *"to at once proceed to the centralization of the schools of said Wayne township."* Upon the termination of said suit in its favor, the said board of education again proceeded to the accomplishment of the centralization of said schools and to date the buildings are not yet completed. The suit referred to above served only to delay the accomplishment of centralization and it can hardly be said that the termination of said suit, in favor of the board of education, on March 19, 1912, could be construed as mean-

ing that centralization had thereby been accomplished and completed on that date, when, as aforesaid, such suit only delayed and hindered the board in its attempt to proceed at once to the centralization of the schools of said township.

Section 4716 provides that the subdistricts of a township shall continue as they exist, etc., as follows:

> "Sec. 4716. The division of township school districts into subdistricts as they exist, shall continue and be recognized for the purpose of school attendance, but the board of education may increase or diminish the number or change the boundaries of the subdistricts at any regular meeting. A map designating such changes shall be entered upon the records of the board."

Section 4717 of the General Code provides that so long as townships are divided into subdistricts, a director shall be elected by each subdistrict as follows:

> "In all township districts, the schools of which are not centralized or consolidated, there shall be elected on the second Monday of April each year by ballot, in each subdistrict by the qualified electors thereof one competent person having the qualifications of an elector therein, who shall be styled director."

Further, it is to be noted that said section 4716, supra, says "the division of township school districts into subdistricts, as they exist shall continue," so that all subdistricts into which townships are divided, shall continue as such until centralization is effected, as provided by section 4726, supra.

A subdistrict school can be discontinued only in one of two ways, i. e., by consolidation or centralization, and as we are only concerned with centralization of all the subdistrict schools of the particular township involved, we will not, therefore, go further into the subject of consolidation of the subdistricts than to merely mention it in passing.

It follows, therefore, that subdistrict schools continue up to the very time that the schools have actually been centralized and until all of the subdistrict schools are actually merged into and become part of the centralized schools. This is necessarily true so that the pupils of such townships can attend the subdistrict schools during the interim that the board of education is engaged in its statutory duty "to proceed at once to the centralization of the schools of the township," after a majority of the electors of such township have voted in favor of such centralization.

Webster defines "centralization" as follows:

> "An act or process of combining or reducing several parts to a whole."

Century dictionary defines "centralization" as follows:

> "The act of centralizing or bring to one center."

Under the above definitions of the term "centralization," it can hardly be said that the centralization of the subdistrict schools is accomplished until they are "combined together as a whole" or "brought to one center."

Such subdistricts are surely not "combined together," "reduced to a whole" or "brought to one center" so long as each school continues to operate as a separate subdistrict school.

Therefore, in direct answer to your inquiry, it is the opinion of this department that centralization of said schools does not date from the time the result of the election was certified to the board of education, nor from the time the case you refer to was decided in the supreme court, to wit, March 19, 1912, but that such centralization should date from the time the buildings are completed and the time that the schools are first in actual operation as centralized schools. Therefore, it follows that the three years after which another election can be held, expires three years after that time.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

601.

BEFORE A SPECIAL SCHOOL DISTRICT CAN BE MADE FROM PARTS OF THREE SPECIAL SCHOOL DISTRICTS, THE FIRST SPECIAL SCHOOL DISTRICT MUST BE ABANDONED. THE PROPERTY WILL THEN REVERT TO THE TOWNSHIP SCHOOL DISTRICTS FROM WHICH THE SPECIAL SCHOOL DISTRICT MAY BE FORMED. THE STATUTES ALSO PROVIDE A MEANS OF TRANSFERRING TERRITORY FROM ONE SCHOOL DISTRICT TO ANOTHER.

The village of Loveland is located in three counties and is a part of three special school districts. In order to make the village of Loveland a special school district it will be necessary to get the approval of the three special school districts in the transfer of territory. The statutes provide a method whereby the three special school districts could be abandoned, and then the formation of one special school district would become an easy matter. The problem may be worked out either by abandoning the special school districts and organizing a village district, or by means of transferring the territory of the village from one district to another, so as to get the territory of the village in one school district.

COLUMBUS, OHIO, September 26, 1913.

HON. FRANK W. MILLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Under date of February 7, 1913, you submit the following to this department for opinion:

> "The village of Loveland, Ohio, is located in three counties, Clermont, Hamilton and Warren. It is a part of three special school districts at this time with three different boards of education and three different school systems. It has never been regularly organized as a village school district in compliance with section 4687.
>
> "The board of education of the largest district within the village has asked that they be combined into one village school district.
>
> "Can the three special school districts with the territory which is attached to them for school purposes be compelled to form one village school district? If so, how shall they proceed?"

Section 4687, General Code, to which you refer, provides:

> "*Upon the creation of a village, it shall thereby become a village school district, as herein provided*, and, if the territory of such village previous to its creation was included within the boundaries of a special school district and such special school district included more territory than is included within the village, such territory shall thereby be attached to such village school district for school purposes."

This section applies to newly created villages. It does not cover a case where a village, or even a newly created village, has within its territorial limits parts of three special school districts.

The words of this section, "as herein provided," refer to the provisions of section 4681, General Code. This section as amended in 103 Ohio Laws, 545, reads:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district."

The only change made in this section by this amendment was to increase the required tax valuation to five hundred thousand dollars.

This section was construed in Buckman vs. State, 81 Ohio Stat., 171, where it is held:

> "By force of the provisions of section 3888, Revised Statutes, as amended April 2, 1906, and in effect April 15, 1906 (98 O. L., 217), each incorporated village then existing—April 16, 1906—or since created, 'together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than one hundred thousand dollars,' constitutes and is a village school district, no vote of electors of such village being necessary to the creation or establishment of such district."

In considering whether or not a village becomes a village school district, the territory of such village which is detached for school purposes must be excluded, and the territory which is attached thereto for school purposes must be included.

In the village of Loveland there are parts of three special school districts. Your direct question is whether or not these three special school districts may be compelled to form one village school district.

This raises a question as to whether the territory of a special school district may be taken to form a village school district.

In an opinion given to Hon. Jay S. Paiseley, prosecuting attorney, Steubenville, Ohio, by this department, it was held that a part of one village school district could not be taken to form another village school district. This conclusion was based upon the opinions of the supreme court of Ohio in Scott vs. McCullough, 72 Ohio St., 538, and Fulks vs. Wright, 72 Ohio St., 547.

In Scott vs. McCullough, the syllabus reads:

> "No part of the territory of a special school district is subject to be taken to form another special school district."

In Fulks vs. Wright, it is held:

> "When the schools of a township have been centralized, no part of the territory comprised in such centralization is subject to be taken to form a special school district."

In this last cited case, Summers, J., says on pages 548 and 549:

> "But we are of opinion, for the reasons stated in the opinion in that case (Scott vs. McCullough, supra), that the words 'contiguous territory' are to be limited to such territory as the legislature manifestly had in contemplation when the section was enacted, and that is, to territory that had not been pre-empted by being taken to form some other district, but such as remained a township district or a part thereof."

The court, in effect, states the rule to be that only territory which remains in a township school district, or a part thereof, can be taken to form another school district.

This rule will apply to the territory of a special school district where it is proposed to take such territory to form a part of a village school district. The only means, provided by statute, by which the territory of a special school district may be taken to form a village school district, is when such territory comes within the terms of section 4687, General Code. We here refer to the formation of a new school district and not to the transfer of territory from one school district to another district. This will be considered later.

Section 4728, General Code, provides for the formation of a special school district, as follows:

> "A special school district may be formed of any contiguous territory, not included within the limits of a city or village, which has a total tax valuation of not less than one hundred thousand dollars."

When a special district is formed it must have a tax valuation of not less than one hundred thousand dollars. It is safe to assume, therefore, that each of the three special school districts which take in part of the territory of the village of Loveland, has a tax valuation of one hundred thousand dollars.

Section 4687, General Code, provides that upon the creation of a village, it shall become a village school district, as provided in section 4681, General Code. It then specifically provides for the territory of the special school district if such village is a part of a special school district.

In determining the tax valuation under section 4681, General Code, the territory in such village which is detached for school purposes must be excluded, and the territory which is attached for school purposes, must be included.

The attached and detached territory therein referred to applies to territory which has been taken, or pre-empted as it were, to form a school district other than a township district.

By operation of section 4687, General Code, the territory of the special

school district becomes attached to the village school district for school purposes. In fact the special school district becomes the new village school district upon the creation of the village.

Even though this section would apply to the village of Loveland and would require one of the special school districts to become a village school district, it would not solve the present difficulty. The territory of the other two special school districts would remain intact, and would be detached from the village school district for school purposes. Another difficulty would arise in the application of section 4687, General Code. There are three special school districts in the village of Loveland, and section 4687, General Code, does not provide which one shall become the village school district, or how such a case shall be determined.

The rule of law, as laid down in Scott vs. McCullough, supra, applies, that the territory of one special school district cannot be taken to form another special school district, or any other school district. In other words, the whole territory of the village of Loveland, under the present law, cannot be formed into one village school district, without the approval of the three special school districts in the transfer of territory. There is no provision of statute by which it can be compelled to form a village school district, or by which the three special school districts may be required to consolidate and form one school district.

The statutes provide a means of abandoning special school districts, and upon such abandonment the territory of such special school district reverts to the township school district or districts from which it was originally taken.

Section 4741, General Code, provides:

> "When a petition is signed by not less than one-third of the electors residing within the territory constituting a special school district, praying for the abandonment or continuance of such special district, is presented to the board of education of such district, or when such board, by a majority vote of the full membership thereof, shall decide to submit the question of abandoning or continuing the special school district, the board shall fix the time of holding such election at a special or general election. The clerk of the board shall notify the deputy state supervisors of elections as herein provided in case of first election, of the date of such election and the purposes thereof, and such deputy state supervisors shall provide therefor. The clerk of the board of education shall post notices thereof in five public places within the district."

Section 4743, General Code, provides in part:

> "If more votes are cast for abandonment than against it, or against continuance than for it, such board shall certify the result to the board or boards of education of the township or townships having territory in the special district, and the territory of the special district shall thereby revert to the township school district or districts from which it was originally taken, except as hereinafter provided in case of indebtedness of the special district."

The proceedings to abandon the special school district must be started either by the board of education of the district, or by the electors thereof. There is no way of compelling them to take such action. Even after such

action is taken, the question of abandonment must be submitted to a vote of the electors. If all three special school districts should be abandoned, it would then become an easy matter to organize the village school district.

The statutes also provide a means of transferring territory from one school district to another district. The situation might be worked out under these sections, but there is no way of compelling such action.

The situation presented is a peculiar one which is not covered by statute. There is no way to compel the people of Loveland to combine their school districts. They themselves can, if they so desire, solve the difficulties which are presented, either by abandoning the special school districts and then organizing the village district, or by means of transferring the territory of the village from one district to another so as to get the territory of the village in one school district. Either of these plans will require some thought so as to properly take care of all the territory affected.

A further question has been raised as to the legality of the organization of the special school districts. It being contended that they were organized by special act of the legislature and that such acts are unconstitutional.

It appears that the district which takes in the larger part of the territory of the village of Loveland is located in Miami township of Clermont county, and is known as the "Loveland Village School District." The district in Warren county is known as the "Smith Special School District," and is located in Hamilton township. The third district is known as the "West Loveland Special School District, and is located in Symmes township of Hamilton county. This information has been kindly furnished by Hon. Earl E. Ertel, member of the house of representatives.

An examination has been made of the year books since 1880, but no act has been found for the organization of the "West Loveland Special School District" or of the "Loveland Village School District." No records of proceedings have been submitted by which these districts were organized. It must be assumed until otherwise shown, that these districts have been legally organized.

It appears that the third district, the "Smith Special School District," was organized by special act of the legislature as set forth in 92 Ohio Laws, 532. This act was passed April 1, 1896, and section 1 thereof provides:

"*Be it enacted by the General Assembly of the State of Ohio:*

> "That the territory comprising the sub-district number 4 of Hamilton township, Warren county, Ohio, be and the same is hereby made a special school district to be known as the 'Smith Special School District,' of Hamilton township, Warren county, Ohio."

The school laws were revised by a general act in 97 Ohio Laws, 334, et seq., and the manner of organizing special districts changed in view of the decisions of the supreme court holding special acts unconstitutional, as to municipal corporations.

In the above act an attempt was made to continue in existence all special school districts created by special act of the legislature.

Section 3891, Revised Statutes, as amended in said act, provided:

> "Any school district, *now existing*, other than a city, village or township school district, and any school district organized under the provisions of chapter 5 of this title, shall constitute a special school district."

In carrying this section into the General Code as section 4684, the words "now existing" were taken out. Otherwise the section remains the same.

This section was considered in case of Bartlett vs. State of Ohio, 73 Ohio St., 54, wherein it was held:

> "It is not within the power conferred on the general assembly by the constitution, to declare that things done and created under and by virtue of unconstitutional acts of the general assembly, nevertheless 'shall continue to be and remain and be recognized and regarded as legal.'
>
> "Section 3891, of the Revised Statutes and sections 3891 and 3928, of the Revised Statutes as amended and supplemented by 'An act to provide for the organization of the common schools of the state of Ohio, and to amend, repeal and supplement certain sections of the Revised Statutes and laws of Ohio herein named,' passed April 25, 1904 (97 O. L., 77), are unconstitutional and void, in so far as they declare to be legal and valid special school districts, all special school districts which have been created under the provisions of special acts of the general assembly."

In the case of State of Ohio vs. Spellmire, 67 Ohio St., 77, it is held:

> "The subject matter of schools, including school districts, and establishing and changing the same, is of a general nature; and all legislation as to them must be general, having a uniform operation throughout the state. State ex rel. vs. Shearer, et al., 46 Ohio St., 275, overruled, and State vs. Powers, 33 Ohio St., 54, reaffirmed.
>
> "The act of April 2, 1903, entitled 'An act to create a special school district in Springfield and Sycamore townships, in Hamilton county, and Union township, Butler county,' 95 Ohio Laws, 743, is in conflict with that part of section 26, article II of the constitution which provides that: 'All laws of a general nature, shall have a uniform operation throughout the state,' and is therefore unconstitutional and void."

In view of the foregoing decisions by the supreme court, the special act which created the "Smith Special School District" is unconstitutional, and the provision of section 3891, Revised Statutes, which attempted to continue such district in existence is also unconstitutional.

Therefore, if the "Smith Special School District," rests its organization upon the act of 92 Ohio Laws, 533, it is not a legally organized special school district. It may be that since the above decisions this district has been properly organized under the general laws. Nothing, however, has been presented in that regard.

The territory of this district, if it has not been legally organized since its first organization by special act, would revert to the district or districts from which it was created.

If this territory should revert to a township, not having centralized schools, it would not be pre-empted territory, and could be taken to form a village school district, or some other school district.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

(To the Clerk of the Supreme Court of Ohio)

87.

CLERK OF SUPREME COURT—LAW STUDENT FUND FOR WHICH CERTIFICATE OF DEPOSIT IS OBTAINED FROM A BANK NOW DEFUNCT IS A TRUST FUND AND A PREFERRED CLAIM—EFFECT OF INTEREST PAYMENT—TREASURER'S CHECK NOT PRESENTED IN REASONABLE TIME NOT A PREFERRED CLAIM.

By the decision of Smith et al. Trustees vs. Fuller et al., 86 O. S. 57, it is established that the trustees have no right to create a relation of debtor and creditor, that is, to loan out trust funds, and that in the absence of a clear showing, that a deposit of a trust fund with a bank was made as a loan by way of a general deposit, such purpose would not be attributed to the trustee.

When, therefore, the clerk of the supreme court receives a certificate of deposit, for a deposit by him, of law student funds, which certificate of deposit showed on its face a recognition of the fact that the amount was a trust fund, such deposit will be regarded as a special and not a general deposit, and must, therefore, be treated as a preferred claim against the trustees of a bank when the latter is undergoing liquidation. The fact that the certificate of deposit bears interest is not sufficient to change the deposit from a special to a general deposit.

When the clerk has received a check for a definite amount from the bank for interest upon the funds so deposited, and such check is not presented within a reasonable time, the same must be considered as a general claim against the bank and in no way preferred.

COLUMBUS, OHIO, January 14, 1913.

HON. FRANK E. MCKEAN, *Clerk of the Supreme Court of Ohio, Columbus, Ohio.*

DEAR SIR:—In your letter of April 11, 1912, you make the following request for my opinion:

> "At the time the Columbus Savings and Trust Company suspended business the supreme court of Ohio had on deposit, in my name, as clerk of the court, certificate of deposit for $1,200.00, and a treasurer's check for interest, making a total of $1,248. This represented what is known as the 'Law student fund.' The aggregate of this fund, less the $48.00, was a surplus remaining after paying the expenses incident to holding said bar examinations and was subject to use in defraying the expenses of subsequent examinations, providing the amount paid by the students would not equal the amount of an examination.
>
> "I am presenting this matter to you by request of Honorable William Z. Davis, chief justice of the supreme court of Ohio, for the purpose of having you advise me whether or not this claim would not likely be considered a preferred claim, in view of the fact that it substantially is a trust fund, and might possibly be analogous to case No. 12996, E. B. Smith, et al., Trustees, vs. Rathbun Fuller et al., decided by this court on Tuesday, April 2, 1912, on which an opinion was rendered."

Rule 14 of the Rules of Practice in the supreme court of Ohio, governing the admission to the bar, provides, among other requirements, for certain fees to be paid by persons who register as law students, and also for fees to be paid

by persons taking the examination for admission to the bar, and by persons admitted without examination.

Section 16 of rule 14 provides for the administration of this fund, which, as you state, is called the "Law student fund," and is as follows:

> "The clerk shall enter the date of the filing of all papers under this rule, with a pertinent description of the same, in a record provided for that purpose, and shall enter all sums received under this rule in a cash book, showing the date, from whom and for what received, and shall pay the same out upon the order of the chief justice in payment of the expenses of the examinations, and for no other purpose. That is to say: costs of necessary printing and stationery; necessary janitor or messenger service; necessary hall rent, postage and express charges and other necessary expenses; to the clerk for each certificate of admission issued to an applicant, $1.00, and also the registration fees paid under this rule; to each member of the standing committee $50.00, for each examination, and to each member of the committee on general learning $10.00 for each session, and his necessary traveling expenses, actually incurred in the work of the committee.
>
> "If the funds are not sufficient, such pro rata distribution shall be made as the funds will warrant."

It will be noted, from the above rule, that this fund is essentially a trust fund in the hands of the clerk, and can only be expended by the clerk on the order of the chief justice of the supreme court, for the items specified in the rule. There seems to be no provision as to the disposition the clerk shall make, from time to time, of the surplus remaining in his hands but, of course, under the rule and well settled principles of law, the clerk is required to hold and safely keep said fund at all times, and to only use the same for the purposes specified.

It appears, from your letter and from your books, that this deposit was not originally made by you. There was an accumulation in the "Law student fund" of twelve hundred dollars which was, by one of your predecessors in the officer of clerk of the supreme court, deposited in the Columbus Savings and Trust Company, and a certificate of deposit taken for that amount. When you assumed office this certificate of deposit was transferred to you and, on February 5, 1912, the certificate then outstanding became due; it was cancelled by the bank and a new certificate for twelve hundred dollars was issued, an exact copy of which is as follows:

"CERTIFICATE OF DEPOSIT.

"THE COLUMBUS SAVINGS AND TRUST CO.

"Law Student Fund. "COLUMBUS, OHIO, February 5, 1912.

"This certifies that Frank E. McKean, clerk supreme court of Ohio, has deposited with this company twelve hundred dollars $1,200.00
24.00

$1,224.00

payable to the order of self on surrender of this certificate six or twelve months after February 3, 1912, with interest at the rate of 4 per cent. per annum.

"Interest ceases at maturity.

"NOT MORE THAN TWELVE HUNDRED $1,200

"No. 12656. H. W. BACHUS, *Treasurer.*"

From appearance, the certificate, as originally drawn, called simply for $1,200, that amount being written and also expressed in figures; apparently, someone has placed the figures $24 immediately under the figures $1,200, on the certificate, drawn a line and then placed the figures $1,224. Your books show that the amount due on the certificate of deposit was $1,200 even, and there is nothing to show for what purpose the additional $24 was added, or that it is really a part of the certificate; therefore, the rule that where the sum written in the body of the check differs from the sum expressed in figures, in the corner or margin, the written words will control the figures, would govern, and the amount of this certificate must be taken as twelve hundred dollars.

On the same date, February 5, 1912, a treasurer's check, amounting to $48, was issued by the Columbus Savings and Trust Company to you as clerk. This check represented four per cent interest on the certificate of deposit, surrendered by you on February 5, 1912. An exact copy of this check is as follows:

"THE COLUMBUS SAVINGS AND TRUST CO.

"COLUMBUS, O., Feb. 5, 1912. No. 9681.

"Pay to the order of Frank E. McKean, clerk $48.00
"Forty-eight dollars.

"NOT MORE THAN FIFTY DOLLARS $50.

"TREASURER'S CHECK. H. W. BACHUS, Treasurer."

From the above facts, and from sections 16 of rule 14, above quoted, it must be conceded that you, as clerk of the supreme court, were a trustee, with powers strictly limited, for this fund. This being true, it seems to me that the case of Smith et al., Trustees, vs. Fuller et al., Assignees, 86 O. S. 57, as reported in the Ohio Law Bulletin, in the issue of June 24, 1912 (which is the case referred to by you in your request), certainly covers this transaction. The facts in that case, as stated by Judge Spear, were as follows:

> "The plantiffs in error are trustees for the Imperial Savings Company, an insolvent concern * * *. The defendants in error are assignees of the East Side Banking Company, an insolvent banking corporation * * *.
>
> "The suit * * * was by the plaintiffs in error against the defendants in error to have a trust impressed upon moneys that remained in the vaults of the bank at the time of the assignment. It is shown by the record that upon two separate occasions the trustees * * * deposited with the bank trust money coming into their hands * * * taking in each instance a certificate of deposit expressing that a deposit was made by E. B. Smith and A. B. Baumann, trustees; that the same was not subject to check, and the money payable on return of the certificate properly endorsed. No interest was promised. It further appears by the record that the bank failed before the money was withdrawn, having funds in its vaults * * * in amount and value more than sufficient to pay the sum * * * so deposited by said trustees. The assignees refused to allow the claim of the trustees as a preferred claim but did accept it as a claim against the general assets of the bank.
>
> "The cause was heard on a demurrer to the petition and amend-

ment thereto. The demurrer was sustained, both courts holding that the facts alleged presented only the usual case of a general deposit, thus holding that the relation of debtor and creditor arose between the trustees and the bank and therefore no trust was established.

* * * * * * * * * * * *

"We are thus required to determine whether, upon the foregoing facts, the trustees are entitled to payment of their claim out of the assets of the insolvent bank in the hands of the assignees before any distribution to other creditors, or whether the character of their claim is such that they are merely general creditors of the estate, entitled only to their pro rata share of the fund for distribution. In determining this final question the first query presented is whether or not the deposit by the trustees was, in the eyes of the law, in the nature of a special deposit, or a mere general deposit. If the former, then, a second question arises which is, has the fund been kept in such a way as to permit a court of equity to engraft a trust upon it?"

After stating the facts, as above, the opinion of the court is, in brief, as follows:

That the duty of a trustee is to protect the trust property in every reasonable manner, to use diligence in obtaining possession of it, and to retain it securely under his own control; and that a trustee has, in the proper discharge of his duties as such, no right or power, by express contract, to create the relation merely of debtor and creditor, that is, to loan out the trust funds; that such an act, in the absence of authority from the court, would clearly be inconsistent with and a violation of his plain duty; that if he has no right to make such loan generally, it is clear that a loan to a bank, by way of a general deposit, would be equally beyond his power; and that in the absence of a clear showing that the deposit was made as a loan to a bank by way of a general deposit such purpose would not be attributed to the trustee.

The court further says the fact that the account was not subject to check indicates that the deposit lacked one feature usually to be found in the case of a general deposit, and the fact that no interest was to be paid negatives the idea that it was the purpose of the trustees to loan out the money; that the certificates of deposit themselves showed that the bank knew that the money deposited was not the money of the trustees, but was the money of the trust which they represented; that the bank must be held to have been put upon inquiry and should be held bound by the legal effect of knowledge which might have been so acquired; and that, therefore, the bank is charged with knowledge of the rule which forbids a trust from loaning out the trust funds generally, or making a mere general deposit.

The court decides that this was a special and not a general deposit and that the trustees were entitled to have their claim allowed as a preferred claim.

I have given simply a rough summary of this opinion. It is written by Judge Spear and is most clear and comprehensive; it undoubtedly covers exactly the case we have before us, except for the fact that the certificate of deposit for $1,200, issued to you, specifies that it bears interest at four per cent. I take, it however, that this fact would not be sufficient to change the deposit so made from a special to a general deposit, for, at the present time, it is a matter of common knowledge that practically all certificates of deposit bear interest. The certificate on its face shows not only that this deposit was made by you as clerk of the supreme court of Ohio, and not individually, but shows that it was a special fund so deposited, namely, the law student fund. As

stated above, the rule of the supreme court prescribed, however, that this fund should be accounted for by you and how it should be paid, and, of course, as trustee and custodian of the fund, without being so directed by the court, you were utterly without authority to loan the fund or any part of it, or, as the court says in the case above referred to, to make a general deposit and thus create the relation of debtor and creditor with the bank. It seems to me, therefore, from this opinion, that this deposit must be treated as a special deposit and that your claim against the Columbus Savings and Trust Company, for the amount of the certificate of deposit, namely, twelve hundred dollars, should be allowed as a preferred claim and paid by the receiver.

As stated above, there is no provision made in the rule for you to loan or invest this fund. The check for forty-eight dollars, which I take it represents interest, is simply in the form of a treasurer's check, made payable to your order as clerk. Not being specified, there is nothing to signify in what capacity the check is given to you except the word "clerk." This check, I take it, would be governed by the usual rules and should have been presented at the bank for payment within a reasonable time; if the bank failed before the check was presented and the same was not presented within a reasonable time, then, it would be only a general claim against the bank and not a preferred claim.

The rule as to presentment of checks for payment, as stated in Morse on Banks and Banking, section 421, is:

> "In the absence of agreement or special circumstances it is the right of the drawer of a check to expect it to be presented for payment at latest within banking hours on the day following the day of its delivery to the payee, if the bank on which it is drawn be in the same place where the payee lives or does business; if the bank be not in such place, then the check must, within the same time, be put in due course for presentment, either by being sent by mail to the drawee, or by being deposited for collection with a banker, according to the ordinary custom of such business in that place. * * *"

The check was dated February 5, 1912; the bank was taken in charge by the state banking department and closed on the twenty-sixth day of February, 1912; there is nothing upon the face of the check itself to show that it was in any sense drawn against a special deposit—in fact, it was not; it was the increment upon a trust fund; was payable out of the general funds of the bank; and as it was not presented within a reasonable time it must be considered as a general claim against the bank, and in no way preferred.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Supreme Court Reporter)

434.

SUPREME COURT REPORTER MAY RECEIVE COMPENSATION FOR ACTING AS SECRETARY OF OHIO STATE ARCHAEOLOGICAL SOCIETY.

A person may be reporter for the supreme court and secretary of the Ohio state archaeological society, and be paid for his service for both positions from state funds or out of the state treasury.

COLUMBUS, OHIO, August 7, 1913.

HON. E. O. RANDALL, *Supreme Court Reporter, Columbus, Ohio.*

DEAR SIR:—In regard to your inquiry as to whether you may be paid for your services as secretary of the Ohio state archaeological society, and at the same time draw your salary as reporter of the supreme court, permit me to say:

My immediate predecessor, Hon. U. G. Denman, on January 5, 1909, in an opinion of which you have a copy, says:

> "My opinion is * * * that you are entitled to perform the service of secretary to the Ohio state archaeological society and receive compensation therefor out of the public treasury notwithstanding the fact that you are the duly appointed and acting supreme court reporter."

This is directly applicable and meets my approval.

I also beg to advise you that Hon. Wade H. Ellis, the then attorney general of Ohio, on January 8, 1908, in an opinion to Hon. W. O. Thompson, wherein it was asked:

> "Whether section 2 of an act passed April 2, 1906, 98 O. L. 368, makes it illegal for the trustees of the Ohio state university to enter into a contract with persons named as officers in the above act for their services as teachers in the university, and whether this act prohibits such persons therein named as officers of the state from receiving remuneration for such services?"

Section 2 of the act passed April 2, 1906 (98 O. L. 365), is as follows:

> "Provided, further, that no fees whatever in addition to the above named salaries shall be allowed to such officers; and provided, further, that no additional remuneration whatever shall be given any such officer under any other title than the title by which such officer was elected or duly appointed. The salaries herein provided for shall be in full compensation for any and all services rendered by said officers and employes, payment of which is made from the state treasury."

The conclusion reached by Mr. Ellis in his opinion to Hon. W. O. Thompson, above referred to, is as follows:

> "There is nothing in this act to prevent an officer named therein from teaching in the university at such times as do not conflict with the proper performance of his official duties. Since the statute refers to

services required by law or rendered by such officers in their official capacity, and since such teaching is not so required and is done in an individual capacity, compensation may be made to persons holding the offices named in this act for services as instructors in the university."

Upon principle there is no difference between the conclusions of Messrs. Denman and Ellis. I only desire to add that since the rendition of Mr. Denman's opinion annual appropriations have been made to cover the current expenses of said society, which current expenses in each case included an allowance for the payment of its secretary, with the knowledge on the part of the legislature that the secretary of said society was reporter for the supreme court and being compensated out of the state treasury for his services as such. This, to my mind, can only be regarded as a legislative approval of the opinion referred to.

Concurring in the conclusions of my predecessors, Ellis and Denman, I beg to advise you that in my opinion you are entitled to be compensated out of the state treasury for your services as secretary of the Ohio state archaeological society, notwithstanding the fact that you are reporter for the supreme court of Ohio, and being paid therefor from the same source.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Various Appointive State Officers)

(To the Adjutant General)

30.

OATHS—OFFICERS WHO MAY ADMINISTER TO MEMBERS OF MILITIA.

Regulations of the Ohio national guard provide that judge advocates general, officers of summary courts, and officers detailed to conduct investigation or the presiding officers of any board appointed for such purpose, are the proper officers to administer oaths.

Section 14862, *General Code, provides that certain officers may administer oaths to members of the militia, when they are outside of the state, engaged in the service of the United States.*

COLUMBUS, OHIO, November 27, 1913.

HON. CHAS. C. WEYBRECHT, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of November 9th, you wrote this department as follows:

> "Please note enclosed letter from the war department, in which the secretary of war requests a list of all officials who are authorized by the laws of Ohio to administer oaths, other than the usual notaries public, justices of the peace, clerks of courts, etc."

The letter to which you refer is as follows:

> "1. The war department frequently receives affidavits pertaining to the administration of militia affairs, sworn and subscribed to before an officer of the organized militia. Militia officers, as such, are not in general authorized to administer oaths, and the return of papers in such cases for citation of authority involves delay.
>
> "2. The secretary of war has directed me to request you to furnish this office with a list of all officials who are authorized by the laws of your state to administer oaths, other than the usual notaries public, justices of the peace, clerks of courts, etc., with an extract copy of the law covering each case."

Just what the secretary of war has meant by a list of all officials who are authorized by the laws of this state to administer oaths *other* than the usual notaries public, justices of the peace, clerks of court, etc., is not altogether clear.

I have made a thorough investigation of the statutes pertaining to the administering of oaths and I find innumerable officers and boards who are authorized to administer oaths in certain instances, within range of their special duties. I take it to be the meaning of your letter, however, that you are not interested in any powers to administer oaths other than those which would extend to military affairs.

It would seem scarcely necessary to set out the authority appearing on page 29 of your "regulations for the Ohio national guard," which states "that judge advocates of courts martial, and the trial officers of summary courts, are hereby authorized to administer oaths for the purpose of the administra-

tion of military justice, and for other purposes of military administration." (Act of congress of July 27, 1892.) The same may be said of the power given to any commissioned officer of the Ohio national guard, to administer the oath of enlistment, the authority for which appears on page 98 of the same work, as paragraph 276.

Paragraph 602 of said code of regulations provides generally, as follows:

> "The proper officers to administer oaths are judge advocates general, judge advocates of courts martial, the trial officers of summary courts, and, in cases of investigation, the officer detailed to conduct the investigation, or the recorder, and if there be none, the presiding officer of any board appointed for such purpose. When none of these are within reach and available, recourse must be had to a notary public or other civil officer competent to administer oaths for general purposes."

I take it that the authority which properly answers your question is section 14862, General Code, which is as follows:

> "Section 14862 (3107-55 Bates). The colonel, lieutenant colonel, major, or adjutant of any regiment or battalion, which has been or may hereafter be raised in this state, and now is or may hereafter be in the service of the United States, or of this state, whether regular or volunteer, shall be and is hereby authorized to administer oaths, and take depositions, affidavits and acknowledgments of deeds, mortgages, leases and other conveyances of lands, and all powers of attorney relating thereto, to be used or recorded in this state, of any person without this state, who for the time being shall be in the service of the United States, or of this state, in any regiment or battalion raised in this state or connected therewith, in the same manner as a justice of the peace or commissioner of this state might do."

I have been unable to disclose anything further which I feel would be material to your inquiry.

I trust that this will prove satisfactory.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

49.

MILITIA—PERSON SENTENCED BY COMMANDING OFFICER TO COUNTY JAIL—ARRANGEMENT WITH SHERIFF FOR BOARD.

Section 2850, General Code, authorizes the county commissioners to pay to the sheriff not less than forty-five, nor more than seventy-five cents per day for keeping and feeding prisoners. This statute cannot be held to apply, however, to any prisoners other than those expressly provided for in the statutes. There is no provision in the statutes for the commitment of a military prisoner to the county jail, nor for the payment of the board of such prisoner. In the case of McGorray vs. Murphy, however, the court recognized the right of military authorities to commit to a county jail, and intimated that the expense of the board of such prisoner must be provided for by arrangement with the sheriff.

When a prisoner is so committed to the county jail, therefore, the county commissioners may not allow a sheriff for his board.

COLUMBUS, OHIO, January 30, 1913.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for an opinion upon the facts stated in a letter addressed to me by Capt. H. S. Dyar, of company B, 7th Ohio infantry, which letter is, in part, as follows:

> "Section 3067, Revised Statutes, gives the commanding officer of a military company the authority to arrest and confine any member of his command, for violation of any order, regulation or law for the government of the Ohio national guard. I arrested a member of my company and tried him by a summary court and he was sentenced to ten days in the county jail, and served the time. Now, the sheriff informs me that he cannot charge the man's board to the county as he does for other prisoners. What I desire is your opinion as to who has to pay that board bill. Can the sheriff charge it to the county as he does for other prisoners? The man was arrested and tried for violation of the 33d article of war."

Section 5251, General Code, formerly section 3067, Revised Statutes, provides as follows:

> "The commanding officer of a regiment, battalion, company, troop or battery, may arrest any member of his command for the violation of an order, regulation or law for the government of the national guard, and may authorize, in writing, any constable or police officer of the city, village or township where such violation occurs, to so arrest such delinquent member. Such commanding officer may turn over, to any constable or police officer, a member of his command so arrested by him. Such constable or police officer shall hold such man, so arrested, in the custody, not exceeding five days, until he has been tried by the proper court-marshal, or has been discharged by proper authority."

It will be observed that the foregoing only authorizes a commanding officer of a regiment to arrest any member of his command for the violation of

an order, regulation or law for the government of the national guard, and may authorize certain officers, named in the statute, to detain such member, not exceeding five days, until he has been tried by court-martial or discharged by the proper authority. The thirty-third article of war is one of the regulations for the government of the Ohio national guard, and a violation thereof comes within the provisions of section 5251, General Code. This section, however, is not broad enough to provide a place of detention after conviction, and I have not found any other statute of this state which authorizes the commitment of a prisoner, found guilty of violating military law, to a county jail.

Our supreme court, however, in the case of McGorray vs. Murphy, 80 O. S., 413, upheld the commitment to the county jail of a man found guilty of violating a provision of such law. The court, in rendering the opinion, on page 416, uses the following significant language:

> "Nor can it avail anything to the defendant in error that a sheriff is a civil officer and ordinarily acts in that capacity, and that when receiving prisoners sentenced by civil courts his authority ordinarily is evidenced by a formal commitment, because in this instance he was acting as the instrument of a military court and in such case a commitment is not necessary. In field service the offender is taken to the guardhouse without ceremony or preliminaries. In the absence of a military prison he is delivered to a sheriff or jailer upon arrangement with the latter."

The court intimated, but did not expressly decide, that a prisoner violating military law may not be committed to the jail of a county except upon arrangement between the officer committing him and the sheriff of the county.

Section 2850, General Code, authorizes the county commissioners to pay to the sheriff not less than forty-five, nor more than seventy-five cents, per day, for keeping and feeding prisoners. Other statutes provide in express terms the classes of prisoners who may be committed to the county jail.

It is my opinion that the board of only such prisoners as are committed to jail pursuant to some statute of this state can be charged to the county. The commitment of a military prisoner to a county jail, not being expressly authorized by statute, can only be done when arrangements are made between the officer committing him and the sheriff. Such arrangements should be made on the authority of your department, so as to include a provision as to the payment of a board for such prisoner.

I am of the opinion that you should make arrangements for the payment of the board of this particular prisoner, during the time that he was confined in the county jail; and if there is not already a regulation on this subject, I would suggest that you adopt one for future guidance.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

71.

MILITIA—OFFICERS OF OHIO NATIONAL GUARD MAY NOT BE REIMBURSED FOR TIPS WHEN TRAVELING.

Under sections 5292, 5293 *and* 5296, *General Code, officers of the Ohio national guard, when engaged upon inspection or other duties, on order of the commander-in-chief, are entitled to the same pay as is allowed commissioned officers of like grade in the army of the United States, together with the necessary transportation. Their allowance for necessary transportation, must be governed by the rule as it exists with reference to the allowance for such transportation to public officers in Ohio, and as it is well established in this state, that tips may not be made a public expense, nor porters' fees, when they are in fact donated as a gratuity, officers of the national guard may not be reimbursed from the public treasury for either of these expenses.*

COLUMBUS, OHIO, January 28, 1913.

HON. GEORGE WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Under date of January 23d, you request my opinion as follows:

> "Kindly let us have an opinion as to whether or not tips and porter fees by officers of the Ohio national guard are permissible. This department holds that they are, and cites authority section 5296 of the Code, which provides that pay of officers of the organized militia shall be the same as of like grade in the army. Paragraph 346, pay manual of the U. S. army, provides for certain expenditures to officers of the army."

Section 5296, General Code, provides as follows:

> "For service and attendance upon general courts-martial, courts of inquiry, and boards appointed by the commander-in-chief, as member, judge, advocate, recorder or witness, or upon inspection or other duty when ordered by the commander-in-chief, officers shall receive as *pay* the amount allowed by law for duty at annual encampments, *together with transportation in kind and actual necessary expenses for each day's service* and the time actually employed in going to and returning from such duty, courts or boards."

Under this section, officers shall receive as pay the amount allowed by law for duty at annual encampments, together with transportation in kind and *actual necessary expenses.*

The section providing for pay at annual encampments is 5293, General Code, which provides:

> "Officers and enlisted men shall receive *pay* for each day actually spent by them on duty at *annual encampments*, ordered by the commander-in-chief, at the following rate, together with all *necessary transportation*, quartermaster stores and medical supplies. Each commissioned officer shall receive *pay* as provided in the next preceding section. For each day's service performed, each enlisted man shall receive one dollar and rations at a rate not to exceed forty cents a day."

Under this section, each commissioned officer receives pay as provided by section 5292, General Code, which follows:

> "Officers and enlisted men of the national guard shall receive pay for their services at the following rates: *When in actual service, in case of riot or insurrection, or when called upon in aid of the civil authorities*, each commissioned officer shall receive such sum per day for *each day's service* performed as is allowed commissioned officers of like grade in the army of the United States, *together with the necessary transportation*, and each enlisted man shall receive two dollars for each day's service performed, *together with the necessary transportation*, commissary and quartermaster stores, and medical supplies. For all horses of enlisted men there shall be paid two dollars per day for each horse necessarily used by them for each day's service performed."

The statute which governs, therefore, is the latter statute and this statute provides that each commissioned officer shall receive such sum per day *for each day's service* as is allowed commissioned officers of like grade in the army of the United States, together with the *necessary transportation*.

It is clear that the effect of this statute is to provide that the pay of the officers in the Ohio militia shall be the same as that allowed officers of like grade in the army of the United States. As to expenses, however, special provision is made, and it is provided that *actual necessary expenses* shall be allowed in each case. There is nothing in this statute to justify the conclusion that the expenses allowed officers in the Ohio militia shall be the same as that allowed officers in the army of the United States. It is, therefore, unnecessary to determine what the manner of paying such expenses is in the regulations pertaining to United States army officers. Whatever the rule may be as to the allowance of tips and porters' fees to officers in the United States army, the rule followed with reference to the Ohio militia under these statutes, must be that which governs in Ohio.

Under date of March 22, 1912, I rendered an opinion to the Honorable E. M. Fullington, auditor of state, in which I said:

> " * * * that a 'tip' is defined as a gift or gratuity, and the Century Dictionary defines it as a donation to one for some service or pretended service while in the employ of another and for which the employer makes payment. In any light it is a gratuity or donation to one who is ready and willing to receive but who confessedly has no right to demand, and therefore cannot be considered as an expense chargeable to the state as other expenses may be.
>
> "Money paid to a porter may or may not be legal expense, depending upon the character of service rendered and whether the doing of that for which the money was given was, or was not, a part of his duties under his employment."

I regret to be obliged to differ with the opinion of your department, but in consistency with the rule as I saw it in the former opinion, and which I have no reason to overrule, I am compelled to conclude that tips may not be allowed as actual necessary expenses and porters' fees may not be allowed under this head, when they are rendered, in fact, as a gratuity, and not as a payment for some particular service, to which the officer is entitled without payment.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

163.

ENGINEER'S NEGLIGENCE—EMPLOYER NOT LIABLE FOR INJURY TO EMPLOYE NOT OCCURRING WITHIN SCOPE OF EMPLOYMENT.

An employer cannot be held liable for an injury resulting to an employe, whilst said employe was not acting within the scope of his employment.

COLUMBUS, OHIO, April 9, 1913.

GEN. GEORGE H. WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Your letter in regard to suit of Nickels, Admr., vs. Murray, for damages on account of the death of Nickels, caused by a premature explosion of a blast on May 26, 1912, together with statement of facts and testimony is at hand.

Murray's liability rests upon the question whether the decedent Nickels was in Murray's employment at the time of his death, and if he was, whether the death of Nickels was occasioned by a preventable accident or is to be charged to any wrong, default or neglect of Murray.

While one of the circuit courts of the state has undertaken to construe the act of April 30, 1910, and has held that an employer is liable, not under the old rule of negligence of the employer, which was the proximate cause of the accident, but for any wrong, neglect or default, which caused the accident, yet I feel that said construction will be much more difficult of application than the definition I would prefer—which is that an employer is liable for "preventable accidents."

I will therefore consider the question of liability under both constructions. At all events the person injured must be an employe, and must when injured be engaged in the line of his duty under his contract of employment.

That Nickels was in the employ of Murray will have to be considered; that he was engaged in labor of like character with that for which he was hired will not be questioned. But Murray was not employed to make demonstration of explosives (see Murray's statement); nor was Nickels employed to do this demonstrating (Ibid).

Murray says: "I accordingly stated the situation to one of our workmen, Anthony Nickels, and asked him if he would volunteer to take my place on Sunday for a couple of hours and show the men from company D how to blast. He readily agreed," etc.

Accepting this as a correct statement of the facts, Nickels was not engaged in the line of his duty when injured.

Section 6242, General Code, as amended April 30, 1910, defines employers' liabilities and enlarges the definition of superior servants as follows:

> "Section 6242. That in all actions brought to recover from an employer for personal injuries suffered by his employe or for death resulting to such employe from such personal injuries, while in the employ of such employer, arising from the negligence of such employer or any of such employer's officers, agents, or employes, it shall be held in addition to the liability now existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employe of such employer, is not the fellow servant, but superior to such other employe; any person in the employ of such employer in any way having charge or control of employes in any separate branch or department, shall be held to be

the superior and not fellow servant of all employes in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to repair or inspect the ways, works, boats, wharves, plant, machinery, appliances or tools, in any way connected with or in any way used in the business of the employer or to receive, give or transmit any signal, instruction, or warning to or for such employes shall be held to be the superior and not fellow servant to such other employes of such employer."

Section 6243, General Code, was amended at the same time and now reads:

"That if the employe of any such employer shall receive any personal injury by reason of any defect or unsafe condition in any ways, works, boats, wharves, plant, machinery, appliances or tools, except simple tools, in any way connected with or in any way used in the business of the employer, such employer shall be deemed to have had knowledge of such defect, before and at the time such injury was so sustained, and when the fact of such defect shall be made to appear upon trial of an action brought by such employe or his personal or legal representatives, against any such employer for damages, on account of such injuries so received, the same shall be prima facie evidence of neglect on the part of such employer; but the employer may show by way of defense such defect was not discoverable in the exercise of ordinary care."

Section 6244, General Code, eliminates the defense of "fellow servant." Section 6245, General Code, eliminates assumption of risk.

It will be observed that section 6242 is intended to add to the rights of recovery by an employe; that section 6243 provides for recovery where the injury was by reason of any defect or unsafe condition in any way, works, boats, appliances or tools except simple tools, in any way connected with or used in the business of the employer, but nowhere in this act can be found any expression tending to change the rule that the injured employe, to recover, must have been, when injured, engaged in the business of the employer, and in the line of his duty, as marked out or measured by the terms of his employment.

A careful reading of the exhibits attached to your letter fails to disclose the fact that Nickels was either engaged in the line of his duty or in the business of his employer, whether we hold that to be Mr. Murray, the Murray Stone Company or anyone else.

I feel that this case is clearly distinguishable from the line of cases where it is held that liability attaches in favor of one who joins with an employe in the work of the master, at the solicitation of an employe who had no right to hire, and that in no event can liability be found to attach against Murray, the company for which he was superintendent and on whose grounds the demonstration was made, or to the national guard at whose request, and for the benefit of which the same was made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

274.

APPROPRIATIONS—POWERS AND DUTIES OF ADJUTANT GENERAL WITH REFERENCE TO EXPENDITURE OF $13,000. APPROPRIATION FOR REMODELING AND REFURNISHING OFFICES OF BOARD OF PARDONS, GOVERNOR, ADJUTANT GENERAL, AUDITOR OF STATE AND THE DAIRY AND FOOD COMMISSIONER.

The work of moving, remodeling and refurnishing offices in the state house does not come within the terms of section 2314, General Code, requiring contracts for erection, alteration or improvement of state institutions or buildings, to be contracted for only after plans, specifications and estimates are prepared, when the amount of each contract let for work does not exceed $3,000. The remodeling of such office when the contract exceeds $3,000 would come within said statute.

Since the legislature has appropriated the lump sum of $13,000 for this work, it is discretionary with the adjutant general whether he will make separate contracts for the work or enter into one contract for all work.

It would also be legal for the separate departments, each to make its own contract for remodeling and refurnishing in the manner provided by law.

COLUMBUS, OHIO, May 20, 1913.

GENERAL GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 20, 1913, in which you make the following request for my opinion:

> "In the appropriation bill passed by the recent legislature, there is an item of $13,000 for remodeling and refurnishing the offices of the board of pardons, governor of Ohio, the adjutant general, auditor of state and dairy and food commissioner. As these various offices will have to be improved separately, I write to ask you whether this appropriation can be treated in independent amounts for the improvement of the various departments and handled in this way, each one of the items running under $3.000."

House bill No. 674 entitled "An act to make sundry appropriations, and to amend house bill No. 381, passed February 27, 1913, entitled an act 'To make partial appropriations for the last three-quarters of the fiscal year ending November 15, 1913, and the first quarter of the fiscal year ending February 15, 1914,' and to amend house bill No. 500, passed April 14, 1913, entitled an act 'To make general appropriations,'" passed April 28, 1913, carried among others, the following appropriation:

"STATE HOUSE AND GROUNDS.

"Roof repairs and replacement of skylights of capitol building..	$2,000.00
"Remodeling press room and rebuilding stairway, including material and labor required.....	1,500.00
"Moving, remodeling and refurnishing offices of the governor, adjutant general, auditor of state and dairy and food commissioner	13,000.00
"Repairs and improvement of wash room and toilets of the senate and house of representatives.....	1,500.00"

By the provisions of section 146 et seq., of the General Code, you are made the superintendent of the state house and grounds, and given supervision of all work or material required in or about the state house and grounds and the power to make contracts for such work and material. The sections bearing upon this are as follows:

"Sec. 146. By virtue of his office, the adjutant general shall be superintendent of the state house. He shall have supervision and control of the state house and heating plant therein, materials and persons employed in and about the state house, the grounds and appurtenances thereof and all work or materials required in or about them.

"Sec. 147. Each contract for such work and materials shall be in writing, signed by the superintendent on behalf of the state. A copy thereof shall be deposited in the office of the secretary of state within ten days after the contract is executed. No contract shall exceed the amount appropriated by law applicable to such purpose.

"Sec. 149. The superintendent shall keep a record of all contracts made by him, and of all accounts for labor and material, and certify such accounts to the auditor of state, as payments thereon shall become due."

The contracts for the erection, alteration or improvements of state institutions or buildings, or additions thereto, excepting the penitentiary, the aggregate cost of which exceeds $3,000 are regulated by sections 2314 to 2332 inclusive of the General Code, and it has been suggested that possibly sections 2314 and 2323 of said building code would apply to the contracts to be entered into in pursuance of the appropriation to which you refer, and as the aggregate of the appropriation is $13,000, and all of the work to be done is confined to the state house proper, it would be necessary for you to advertise for these separate contracts as is provided by said sections as to contracts for the erection, alteration or improvement of a state institution, or building or addition thereto. Said sections are as follows:

"Sec. 2314. Before entering into contracts for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out, and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof.

"Sec. 2323. No contract shall be made for labor or materials at a price in excess of the entire estimate thereof. The entire contract or contracts, including estimates of expenses for architects and otherwise,

shall not exceed in the aggregate the amount authorized by law for such institution, building or improvement, addition thereto or alteration thereof."

While it is not stated in your letter, I am advised that separate and distinct estimates were made for moving, remodeling and refurnishing, first, the office of the governor; second, the adjutant general; third, the auditor of state, and fourth, the dairy and food commissioner; that these separate estimates were filed with the finance committee of the legislature, and that the finance committee instead of making a separate appropriation for each department simply made one lump appropriation to cover the entire matter. This appropriation, of course, being the total of the separate estimates.

It is further to be borne in mind that while these different offices are each and all situated in the state house proper, yet they are separate and distinct departments, and the repairs or alterations made in one department do not necessarily have any connection whatever with any other department or with the state house as a whole. The items given in the appropriation, "moving and refurnishing," do not come under the building code at all, and the item of "remodeling" is the only one to which the building regulations could apply in any respect. By section 2314, above quoted, these provisions essentially apply to contracts for the erection, alteration or improvement of a state institution or building or addition thereto, and it is necessary to consider remodeling as an improvement in order to come under the regulations at all.

Now in the matter of making contracts for the remodeling feature of this work, it seems to me that the matter is disposed of by the language of the section itself. If you deem it best, and it is feasible and practicable to enter into one contract for remodeling all of the four separate offices, then such contract if it exceed in amount three thousand dollars would have to be let as provided by section 2314 et seq., but bearing in mind the manner in which this appropriation was made, that is, that separate estimates were furnished the legislature by the separate departments, and also the fact that this remodeling is a series of internal improvements which, except for the fact that the different offices were to be remodeled at practically the same time, have no connection whatever with each other, it seems to me that the practical and common sense method in which to transact the matter is to treat the contract for each department as a separate contract; if this is done, so long as each separate contract does not exceed three thousand dollars, then the same can be let by you as provided in section 146 et seq. In addition to the above it does not seem to me that the fact that this appropriation comes under the head of "state house and grounds" gives you exclusive control over these alterations and repairs. I think that if the separate departments each made its contract for remodeling in the manner provided by law, the contracts would be valid and the contract price could be paid out of this appropriation, provided, of course, the aggregate of all such contracts did not exceed the amount of the appropriation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

425.

PROPERTY OF STATE NOT SUBJECT TO ASSESSMENT—ASSESSMENT AGAINST STATE MAY BE PAID BY APPROPRIATION OF THE LEGISLATURE.

The property of the state is not subject to assessment for local improvement, and there is no provision for the payment of assessments against the state. These assessments would have to be met by an appropriation of the legislature.

Where the city of Columbus has a bill against the state for cluster lights around the state house, the city should, through its proper officers, bring the matter to the attention of the general assembly, to obtain an appropriation to cover the cost of placing these lights.

COLUMBUS, OHIO, July 17, 1913,

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of July 16th you enclose two assessment notices for construction of central district cluster lights which were placed upon streets surrounding the state house, and you inquire whether the state is liable for the bill, and if so, from what fund the same should be paid.

The lands of the state of Ohio are exempt from taxation under section 5351, General Code.

An exemption from taxation is not an exemption from assessment for local improvement.

Sec. 42 O. S. 128.

An examination, however, of such assessment statutes disclose that there is no provision in such statutes for the making of collection of assessments on property belonging to the state, and it is decided by the various authorities that unless the state provides for assessments to be made against it, especially property belonging to it, no assessment can be made against the state for the improvement of such property, and furthermore, there has been no provision made for the collection of any such assessment. I do not believe, therefore, that the property of the state is subject to assessment for local improvements, but even if it were so subject there is no provision made for the payment of such assessment, and therefore, the collection thereof since there is no provision of law that the state may be sued, would have to be made by appropriation by the general assembly.

The general assembly has not made any appropriation for the payment of such assessments nor are there any funds in your hands available for such purpose. I am, therefore, of the opinion that the state of Ohio is not liable for the payment of the assessment charged against it for the construction of the central district cluster lights, and even if liable there would be no fund from which the same could be paid, nor do I feel that it is your duty to call the attention of the general assembly to the matter. If the city of Columbus is desirous of obtaining from the legislature a sum sufficient to cover what has been estimated to be the state's share of the cost of such improvement, said city should through its proper officers, bring the matter to the attention of the general assembly.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

479.

MONEY APPROPRIATED BY LEGISLATURE FOR FURNISHING STATE OFFICES IN COLUMBUS MAY NOT BE USED TO FURNISH STATE OFFICES OUTSIDE OF COLUMBUS.

When an appropriation is made for furniture and carpets necessary for the departments of government located in the city of Columbus, this money may not be used to pay for office furniture in a state office outside of the city of Columbus.

COLUMBUS, OHIO, August 14, 1913.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of August 7th, enclosing a bill rendered by the Ohio state reformatory to the bureau of labor statistics, which shows on its face that certain furniture was furnished, presumably at the request of the bureau of labor statistics, for use in the Dayton office, or rather, branch office of the bureau, and you call my attention to the appropriations made by the last general assembly for the use of your department, and request my opinion as to whether or not you may lawfully pay the bill in question which has been presented to you from this appropriation.

The general appropriation bill for the year 1913, 102 O. L. 611, contains the following item:

"ADJUTANT GENERAL'S DEPARTMENT.

* * * * * * * * * * *

"For furniture and carpets necessary for use in the department(s) of government *located in the city of Columbus, Ohio* .....$5,000.00"

In passing I may remark that the bureau of labor statistics received no appropriation for furniture and carpets, and that section 3 of the appropriation bill expressly prohibits the payment of bills for furniture and carpets out of appropriations for contingent expenses, so that if the bill attached to your letter cannot be paid out of the appropriations above quoted it cannot be paid at all.

In my opinion the bill cannot be so paid. Whatever may have been in the mind of the legislature in using the language which I have quoted, it is impossible to avoid the conclusion that the appropriation is not available to pay for furniture and carpets to be used elsewhere than in offices located at Columbus.

Of course, the bureau of labor statistics is a "department of government located in the city of Columbus" in the sense that its principal office is there located. If the appropriation be given an excessively liberal interpretation, then the furniture and carpets for its use, whether in the city of Columbus or elsewhere, should be payable therefrom. Such a liberal interpretation, however, would, in my opinion, defeat the purpose of the limitation in the appropriation. Obviously this limitation is inserted because it was conceived that the adjutant general, being the custodian of the state house, was in a position to better supply the needs of the offices located in Columbus than the several heads of the departments themselves. This consideration, however, would not apply to the offices of state departments located in other cities, about the

needs of which the adjutant general would not be in a position to be advised.

It appears that the general assembly has, doubtless by inference, failed to provide for furniture and carpets for offices located elsewhere than in the city of Columbus. Such an oversight, however, can be remedied only by the legislature itself.

I, therefore, advise you to refuse payment of the bill tendered, and I enclose the same herewith.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

549.

CONVICT LABOR MAY BE EMPLOYED TO CONSTRUCT AN ADDITION TO THE STATE ARSENAL.

Where $3,000.00 has been appropriated for the construction of an addition to the state arsenal the work may be done by convict labor. The convict labor so required may be secured by the state armory board on the requisition and authority of the board of administration.

COLUMBUS, OHIO, October 10, 1913.

HON. GEORGE H. WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of October 8, 1913, in which you ask opinion of me as follows:

> "At the last session of the legislature an appropriation was made for building an addition to the state arsenal. This is on property owned by the state and the building to be the property of the state.
>
> "It would be a matter of economy to the state of Ohio if convict labor could be secured in doing this work. Application has been made to Dr. Shepherd, state board of administration, and he has stated that if the opinion of the attorney general is that this can be done, he will furnish the labor."

Section 5278 General Code provides as follows:

> "The adjutant general shall have general direction over the state arsenal, state camp grounds and other military property of the state. He shall employ such labor thereat, as the governor deems the necessities and best interests of the state require."

The appropriation referred to is one made to the adjutant general's department by the legislature (103 O. L. 611) and reads as follows:

"Magazine and ambulance sheds state arsenal.....$3,000.00"

I assume that it is not questioned but the state arsenal is a state institution or building, as much so as any other institution or building owned and controlled by the state.

The amount of the appropriation indicates that the addition or improvement in question does not come within the provisions of section 2314 and succeeding sections of the General Code which provide that the construction, alteration

or improvement of a state institution or building, other than the penitentiary, the aggregate cost of which exceeds three thousand dollars shall be on contract let on competitive bids as therein provided, and it only remains to ascertain whether the statutes permit the employment of convict labor on the work in question.

Sections 2228, 2229 and 2230, General Code, provide as follows:

> "Sec. 2228. The board of managers of the Ohio penitentiary, the board of managers of the Ohio state reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institution may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter.
>
> "Sec. 2229. The board of managers of the penitentiary and the board of managers of the reformatory, so far as practicable, shall cause all prisoners serving sentences in such institutions, physically capable, to be employed at hard labor for not to exceed nine hours of each day other than Sundays and public holidays.
>
> "Sec. 2230. Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; for a public institution owned, managed and controlled by the state or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

These sections are part of an act passed March 29, 1906 (98 O. L. 177), the primary purpose of which was to withdraw convict labor from competition with free labor in the manufacture of trade commodities, and to confine the labor of such convicts to work for the state and other public agencies or institutions, or in the production of commodities to be used by such public agencies or institutions.

As I see it the only question presented on a construction of the sections of the General Code above set out is whether it is the intent of their provisions to confine the work and labor of convicts therein authorized to such as can be done and performed at the institution wherein they are confined. Aside from a consideration of the manifest purpose of the enactment of which the sections are a part, the cardinal rules of construction pertinent to a consideration of the provisions of these statutes with respect to the question suggested are, first, that the intent of the legislature is to be sought first of all in the language employed; and second, the statutory provisions are to be so construed as to give meaning and effect to every part and word (66 O. S. 621; 73 O. S. 159).

I am of the opinion that the words "in the penitentiary or reformatory" in section 2228 limit the word "prisoner" rather than the words "labor or

time," and that it is the intent of the statute to prohibit the work or labor of convicts on private contracts either in or out of the penal institutions therein mentioned. As pertinent to the question at hand I am of the opinion by reason of the provisions of sections 2228 and 2230 that convicts in the penitentiary or the state reformatory may work for the state or a public institution owned and managed by it, and the products of their labor may be disposed of to the state or to such public institution; and further, that their labor may be for the preparation and manufacture of building material for the construction or repair of a state institution or such labor may be in the work of the construction or repair of such state institution.

Convict labor may therefore be used in the construction of the addition to the state arsenal contemplated by the appropriation, and such labor may be employed either in the preparation and manufacture of the building material necessary to the construction of said addition, or, such labor may be employed at the building in the construction and erection of the same.

Section 2206, General Code, provides as follows:

> "Work, labor or service shall not be performed by a convict within the penitentiary unless it be expressly authorized by the board of managers."

By section 1839, General Code, the Ohio board of administration has succeeded to all the rights of the boards of managers of the penitentiary and the state reformatory, and the convict labor you may desire in the construction of the improvement in question can be furnished only on the requisition and authority of said board of administration.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

598.

THE ORGANIZATION AND SERVICE OF THE MEDICAL DEPARTMENT OF THE OHIO NATIONAL GUARD SHOULD BE FASHIONED AFTER THAT AS PRESCRIBED FOR THE MEDICAL DEPARTMENT IN THE REGULAR SERVICE.

The designation of officers of the medical corps as staff officers would attempt an arrangement contrary to the intention of section 5190, *General Code, requiring the national guard to be organized in a like manner as prescribed for the regular and volunteer armies of the United States.*

COLUMBUS, OHIO, November 6, 1913.

HONORABLE GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Under favor of October 28th you request my opinion as to whether the officers of the medical department are staff officers under the purview of section 5192, General Code, which provides that:

> "permanent commanders of divisions, brigades, regiments and separate battalions shall nominate the staff officers therefor for appointment by the governor."

Section 3, article IX of the constitution of Ohio, is as follows:

"the governor shall appoint the adjutant general, quartermaster general and such other staff officers as may be provided for by law. Majors general, brigadiers general, colonels or commandants of regiments, battalions or squadrons, shall severally appoint their staff and captains shall appoint their non-commissioned officers and musicians."

Section 5190, General Code, provides:

"* * * the national guard shall be organized in a like manner as prescribed for the regular and volunteer armies of the United States."

Section 5189 of the Ohio Code provides as follows:

"the Ohio national guard shall consist of not more than one hundred companies of infantry; four batteries of artillery; four troops of cavalry; one band for each organized regiment and separate battalion; a medical corps; a signal corps; a corps of engineers; the governor's staff and staff officers and non-commissioned staff officers provided in section 5991."

In the regular service, the medical department is a separate department and served by proper assignment with the various organizations in the service.

United States Compiled Statutes 1901.
Supplement 1911.
Pages 299 to 305 inclusive.

Act April 23, 1908, c. 150.
Sections 7 and 8.
35 Stat. 68.

Nowhere can I find any provisions designating officers of the medical corps as such staff officers of the commanders of divisions, brigades, regiments and separate battalions, as is comprehended by section 5192 of the General Code. I am of opinion that such a designation would attempt an arrangement contrary to the intention of section 5190, General Code, requiring the national guard to be organized in a like manner, as prescribed for the regular and volunteer armies of the United States.

I am, therefore, of the opinion that the organization and service of the medical department should be fashioned after that as prescribed for the medical department in the regular service, as prescribed by the United States statutes above cited.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State Armory Board)

75.

ARMORY—STATE ARMORY BOARD MAY NOT ADVERTISE AND ENTER INTO CONTRACT FOR BUILDING OF ARMORY UPON PLEDGES OF DONATIONS—MUST HAVE MONEY.

The state armory board is not authorized to enter into a contract until funds are available to pay the obligations created thereby. When citizens, therefore, have pledged $50,000.00, *in contributions for the erection of an armory, the board may not enter into a contract for the same, until the money has been received by it.*

COLUMBUS, OHIO, February 11, 1913.

COLONEL BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 30, 1912, as follows:

> "The armory board met with the Akron chamber of commerce at Akron, Ohio, on December 27th. This chamber, acting for the city of Akron, proposes to donate a site and fifty thousand dollars towards the erection of an Akron armory. The site would be a part of the civic center and this donation is conditioned on the state using fifty thousand dollars of its money in the armory. In this way the state would acquire a valuable tract of ground and an armory costing one hundred thousand dollars.
>
> "The city's contribution of fifty thousand dollars is represented by pledges, payable twenty-five thousand dollars about February 1st, and twenty-five thousand dollars about July 1st. The armory board informed the chamber of commerce that it could not enter into contracts for building the armory until all of this fifty thousand dollars had been paid to the state's credit. The chamber of commerce wishes the building begun prior to July 1st and requested that I write you to ascertain if this could be done under the above detailed circumstances."

Section 5256 of the General Code provides:

> "The board may receive gifts or donations of land, money or other property for the purpose of aiding in the purchase, building, furnishing or maintaining of an armory building. All lands so acquired shall be deeded to the state of Ohio, and all property received under the provisions of this section from any source, shall become the property of the state."

Sections 5258 and 5259, General Code, provide the method of advertising for bids for the erection of armories, the execution of contracts and bonds for the faithful performance thereof. The state armory board is not authorized to enter into contracts until the funds are available to pay the obligations created thereby. To do so would establish a bad precedent and might result in needless delay and confusion and lead to useless litigation.

I, therefore, advise that no steps be taken toward the erection of an armory at Akron until the funds needed therefor are available to your board.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

96.

ABSTRACT OF TITLE—LAND IN CITY OF WARREN, OHIO—DEFECTS AND OMISSIONS.

COLUMBUS, OHIO, February 15, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 29th enclosing abstract of title and non-executed deed for the following described premises, which it is proposed to donate to the state of Ohio for an armory site, to wit:

"Situate in the city of Warren, county of Trumbull and state of Ohio, and known as being part of lot number fifty-four (54) in the original town plat of Warren and is bounded and described as follows: Beginning at a stake in the south line of High street and in the north line of said lot number fifty-four (54) and seven rods east from the northeast corner of lot number fifty-three in said town plat, said stake being at the northeast corner of lands conveyed by James Scott to Isaac Fithian by deed dated October 29, 1827, and recorded in Trumbull county Records of Deeds, Book V, page 131; thence south along the east line of lands conveyed to Isaac Fithian as aforesaid thirteen (13) rods to the south line of lot number fifty-nine (59) in said original town plat; thence east along the north line of said lot number fifty-nine (59) about six and one-half (6½) rods to the southwest corner of lands conveyed by Joel F. Asper to the wardens and vestry of Christ's church of Warren by deed dated September 9, 1861, and recorded in Trumbull county Records of Deeds, Book 85, page 18; thence north along the west line of said lands conveyed to the wardens and vestry of Christ's church as aforesaid thirteen (13) rods to the south line of High street; thence west along the south line of said street about six and one-half (6½) rods to the place of beginning, and being further known as city lot number seven hundred ninety-two (792), according to the revised map of the city of Warren, as recorded in Trumbull County Records of Maps, Book 5, pages 27 and 28."

I have carefully examined said abstract and deed, together with the transcript of the proceedings of council of the city of Warren in relation to the purchase of said land, and I find no defects therein which would prevent the state from acquiring a good title. There are no liens against said real estate as disclosed by the abstract, except a mortgage for $2,000.00 given by Olive M. Adams and husband to Mrs. Emeline McKee, and taxes for the last half of 1912 amounting to $52.59. A certificate of the clerk of the United States district court for the southern district of Ohio, eastern division, as to suits, judgments and bankruptcy proceedings in said court against the present owner of said land should be attached to the abstract.

Subject to the foregoing, I am of the opinion that upon the execution and delivery of a deed the state of Ohio will acquire a good and indefeasible title to said premises in fee simple.

I am herewith returning the abstract, deed, transcript of council proceedings and correspondence had between you and the owner of said land.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

210.

CONTRACT—DUTY OF ARMORY BOARD TO SUBMIT DISPUTED CLAIM TO COURT FOR SETTLEMENT WHEN SURETY COMPANY PERFORMS ABANDONED CONTRACT.

When by reason of the death of a contractor, who had entered into the performance of a contract made by the state armory board, a surety company enters into the completion of such contract and numerous conflicting and confused claims are presented, it is the duty of the board to submit the matter to the court for settlement.

COLUMBUS, OHIO, April 1, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 24th enclosing the correspondence carried on between your board and Citizens Trust & Guaranty Company, of West Virginia, in reference to the payment of claims arising out of the construction of an armory at Batavia, Ohio. The correspondence is quite extensive and I will not attempt to quote it here. The facts are substantially as follows:

> "The armory board entered into a contract with one J. L. H. Barr for the construction of said armory. Said contractor gave a bond for the faithful performance of said contract, with Citizens Trust & Guaranty Company, of West Virginia, as surety, which bond was approved by your board. The contractor commenced the work of construction and the same was proceeding toward completion until the death of the contractor on November 16, 1912. Thereafter it was discovered that he owed various persons and firms who had performed labor or furnished material for the construction of said armory the sum of about $9,400.00. Estimates had been allowed from time to time, aggregating $10,228.00 during the progress of the work, and on completion the contractor would have been entitled to an additional sum of about $7,665.00. Most, if not all of those who had performed labor or furnished materials, as stated above, attempted to perfect liens. Under date of December 4, 1912, in response to your request of November 24th, I advised that no liens could be effective as against the funds remaining in your possession after the completion of the Batavia armory, and requested you to give immediate notice to the surety on the contractor's bond to complete said contract. This notice was duly given and the surety company, within a reasonable time, undertook the work and completed said armory to the satisfaction of the state armory board, and the same was duly accepted by said board on the first day of February, 1913. The surety company presented a claim for labor and materials alleged to have been furnished by it after assuming the completion of this contract, amounting to $1,369.00. In addition to this, the surety company claims the sum of $2,390.00 for some features of the work which the contractor had ordered, the payment of which said surety company guaranteed, for the purpose, as it claims, of expediting the work."

Under the foregoing facts you desire my advice as to how you should proceed to settle these various claims.

On account of the great difficulty of determining to whom the balance in the Batavia armory building fund legally belongs, in view of the many conflicting claims thereto and some dispute as to the validity of certain claims, I am of the opinion that it is not within the province of your board to assume the responsibility of determining to whom this money legally belongs, as that is the functon of a court.

I, therefore, advise that you deposit said money with the clerk of the court of common pleas of Clermont county, Ohio, and file a petition in said court making all known claimants to said money, parties, and ask the court to determine to whom said money belongs, and to order the distribution thereof, and relieve the state of Ohio from liability on account thereof.

The correspondence discloses the names of a number of these claimants, but as I am not certain that the list is complete, I will await your further advice in this respect before proceeding to prepare the petition.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

268.

ABSTRACT OF TITLE—PROPERTY SITUATED IN VILLAGE OF OTTAWA.

COLUMBUS, OHIO, May 19, 1913.

The Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—Messrs. Bailey & Leasure, attorneys at law, Ottawa, Ohio, have forwarded to this office for examination and approval, an abstract of title and deed from the trustees of Ottawa lodge No. 565, Knights of Pythias, for the following described real estate, upon which it proposed to erect an armory, to wit:

> "Situated in the village of Ottawa, county of Putnam and state of Ohio, and known as inlot number two hundred fifty-seven (257) and inlot number two hundred fifty-six (256), except twenty-five feet off of the east side of said inlot number two hundred fifty-six (256)."

I have carefully examined said abstract and find from such examination that there is no break in the chain of title from the United States government to the trustees of Ottawa lodge, number five hundred sixty-five (565), Knights of Pythias.

The will of Henry Ayres devises all of his property to his wife Sarah A. Ayres for life, and at her death provides that the same shall descend to John Dean Adams and Emma Harman, in equal shares. An affidavit should be attached to the abstract as to whether the wife of said Henry Ayres was dead at the time of the execution of the deed from said Adams and wife, to Emma Harman, and from the latter to the trustees of Ottawa lodge, number five hundred sixty-five (565), Knights of Pythias.

The abstract discloses the existence of a mortgage on said premises from the present owner to Emma Harman, for the sum of thirty-five hundred dollars ($3,500). The last half of the 1912 taxes and some street assessments, against said property are unpaid, and the undetermined taxes for the year 1913 are a lien. No examination of the United States court records appears to

have been made. A certificate of the clerk of said court, as to the pendency of suits therein, against the present owner of this property, should be attached to the abstracts.

Subject to the foregoing, I am of the opinion that the state of Ohio will acquire a good and sufficient title to said property, in fee simple.

The abstract and deed are herewith enclosed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

319.

ABSTRACT OF TITLE—PROPERTY SITUATED IN NAPOLEON, OHIO.

COLUMBUS, OHIO, June 11, 1913.

The Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—I am transmitting to you herewith, abstract of title and deed from the village of Napoleon to the state of Ohio, for lot number 100 in said village, which is to be donated to the state for the use as an armory site.

I am of the opinion, after careful examination of said abstract and deed, that the grantee will acquire thereby a good and marketable title to said premises, in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

405.

ABSTRACT OF TITLE—PROPERTY SITUATED IN CITY OF GALION, CRAWFORD COUNTY, OHIO.

COLUMBUS, OHIO, July 30, 1913.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of July 16th you submitted to me for examination and approval, abstracts of title to the following described real estate for an armory site, to wit:

> "Situated in the city of Galion, county of Crawford, and state of Ohio, and known as being inlot No. 115 and the north half of inlot No. 117 of the new or revised inlots in the city of Galion, Ohio, as same are consecutively numbered, excepting a strip 45 feet in width off the east end of each of the aforesaid inlots."

A careful examination disclosed no defects therein that would prevent the state of Ohio from acquiring a fee simple title. There appears to be several uncancelled mortgages on said premises, but as they were executed a great many years ago, action upon them has been barred by the statute of limitations.

Lot No. 117 was formerly owned by the Evangelical Lutheran Peace Congregation of Galion, Ohio, but was conveyed by the trustees thereof to John

Jacob Schaefer, as shown on page 13 of the abstract. The court proceedings, authorizing such sale, should be incorporated in the abstract and also proceedings leading up to the execution of the sheriff's deed, noted on page 11.

There are no liens against said real estate except the undetermined taxes for the year 1913.

The deed from the city of Galion to the state of Ohio is in proper form and when the same is executed, will be sufficient to convey to the state of Ohio a good and marketable title in fee simple.

A resolution authorizing the mayor and director of public service to convey said real estate to the state of Ohio was passed by the council of the city of Galion on July 8, 1913. The same was approved by the mayor and attested by the clerk on the same day.

The question has been raised as to whether such resolution is subject to the provisions of the municipal, initiative and referendum statutes (sections 4227-1 to 4227-6, General Code, inclusive), as amended by the last session of the general assembly (103 Ohio Laws 211).

Section 4227-2 provides in part:

> "An ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of such municipal corporation, except as hereinafter provided.
>
> "When a petition signed by ten per cent. of the electors of any municipal corporation shall have been filed with the election officer, officers or board having control of elections in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, ordering that such ordinance or measure, be submitted to the electors of such municipal corporation for their approval or rejection, such election officer, officers or board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to thirty days after the filing of such petition. * * *
>
> "No such ordinance or measure shall go into effect until and unless approved by the majority of those voting upon the same."

The other related sections have no bearing upon this question and need not be considered.

I am of the opinion that the provisions of section 4227-2 apply to resolutions authorizing the conveyance of real estate owned by a municipal corporation to the state for armory purposes. The deed from the city of Galion to the state of Ohio should not be executed until the expiration of 30 days from the signing of the aforesaid resolution by the mayor, unless a referendum petition is filed in the meantime. In that event, the deed should not be executed until the resolution is duly approved at the next succeeding, regular or general election, as provided by section 4227-2. The abstracts and deed are herewith enclosed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

420.

STATE ARMORY BOARD — BILLS CHARGED TO ARMORY COMPANY SHOULD NOT BE PAID BY STATE—CONTRACT SHOULD BE ENTERED INTO BY STATE ARMORY BOARD.

Where in the construction of the armory at Pomeroy, after the statutory allowance of $20,000 *had been exhausted, extra amounts had been expended and charged to the armory company, said amounts may not be legally paid by the state armory board. Where bills of this nature are intended to be paid by the state, the contract should be duly entered into by the state armory board.*

COLUMBUS, OHIO, July 28, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—On July 15th you requested my opinion on the following:

> "I herewith have the honor to enclose a copy of a resolution passed July 12th by the armory board together with a copy of the account therein referred to.
>
> "In completing the armory at Pomeroy, several difficulties were encountered which increased the estimated cost and the board finished its work of original construction when it had exhausted the maximum statutory allowance of twenty thousand dollars. But at that time several items were required in order to maintain the armory and several items were furnished by contractor and charged to the local company which has not paid same, being probably unable to do so. It seemed to the board that it should take care of this account under its statutory duty to maintain the armory but the board thought best to obtain your advice before doing so."

Section 5261, General Code, limits the amount that may be expended by the state in the building or lease of an armory, and reads as follows:

> "The maximum amount to be expended by the state for the building or purchase of an armory for a company or single organization, shall not exceed twenty thousand dollars, and ten thousand dollars additional thereto for each organization or headquarters provided for. In no city or village shall more than one building be erected or purchased until provisions have been made for all organizations therein, nor shall a building be leased or rented for the use of a company or single organization in excess of six hundred dollars per year for each organization provided for."

The state armory board is required by section 5255 to provide armories and maintain the same. That section reads:

> "The board shall provide armories for the purpose of drill and for the safe keeping of arms, clothing, equipments and other military property issued to the several organizations of organized militia, and may purchase or build suitable buildings for armory purposes when, in its judgment, it is for the best interests of the state so to do. The board shall provide for the management, care and maintenance of

armories and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

The question for determination is whether the items of said account come under the head of new construction or maintenance.

Maintenance is defined by the Century dictionary as

"an act of maintaining, keeping up, supporting or upholding; preservation; sustentation."

From this definition it is clear that the word "maintenance" is not broad enough to include new construction.

If the items of said account were necessary in order to complete the armory and place it in a condition suitable for occupancy in the first instance, the account cannot be allowed under the head of maintenance.

Without discussing the various items constituting said account, I think the fact is apparent on the face of the bill rendered, that the account was for work done as a part of the original construction of said armory. That such was the understanding of the contractor when the work was performed is very evident. Although the account purports to be charged to the Ohio state armory board, it appears that it was for "extra work to be charged to O. N. G., Pomeroy, Ohio," and the following notation is found at the bottom of the bill:

"This amount was to have been paid by O. N. G. at Pomeroy, O."

If said account were a proper charge for maintenance, it ought not to have been rendered, for extras, as was done.

The duty of maintaining said armories is conferred by law upon the Ohio state armory board and not upon local companies of the state militia. There is no authority vested by the statutes in the latter to enter into contracts, either for construction or maintenance of armories so as to be binding upon the state.

If this bill were originally intended to be charged against the state, a contract should have been duly entered into by the Ohio state armory board. Nowhere does it appear that this has been done; in fact, your letter discloses that the contrary is true.

The work seems to have been performed by virtue of an arrangement between the local company and the contractor and he must look to the company for payment.

It is, therefore, my opinion that said account may not legally be paid by the Ohio state armory board out of the funds at its disposal for the maintenance of armories.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

426.

STATE ARMORY BOARD MAY PAY INCREASED EXPENSE OF MAINTAINING ARMORY CAUSED BY THE RECENT FLOODS.

Where because of flood damages, the expenses of maintaining an armory were greatly increased, the state armory board may pay such increased expense, since there is no statute limiting the amount that may be expended by the board for the maintenance of armories.

COLUMBUS, OHIO, June 26, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 21st, in which you state:

> "In Delaware, Ohio, the state leases an armory from the county commissioners. During recent flood this armory was damaged to some extent by the water.
>
> "Heretofore the expenses of regular maintenance of this armory has been just six hundred dollars per year, and the company commander now wants the armory board to repair the flood damages and cause the state to pay for same. Such payment would be in excess of the six hundred dollars for maintenance of this armory for this year.
>
> "The armory law is silent as to how much the board should pay for maintenance; but specifically provides that only six hundred dollars may be spent for rentals of each armory.
>
> "The board therefore requests an opinion as to whether or not extraordinary maintenance expense may be paid in cases where rentals and regular maintenance of armory cost six hundred dollars per year."

Under date of May 19th you submitted another communication, enclosing certified copy of the account for labor and material, amounting to $132.09, together with affidavit of the company commander that the expenditure of said amount was necessary to restore the Delaware armory to a condition suitable for occupancy.

Section 5255, General Code, provides:

> "The board shall provide armories for the purpose of drill and for the safe keeping of arms, clothing, equipments, and other military property issued to the several organized militia, and may purchase or build suitable buildings for armory purposes when, in its judgment, it is for the best interests of the state so to do. The board shall provide for the management, care and maintenance of armories and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

Section 5261, General Code, provides in part as follows:

> "* * * nor shall a building be leased or rented for the use of a company or single organization in excess of six hundred dollars per year for each organization provided for."

From these quoted provisions of statute, it is clear that the state armory board is charged with the duty of maintaining armories and that, as stated in your first communication, the rental of the armory may not exceed six hundred dollars per annum. No limit is placed by the statutes upon the amount that the armory board may expend for the maintenance of an armory, whether the same is leased or owned by the state.

You have advised me orally, that the armory board allows six hundred dollars per annum for the maintenance of each armory in the state, and when an armory is leased, said sum of six hundred dollars is required to cover both rental and maintenance. The amount that may be paid for rent is limited by the statute, but the limitation upon the amount that may be spent for maintenance derives its authority from a rule of the armory board and not by virtue of any statute. I know of no reason why such rule may not be so modified as to permit the payment of extraordinary maintenance expenses in cases where the same is necessary and especially in view of the fact that the statutes do not limit the amount that the armory board may expend for maintenance, I am of the opinion that said board may legally pay said accounts out of the state armory fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

460.

NEW MECHANICS' LIEN LAW DOES NOT AFFECT CONTRACTS ENTERED INTO BY THE STATE.

The new mechanics' lien law, 103 O. L., 369-379, does not affect contracts entered into by the state, consequently no change is necessary in the printed form submitted by the state armory board.

COLUMBUS, OHIO, August 25, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of June 23, 1913, you write and ask opinion of me, as follows:

> "The state armory board has been using the form of builders' proposal hereto attached in securing bids for construction of state armories. We are about to have a new lot of forms printed with minor changes.
>
> "Before doing so we have the honor to request that you approve the printed form making such changes as you may consider necessary under any recent amendment to the mechanic lien law which affect a contract made under such proposal."

Sections 8324 and 8325, General Code, provide as follows:

> "Section 8324. Any sub-contractor, material man, laborer or mechanic, who has performed labor or furnished material, fuel, or machinery, who is performing labor or furnishing material, fuel or machinery, or is about to perform labor or furnish material, fuel or machinery, for

the construction, alteration, removal or repair of any property, appurtenance or structure, described in sections eighty-three hundred and eight and eighty-three hundred and sixteen, or for the construction, improvement or repair of any turnpike, road improvement, sewer, street or other public improvement, or public building provided for in a contract between the owner, or the board officer or public authority and a principal contractor and under a contract between such sub-contractor, material man, laborer or mechanic, and a principal contractor or sub-contractor, at the time of beginning to perform such labor or the delivery of the fuel or machinery, or at any time, not to exceed four months from the performance of the labor or the delivery of the machinery, fuel or material, may file with the owner, board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of such labor performed, and to be performed, material, fuel or machinery furnished, containing a description of any promissory note or notes that have been given by the principal contractor or sub-contractor on account of the labor, machinery or material, or any part thereof, with all credits and set-offs thereon, and proof that the sworn and itemized statement above provided for was mailed by registered letter to the address of the owner, board or officer, shall be taken as prima facie evidence of the filing thereof with the owner, board or officer, as herein provided.

"Section 8325. Upon receiving the notice required by the next preceding section, such owner, board or officer or public authority or authorized clerk, agent or attorney thereof, shall detain in his hands all subseuent payment from the principal or sub-contractor to secure such claims and the claims and estimates of other sub-contractors. material men, laborers, mechanics or persons furnishing materials to or performing labor for any contractor or sub-contractors who intervene before the next subsequent payment under the contract, or within ten days thereafter."

These sections were a part of our statutory law long before the recent act creating a lien in favor of contractors, sub-contractors, laborers and material men (103 O. L., 369), and before the adoption of the recent constitutional amendment authorizing its enactment. Under these sections above noted it has been held that although they were effective, within the limitations of the constitution as to public buildings or improvements erected or made by officers or boards of political sub-divisions of the state, they had no application to buildings or improvements erected or made by the state itself.

"Clark vs. Haggerty, 5 C. C., 235, 238;
Merrit vs. Morrow, 10 N. P. (N. S.) 279."

This conclusion of the courts is conformable to the fundamental principle obtaining in constructions of statutes that a state is not bound by the terms of a general statute, unless it be so expressly indicated, and conformable also to the cardinal principle that a state cannot be sued at the instance of a citizen without its consent.

"Merritt vs. Morrow, supra;
State ex rel. vs. Board of Public Works, 36 O. S., 409;
State ex rel. vs. Cappeler, 39 O. S., 207, 213."

The purpose and effect of the constitutional amendment as to mechanics' liens adopted September 3, 1912 (Art. II, Sec. 33), was to authorize the enactment of appropriate laws granting to sub-contractors—using that term in its comprehensive sense—a direct lien on buildings or improvements to which they may have contributed material or labor and which, by decision of the supreme court, was denied them under the constitution as it stood before the amendment. And the legislation enacted in pursuance to his constitutional amendment (103 O. L., 369-379) is in its purpose appropriate to this end.

An examination of this legislation as to mechanics' liens enacted at the last session of the legislature discloses that no provisions were made therein with reference to liens on public buildings or improvements of any kind, or against public funds that may become due and payable on account of their erection or construction. Sections 8324 and 8325, General Code, still stand as the sole authority for liens or claims against public funds on account of material or labor furnished in the erection or construction of public buildings or improvements. As before noted, these sections have no application to buildings or improvements erected or constructed by the state, and it follows in answer to your inquiry, that no changes are necessary in the printed form of builders' proposal submitted by you, on account of the recent legislation as to mechanics' liens.

In arriving at this conclusion I have not overlooked the fact pertinent to the reasoning upon which the courts have proceeded in holding legislation of this kind not applicable to or against the state, that by amendment to the constitution "suits may be brought against the state in such courts and in such manner as may be provided by law" (Art. I, Sec. 16). This provision is as yet without importance, however, for the reason that no legislative provisions have been made as to such suits. Furthermore, the principle of construction before noted, that the state is not bound by the terms of a general statute unless it be so expressly provided, is of itself full and sufficient support for the conclusion that the mechanics' lien laws do not affect the state as to buildings or improvements erected or constructed by it.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

477.

JOINT ARMORY AND MEMORIAL BUILDING MAY BE ERECTED—FUNDS FOR THE CONSTRUCTION OF SUCH BUILDING MAY BE ACCEPTED BY ARMORY BOARD FROM CLARK COUNTY MEMORIAL ASSOCIATION.

The state armory board may receive the money derived from the sale of bonds from the Clark County Memorial Association, for the construction of the Clark county memorial building, and this money, together with an appropriation of its own funds, may erect an armory and memorial building combined.

COLUMBUS, OHIO, September 10, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—On August 16th you wrote me that the Clark County Memorial Association proposed to transfer to the state armory board the sum of $250,000, this being the amount derived from a bond issue voted for by the electors of Clark county, for the purpose of constructing a memorial building. The object of the transfer was to provide for the construction of a joint memorial building and armory. Mr. Frank L. Packard, an architect of Columbus, Ohio, had been

selected by the memorial association as architect for its building, and the association desired to retain him as a representative of the memorial features of the joint building.

In addition to this you furnish me with copy of a resolution adopted by the said memorial association, in which it is provided that its tentative proposal for the construction of a joint memorial-armory building at Springfield be referred to the attorney general for his opinion as to the proper method of procedure in such joint construction, and the legal feasibility thereof. The resolution stipulates that Architects Packard and Best be requested to prepare, without cost to the state, sketch of such proposed joint building; the said sketch to be submitted to both boards before further action.

Sections 3059-3069, exclusive of sections 3063-1 to 3063-3, inclusive, provide that upon certification by the county commissioners that it is desirable to erect, furnish and maintain a county memorial building to commemorate the services of the soldiers, sailors, marines and pioneers of the county, and to expend for that purpose not to exceed $250,000, the governor shall appoint a board of trustees of five citizens of the county, which shall be known as the "Memorial Association of ..... County, Ohio." This board shall receive no compensation, and is to be paid its necessary expenses. Immediately upon their appointment these trustees shall notify the deputy state supervisors of elections of their appointment and organization, direct the submission to popular vote, at the next county election, of the question of the issue of bonds, in the amount fixed in the resolution passed by the commissioners, and also of the erection and maintenance of the memorial building. If the majority of votes cast be in favor of such bond issue and the erection of a memorial building, the county commissioners shall issue and sell the county bonds in an amount not to exceed the sum provided for in the resolution. The fund so created shall be placed in the county treasury to the credit of the "memorial building fund" and shall be paid out on the order of the trustees, certified to by the chairman and secretary thereof.

The trustees are authorized to employ an assistant secretary and such architects, clerks, laborers and other employes as may be necessary, and may acquire lands necessary for their use, as well as prepare plans, specifications and make contracts for the construction of the memorial building.

Upon its completion the building is to be turned over to the county commissioners, who are to maintain, equip, decorate and furnish it, at a cost not to exceed $250,000. For the purpose of caring for and improving such building, they are authorized to levy an annual tax.

I gather from your question that all of these statutes have been complied with, and the money is now in the county treasury of Clark county.

Subsequent to the passage of the statutes just referred to, and supplementary thereto, the legislature passed an act relating to the expenditure of money in the "memorial building fund." This act is embodied in sections 3063-1 to 3063-3, inclusive, which substantially provide that the "memorial building fund" may, upon the order of the trustees, be turned over to the state armory fund, to be expended by the state armory board, in connection with money in the latter fund, for the purpose of erecting an armory, which shall also be a memorial building, for the purpose hereinbefore defined, and which shall be under the control of the state armory board, which may, upon completion of the building, turn over a designated portion thereof to the county commissioners, upon such terms as may be agreed upon by the commissioners and the armory board. Such commissioners are to provide for the equipment thereof, as before specified.

To be read in connection with the foregoing statutes are sections 5253-5271,

General Code, which, in so far as they are here pertinent, provide for the appointment of a state armory board, which shall provide for the management, care and maintenance of armories, and is authorized to receive donations for the purpose of purchasing, building, furnishing or maintaining armories. This board is empowered to erect an armory in the manner prescribed, the amount to be expended by it not to exceed $20,000, for a company or single organization, and $10,000 for each organization or headquarters provided. These armories are for the use of the permanently organized militia quartered therein, although a suitable room or rooms must be provided for the Grand Army of the Republic and the United Spanish War Veterans, unless such room is provided by the erection of a county memorial building, or otherwise by the county or state. A board of control governs such armories. The armory board has power to condemn land as a site for an armory.

From these statutes it is clear that the state armory board may receive the money derived from the sale of bonds for the construction of the Clark county memorial building, and with the money so received, together with an appropriation from its own funds, may erect an armory, *which shall also be "a memorial building to commemorate the services of the soldiers, sailors, marines and pioneers of the county."* It is the clear and manifest intention of the statutes that this building shall be so constructed that these two purposes are to be kept distinct, i. e., the building is to be so constructed as to permit the turning over of part of it so the county commissioners, under such conditions of control as the two boards may agree upon.

A further indication of the legislative intent that the money paid by the county, through the trustees, shall give the county an interest therein is apparent from the fact that in case of sale by the armory board the commissioners are entitled to a proportionate share of the selling price. The bonds were issued for a designated purpose, namely, the construction of a memorial building to commemorate, etc., and it would be a deviation of such funds and a regrettable imposition upon those who so generously voted a tax upon themselves for this purpose to have the money raised by them used for another purpose. This the legislature did not intend.

Therefore, in case this money is accepted by your board, while it will be your duty to erect the armory, you must make provision for its use as a memorial building, and upon its completion it would be proper for your board to turn over to the commissioners a designated portion thereof, upon such terms of control as your two boards may agree upon.

While, in the erection of the building, the armory board is to have full supervision and control, and the statutes governing it are those which control in the erection of armories, nevertheless, the state must expend from the state armory fund the amount it would have expended for an armory had it been building no memorial building.

As I understand it, the Clark County Memorial Association has already employed Mr. Frank L. Packard as architect for the memorial building, and wishes him retained for the purpose of designing the memorial features of the joint building. This memorial association had power, under sections 3064-3066, General Code, to employ him and cause plans to be prepared, and consequently I think that you should recognize this contract and have your architect co-operate with him in designing the joint building, should you decide to accept the memorial building fund.

It would also be perfectly proper for Mr. Packard to prepare the plans for the memorial feature of the building and be paid for this service out of the fund turned over to you. Your own architect can design the armory portion;

but the two architects should work together in order that harmony of design may result. I would suggest that the two architects jointly prepare a sketch embodying the outlines of the proposed joint building, without cost to the state as suggested in the resolution, and have this approved by both the memorial association and your board before further action is taken. There should be no difficulty in thus arriving at a plan that would be satisfactory to all concerned.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

498.

STATE ARMORY BOARD SHALL AWARD ITS CONTRACTS TO THE LOWEST RESPONSIBLE BIDDER WHO SUBSTANTIALLY COMPLIES WITH THE RULES UNDER WHICH SUCH CONTRACTS ARE MADE.

The state armory board shall award its contracts to the lowest responsible bidder who substantially complies with the provisions of section 5228.

Where a responsible bidder complies with the statute in every way except that the deposit made by him does not quite equal two per cent. of the aggregate amount required by law to be deposited, the fact that the certified check deposited by him would not equal the two per cent. required by law would not bar him from receiving the work.

COLUMBUS, OHIO, September 22, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of August 16th, which is as follows:

> "I herewith transmit three bids and an incomplete bid received today for the Ottawa armory. The following is a tabulation of said bids:
>
> "(1) Meyers Bros. (W. R. & C. L. Meyers) of Leipsic—
> Building complete, tile roof, steel roof trusses.....$18,299 49
> Building complete 'wooden roof'..... 18,000 00
> Certified check for..... 350 00
> Cash 14 00
> Short $1.98 of being 2%.
>
> "(2) Chas. A. Meyers, agreeing to build, not stating the building $18,300 00
> No certified check.
>
> "(3) Clemmer & Johnson, Hicksville—
> Building complete, tile roof, steel roof trusses.....$18,393 00
> Building complete, composition roof..... 18,093 00
> Certified check 400 00
> 'Will construct sewer for the sum of $175.00 additional.'
>
> "(4) Loudenback & Sieverling, Sidney—
> Building complete, tile roof, steel roof trusses.....$18,317 91
> Certified check 370 00
> Check made to order of 'state armory board.'

"You will note that the Meyers Bros.' bid has an incomplete certified check and also that the check of Loudenback & Sieverling has a certified check made to order of 'state armory board.'

"The advertisement for bids is also herewith transmitted. It requires the certified check to be made to the order of the secretary. As two biddrs did not furnish proper certified checks, the board passed a resolution of which the following is a copy:

> "'*Resolved*, That the bid of Clemmer & Johnson is the lowest bid which conforms to the advertisement therefor and to the plans and specifications and that a contract be awarded to said Clemmer & Johnson for construction of said Ottawa armory complete for the sum of $18,393.00 upon the said contractors Clemmer & Johnson, giving bond in the sum of nine thousand, two hundred ($9,200.00) dollars to the satisfaction of the attorney general of Ohio, and upon the further condition that said attorney general approves this award for which purpose the secretary will transmit all bids to him.'

"If the award made by the board is approved, please draw the contract and bond as required by law. If one of the other bids should have been accepted, please so advise and also advise if we may still accept same by rescission of above resolution."

Section 5258, General Code, provides for advertisement for bids for the construction of a state armory and reads as follows:

> "The board shall advertise for sealed bids for the erection of such armory, and publish such advertisement in at least one newspaper in the city or county in which the armory is to be erected. All bids received shall be filed in the office of the adjutant general, and must be accompanied by a forfeit consisting of a deposit of cash or certified check equivalent to two per cent. of the estimate on the building, conditioned upon the bidder entering into a contract, if his bid is accepted. All money so forfeited shall be covered into the state treasury to the credit of the 'state armory fund' hereinafter provided for. Upon the day specified in the advertisement, the bids received shall be opened by the board, and the lowest bid which complies with the plans and specifications submitted, may be accepted. The board may reject any and all bids and readvertise for bids."

The bid of Meyers Brothers was the lowest bid received, but the certified check and cash deposited by them amounted in the aggregate to less than two per cent. of the amount of the bid.

The question for determination is whether this irregularity would be a sufficient reason for refusing to award the contract to Meyers Brothers. I have not found any Ohio authorities directly in point, but the decision of the common pleas court of Philadelphia, in the case of Smith vs. The City of Philadelphia, 2 Brewsters Reports, 443, fully covers the present situation. The court held:

> "An injunction will not be granted to restrain municipal authorities from awarding a contract to the lowest bidder, although he did not file a bond prior to the award as required by ordinance."

The facts of the case were that the lowest bidder failed to file with the city solicitor any bond prior to the award of the contract to him, as was required by the ordinance under which the improvement was to be made.

On page 444 of the opinion the court says:

> "The bond required by the ordinance of May 25, 1860, is not the security to be exacted for the faithful performance of the contract, but simply a guaranty that the lowest bidder will come forward, give the required security, and sign the formal agreement. This is clearly a stipulation which the city authorities might in the exercise of an honest discretion insist upon or waive at their pleasure. No corruption or fraud is suggested, nor is it pretended that the city has been or can be injured by the award of the contract to defendant McGlue."

The deposit made by Meyers Brothers was in my judgment in substantial compliance with the requirements of section 5258, and the fact that it did not amount to two per cent. of their bid would not be a sufficient reason for refusing to award the contract to them.

Section 5258 requires that contracts for the construction of armories shall be awarded to the lowest bidder whose bid complies with the plans and specifications.

As the bid of Meyers Bros. was the lowest bid submitted and as the same is in substantial compliance with the requirements of the statute and the plans and specifications, I am of the opinion that your board should rescind its resolution awarding the contract to Clemmer & Johnson and adopt another resolution awarding it to Meyers Bros.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

539.

STATE ARMORY BOARD MAY PAY MONEY TO THE ASSIGNEE OF A HOLDER OF A CLAIM FOR EXTRAS.

Where a contractor assigns a claim which he holds against the state armory board, the assignment will absolve the state armory board and the state of Ohio from further liability to the contractor on his claim for extras, and the money may be paid to the assignee.

COLUMBUS, OHIO, October 2, 1913.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 23, which is as follows:

> "I herewith enclose, for your approval, duplicate certified accounts for $550.00, to Edward Vollrath, attorney for all armory creditors, Bucyrus. This account was allowed by the armory board at its meeting September 20, 1913."

Prior to the date of your letter, the contractor made a claim for extras in the construction of the Bucyrus armory and your board offered him $550.00

in settlement of his claim, which he refused to accept, contending that he was entitled to more money.

Thereafter he made an assignment of his claim for extras to Col. Edward Vollrath, for the benefit of his creditors, of which assignment the following is a copy:

> "I hereby assign to Edward Vollrath, of Bucyrus, Ohio, the entire amount, including extras that may be still due me from the state of Ohio on account of the Bucyrus armory. This assignment is made in consideration and for the purpose of distributing said amount among the creditors which I am still owing on account of said armory, and you are authorized to pay any and all amounts so owing to me on account of said Bucyrus armory, including extras, to said Edward Vollrath, who represents said creditors, to be so applied.
>
> "A detailed and correct statement of the balances due said creditors is hereto attached and made a part thereof.
>
> "[Signed] E. E. BOPE."

I am of the opinion that the above assignment will absolve the state armory board and the state of Ohio from further liability to Mr. Bope on his claim for extras and you may safely pay the said sum of $550.00 to the assignee.

The two copies of certified account enclosed in your letter are herewith returned, with my approval duly endorsed thereon.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

544.

CONTRACTS FOR ARMORY PURPOSES MUST BE ENTERED INTO BY THE STATE ARMORY BOARD.

Local officials of the national guard company have no authority to bind the state armory board by contract unless such authority is expressly granted by statute. A lease entered into by a captain of the national guard is not binding on the state armory board.

COLUMBUS, OHIO, October 3, 1913.

COL. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 16th, with enclosure of two leases, for certain real estate in the village of Clyde, which was used for armory purposes, together with certain correspondence relating thereto. You request advice as to whether the state armory board should pay the rent for said armory.

It appears that S. S. Richards and Mrs. W. C. Terry, on the twenty-seventh day of July, 1910, leased to company I, sixth infantry, Ohio national guards, by A. H. Wicks, captain, certain real estate in the village of Clyde, for a period of three years from August 1, 1910.

During the term of this lease, the state of Ohio erected an armory at Clyde and the same has been occupied by company I since December 1, 1912. Rent has been paid by the lessee to June 30, 1912, and there is due to the

lessors rent from that time for the remainder of the period named in the lease —one year and one month.

The lessors claim to have made diligent efforts to secure other tenants after company I had vacated the premises but were unsuccessful. They also claim that the leased property was never surrendered to them and the lessees say that some time in September, 1912, they offered to surrender the property but that the lessors refused to accept the same.

We are not at present concerned with these disputed questions of fact. The sole question here is one of law, that is, whether the state of Ohio is liable, in any event, for the payment of said rent.

At the time of the execution of these leases, the state armory board was vested with authority "to provide armories by lease, purchase or construction." 100 O. L., p. 27—2d paragraph, section 4.

It was the manifest purpose and intention of this statute that the duty of leasing armories was to be performed by the state armory board and not by separate organizations of the state militia.

I am informed that the armory board knew nothing whatever of the existence of these leases until this controversy arose.

My immediate predecessor in office, on June 10, 1909, rendered to your board an opinion to the effect that leases of armories could not be made for a longer term than two years from the time of the appropriation by the legislature of the state armory fund.

See annual report of attorney general for 1909, p. 425.

If the leases in question had been made by the armory board, as required by law, instead of by the local company, the opinion of my predecessor doubtless would have been followed and the present difficulty would have been avoided.

Local officers or companies of the state militia are without legal authority to bind the state or the armory board by contract unless such authority is expressly granted by the statutes. The authority to lease armories being expressly conferred by statute on the Ohio state armory board, I am constrained to hold that such power cannot be exercised by any other officer or body.

I am, therefore, of the opinion that said leases created no obligation against the state and that your board may not legally pay the claim made for rent thereunder.

Leases and correspondence are herewith enclosed.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

674.

ABSTRACT OF TITLE.

Deed from John G. Reeves to the state of Ohio.

COLUMBUS, OHIO, December 31, 1913.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of December 31st, wherein you enclose abstract of title and deed from John G. Reeves to the state of Ohio, for the following described premises, to be used as a site for an armory in the city of Lancaster, to wit:

> "Situate in the said city of Lancaster, in the county of Fairfield, and state of Ohio, and is known and distinguished by being seventy-one (71) feet off of the north ends of lots numbered seventy-five (75) and seventy-six (76) in said city, and is bounded and described as follows:
>
> "Beginning at the northeast corner of said lot number seventy-six (76), at the intersection of Broad and Wheeling streets in said city, thence south with the east line of said lot number seventy-six, along Broad street, seventy-one (71) feet to the northeast corner of the lot sold and conveyed by said J. G. Reeves to Frank Beck by deed dated April 1, A. D. 1897, and recorded in Book No. 82, page 588 of the Deed Records of said Fairfield county, thence west on the north line of said F. Beck lot to the west line of said lot number seventy-five (75), thence north along the west line of said lot number seventy-five (75) to the northwest corner of said lot, at Wheeling street, thence east along the north lines of said lots number seventy-five (75) and seventy-six (76) to the place of beginning, one hundred and sixty-five (165) feet."

I have carefully examined the abstract of title, and from such examination I am of the opinion that the present owner has a good and indefeasible title to said real estate, subject only to a mortgage for $6,350.00 given by said Reeves to C. B. Whiley, taxes for the year 1913 and a special assessment for a street improvement. All of these, I understand, will be paid before the deed is turned over to your board.

The deed is duly signed, acknowledged and witnessed, and is sufficient in form to convey to the state of Ohio a fee simple title, and I advise that you accept the same.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Tax Commission)

23.

TAXES AND TAXATION—TAX COMMISSION MAY NOT REMIT PENALTIES AGAINST CORPORATIONS AND PUBLIC UTILITIES ASSESSED UPON THE DUPLICATE OF THE TREASURER OF STATE—POWER OF ATTORNEY GENERAL WITH CONSENT OF TAX COMMISSION TO COMPROMISE AND SETTLE SAME—EFFECT OF OMISSION BY STATE TREASURER TO NOTIFY CORPORATIONS OF TAXES DUE.

Section 6617-4, General Code, which authorizes the tax commission to remit such tax penalties as accrue by reason of negligence or error of an officer, required to perform the duties relating to the collection of taxes, must be read in connection with section 6617-5, General Code, which discloses that these sections were intended to apply to simple taxes only, assessed upon the duplicate of the county, by virtue of the provisions of the later section, providing for a notice to the prosecuting attorney and county auditor before such remission is allowed.

Under these sections, therefore, the tax commission is not empowered to remit a penalty assessed upon the duplicate of the treasurer of state, on the ground that said treasurer failed to notify the corporation of the date when the tax was due, in accordance with section 5488, General Code.

Under section 5524, General Code, however, the attorney general is authorized, with the advice and consent of the tax commission, to compromise or settle any claim for delinquent taxes, fees or penalties. The use of the term "settle" in this statute justifies the construction that the attorney general, in accordance therewith, may remit or reduce penalties for any good and sufficient reason. The terms and condition of such settlement must be set out in detail in the annual report of the tax commission to the general assembly and governor.

When it is settled therefore, that the corporation had no actual notice of the fact that such tax was due, the penalty may be compromised or settled under this statute, and the fact that such tax appeared upon the duplicate, need not necessarily be construed to charge said corporation with notice of the fact that the tax was due.

COLUMBUS, OHIO, December 17, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 25th in which you request my opinion as to the power of the tax commission of Ohio, under section 5617-4, General Code, to remit penalties which have accrued against corporations and public utilities, especially the former, for failure to pay the annual fees or taxes assessed against them on the books of the treasurer of state as such, because of the failure of the corporations or public utilities to receive notice which the treasurer of state is directed to send them of the amount of the fee or tax.

You also request my opinion in the same letter as to the power of the attorney general and the commission under section 5524, General Code, to compromise claims for fees or taxes under such circumstances, and also in cases in which the failure to pay the fee or tax when due arose out of an oversight on the part of some officer or employe of the corporation or public utility.

In connection with these requests you call my attention in particular to the large number of corporations for profit, domestic and foreign, required to

file reports with the tax commission, and pay fees to the treasurer of state upon the basis of their capital stock, and to the expense of administering the law under which those reports and fees are exacted, consisting of items for postage and clerk hire. You also compare the laws providing for penalties for failure to pay such taxes with those to pay simple taxes collected through the office of the county treasurer, which latter penalties are imposed automatically without reference to the cause of failure to pay.

So much of the statutory law which is involved in your inquiry as is necessary to be considered may be first quoted:

Section 5488, General Code:

"After determining the amount of taxes or fees payable to the state as provided in this act, the auditor of state shall thereupon prepare proper duplicates and reports, and certify them to the treasurer of state for collection.

"Upon the receipt of such duplicate the treasurer shall notify each company charged with taxes or fees thereon, of the amount due from it."

Section 5491, General Code:

"All taxes received by the treasurer of state under the provisions of this act, shall be credited to the general revenue fund. If any public utility fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, or if any corporation fails or refuses to pay, on or before the dates fixed, in this act, the fee charged against it, the treasurer of state shall certify the list of such utilities or corporations, so delinquent, to the auditor of state, who shall add to the tax or fee due, a penalty of fifteen per cent. thereon." * * *

Section 5498, General Code:

"Upon the filing of the report, provided for in the last three preceding sections (as to domestic corporations for profit) the commission, after finding such report to be correct, shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October."

Section 5503, General Code:

"On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company (foreign corporation for profit) in addition to the initial fees otherwise provided for by law, for the privilege of exercising franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by the prop-

erty owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following December."

Section 5617-4, General Code:

"The commission may remit * * * such penalties as have accrued, or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the * * * collection of taxes. * * * but its power under this section, shall not extend to taxes levied under the provisions of subdivision two of chapter fifteen of title two, part second, of the General Code." (So-called Dow-Aiken liquor tax.)

Section 5617-5, General Code:

"No such taxes, assessments or penalties in excess of one hundred dollars, shall in any case be remitted until after at least ten days' notice of the application to have them remitted shall have been served upon the prosecuting attorney and the county auditor of the county where such taxes or assessments were levied, and proof of such service has been filed with the commission. When any taxes or penalties have been remitted as provided in this and the next preceding section, the commission shall make a report thereof to the auditor of state."

Section 5524, General Code:

"With the advice and consent of the commission, the attorney general may, before or after any action for the recovery of fees, taxes or penalties certified to him as delinquent, under the provisions of this act, compromise or settle any claim for delinquent taxes, fees or penalties so certified.

"And all claims compromised or settled as herein provided shall be set forth in the annual report of the tax commission to the general assembly and governor, giving in detail the terms and conditions of such compromise or settlement."

The question as to the application of section 5617-4 to the subject matter involved in your inquiry will be first considered.

While the language of section 5617-4 is on its face broad enough to include penalties assessed in consequence of the negligence of the treasurer of state, who is an officer required to perform a duty relating to the collection of taxes, viz., excise taxes from public utilities and franchise taxes from corporations for profit, I am of the opinion that properly construed this section does not authorize the remission of penalties which have accrued by reason of any such negligence.

Section 5617-5 must be read in connection with this section as the legislative history thereof shows it to be a part of the same legislative idea. That section, above quoted, provides that no penalties in excess of one hundred dollars shall be remitted in any case except upon notice to the prosecuting attorney and the county auditor of the county where such taxes or assessments are levied. By necessary implication this section, therefore, limits the scope of the preceding section to simple taxes and penalties thereon. Indeed, the entire subject

matter of these two sections is found in section 167, of the Revised Statutes, the only difference between the two statutes or group of statutes being that the auditor of state instead of the tax commission was authorized to exercise the power under the former law.

It is true that the former law was held, in State ex rel. vs. Jones, Auditor, 51 O. S., 492-515, to apply to the remission of penalties and assessments against express, telegraph and telephone companies under the Nichols law. However, the result of the Nichols law assessment was a charge upon the general duplicate of a county, and this decision did not establish a principle upon which it could be held that any tax which was to be collected through the office of the treasurer of state, or any penalty thereon, could be remitted through this machinery.

I am, therefore, of the opinion that the tax commission has no power to remit any taxes assessed upon the duplicate of the treasurer of state or any penalties thereon under this section just discussed.

Section 5524, General Code, however, applies directly and solely to taxes collected through the office of the treasurer of state. It is only such taxes or fees as are certified to the attorney general for collection, and it is only such taxes or fees as are certified to that officer which may be compromised or settled under this section.

The primary meaning of this section is bound up with the significance of the two terms, "compromise" and "settle." The following definitions are those of the Century Dictionary:

> "Compromise. A settlement of differences by mutual concessions; * * * * a bargain or arrangement involving mutual concessions * * * *."

The verb which is the form of the root used in this statute takes its meaning from the noun as above defined.

> "Settle. To change from a disturbed and troubled state to one of tranquility, repose or security."

The following definitions are found in Bouvier's Law Dictionary:

> "Compromise. An agreement made between two or more parties, as a settlement of matters in dispute between them. (The verb of course takes its meaning as above defined.)
>
> "Settle. To adjust or ascertain, to pay."

It will be noted that the term "compromise" involves the idea of mutual concessions, while that of "settle" does not necessarily involve such an idea, and I am of the opinion that if it were not for the use of the latter term, there would be no power in the tax commission and the attorney general, under this section to accept payment of the fee or tax due from a corporation or public utility without the payment of any penalty whatever, nor to accept any sum less than that technically charged against any corporation or public utility in satisfaction of a claim except in consideration of the withdrawal of some defense or because of the failure of assets of the corporation or public utility or for some other like reason. Having, however, the power not only to compromise a claim for taxes or penalties, but also to settle such a claim, I am of the opinion that the attorney general and the tax commission may accept payment of a claim against a corporation or public utility of taxes or penalties or either for

less than the total sum certified, or for the tax without the penalty as the case may be. The statute makes it clear, however, that this may not be done so as to bind the state arbitrarily, but that in each such case there must exist some good and sufficient reason, such as may be set forth in the annual report of the tax commission to the general assembly and governor.

It is true that some doubt is thrown upon this interpretation of the section because of the requirement that the terms or conditions of such compromise or settlement be set forth in the report. I do not interpret this clause, however, as requiring that all compromises and settlements be upon terms and conditions to be observed by the corporation or public utility in the sense that no compromise or settlement could be made without mutual concession. It is sufficient, in my judgment, to satisfy this portion of the statute, that the statement made by the tax commission should set forth fully the circumstances under which the action was taken and the reasons actuating the commission in the approval of the settlement.

Coming now to the specific causes of complaints for remission or compromise described by you in your letter, I beg to state that in my judgment the failure of the treasurer of state to notify the public utility or corporation of the amount of taxes due, as specifically required by section 5588, General Code, if found by the attorney general and the tax commission to be actually the cause of the delinquency of the corporation or utility, would constitute sufficient ground for the settlement of a claim for taxes and penalties by the receipt of the tax alone, or at least by the receipt of a small part of the penalty.

For reasons already stated, I do not regard such a failure of the treasurer of state to notify the taxpayer of the amount of the tax due as an act of negligence or an error within the meaning of section 5617-4. The statute, however, does require that the treasurer of state send out these notices and the corporations and utilities are therefore in law entitled to rely upon such notice. It is true that some of the sections above quoted specifically provide the dates at which the taxes and fees shall become due and payable. It is also true that the amount of the charge on the books of the treasurer is a matter of public record which could be ascertained by any person upon inquiry. However, it is not true that the amount of the tax or fee in a given case would necessarily be known to the public utility or corporation without its receiving such a notice as that designated in section 5588, or without actual investigation at the office of the treasurer of state. While, therefore, the law puts the corporation or public utility upon its notice as to the date of payment it does not accomplish the same result as to the amount due unless the making of the public record in the office of the treasurer of state be so construed. In my opinion the mere fact that the duplicate is made up and in the possession of the treasurer of state is not sufficient to constitute constructive notice to the corporations and public utilities of the amount due from them. This is because section 5588 expressly requires another kind of notice; so that it was evidently the intention of the statute that the taxpayer should have the right to rely upon some form of notice other than the mere record in the office of the treasurer.

As I have already indicated, however, I do not believe that the failure to receive notice from the treasurer of state ought to be regarded as final and conclusive in all cases as an incontestable ground for compromise of a claim for taxes or fees without the payment of the penalty. This is the notice which the law requires. There may, however, be actual notice of the amount due other than that which might be given by the sending of such a letter by the treasurer of state.

If it should develop in the case of any delinquent corporation or utility that an officer thereof actually knew the amount of the fee assessed against the

corporation or utility but chose to take refuge behind a technicality in order to excuse willful failure to pay the tax within the time limited by law, I do not believe that in such a case a settlement should be made upon the basis of the tax without the penalty.

I do not believe that an oversight on the part of some officer of a corporation is, excepting in some exceptional cases, a ground which ought to be relied upon by the attorney general and the tax commission in support of a settlement of any claim for taxes and penalties for less than the entire aggregate sum of both. The oversight of an officer or clerk of a corporation is, so far as the state is concerned, the oversight of the corporation itself. Nevertheless I can conceive of an exceptional case, such as where the treasurer's notice was sent to a person who no longer was an officer of the corporation, and on this account and through the negligence of the ex-officer failed to reach the proper officers of the corporation in time to afford them an opportunity to pay the tax; or, again, I can imagine a change of accounting officers on the part of the corporation made at such a time as to make it difficult for the incoming officer to ascertain whether or not the tax or fee had been paid until too late to pay it when due. Each case of this exceptional nature would have to rest upon its own foundation and equities. The general rule in such matters, however, is as I have already stated, viz., that the attorney general and the tax commission ought not to compromise, or more properly speaking, settle the claim for taxes or penalties for the amount of the tax without the penalty where the corporation seeks to excuse itself for failure to pay the tax or fee at the time specified by law, on the ground that some officer or employe thereof had been negligent.

In conclusion, I may say that I am aware that the statute providing for the collection of taxes through the office of the county treasurer is much less expensive of operation and much more hard and fast in the matter of penalties than the sections which I have been discussing. The state's expense, however, is no valid reason for refusing to settle penalty claims in the face of the statute which expressly requires the treasurer of state to send out notices. If this statute were fully and effectively complied with no corporation could claim that it was justifiably ignorant of the time, place and amount of payment due from it. In this connection I believe hat so long as this provision remains a part of our law it ought to be complied with to the fullest extent, and I would recommend that the notices to be sent by the treasurer of state be sent by first-class post.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

97.

TAXES AND TAXATION—BANKS AND BANKING—POWER OF TAXATION OF SHARES OF STOCK IN NATIONAL BANK—NOT EXCEEDING TAX ON OTHER MONEYED CAPITAL—POWER OF TAX COMMISSION TO REMIT TAX ASSESSED IN STOCK WHICH WAS FRAUDULENTLY VALUED BY OFFICIALS OF A BANK MAKING TAX RETURN.

The officers of the Second national bank, after unlawfully speculating and dissipating the assets of said bank, in their report to the auditor, fraudulently overvalued the assets of said bank, and falsely stated the data upon which the auditor valued the shares of stock of said bank, and in accordance with which value the assessment for taxation was made and paid by the said officers of the bank. The condition of the bank at the time the tax return was made, was evidenced by a letter of the deputy and acting comptroller of the currency, requiring an assessment against the stockholders for the benefit of creditors to the extent of the full par value of their shares of stock, held:

The power of the state to tax shares of stock in national banks is permissive only and the permission is set out to its full extent in section 5219, Revised Statutes of the United States, which statute requires that taxation of such shares of stock shall not be assessed at a greater rate than on other moneyed capital in the hands of individuals of the state.

The finding of the comptroller of currency is a quasi judicial determination, which may not be attached collaterally, and which must be deemed conclusive evidence of the fact that such shares of stock were valueless at the time return for tax was made. The action of the cashier of the bank in making a false return was fraudulent and the assessment of the tax based thereon must be deemed to have been illegal and vitiated by the fraud.

Since the tax upon shares of stock in a national bank may not exceed the tax upon other moneyed capital within the state, and since also the transaction is false by reason of the fraud on the part of the cashier, therefore, under section 5617-4, General Code, which empowers the commission to remit taxes and penalties thereon, found it to be illegally assessed, the commission may remit the tax assessment which was based upon this fraudulent return.

Since the cashier of the bank, under section 5411, General Code, is appointed to make the return by the statute, without any assent upon the part of the stockholders, he acts without the will of the principal, and is, therefore, not an agent of the stockholders. He is not an agent created by law for the reason that the state's jurisdiction is permissive only and the relations which exist are only those between the stockholders and the federal government. The stockholders, therefore, cannot be deemed to be estopped by the action of the cashier, as their presumed agent in making the return.

COLUMBUS, OHIO, February 26, 1913.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You request my opinion as to whether you have jurisdiction to entertain the application for remission of tax on behalf of the Second national bank of Cincinnati and the stockholders thereof. You have submitted to me the application, which is as follows:

"Now come the Second national bank, of Cincinnati, Ohio, and Ferdinand Jelke, Jr., trustee, one of the stockholders thereof, who pre-

sents this matter on his own behalf and on behalf of all the other stockholders of said banking association, and represent as follows, viz:

"1. That the Second national bank, of Cincinnati, Ohio, is a duly incorporated banking association organized under the laws of the United States, having numerous shareholders, of whom said Ferdinand Jelke, Jr., trustee, is one.

"2. That on May 3, 1911, the officers of the Second national bank, of Cincinnati, made a certain tax return for the purpose of having a valuation put upon the shares of its capital stock for taxation, a true copy of which tax return is filed herewith. That subsequently, proceedings were had thereon, so that a valuation of 10,000 shares of the capital stock of said the Second national bank was put upon the tax duplicate of Hamilton county, Ohio, at $1,607,530.00, upon which taxes for the year 1911 were assessed in the sum of $24,112.96, one-half, to wit: $12,056.48 payable in December, 1911, and the second half, $12,056.48, payable in June, 1912. That the half payable in December, 1911, was paid on its shares and for the shareholders of said bank by said banking association.

"3. Your petitioners further show that between January 1, 1912, and April 1, 1912, an examination and investigation of the condition and affairs were instituted and had by the clearing house association, of Cincinnati, and the comptroller of the currency of the department of the treasury of the United States, and that it was then discovered that said banking association had, through injudicious investments, speculation and dissipation of the bank's funds by its officers, suffered losses to the entire amount of its capital, surplus and undivided profits, and that there was no value whatever to said stock, and that an assessment of one hundred per cent. (100%), or the full amount of its capital, was necessary in order to restore its impaired capital and permit it to do business.

"Upon such examination, the comptroller of the currency ordered charged off as worthless and without value, a large amount of paper, notes, bills, stocks, bonds, securities and assets, all of which stood upon the books of the bank in April, 1911, at the time of the tax return aforesaid, and were then worthless and without value. That the officers of said bank had been unlawfully speculating and promoting enterprises of their own which were failures, and by injudicious investment the funds and assets of said bank had been dissipated and lost, and that this had transpired and been committed by the said officers prior to the tax return aforesaid, and said tax return as made by them was false and deceitful, and was made for the purpose of deceiving the national bank examiners, the comptroller of the currency, the clearing house association, of Cincinnati, all of the stockholders of said bank, and the public, and for the purpose of concealing their improvident and unlawful acts, and said tax return was untrue in that on its face it showed a taxable value as hereinabove set out, whereas in April, 1911, the shares of said bank, by reason of such conduct and dissipation of the funds on the part of its officers, were valueless and said shares had no taxable value whatever and should not have been listed as having value, all of which these complainants stand ready and offer to prove to your honorable commission.

"4. Complainants further say that already taxes in the sum of $12,056.48 have been paid by said banking association for its share-

holders on account of its shares in excess of what ought to have been paid.

"Wherefore, complainants pray your honorable commission that the taxes for the last half of the year, 1911, viz: $12,056.48, which were due and payable in June, 1912, but which have not been paid, be remitted, and that your honorable body fix a time for hearing of this application, and that in the meantime the treasurer of Hamilton county, Ohio, be ordered to refrain from adding any penalty for non-payment thereof, and that upon final hearing all of the unpaid portions of the tax upon the shares of said bank for the year 1911 be remitted."

With the application is a brief filed by Hon. Ferdinand Jelke, Jr., Hon. Thomas K. Schmuck and Hon. James R. Clark. On my own motion I requested the views of Hon. Charles A. Groom, first assistant prosecuting attorney of Hamilton county, as to the authority of the tax commission to reduce the valuation of the shares of stock of said bank upon the complaint filed with the tax commission on September 20, 1912. The briefs have been of the greatest possible aid in enabling me to arrive at the conclusion hereinafter stated.

Counsel for the applicant state the facts in the case to be as follows:

"On May 3, 1911, pursuant to the provisions of section 5411 of the General Code of Ohio, the cashier of the Second national bank, of Cincinnati, Ohio, made a return to the auditor of Hamilton county, Ohio, of the resources and liabilities of the bank, and the number and value of shares of stock therein. Upon receiving such report, the auditor of Hamilton county, Ohio, put a total value of $1,607,530.00 upon the ten thousand (10,000) shares of stock in said bank, and assessed taxes thereof for the year 1911, in the sum of $24,112.96. In December, 1911, the taxes then due and payable were paid by the bank, so there now remains due and unpaid taxes in the amount of $12,056.48.

"The taxes thus levied were taxes to which the stockholders, and the stockholders alone, were subject (Owensboro National Bank vs. Owensboro, 173 U. S., 664; United States Revised Statutes, section 5219), but which the state, acting within the scope of its delegated powers (5 Thompson on Corporations, section 5938; National Bank vs. Commonwealth, 9 Wall., 553) requires the bank to pay and reimburse itself from the stockholders thereof (Ohio General Code, section 5655).

"In January, 1912, the clearing house association of Cincinnati, and the comptroller of the currency of the department of the treasury of the United States instituted an examination of the affairs of the Second national bank.

"This examination disclosed the fact that the mismanagement, speculation and misappropriation of the funds by bank officials had dissipated the entire capital stock, surplus and undivided profits. The comptroller of the currency thereupon ordered charged off as worthless, notes, bills, stocks, bonds and securities of great face value, which were upon the books of the company at the date of the return for taxation in May, 1911, and which formed the basis thereof. The comptroller, within the scope of his authority, issued an order binding upon all persons and all courts (Thomas vs. Gilbert, 101 Pacific, 393), requiring the levy of 100 per cent. assessment upon each share of stock in order to restore the impaired and dissipated capital. The condi-

tion of the bank at this time and prior thereto, as evidenced by the letter of the deputy and acting comptroller of the currency, dated March 4, 1911 (appendix), makes clear the fact that at the date of the report for taxation, the assets of the bank had been entirely wiped out, and consequently the shares of stock therein had no value whatsoever. The affairs of the bank disclosed the fact that the misstatement as to the financial condition of the bank was wilfully false and fraudulent, and was a part of a long continued scheme of fraud, the intended victims of which were the public. the stockholders and the federal government.

"In August, 1912, the stockholders of the bank, who are the real parties in interest, and the reorganized bank, filed an application for the remission of the unpaid taxes which had been assessed upon the fictitious and inflated value contained in the false and fraudulent report. In August, 1912, on this identical statement, the government of the United States, acting through the commissioner of internal revenue under the secretary of the treasury by and with the advice of the solicitor, department of justice, abated the excise tax and remitted all taxes due the federal government."

Counsel for the applicant say that:

"The state of Ohio surely has power to grant relief in a tax matter appealing so strongly to equity and justice. All the powers of the sovereign state for the equitable adjustment, revision and remission of taxes have been combined, consolidated and vested in your honorable board."

They quote section 1465-33 of the General Code, as follows:

"All powers, duties and privileges imposed and conferred upon any state board, which board was abolished, or its powers in whole or in part conferred upon the tax commission of Ohio, by an act of the general assembly, passed May 10, 1910, or any power or duty theretofore conferred upon any state or county officer or board, which power and duty by such act was conferred upon such commission, is hereby imposed and conferred upon the commission created by such act." Ohio General Code, section 1465-33. (Sec. 35, 102 O. L. 229.)

Quoting from brief of applicant, under heading number two:

"The tax commission of Ohio has power to remit taxes illegally assessed, and, therefore, may abate the taxes in question.

"Section 149. (Remission of taxes and penalties.) The commission may remit taxes and penalties thereon, found by it to have been illegally assessed, and such penalties as have accrued, or may accrue, in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of property for taxation, or the levy or collection of taxes. It may correct an error in an assessment of property for taxation or in the duplicate of taxes in a county, but its power, under this section, shall not extend to taxes levied under the provisions of subdivision two of chapter fifteen of title two, part second, of the General Code." Ohio General Code, section 5617-4. Sec. 149 (102 O. L. p. 257.)

Quoting again from brief of applicant's counsel, page 10:

> "The commission may raise or lower the assessed value of any real or personal property, first giving notice to the owner or owners thereof fixing a time and place for hearing any person or persons interested to the end that the assessment laws of the state may be equitably administered." Ohio General Code, section 5617-2. Sec. 147 (102 O. L. p. 257).

The applicant bases its claim upon the jurisdiction and power of the tax commission to remit taxes and penalties thereon, found by it to have been *illegally* assessed. The contention of Mr. Groom is that the facts presented, if true, do not disclose that the taxes against the Second national bank have been illegally assessed. Mr. Groom's position is that the only remedy of the Second national bank was under paragraph 147, Ohio General Code, section 5617-2, 102 O. L. 257, wherein it is provided that the commission must first give notice to the owner or owners of real or personal property, fixing a time and place for hearing any person or persons interested, to the end that the assessment laws of the state may be equitably administered. It is argued by Mr. Groom, and of course is conceded by Judge Jelke and his associates, that the time had gone by before the application was filed for any relief under paragraph 147 aforesaid. So that the question in its last analysis is this: If the facts set forth in the application be true does it legally follow that the assessment was illegal? Applicant's counsel say "yes" to this question, and Mr. Groom says "no." The former say the bank officials were the agents of the stockholders for the purposes of taxation; the latter say that the bank officials were the agents of the state for the purposes of taxation.

In People vs. Weaver, 100 U. S., 539, the first syllabus is: .

> "The provision in section 5219 of the Revised Statutes of the United States, that the state taxes on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individuals of the state has reference to the entire process of the assessment, and includes the valuation of shares as well as the rate of percentage charged thereon."

Construing this section under consideration, Waite, C. J., in Hepburn vs. The School Directors, 23 Wallace, 480, at page 484, said:

> "Therefore, some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock. * * * It is not the amount of money invested that is wanted for taxation, but the amount of *moneyed capital* which the investment represents for the time being. If the value set upon the share does not exceed this amount, it will not be assessed at a greater rate than other money at interest."

Applicant's counsel, commenting on this, say, at page 19 of their brief:

> "From this it follows that if the tax value exceeds the amount of moneyed capital which the share represents for the time being, taxation based thereon is at a greater rate than other money at interest. Since this is the case, the tax thus levied is, therefore, unauthorized

by section 5219 of the United States Revised Statutes, and since it is unauthorized, that is to say, since the levy is not in exercise of the power delegated by congress, it is void, as an interference with the federal agency.

"In the case at bar, the amount invested in the shares was probably accurately represented by the cashier's return. But the amount of moneyed capital which the investment represented for the time being was nil.

"The whole capital, and each proportional part thereof, as represented by each individual share, had been utterly wiped out. It follows, therefore, that the taxation of these worthless shares calculated upon a valuation of $200 per share, is taxation at a greater rate than on other money at interest. Since this is the case, the taxes under consideration are illegal and void.

"We have found that the taxes under consideration were not only unauthorized by statute, but were prohibited by the fundamental law of the land. Hence it is clear that taxes thus levied are illegal as that term is universally defined, and since such taxes are illegal, it is within the power of the board of tax commissioners as enumerated in the statute to remit them."

It might further be added that—to use a common but expressive phrase—it is up to the state to see that its scheme of taxation conforms not only to the letter but to the spirit of section 5219, Revised Statutes of the United States. The state must see that the state taxes on the shares of any national banking association *shall not be at a greater rate than is assessed on other moneyed capital in the hands of individuals of the state*, and that this includes the valuation of shares as well as the rate of percentage charged thereon. Keeping in mind now that the right to assess the shares of national banks is permissive and that the character and scope of the permission is defined by federal statutes, which are interpreted by federal decisions, we come pretty quickly to the conclusion that it is the duty of the state to conform strictly to the federal requirements, else the state itself is outside of the permission granted by the federal statute; and if the state itself is without the permission there can be no question that the tax has been illegally assessed, if there was fraud on behalf of the officials of the bank and the stockholders were in no wise parties thereunto.

Section 5411 of the General Code is as follows:

"The cashier of each incorporated bank, and the cashier, manager or owner of each unincorporated bank, shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each and the par value of each share, and of the amount of capital employed by unincorporated banks, not divided into shares, and the name, residence and proportional interest of each owner of such bank."

Is the cashier of the bank the agent of the stockholders for purposes of taxation? It will be kept in mind that national banks are the creatures of

the federal government; that the stockholders proceed in conformity to federal requirements, that they select such officers as the federal laws demand, and in conformity thereto. By the selection of such officers, which are for all executive purposes in connection with the bank, they do not empower the cashier of the bank or any other executive officer to report for taxes and to report in a manner binding upon them. Suppose the stockholders were of opinion, and so voted at a meeting, that their stock was worth a certain amount and the same was true; and suppose the cashier reported a higher amount to the county auditor; the action of the stockholders would not be binding upon the state government—the stockholders, in fact, have nothing to do with the matter; they are without power to act, and the doctrine of estoppel could in no wise apply to them.

Judge Day, in Lander, Treasurer, vs. Mercantile National Bank, 118 Fed., 785, at page 789, said:

> "The stockholder in banks, as we have already seen, is not required to return his shares; that duty devolves upon the cashier."

Judge Jelke well says in his brief:

> "Where a man does that which he, and he alone, is required to do, he cannot be said to act for one whose duty he has not undertaken and whose instructions he does not obey. Since the cashier in the present case did not act for the stockholders, it is clear that he was not their agent."

It is further observed in the brief:

> "In the second place, the existence of agency presupposes the right of selection on the part of the person represented or served.
>
> "It is a fundamental principle that agency can exist only by the will of the principal, and with the consent of the agent. It is, therefore, essential to the formation of the relation that the principal shall in some manner, either expressly or by implication from conduct for which he is responsible, appoint the agent, and that the agent shall in some way accept the appointment."
>
> 31 Cyc. 1215.

Nor is the case one wherein the relation of principal and agent can be created by operation of law, because the collection of the taxes upon the stock through the instrumentality of the corporation itself is merely permissive again, and it is not to be thought for a moment that the federal statute would permit the state to resort to any scheme of taxation which would work inequity and injustice upon innocent stockholders. If the corporation were an Ohio one it is conceded that the relation of principal and agent could be created by operation of the Ohio statute; but when it is kept in mind that the relations which exist are solely relations between the stockholders and the federal government, the state being without any jurisdiction whatever, save of a permissive character, and that being to assess the stock when the state adopts means and agencies for the assessment of that stock, leaving out of view the will of the stockholders, the means, agencies and instrumentalities selected by the state are the state's, by which it is bound and not the stockholders.

As before said—and it can be said again at the expense of repetition—it is the duty of the state to see that no fraud is perpetrated upon an innocent

stockholder in a national bank. The entrance of fraud into the transaction leading up to the assessment vitiates the entire assessment and, in my judgment, makes the same illegal, and gives to the tax commission full jurisdiction to correct the return just as fully as if the tax commission or the county auditor themselves had made the error.

Quoting again from applicant's brief, under heading ten:

"However, the federal government has conferred upon the state the power to tax the shares of stock in national banks in the hands of the shareholders thereof. Under this grant, the state may require the bank to pay the taxes on the shares when it can reimburse itself from dividends on the stock."

"Section 5219, Revised Statutes of the United States, provides:

"'STATE TAXATION. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.'

"The general rule as to the right of the state to exact from the bank the payment of taxes assessed pursuant to the statute is thus stated in 5 Thompson on Corporations, section 5938:

"'The state has power by express statute to that effect, to require national banks to pay the taxes lawfully assessed against the shareholders and reimburse themselves from dividends due such shareholders or otherwise, but this must be done by express authority.'

"Accord:

"National Bank vs. Commonwealth, 9 Wall, 353.

"Pursuant to this grant of power as thus construed, the state of Ohio has provided that the bank shall pay the taxes upon such shares and recoup the amount from dividends which are then due or which may thereafter become due upon such stock.

"Ohio General Code, section 5672:

"'Taxes assessed on shares of stock, or the value thereof, of a bank or banking association, shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes.'

"Section 5673, of the Ohio General Code:

"'Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders, respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner.'

"Construing these sections, the circuit court of Ohio, in the case of the National Trust Company vs. M. A. Lander, 19 O. C. C., 271, as treasurer, etc., has said:

"'(2) Taxation is on stock, not on bank. The tax against the shareholder, and the provision for the banks paying it, is not a provision for the bank paying its own tax, but a mere method of collecting the tax from the stockholders, and the lien is upon no property of the bank, but entirely upon that of the stockholder.

"'(4) Bank pays tax for the stockholders. Requiring the bank to pay the treasurer is but another method of requiring the stockholder to pay his tax.'"

Quoting from applicant's brief, under heading twelve:

"Notice to shareholders of impairment of capital of the bank is a quasi-judicial determination that cannot be questioned collaterally.

"April 18, 1912.

"SIR:—You are hereby notified that this association has received notice from the comptroller of the currency that its capital stock has become impaired by the amount of $1,000,000.00 and that under the provisions of section 5205, United States Revised Statutes, this deficiency in the capital stock must be made good by assessment upon the shareholders pro rata to the amount of capital stock held by each, or the bank placed in liquidation.

"Your proportion of the assessment upon ..... shares held by you amounts to $.....

"You are hereby notified that a meeting of the shareholders of this association will be held on the 18th day of May, 1912, at 10 o'clock a. m., at the offices of The Second National Bank, Ninth and Main streets, Cincinnati, Ohio, for the purpose of considering and voting upon the question of paying the assessment within three months from April 18, 1912, the date of the comptroller's notice, or placing the bank in liquidation.

"Section 5205, United States Revised Statutes, provides that:

"'Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the dificiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the comptroller of the currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 5234.'

"This section was amended by section 4, act of June 30, 1876, as follows:

"That the last clause of section 5205 of said statutes is hereby amended by adding to the said section the following proviso:

"'And provided, that if any shareholder, or shareholders, of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

"'W. S. ROSE,
"'CHARLES A. HINSCH,
"'CLIFFORD B. WRIGHT,
"'FREDERICK HERTENSTEIN,
"'B. H. KROGER,
"'CASPER H. ROWE,
"'CHARLES E. WILSON,
"'HARRY L. LAWS,
"'JOHN OMWAKE,
"'*Directors of The Second National Bank, of Cincinnati, Ohio.*'

"Such action by the comptroller of the currency appropriated all the assets of the bank to the payment of creditors, practically set them aside and made them a trust fund for that purpose, thereby leaving nothing for the shareholders.

"The finding of the comptroller is conclusive both as to the necessity for and the amount of such assessment.

"It amounts to an express finding that all of the bank's assets are needed to pay its creditors.

"This finding is conclusive and binding upon the shareholders and cannot be questioned either at law or in equity.

"It is likewise binding upon the state of Ohio, whose only right to tax bank shares is by federal grant and that grant is subject to all prior rights, claims and liens reserved to the federal government and its officers, to safeguard and perpetuate such national bank as a federal instrumentality.

> "'The decision of the comptroller of the currency that the capital stock of a national bank is impaired is conclusive on the stockholders of the bank and on the courts, the bank having no alternative but to make good the impairment or liquidate.'
>
> "Thomas vs. Gilbert, et al., 101 Pacific, 393.

"Where a national banking association is insolvent, order of comptroller of currency declaring to what extent the individual liability of stockholders shall be enforced is conclusive.

"(United States supreme court, 1869.) Kennedy vs. Gibson, 75 U. S. (8 Wall.), 498.

"(United States supreme court, 1876.) Casey vs. Galli, 94 U. S., 673.

"(United States supreme court, 1878.) Germania Nat. Bank vs. Case, 99 U. S., 628.

"(United States circuit court of appeals, 1901.) Deweese vs. Smith, 106 Fed., 438.

"(United States circuit court of appeals, 1899.) Aldrich vs. Campbell, 2 B. C., 481, 97 Fed., 663.

"(United States circuit court.) Bailey vs. Sawyer, 4 Dillon, 463.

"(United States circuit court, 1891.) Young vs. Wempe, et al., 46 Fed., 354.

"(California.) O'Connor vs. Witherby, 111 Cal., 523.

"The question as to whether there is a deficiency of assets, and when it is necessary to enforce the individual liability of shareholders, is for the comptroller to determine, and his decision in this matter is final and conclusive.

"(United States supreme court, 1869.) Kennedy vs. Gibson, 75 U. S. (8 Wall.), 498.

"(United States supreme court, 1878.) Germania Nat. Bank vs. Case, 99 U. S., 628.

"(United States supreme court, 1876.) Casey vs. Galli, 94 U. S., 673.

"(United States circuit court.) Strong vs. Southworth, B Ben., 331.

"(United States circuit court.) Bailey vs. Sawyer, 4 Dill., 463.

"The action of the comptroller in ordering an assessment against the stockholders of an insolvent national bank is conclusive on the stockholders of the necessity for such assessment, which cannot be questioned by them, either at law or in equity.

"(United States supreme court, 1869.) Kennedy vs. Gibson, 75 U. S. (8 Wall.), 498.

"(United States supreme court, 1876.) Casey vs. Galli, 94 U. S., 673.

"(United States supreme court, 1878.) Germania Nat. Bank vs. Case, 99 U. S., 628.

"(United States circuit court of appeals, 1899.) Aldrich vs. Campbell, 97 Fed. Rep., 663.

"(United States circuit court, 1899.) Aldrich vs. Yates, 95 Fed. Rep. 78.

"(United States circuit court, 1895.) Nead vs. Wall, 70 Fed. Rep., 806.

"(United States circuit court, 1889.) Welles vs. Stout, 38 Fed. Rep., 67."

The situation disclosed by what is contained under heading twelve in the brief of applicant's counsel is unusual indeed and discloses a state of facts which in no wise makes it a dangerous precedent for your commission to accord relief in the present case, because, as is therein said, you have a quasi-judicial determination that cannot be questioned collaterally of the fact that at the time when the second half of the taxes in question became payable there was no fund out of which to pay them. If the second half of the taxes were to paid the payments would unquestionably affect the 100% assessment required by the federal authorities. This assessment was unquestionably ordered for the protection of creditors and depositors and those having a conscionable claim, a claim not resting upon the fraudulent act of an officer. I do not believe that the federal instrumentality would permit itself to be used in the way of raising a fund to pay an obligation inequitable. For your board to refuse to entertain this application would mean to put at a discount the opportunity held out by the federal government to the stockholders to put up their capital stock twice. The honor of the stockholders of the bank in coming forward and saving the depositors and creditors from loss is to be encouraged and commended by the state and not placed at a discount.

I have given most careful consideration to the lucid brief of Mr. Groom and I concur fully in his conclusions, if the case were one wherein there was no fraud on the part of the bank officials. If it were a case of mere over-valuation by error of judgment I would unhesitatingly suggest to your commission not to assume jurisdiction but in my judgment this is a splendid illustration of fraud vitiating the whole transaction.

Mr. McGhee, first assistant attorney general, was present in the grand jury room at the recent investigation of The Cincinnati Trust Company and heard the testimony with reference to the value of the Ford-Johnson securities, which are the securities, as I understand it, upon which face value was returned by the bank officials in the case of the Second National Bank. He informs me, and likewise the prosecuting attorney of Hamilton county has informed me that the securities of the Ford-Johnson Company were almost worthless, and that the same was well known to the bank officials in April, 1911. I went over the testimony myself personally as to the value of the Ford-Johnson stock and securities, and such was my own conclusion. I agree with Judge Jelke in his statement that,

"The old shares never had the reported value, never had any value properly subject to tax in the year 1911, and whatever contingent value they might have had was entirely wiped out by the comptroller's action, like the total destruction of a chattel by fire or other catastrophe.

"Hence, any effort to make the restored or rehabilitated shares liable for this tax would be an assault to weaken or destroy a federal instrumentality."

If you find the facts to be as stated in the application it is my judgment that if the state of Ohio were to enforce the collection of the second half of the taxes and cognizance thereof were taken by the federal government, it would not be unlikely that the federal government would take away from the state the convenient right which it has heretofore enjoyed of collecting taxes on bank shares through the instrumenality of the bank itself.

I concur in the conclusion reached by Judge Jelke, that there is every legal and equitable reason for the remission of this tax; to insist upon its payment would be equivalent to assessing the innocent and unfortunate shareholders upon their loss, because:

1. The tax was based upon a valuation reported in bad faith by an agent designated by the state.
2. The tax was illegally assessed.
3. An attempt to collect it would be vain and fruitless in many instances, and, in all, work a hardship without profit to the state.
4. An attempt to collect it would embarrass and tend to weaken and destroy a federal instrumentality.
5. The law and the public and private conscience demand it.

It has been my constant aim, during my incumbency in office, to allow no point on behalf of the state if there was any doubt whatever about it. The same principle applies to your honorable board; if either of us have doubts we should submit the matter to court. On the other hand, I take it that no public officer should permit fraud to stand as a shield between him and the discharge of his duty. I cannot conceive that any wrong will be done anybody by your assuming jurisdiction to hear and determine this case; and if you find that the officials of the bank acted fraudulently, and that taxes have been imposed two or three times greater than should have been imposed, that the cashier of the bank knew it at the time, you have a right to correct the returns as if listing the property *de novo*, and afford such relief as equity and good conscience demand.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

113.

TAXES AND TAXATION—PUBLIC UTILITY—APPLICATION OF EXCISE TAX AND PROPERTY TAX TO PUBLIC UTILITY COMPANIES—MANUFACTURING COMPANIES, REAL ESTATE COMPANIES AND CLEVELAND TRUST COMPANY, WHEN ENGAGED INCIDENTALLY IN THE BUSINESS OF FURNISHING ELECTRIC LIGHT AND POWER TO CONSUMERS—WHEN THE EXERCISE OF POWER ULTRA VIRES AND ILLEGAL.

Section 5414, General Code, specifies that the term "public utility" shall embrace electric light companies, and that the term also includes any plant or property owned or operated, or both, by such company.

Section 5416, General Code, specifies that any person, persons, firm, firms, copartnership, voluntary association, joint stock association, or corporation, wherever organized or incorporated, when engaged in the business of supplying electricity for light, heat or power purposes is an electric light company; and section 5483, General Code, requires the auditor to charge for collection from each electric light company, an excise tax for the privilege of carrying on its intrastate business. The term business as it is used these statutes, includes an incidental as well as the primary activity of a corporation.

Excise taxes are two sorts; those imposed upon the manufacture or sale of commodities; and those imposed upon pursuits or occupations. The latter is the form comprehended by these statutes. Excise taxes are imposed either by reason of a special privilege enjoyed, or because of an enhanced value attached to the business by reason of its nature, or by reason of the fact that the business is a natural monopoly.

The foundation of the excise tax, under these statutes, is based partly on each of these incidents. These incidents attach to a business, whether or not the same is pursued as an incident to the primary activity of a person, firm or corporation, or whether such business is itself the principal pursuit engaged in.

License taxes which are imposed in the carrying out of the police power have for their foundation, practically the same reasons which justify the imposition of excise taxes, and therefore, decisions construing the exercise of the power to impose license taxes may be applied in interpreting the right to impose excise taxes. The decisions relating to license taxes endorse the rule that an incidental business may be subject to a separate license or excise tax, upon the value thereof. When a corporation, therefore, is incidentally engaged in a manner not even independent of the primary purposes for which it was formed, such incidental activity may be taxed by reason of the fact that it is devoted to a public use and therefore charged with a public interest, under the above statutes, providing for the imposiion of an excise tax.

This rule is supported by the principle that the legislature is not presumed to have left open the question, whether or not, the business of supplying electric light and power was in reality an incidental or an independent activity.

Under the rule of State ex rel. vs. Taylor, where specific provision is not otherwise made, a corporation may be formed for the carrying on of but one specific primary purpose. Manufacturing companies, therefore, may not be authorized to pursue, in addition to the power to manufacure, the further independent power to dispose of electric light and power to consumers. The same is true as to corporations organized to construct and operate a public building; and the rule is also applicable to the Cleveland Trust Company, organized primarily for the purpose of conducting a banking business.

Under section 10212, General Code, however, natural or artificial gas companies, gas light or coke companies, companies for supplying water for public or private consumption; electric light companies, or any electric light and power company, or any water company; or any heating company, or any incline, movable or rolling road company, doing business in the same municipal corporation, may consolidate into a single corporation, and this statute is construed to give the implied power to form a corporation for the carrying on of any one or several of these businesses in the first instance. These rules do not apply to foreign corporations, which may be admitted to do business in this state in the performance of any number of purposes for which any one corporation may be organized to conduct within this state.

Any of these companies, however, may be engaged in the production of electric light and power for purposes incidental to their primary activities, and if when producing the same within these limitation, to prevent economic waste they dispose of their surplus current to outside consumers, such business may be authorized as incidental to their primary activity. Under these rules, therefore, when a corporation is authorized to pursue but one purpose, within the limitations aforesaid, it is not prevented from pursuing several businesses, providing that all businesses, not authorized by their primary purpose clauses, are indulged in as merely incidental to their principal business or purpose.

Inasmuch as the legislature cannot be presumed to have intended that the question, whether or not a business is or is not a public utility business, shall be left to the discretionary determination of the taxing power, and in view of the clean cut definitions comprehensive of the term public utility, as set out in the above statutes, the question as to whether or not such business constitutes a public utility, must be left to the determination of the court in a quo warranto or injunction proceeding, and therefore, when a corporation is supplying electric light or power to consumers, as set out in section 5416, General Code, whether incidental or primary, such business shall be subjected, by the taxing authorities, to the taxes provided for public utilities, even though it is supposed that the powers, in so conducting such business, are ultra vires. Regardless of the extent, therefore, to which a corporation may be engaged, in the business of furnishing electricity to consumers, regardless of the fact that it may be engaged in some other principal enterprise, to which the furnishing of electricity is subordinate, regardless of whether the furnishing of electricity is properly incidental to such other enterprise, or is virtually independent thereof, regardless of the declared purpose of the corporation, and regardless of the question of ultra vires, such company is, if it habitually and customarily furnishes electric current to consumers, an electric light company within the meaning of section 5416, General Code.

Such corporation, therefore, must make reports to the tax commission and pay excise tax on its gross receipts. Its property must also be valued for tax on a unit basis by the tax commission, upon property reports made to the commission. Such corporation is not required to make annual reports to the commission as a domestic corporation for profit, or as a foreign corporation for profit, doing business in Ohio.

The gross receipts required to be reported to the tax commission, upon which the excise tax is to be computed, under section 5417, General Code, are all the interstate receipts of the corporation so engaged in the operation of a public utility.

Under section 5419, General Code, all the real estate, personal property, moneys and credits, owned and held by such corporation, within this state, in the exercise of its corporate powers, or as incidental thereto, whether such

property or any portion thereof is used in connection with such public utility business or not, must be reported and valued upon the unit basis by the tax commission.

COLUMBUS, OHIO, March 13, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 20th, enclosing copies of the respective purpose clauses of the articles of incorporation of some fourteen corporations, and of your subsequent letter of August 21st, enclosing similar copies of purpose clauses of two other corporations. Your letters advise me that all of these corporations are supplying electricity, for light, heat or power purposes, to consumers within this state, and that in the case of each one of them this activity is subordinate or incidental to the principal business carried on by the company. You request my opinion upon the question as to whether the supplying of electricity, for light, heat or power purposes to consumers in Ohio, under these circumstances, constitutes these companies, or any of them, "electric light companies" or "public utilities," as defined in sections 40 and 39, respectively, of the act of June 2, 1911, 102 O. L., 224; and, specifically, as to whether or not, as such electric light companies or public utilities, these companies, or any of them, are required to make property returns to the tax commission, under section 46 of said act, and to have their plants or properties valued for simple taxation by the commission; and whether, also, such companies are liable, on the one hand, for reports to the commission, under section 81 of said act, and excise taxes, under section 92 thereof, or, on the other hand, for reports to the commission, under section 106 or section 110, as the case may be, of said act, and franchise taxes, under section 109 or section 113 thereof.

I may anticipate slightly by saying that the question is not necessarily the same as to all of these companies; that is to say, it is not a single legal problem that is involved, but, perhaps, several. These corporations, according to the provisions of their respective articles of incorporation, fall into, at least five classes; and the questions involved ought to be separately considered and determined as to each one of these five classes.

In the first class of corporations enumerated by you in your letters may be placed those corporations which are given, *by their articles of incorporation, express power to furnish, supply or sell electricity.* The corporations falling into this class, with the purpose clauses of their respective articles of incorporation, as quoted by you, are as follows:

"Bedford Electric Light & Power Company.

"Maintaining and operating an electric light plant, an electric power plant, and a water power plant in and about Bedford, Cuyahoga county, Ohio, and the doing of any and all things necessary and incident thereto."

"Mantua Light, Heat & Power Co.

"Manufacturing, producing, furnishing, selling gas and electricity, or either, for heat, light, power and other purposes, and for doing all things incident to said purpose."

I do not place in this class those corporations whose charters attempt to authorize them to carry on, jointly, the business of some form of manufacturing and that of furnishing electric current. Such corporations will be placed in a separate classification, which I will next define, and the members of which I will now enumerate.

The second class, at the nature of which I have already hinted, consists of those corporations, the purpose clause of whose articles of incorporation attempt to *authorize the business* of furnishing *electric* current for light, heat or power purposes, in connection with some distinct enterprise other than the furnishing of *water*, gas or other similar utilities. In most instances, as will be observed by the purpose clauses quoted, *this distinct activity* is *that of manufacturing in some form* or another. The members of this class, with the purpose clauses of their respective articles of incorporation, as quoted by you, are as follows:

"*Camden Electric Light & Milling Co.*

"Operating a steam and water power plant to create power sufficient to run a mill for the grinding of grain, and to run electric motors and dynamos for the furnishing of light and power, and to do all other things incidental thereto."

"*Elyria Milling & Power Company.*

"Owning, controlling and operating flour and grist mills and for buying and selling at wholesale and retail and dealing in grain, seed, flour, feed and kindred merchandise, and for the purpose of producing, marketing and supplying heat, power and light generally, and of owning all machinery, privileges, real estate and other property needed in carrying on such business, and for doing all things incident to such purposes and business."

"*The Long Manufacturing Company.*

"Owning and operating mills for the manufacture of flour, feed and all kindred products; dealing in flour, grain, feed, cement, concrete blocks, bricks, coal, salt, lime and kindred products, and for the production of electricity by and with the power used in said milling business to light and heat said mills and premises, and of disposing of and selling the surplus current, and do all things necessary and incident to the supplying of said current for lighting streets and heating, lighting and furnishing power to business places and dwellings."

"*Sheriff Street Market and Storage Company.*

"*July* 31*st*, 1890.

"The business of the storage and sale of provisions, goods and merchandise on behalf of the company or others; the constructing, owning and operating buildings adapted to such business, and the leasing of the same or parts thereof or rights thereunder to others, for use in the sale of meats, fish, poultry, flowers, vegetables and fruit; all kinds of personal property, food substances and marketable commodities.

"Amendment to the above signed June 6, 1895.

"Adding to the third clause thereof relating to the purpose for which the corporation is formed, the following clause to wit:

"Also the manufacture and sale of ice, and the production by suitable machinery and appliances, of refrigeration, steam and electric power, and electric light, and the furnishing of same to persons and corporations for their use in connection with heating, lighting or refrigeration of buildings or operation of machinery."

In the third class I would place those corporations which are simply organized as manufacturing companies, without express authority or attempted authority to engage in the business of selling electric current. These corporations are as follows:

"The Ohio Pail Company.

"Changed September 6th, 1898, from 'Udall-Shillito Co.'

"Manufacturing, purchasing and dealing in wooden ware, including pails, tubs, material for same, and all things incident thereto."

"Pickering Hardware Company.

"The manufacture and sale of general hardware of every kind and description, including hoop iron, cotton duck and other goods and merchandise and everything connected with or incidental to the carrying on of a general hardware business."

"The Smith Gas Power Co.

"Manufacturing purchasing, selling and dealing in any and all kinds of gas engines and gas producers, and in any and all tools, machinery, devices, appliances and supplies used in manufacturing the same, and all things incident thereto."

"Stockport Milling Company.

"Erecting and operating a flour and feed mill."

In the fourth class may be grouped together certain corporations organized for the purpose of dealing in real estate and erecting buildings. The members of this class are as follows:

"The Caxton Building Company.

"Acquiring and holding real estate, erecting buildings and furnishing to tenants and others space, power, light and other facilities."

(It will be observed that this purpose clause is like those of the second class of companies, above defined and enumerated, in that the furnishing of light to "others" is specifically enumerated as a purpose of the corporation. It is deemed better, however, to include this company with the other building companies.)

"Commercial Tribune Building Co.

"Copy of purpose clause in charter.

"For the purpose of acquiring by lease or purchase land in the city of Cincinnati fronting on Walnut street and on Government place and erecting thereon a building and maintaining and renting said building and for purposes incidental thereto."

"The Dayton Arcade Company.

"Constructing and maintaining buildings to be used for hotels, store rooms, offices, warehouses and factories."

"The Ely Realty Company.

"Leasing, buying, selling and dealing in real estate, and the constructing and maintaining buildings and improvements thereon, together with all things incident and necessary thereto, and is to exist for a period of twenty-five years."

"The Palace Hotel Company.

"For the purpose of constructing, purchasing or leasing, using and maintaining a building or buildings with the necessary land to be used as a hotel and for stores, store rooms, offices or apartments, with all appendages and accessories connected therewith."

In the fifth class I would place, alone, the Cleveland Trust Company, which is a consolidation of a corporation of that name and one known as The Western Reserve Trust Company. It will not be necessary to quote these articles of incorporation, as neither of them contain any recital of power either to hold real estate for the use of the company, or to dispose of electric current. In short, the enumerated powers of both of the original companies, now consolidated into the one corporation, are simply those of "safe deposit and trust companies" as defined by statute.

Before proceeding to discuss the several questions, which it seems to me are thus raised, I deem it proper to refer to the fact that you call attention, in your letter of August 20th, to two opinions of this department, one rendered by my predecessor, Hon. U. G. Denman, on June 25, 1910, and found on page 272 of the attorney general's report for the year 1910, and the other rendered by myself, to the commission, on February 11, 1911.

In the first of these opinions Mr. Denman held, in short, that a corporation, organized for the purpose of holding real estate and erecting buildings thereon, has no power to generate electricity and to sell a small portion, presumably the surplus thereof, to consumers other than the tenants of its own building; and that, because of this conclusion of law, a corporation, so organized, would not be subject to the then excise tax, measured by gross receipts, being the same tax above referred to, and being provided for by substantially the same statutory language as is incorporated in the present law, with certain exceptions hereinafter to be pointed out. The opinion also held, as a necessary corallary to this conclusion, that such a corporation would be liable to the franchise tax provided for by the then existing law, which said tax, and the exemptions therefrom are substantially the same under the present law, above referred to.

This opinion, if correct, would be of much assistance in the solution of some of the questions presented by your letter. At the outset of my investigation into these questions, then, I was confronted with the necessity of determining whether or not to follow this opinion. Upon careful consideration, I came to the conclusion that whatever might be the ultimate law of the case, the reasoning upon which the opinion was based is not sufficiently persuasive to permit me to give my unquestioning assent to the conclusions therein expressed I therefore determined to consider the question considered by Mr. Denman de novo.

The second opinion to which you refer, singularly enough, related to one of the companies above enumerated, to wit: The Ely Realty Company. In it I stated my view of what property, under the then existing law, to wit: the act of May 10, 1910, 101 O. L., 399, this corporation should report to the tax commission for valuation as a "public utility," *assuming the corporation to be a public utility, or some of the property owned by it to be such.* My opinion was not invited at that time upon the question as to whether or not this company was a public utility, the question submitted to me being as follows:

> "What property is to be considered in determining the value of the property of a public utility; is it only that part devoted to the public utility business, or is it the property of the company, where it is an incorporated company?"

In my opinion I used the following language:

> "It is, inferentially at least, acknowledged that such sale of surplus current constitutes the company a public utility within the meaning of the act of May 10, 1910, * * *."

So that I did not, at that time, consider the question now presented to me, with respect to The Ely Realty Company, or similar companies. I have no hesitancy in considering this question without reference to what I stated in my opinion of February 11, 1911.

I deem it proper, however, to point out that the statutory provisions upon which the opinion last above referred to was based have been materially amended, as I shall hereinafter more specifically show; so that, in any event, the former opinion, in the matter of The Ely Realty Company, is no longer to be taken as a statement of my views of the law, even as to the point upon which it was given.

Further, before taking up the several classes into which I have divided the corporations enumerated by you, I think it best to deal with a question which seems to be common to all of these cases, and the answer to which, if returned in a certain way, will render unnecessary consideration of any of the other questions which have suggested themselves to me.

It is expressly stated in your letter that each of the corporations which you mention is devoting its capital and efforts *principally* to some business or activity other than the furnishing of electric current to consumers. I take it that by this you mean that *in point of fact this is so as to each corporation of which you speak;* that is, that you have ascertained that the corporations in question are, each of them, engaged in such other principal business *regardless of the "purpose" defined in their several articles of incorporation.* I wish, specifically, to state that this is my understanding of your letter, for the reason that my first impression of your meaning was that you had determined the "principal business of the respective companies," of which you speak, by reference to the

purpose clauses of their articles of incorporation. Upon examining some of these articles of incorporation, however, such as those of The Bedford Electric Light & Power Company and the Mantua Light, Heat and Power Company, for example, it became apparent to me that, at least in these instances, you could not have had the technical "purpose" of the incorporation in mind in speaking of the principal business "in which these corporations are engaged." I therefore, came to the conclusion, as I have already stated, that you desired me, first, to consider the effect, if any, of the fact that these companies supply electric current for light, heat or power purposes, to consumers incidentally to some other principal business, or, as common parlance has it, as a "side line." That being the case, I shall consider this question entirely separate from and unrelated to the question as to the bearing of the charter powers of the several corporations upon the ultimate answers to the several questions involved in your letter.

The following provisions of the General Code, consisting of certain sections of the act of June 2, 1911, above referred to, are quoted in this connection. The interpretation of their meaning is involved here, as well as in connection with other questions which will be hereafter discussed.

> "Section 5415. (Sec. 39.) The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, etc. * * * and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations.
>
> "Section 5416. (Sec. 40.) That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:
>
> "* * * * * * * * * * * *
>
> "When engaged in the *business* of supplying electricity for light, heat or power purposes, to consumers within this state, is an electric light company. * * * *"
>
> "Section 5483. In the month of October, annually, the auditor of state shall charge, for collection from each electric light * * * company, a sum in the nature of an *excise tax*, for the *privilege* of carrying on its intrastate *business*, * * * *"

The ultimate question here is, of course, as to the meaning of the word "business," as repeatedly used in the above sections, and elsewhere in the act of 1911. Does this term contemplate an incidental activity, or is its meaning limited to the principal pursuit of the individual or company to which the law is intended to apply? Both meanings are possible from the etymological standpoint. Thus, Webster's definition of the word, when used in this sense, is as follows:

> "That which busies, or engages time, attention, or labor, as a *principal* serious concern or interest; specif.: (a) *customary employment; regular occupation* * * *; (b) any particular occupation or employment habitually engaged in, esp. for livelihood or gain * * *; (c) A particular subject of labor or attention; a temporary or special occupation or concern."

Three shades of meaning are apparent here, the third of which must, of course, be rejected, as it could not be supposed that the legislature intended to tax one only occasionally devoting his capital or energies to one of the ends mentioned in the statute quoted. The first and second meanings given by Webster, however, both denote continuity, habit or custom, and the question now under consideration necessitates choice between them. The lexicographer just quoted seems to regard the *primary meaning* of the word as that one which signifies principal *activity as distinguished* from secondary pursuit. The Century Dictionary agrees with the definition above given, as to the primary meaning; the authority of the Standard Dictionary is to the contrary. I think it probably true that, strictly speaking, the term does denote the principal activity of an individual or a corporation; yet, it is equally true that in common understanding it is possible for one to be engaged in more than one business at the same time.

We have, however, to deal, not with the meaning of the word used in ordinary parlance, but with the construction of a taxation statute considered as a single legislative act. I have quoted the three sections above referred to as containing other language which tends to shed light upon the meaning of the word "business," as used therein. For example, I have quoted section 5415, General Code, because your question relates, in part, to property taxation, and because it is made apparent by this section that the property tax and its definitions are dependent upon the meaning of the excise tax provisions of the law. Stated more explicitly, the definitions now found in section 5416, or at least most of them, have been in the law since 1896, when the forerunner of the present excise tax law was first enacted. It was not until 1910 that the scheme of property valuation, formerly embodied in what was known as the "Nichol's law," originally applicable only to telegraph and telephone companies, was extended to all the subjects of excise taxation; it was then, and not till then, that the purely artificial term "public utility" came into existence. It would, perhaps, be more accurate, in the development of this line of reasoning, to quote the exact language of the original excise tax law. This, however, would necessitate considerable repetition, and would add greatly to the length of this opinion. It will be sufficient, I think, to call attention to the fact that the definitions of section 5416 antedated those of section 5415, and that the scope and intent of the act of 1911, as a whole, in so far as it applies to so-called "public utilities," is to be determined ultimately by ascertaining, independently, the meaning of the definitions of said section 5416.

I have also quoted section 5483, because the subject matter of this section was a part of the original excise tax law, which I may here state, came to be known as the "Cole law." The phrase that has always been in that law is "a sum in the nature of an excise tax." In 1911 the qualifying phrase "for the privilege of carrying on its intrastate business" was introduced. I think that the fact that the definitions of section 5416 were originally enacted for the purpose of defining the subjects of excise tax is material, and that consideration of this fact is helpful in determining the meaning of the word "business," as used in that section. Cooley defines the term "excise" as follows:

> "Inland imposts levied upon articles of manufacture and sale, upon licenses to pursue certain trades, or deal in certain commodities, upon special privileges, etc." (Cooley on Taxation, page 6.)

This definition is quoted with approval in the federal income tax cases, *sub nom* Flint vs. Stone Tracy Company, 220 U. S., 107-151.

It at once appears, from this definition, that excises are really of two sorts; those imposed upon the manufacture or sale of commodities, and those imposed upon pursuits or occupations. It is obvious, of course, that the tax under consideration is of the latter class.

There seems to be in the mind of the author of the above quoted definition a further classification of occupation excises; into those laid upon license to pursue occupations, on the one hand, and those laid upon, or by virtue of, special privileges, on the other. This distinction is not of great practical importance, however, as is apparent from the following quotation, on page 31, of the same author's work:

> "A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment; and this may be a specific sum, or a sum whose amount is regulated by the business done or income or profits earned. Sometimes small license fees are required, mainly for the expense of regulation; but in other cases substantial taxes are demanded, because the persons upon whom they are laid would otherwise escape taxation in the main, if not entirely. Instances of hawkers, peddlers, auctioneers, etc., will readily occur to the mind. The form of a license, though not a necessary, is a convenient, form for such tax to assume, because it then becomes a condition to entering upon the business or employment and is collected without difficulty. But it is equally competent to impose and collect the tax by the usual methods."

Indeed, while "privilege" is a favorite theoretical foundation for excise taxation, and seems indeed to be the foundation for the tax in question, if the language of section 5483, supra, is to be taken as a guide, yet, it has seemed to me that, except in certain instances, the application of this principle is very elusive; that is, it is not every "company" referred to in section 5416 which is the recipient of special privileges from the state of Ohio, or from any government. No "messenger company," for example, enjoys any special privileges or immunities under the laws of Ohio. There are other "businesses" defined in the section which enjoy no special privileges in law; but, on the contrary, all of them are subjected to unusual *restrictions.*

Discussion of this sort is mainly academic, and without quotation of authorities or further elaboration I content myself with the statement of the opinion that the "privilege" of which the statute speaks is not one created by law, such as the right of eminent domain, but rather one arising from the peculiar facts and conditions surrounding the business in question. Thus, it will be found, I think, that each one of the numerous kinds of "companies" referred to in section 5416 present peculiar problems in taxation. It must be acknowledged that the ordinary property tax cannot be equitably applied to any of them, because of the *added value* inherent in the tangible property of all such companies, by virtue of its use, in connection with other property, as a part of a single plant or system, which said value was recognized and defined by the supreme court of the United States, in the case of Adams Express Company vs. Ohio State Auditor, 165 U. S., 683. The legislative motive for the enactment of the excise tax may be, in part, found in the effort to reach this enhancement of value. This, however could not have been the *sole* motive. Prior to the enactment of the act of 1910 some of the companies upon which excise taxes were imposed were also subject to property valuation upon the unit basis. I will not go deeply into this matter, as the commission is familiar with the history of legislation on this point. With the act of 1910, however, each one of these com-

panies became subject to both kinds of taxation, as the above quoted sections in part show, and as your request for opinion itself demonstrates. So that, at the present time, it is reasonably clear that the imposition of the excise tax cannot be regarded solely as a legislative effort to reach the increment of value resulting from the use of tangible property, with other like property, as a part of a system or plant.

Rather, I think, must the legislative motive and the definition of the word "privilege" be found in the fact that practically all of the businesses enumerated in section 5416 are *natural monopolies*. This is not true, of course, of every one of them, but it is at least true of most of them. It is true, for example, of the business of supplying electric current to consumers; a consumer of this commodity cannot purchase in the open market. A change of custom from one source of supply to another is attended by considerable inconvenience and expense. This fact renders the person or corporation engaged in this business the recipient of a "privilege" which is owed, not to the law, but rather to economic facts.

But, whichever of these two ideas is found to be the foundation of the "privilege" which is the real subject of the "excise tax" in question, it is clear that neither of them is in any way related to or dependent upon, the fact that the business in question constitutes the principal activity of the one who carries it on. It is just as difficult, for example, to appraise, for simple taxation, the electric light plant of an individual or company which carries on another and paramount business, as it is to perform the same act with reference to the property of one exclusively engaged in the business of supplying electric current. Similarly, the economic advantages enjoyed by one who sells electric current incidentally to another occupation, arising out of the nature of the electric current business as such, are equally as great as those of one who does nothing excepting sell electric current.

In other words, because it is clear that the "privilege" upon which the excise tax is laid is a *natural* one and not a *legal* one, it seems reasonable to suppose that the legislature intended the tax to be exacted from those so using their property as to give rise to the privilege, whether such use constituted the principal pursuit of such person or not.

This being the case, it follows, I think, that the excise tax in question must be regarded as an ordinary business or occupation tax, just as if it were a tax laid on storekeepers, hucksters, or draymen; and the meaning of the word "business" may be determined by the authority of cases arising under such tax laws.

The following decisions have helped me to a conclusion upon the point now under discussion:

In Savannah vs. Feeley, 66 Ga., 31, it was held that:

> "Whether the right to run * * * vehicles to and from the railroad depots in the city of Savannah is a part of the business of * * * keeping public stables in said city, so as to make a tax upon the business of keeping such establishments include also a tax on the business of running such vehicles to and from the railroad, depends upon the custom of such trade or business in the city." (1st Syl.)

It will be observed that the court here holds that where there are separate license taxes imposed upon two different pursuits, one of which may be incidental to another, the payment of the tax on the principal business absolves from the payment of the similar tax on the incidental pursuit.

On the other hand, it is held, in Thibaut vs. Kearney, 45 La. Ann., 149, that a planter, keeping a store on his plantation, and selling goods and liquors to his employes, exclusively, falls under the terms of the law exacting a license from everyone "doing a business of selling at retail," although it was testified that the keeping of the store in question was purely incidental to the operation of the plantation.

It was also held in Thibaut vs. Hebert, 25 La. Ann., 838, that a planter who had already paid the license tax on the business of conducting a store incidentally to his plantation operations, and who regularly slaughtered cattle on his plantation, for the purpose of supplying meat to such store, was also liable for a license tax on "the business of slaughter-houses." It is clear, in this case, that the slaughtering of the cattle was purely incidental to the keeping of the store, and that the keeping of the store, in turn, was purely incidental to the operation of the plantation.

A case which follows the Savannah case, above cited, is Bell vs. Watson, 3 Lea, 328. But the same court, in Memphis & Little Rock Railroad Company vs. State, 9 Lea, 118, held in the language of the syllabus that:

> "A railroad company which organizes an express company and carries on a regular express business, as a part of the business of the railroad company, under the management and control of its officers, and by its own agents, is subject to pay a privilege tax imposed by statute upon express companies."

It is here to be noted that the reasons asserted by the court in deciding these two cases are not necessarily inconsistent. It was held, on the one hand, that station running was a *part of* the livery stable business; and, on the other, that the express business was not a necessary part of the railroad business. Thus the cases are reconciled, and the rule is established that two businesses may be separate and distinct as subjects of taxation, although one is carried on incidentally to another by the same person.

A case which follows the Louisiana plantation cases, although said cases are not cited in the opinion of the court, is Alcorn vs. State, 71 Miss., 464. Here the tax involved was not called a license tax but a "privilege tax," and was levied "on each store." It was held, in the language of the syllabus, that "the owner of a large plantation, having numerous tenants, who keeps a store, from which he furnishes supplies to tenants at the usual credit price, for profit, is liable to the tax, though he only keeps such goods as are necessary for the tenants and refuses to sell to any others."

Still another similar case is the Delaware & Hudson Canal Company case, 8 Pa. County Ct., 496, wherein it was held that:

> "Where a company, owning and operating mines, regularly sells a particular brand of powder, exclusively, to his own employes, for use in her mines, usually at a profit, but sometimes for less than cost, the company is a dealer and liable to assessment."

The tax involved in this case was called a "mercantile license tax" but, in fact, no license was issued and the assessment was an exercise of the power of taxation and not the police power. See Eastman taxation in Pennsylvania, section 1114, and cases cited.

In Brooklyn vs. Broslin, 57 N. Y., 591, it was held that an ordinance licensing and regulating cartmen "did not apply simply to those pursuing the separate and independent business of cartmen; but where one having carts for his own

business lets them out for hire * * * without having obtained a license, he is liable for the penalty imposed by said ordinance for such violation thereon." As is apparent from this language of the syllabus, the contention was directly made in this case that the ordinance applied only to those carrying on a distinct and independent business and not to those letting carts for hire, incidentally to the carrying on of some other business. This contention was overruled.

In Laslie vs. District of Columbia, 14 App. Cases, D. C., 407, it was held that an act of the legislative assembly of the District of Columbia, requiring dealers in second-hand personal property to pay a license tax, applied to one whose principal business was that of a retail dealer in new bicycles, but who, in the usual course of that business, received second-hand bicycles as part payment for such new bicycles and resold them as second-hand machines.

On the other hand, it was held, in Eastman vs. Chicago, 79 Ill., 178, that one whose principal business consisted of keeping a retail bookstore, and who, in connection therewith, bought and sold second-hand books, was not liable to procure a license as a dealer in second-hand goods.

It will be observed that some of these cases, perhaps the majority of them, are license cases, and it would be proper to object that they are inapposite here, because the enactment and enforcement of license laws constitute an exercise rather of the police power than the taxing power. It might be sufficient, upon this point, to state that the underlying reasons for excise taxation are substantially the same as those for license. Consideration of this point, however, suggests another angle from which the use of the phrase "public utility," in the present law, may be viewed. While it is true, as already remarked, that the definitions of such terms as "electric light company," "railroad company," etc., found in the present law, were enacted long prior to the legislative recognition of such companies as "public utilities," yet, the choice of this latter term is not without weight as suggesting the true meaning of the word "business," now under discussion. With some exceptions, and by no means as a universal proposition, it may be stated, I think, that one basis for the adoption of the peculiar scheme of taxation applicable to such companies as are enumerated in the act is found in the fact that all of them, by devoting their capital and property to some public use, have invoked the exercise of the police power in such a way as to impose upon the state peculiar governmental burdens, for which the excise tax may be deemed a compensation. This idea is not expressed in Judge Cooley's definition, but judicial authority for it is not lacking.

In Southern Gum Company vs. Laylin, 66 O. S., 578, Burket, J., delivering the opinion of the court, and speculating upon the nature of the franchise tax upon corporations, used the following language (page 595):

> "An excise tax may also be imposed on corporations to *compensate* the state for the additional burden sustained by the state and the people by reason of property being held by artificial bodies * * *."

He cites, on this point, Adler vs. Whitbeck, 44 O. S., 539, which is a luminous decision, directly in point here. The question involved in that case was as to whether or not the tax levied on the *business* of trafficking in intoxicating liquors was a *license* and, therefore, prohibited by the constitution of 1851. In holding that it was not, the court, per Minshall, J., in the course of the opinion, at page 565, uses the following language:

> "Whenever the pursuit of any business is attended with such inconvenience and evils as to make it a source of burden to the general public, beyond what results from the pursuits of men in general, it is competent to the legislature to burden the business distinguished in this regard, with such taxes as will afford indemnity to the general taxpayer for the increased burden thus imposed upon him, and tend to repress the evils connected with the business itself."

It seems clear that if the inconvenience to society in general, resulting from the conduct of a particular business, is a proper ground for excise taxation, inconvenience and expense to government, necessitated by the making and enforcing of regulations pertaining to a business, is also a proper ground for such sense and not in the exact sense used in the statute, do engage the attention and powers of government to an increasingly large degree, by way of regulation and the enforcement of public rights, is a patent fact. In this connection, it is significant that the same general assembly which enacted the tax commission act of 1911 passed also the public utility law, so-called, in which a new and summary method of regulating such "public utilities" was created, involving the expenditure of much state revenue, and in which the very definitions incorporated in section 5416 are used to define the businesses subject to such control.

Now, the expense of governmental regulation is sometimes, and perhaps often, compensated by the exaction of license fees, as conditions precedent to engaging in business. As made clear, however, in the foregoing authorities, the same end may be attained by the imposition of simple business or occupation excise taxes. Therefore, it is proper, I think, to look to license tax cases for authority upon the construction of occupation tax laws.

Indeed, now that the test of what constitutes a public utility, for purposes of regulation, is substantially the same by express enactment as is the same test with reference to the exercise of the power of taxation, it would be proper, in my judgment, to apply the reasoning of the court in cases defining the extent of the police power, as such, in the regulation of such so-called public utilities. As is well known, the leading case establishing the foundations of this power is that of Munn vs. Illinois, 94 U. S., 113, in which Mr. Justice Waite, delivering the opinion of the supreme court of the United States, used the following language, on page 126:

> "Property does become clothed with a public interest when used in a manner to make it a public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus granted."

What constitutes devotion to a public use is in itself an interesting study, which might, with profit, be pursued in this connection, but from which I refrain, because of the limitations of this opinion. For example, in Zanesville vs. Gas Light Company, 47 O. S. 1, natural monopoly is distinctly held to be the basis of a peculiar public interest in the business, which proposition has already been alluded to in this opinion. Minshall, C. J., speaking for the court, on page 33, used the following significant language, which is applicable to many phases of the question raised by your query:

> "It is also argued that a gas company does not come within the reasoning of the principle upon which these cases (meaning Munn vs.

Ill., supra, and State ex rel. vs. Gas Company, 34 O. S. 572) have been decided; that it does not devote the use of its property to the public; that it simply manufactures gas at its works, and then sells it to the consumers, as the manufacturer of any article; and that the public have no use of its property, as in the case of warehousemen * * *. It is true the public has not the use of the property of a gas company as it has of a ferry, nor probably as it has of a warehouse, yet a gas company controls and supplies a public want, in a position that gives it, or may do so, *a virtual monopoly of the supply;* and so far as the public is concerned, it is immaterial whether the manner in which the want is supplied is termed a *letting* or *selling* of property or service. It is the virtual monopoly of the supply of the want that gives to the public the right to regulate the price demanded for it."

In reason, there does not seem to be any distinction as to the interest of the public in a business that enjoys a virtual monopoly, or that is otherwise devoted to public use, as between one purely incidental to another principal activity and one which is a principal or independent pursuit of the person or corporation engaged in it. This question, has, however, been directly raised in New York Cement Company vs. C. R. Cement Company, 178 N. Y. 167. A corporation had purchased, by intermediate conveyance, a canal from the company which originally constructed and operated it. The principal business of the corporation was that of manufacturing cement; its works were located upon the bank of the canal, which it attempted to use, solely, for the purpose of conveying its own product to tide water. This, of course, was a mere incident to its principal business. A competing company, also engaged in the manufacture of cement, might, by bill in equity, to restrain this corporation from excluding its boats from the canal or from exacting tolls for the use of the canal in excess of those prescribed by law for canal companies. The court granted the relief prayed for, holding that so long as this canal was used for the purpose of transportation it should be regarded as a public highway.

In New York and Chicago Grain and Stock Exchange vs. Chicago Board of Trade, 2 L. R. A., 411, the facts were as follows:

The board of trade of the city of Chicago, a corporation under the laws of the state of Illinois, conducted as its principal activity an exchange hall, upon the floors of which, between certain prescribed hours of each business day, its members transacted the business of trading in grain and provisions. So extensive and so important did this business become, that, ultimately, the prices at which commodities exchanged on its floors virtually determined the market prices of such commodities in the extensive territory tributary to the city of Chicago, if not in the country at large, and indeed, to a certain extent, throughout the civilized world. For many years the board of trade permitted telegraph companies to collect and transmit reports of the dealings made on the floors of the exchange. Subsequently, the board of trade made certain rules governing the dissemination of such information. The appellant corporation was organized for the purpose of buying and selling grain on commission, and had been availing itself of the so-called "ticker service" of the telegraph company, under arrangement with the board of trade. The board of trade undertook to discontinue the service of appellant, though appellant offered to submit to all reasonable requirements adopted by the board. Appellant thereupon sought an injunction, which the court, on the authority of Munn vs. Illinois, granted. In discussing the reasons for the opinion, Baker, J., used the following language:

"If the statistics with reference to the individual business of the members of the association and the aggregate business of its members had, from the start, been gathered and compiled at the expense of its members, and for their sole use, it may be it would be strictly private property, held in trust by the board for the use and benefit of such members, and wholly free from any public interest therein. But the board did not so exercise its franchise and so conduct its business, but admitted the telegraph companies to the floor of its exchange, and permitted and encouraged them from day to day * * * to gather these statistics * * * and telegraph them * * * throughout the land, to whomsoever would pay for such information * * *

"The facts that the board of trade is a private corporation and that the statistics of these dealings, collected, as we have stated, are private property, are not conclusive that such statistics are not charged with a public interest, and that there is no duty due the public with respect thereto. * * *"

Although the question is not discussed as such, it is clear that the real issue in this case was as to whether or not a corporation, purely private in its principal aims, could incidentally devote a part of its business to public use and become subject to regulation thereof. The court's answer to this question was in the affirmative.

Indeed, many apt examples of such a state of affairs might be imagined. Thus, a lofty office building is a purely private institution, but the elevator service maintained therein is clearly charged with a public interest and subject to the regulatory power of the state, although it is purely incidental to the maintenance of the building itself.

I think it is clear, then, that a business activity, purely incidental to another enterprise, and not even independent of it, may become peculiarly charged with a public interest; that as such it may become the object of police regulation; that as the object of police regulation it may be licensed; and that instead of licensing such an occupation, a business or occupation excise tax may be laid down upon those engaged therein.

All the foregoing considerations, then, together with the weight of authority as disclosed by the decisions cited, tend to establish the conclusion that the phrase "the business," as used in section 5416, General Code, supra, means, not the principal activity of the individual or corporation, but rather that degree of activity along the lines defined, which, by reason of continuity, amounts to the doing of business within the second of the three meanings of the word "business" as defined by Webster, supra. There is still another reason for this conclusion. The whole "public utility" tax law applies as well to individuals, partnerships and voluntary associations as to corporations. It would, doubtless, be difficult to determine, in many instances, whether an individual, for example, were principally engaged in one occupation or another, and it would be difficult, in any event, to determine, either as to a corporation or an individual, whether the supplying of electric light, for example, were incidental to some other business, in the extreme sense, or had attained to such relative proportions in an individual case as to render it independent of, though subordinate to, the principal business in which the individual or corporation might be engaged. For example, a company whose principal business is mining coal might operate so extensively in that line of endeavor as to require the production of an enormous amount of electric current. The surplus of this current might be used to light the streets and private dwellings of a whole town, yet, in proportion to the total volume of business transacted by the corporation this ac-

tivity might be purely incidental and clearly subordinate to the principal business of the corporation. Another corporation or individual might generate electric current enough to operate a manufacturing plant and, having surplus current to dispose of, might sell the same to a dozen consumers; yet, in proportion to the total amount of business done and capital invested, the furnishing of electric current to consumers would be more extensive in this case than in the other one imagined. The consideration of convenience, therefore, would support the view that the legislature did not intend that these questions of fact should be left open, and opportunity for injustice and unequal operation of the taxation laws be thus afforded, by using the phrase "the business" in a sense which would compel the ascertainment, in a given case, of whether or not the person or corporation engaged in one of the enumerated enterprises was so engaged as an incident to some other enterprise.

To summarize, then, because the excise tax law, which was the original act in which the definitions in question were found, whether founded upon practical difficulties of taxation, the existence of peculiar privileges, or the existence of special burdens and duties to the general public, growing out of the carrying on of the business, is founded upon conditions which have no relation to the question of incidental or principal occupation; and because, further, the conditions which made such businesses subjects of excise taxation, and even of property taxation, by peculiar rules of valuation, are such as to render impracticable and unjust, the application of any such test, I have reached my conclusion upon the first question suggested by your letter. That conclusion is that a person, partnership or corporation is "engaged in the business" defined by section 5416, when it is found doing any of the acts therein enumerated, as a continuous or habitual activity, whether as a principal pursuit, or an independent, though subordinate, undertaking, or as a purely incidental undertaking.

In laying down this broad principle, however, I deem it proper to state that it may be subject to certain exceptions. I have no such exceptions specifically in mind, but realize that the nature of the subject is such that it is unsafe to state rules too rigidly.

From your letter, therefore, it appears that each and every one of the corporations you mention, as being engaged in the business of supplying electricity, for light, heat or power purposes, within the meaning of section 5416, are presumptively to be regarded as "public utilities," both for excise tax and for simple taxation purposes, and hence, under the ruling given you in the matter of the Connecting Gas Company, in an opinion of recent date, must be regarded as exempt from the payment of the franchise tax. There must now be considered, however, certain suppositious reasons why these companies are, some of them, not to be regarded as such public utilities but, because of the operation of the law applicable to private corporations as such, as distinguished from individuals and others subject to the excise tax, are taken out of the rule just laid down.

Mr. Denman's opinion, already referred to, suggests one such reason. Applying the doctrine of State ex rel. vs. Taylor, 55 O. S. 67, to the purpose clause of the articles of incorporation of the company whose case was considered by him, he reached the conclusion that the sale of electric current was an undertaking *ultra vires* and, apparently, that the company, therefore, could not be considered as being engaged in the business of supplying electricity, but should discontinue this practice and pay franchise taxes upon its issued and outstanding capital stock.

Considering, now, the five classes of corporations referred to by me earlier in this opinion, I shall discuss as to each one of them, and the corporations therein, the question as to whether or not the furnishing of electric current,

under the circumstances suggested by you, is beyond the corporate powers as defined in the articles of incorporation transmitted by you to me.

Before so doing, however, permit me to point out that whatever be the true doctrine in State ex rel. vs. Taylor, supra, it has no application to *foreign* corporations. The decision of the whole case is based, as I shall hereafter point out, upon the peculiar language of section 3235, Revised Statutes, now section 8623, General Code, which provides for the formation of corporations under the laws of Ohio. It is not every state, however, whose laws are so stringent as those of Ohio on this point. Many states authorize the formation of corporations for a diversity of purposes, and Ohio admits such foreign corporations to its borders, without limiting them as to the number of independent activities which they may carry on here. Section 178, General Code, which applies here, provides that before a corporation for profit transacts business in this state the secretary of state shall certify "that the business of such corporation, to be transacted in this state, is such as may be lawfully carried on by a corporation organized under the laws of this state, for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively." Your letter does not state whether or not all the corporations you mention are domestic corporations; and from the names of some of them, I have suspected that they are foreign corporations. If that is the case, then, Mr. Denman's opinion, if correct, would not apply to such corporations at all.

Coming now to the first class of corporations mentioned by me, and assuming that both of them are domestic corporations, I beg to state that in my opinion the furnishing of electricity for light, heat and power purposes, to consumers, is not *ultra vires* as to either of them. The following provision is found in section 10212 of the General Code:

> "Any two or more electric lighting companies, natural or artificial gas companies, gas light or coke companies, companies for supplying water for public or private consumption; or any electric light and power company and any water company; or any heating company and any incline, movable or rolling road company; doing business in the same municipal corporation or which are incorporated and organized for the purpose of doing business in the same municipal corporation may consolidate into a single corporation in the manner and with the same effect as is provided for the consolidation of railroad companies."

It has been the opinion of this department, that where, as in this case, two corporations are authorized to be consolidated into one, such authority, by application, permits the original organization of a corporation for all the purposes which a consolidated company might be authorized to pursue. To hold otherwise would simply necessitate the original formation of two companies and immediate consolidation of the two into one, which would seem to be a useless formality.

As to the Bedford Electric Light & Power Company, therefore, the multiplicity of purposes expressed in its articles of incorporation would seem to be authorized by the provision that "any electric light and power company and any water company * * * incorporated * * * for the purpose of doing business in the same municipal corporation may consolidate into a single corporation * * *."

There is some doubt here, it must be admitted, as to whether the purpose of operating a "water power plant" is contemplated within the term "water company." It might be urged that the last mentioned phrase refers solely to com-

panies maintaining and operating "waterworks." This is, at most, however, a doubtful question, and while the powers of a corporation are strictly construed as against the state, the evident intention of the incorporators of this company having been to comply with the section just quoted, I would not hold, in advance of an action in quo warranto at least, that the corporation, having elected to devote most of its capital to the water power business (which, I take it from your statement, is the case), is, therefore, acting *ultra vires*, because this purpose could not lawfully be joined with that of maintaining an electric light and power plant.

In this connection, also, permit me to point out that there are certain dicta in State ex rel. vs. Taylor, supra, which throw additional light upon the meaning of the court in laying down the strict rule of "singleness of purpose," in support of which the case is most often cited. The corporation concerned in that action was originally formed, prior to the enactment of the statute above quoted, "for the purpose of * * * organizing a manufacturing company * * * to engage in the business of manufacturing gas, electricity and furnishing natural gas for light, heat, power and other purposes as may be used by the citizens and corporations in Steubenville, Jefferson county, Ohio, and its vicinity." It was sought, by amendment, to add to this power that of operating a street railway by electricity, or other motive power, and the right to make this amendment was denied by the court. It was argued in behalf of the corporation seeking to make the amendment that, if it had been originally incorporated as a street railway company it might, under this power and incidentally thereto, have lawfully furnished light and power; so that the purpose of the amendment was simply to authorize the company to engage in a group of associated activities, which it might lawfully have engaged in if the language of its original purpose clause had been slightly different. Speaking of this contention the court, per Spear, J., uses the following language:

> "Though the major promise be conceded, do the conclusions follow? Full and due effect is to be given to all the words of the section. And this requires that we keep prominently in mind the words of the proviso, viz: 'nor shall any corporation by amendment, change substantially the original purposes of its organization.' That is, whatever may be done by way of enlarging the original objects, or adding to them, one thing cannot be done, viz.: the original purpose of the organization cannot be substantially changed. In this case, what is it? That purpose, as expressed, manifestly is to furnish light, heat and power. Gas, whether natural or artificial, is the source of light and heat. So, also, is electricity, and that agency possesses the further property of generating power. *It would seem, therefore, not unnatural or improper to authorize a company to combine the business of furnishing natural gas for the purpose indicated with the business of manufacturing gas and electricity and furnishing those commodities for the same and a kindred purpose, to wit: power.* Light and power being generated by the same agency, common results from the same cause or causes, the two objects sought are germane. The main purpose of this company seems to have been light and heat, an incidental purpose power, i. e., power induced by electricity. The incident would follow the principal purpose. So it would seem that a company organized for the principal purpose of acquiring and operating a street railway by electricity might naturally, having obtained authority to do so, join with the incidental purpose of furnishing light and power within the location where it is authorized to operate. And no substantial reason is perceived why,

> if a company had been incorporated for either of the main purposes here indicated, it might not, by proper amendment, be also authorized to join the incidental purpose referred to."

While the court was discussing, in this case, a hypothesis suggested by counsel, I am disposed, in view of the somewhat explicit concessions embodied in the language quoted, to hold that the production of light and power, by whatever agency, constitutes a single purpose, within the meaning of the decision in State ex rel. vs. Taylor.

As to the Mantua Light, Heat & Power Company, it seems that it is clear that if this corporation is, in fact, furnishing gas and electricity in the same municipal corporation, it is within the provisions of section 10212. True, there are here, also, certain difficulties; that section authorizes electric lighting companies to consolidate with artificial gas companies; and seemingly it does not authorize the consolidated corporation to furnish electric *power*. For reasons apparent upon the face of the quotation from the decision in State ex rel. vs. Taylor, and because it is notoriously true that the furnishing of electric current for power is, in fact, a part of the "electric light business," I am of the opinion that this corporation is within its corporate power in furnishing electricity for light, heat or power purposes, and in so doing is, as is the Bedford Electric Light & Power Company, really engaged in one of its principal undertakings, authorized by statute, and not in an incidental pursuit.

The second class of corporations above referred to presents greater difficulties, assuming all of them to be Ohio corporations. As a general proposition, a manufacturing company may not be authorized to engage independently in the business of furnishing electric current. Certain extraordinary incidental powers are conferred upon such corporations by sections 10135 to 10143, inclusive, General Code. These sections are silent as to the power in question; and under the rule of State ex rel. vs. Taylor, which is to the effect that the word "purpose," as used in section 3235, Revised Statutes, now section 8623, General Code, is designedly employed in the singular number, it clearly follows that a manufacturing company cannot be formed for such purpose, and the additional and independent purpose of operating an electric current plant.

This, however, is not tantamount to holding that electric current may not be generated for the purpose of producing power sufficient to operate the manufacturing plant of the corporation, or that any surplus current generated for that purpose may not be sold to consumers. Sales of surplus power, as incidental to the principal business of manufacturing, will be treated of in connection with the third class of corporations defined by me. At the present it is sufficient to point out that while it may be unlawful for a manufacturing company, to engage in the business under discussion, as an independent activity, yet, if, in point of fact, in an individual instance, the corporation merely sells its surplus power or current, its acts in this direction could not be regarded as *ultra vires*, whatever the effect of the attempted authorization thereof in the articles of incorporation, unless such incidental activity is, as such, of itself, *ultra vires*.

The effect of express language in articles of incorporation, not permissible under section 8623, General Code, as construed in State ex rel. vs. Taylor, supra, must be considered. The rule here is succinctly stated in Thompson on Corporations, second edition, section 174, as follows:

> "The rule is well settled that when a corporation is organized under a general law the law itself limits the powers of the corporation and the nature and extent of the corporate privileges; and the powers,

> privileges and immunities specified in the legislative act authorizing its organization cannot be added to or enlarged by the charter or other instruments. In all cases where there is conflict between the charter or articles of incorporation and the general law, the latter governs. But the mere fact that the power enumerated—in the regulations of the association, for example—are in excess of those conferred by the general law, will not entirely invalidate the charter; the charter is valid as to the legitimate powers of the corporation and the enumeration of unauthorized powers is treated as surplusage. * * *" (Citing numerous cases, of which see in particular People ex rel. Peabody vs. Chicago Gas Trust Company, 130 Ill. 268, 8 L. R. A. 497.)

This proposition of law is so well settled as to need no further discussion or elaboration. Applying it to the several purpose clauses of the corporations of the second class defined by me, it follows that if these corporations are organized under the laws of Ohio for the purpose of manufacturing the rule in State ex rel. vs. Taylor limits the independent activities of the corporation to that single purpose, and a recital of the additional power to generate and sell electric current is a mere nullity, and confers upon the corporation, at least as against the state, no power to engage in such business as a separate and independent activity. This is particularly true of the Elyria Milling & Power Company and the Long Manufacturing Company. As to the former the phrase "and for the purpose of producing, marketing and supplying heat, power and light generally" is mere surplusage. As to the latter, at least, all that follows the phrase "disposing of and selling of surplus current as therein found" is surplusage. The entire amendment of June 5, 1895, to the articles of incorporation of the Sheriff Street Market & Storage Company is, if this corporation be a domestic corporation, illegal and void. As in the case of manufacturing companies, corporations formed for the purpose of conducting market houses have certain specific powers which will be found defined in sections 10151 to 10156, inclusive, General Code; but the power to engage in the independent business of manufacturing and selling ice, and producing steam and electric power and current, for supplying consumers, is not included therein. This company, therefore, has no legal authority to engage in these businesses independently of its market house business, despite the language of the amendment.

The case of the Camden Electric Light and Milling Company is a peculiar one. The language of this purpose clause is very ambiguous. On its face, the corporation is not authorized to engage in the business of milling at all, but its authority is limited to the creation and disposition of power by steam, water and electricity, which, as already observed, constitutes a single purpose. It is true that this power is to be generated primarily for the purpose of running a mill, but the corporation is not authorized to run the mill, except by inference. If this company is principally engaged in the business of milling, and incidentally, or in a subordinate way, is in the business of selling electric current, it would seem that quo warranto would lie, not for the purpose of ousting the corporation from the sale of electricity, but rather for the purpose of ousting it from operating a mill. In the absence of more explicit information, I would be unable to hold that the Camden Electric Light and Milling Company is not authorized to supply electricity for light, heat and power purposes.

In conclusion, then, as to the second class of corporations, excepting the Camden Electric Light & Milling Company, I am of the opinion that none of them are authorized to carry on the business of supplying electric current for light, heat and power purposes, as an independent enterprise, whether paramount or subordinate to another activity. Your letter states, however, that

the corporations enumerated by you are selling electric current, not as an independent business, but incidentally to some other business. In an effort to cover the whole field suggested by your letter, and, particularly, by your reference to former opinions of this department, I have heretofore discussed, and shall continue to discuss the status of these corporations for taxation purposes upon both assumptions, namely: first, upon the assumption that the electric current business of the corporations in question is more extensive than could properly be determined incidental to their other business; and, second, upon the assumption that such electric current business is carried on by each of these corporations in a manner purely incidental.

This question is virtually the same as to those corporations placed by me in the second class, and those in the third class, for reasons already pointed out. That is to say, the recital in the articles of incorporation of corporations of the second class of the power to manufacture and distribute electric current being void and mere surplusage, these manufacturing corporations are, in law, upon the same footing as those of the third class, whose articles authorize merely the conduct of some manufacturing enterprise, and are themselves open to no criticism.

As to both classes of corporations, then, always assuming all of those mentioned by you to be domestic corporations, the carrying on of an independent business of supplying electricity to consumers, in addition to the principal business of manufacturing, is clearly *ultra vires*. No argument is necessary upon this point. An action in quo warranto, or possibly one in injunction, upon relation of the attorney general, would undoubtedly lie to prevent a manufacturing corporation from engaging in such an independent enterprise. Under the law of *ultra vires* minority stockholders of the corporation might restrain the carrying on of such business, and various legal consequences might ensue. A corporation would be, in my judgment, carrying on an independent business within the meaning of this principle if its sales of electric current were not confined to the surplus current generated by its plant. That is to say, under modern conditions, almost every manufacturing operation necessitates the employment of mechanical power. One of the most convenient methods of supplying power for such purposes is by the generation of electric current. The installation and operation of an electric power plant is clearly a proper incident to the carrying on of the manufacturing business by a corporation organized for that principal purpose.

It is probably true, and I have assumed it to be true, that without the investment of additional capital, and at a very slight increase in operating expense, a power plant, reasonably adapted to the needs of the manufacturing plant, as such, can be made to generate more than sufficient electric current to supply such needs. For example, it may be, and in many instances doubtless is, true that the manufacturing plant, as such, is in operation only during the hours of the usual working day, whereas, without appreciable additional cost, the dynamos in the power plant could be kept running during the night season as well. So long as this is true it would be an economic waste not to make use of such apparatus during the idle hours of the plant if use can be made thereof.

Now, it is well known, of course, that the same electric current which generates power to operate a manufacturing plant is capable, by means of other apparatus, of producing light. I am of the opinion that, under circumstances like these, the use of the plant and equipment of manufacturing company, and the installation of necessary incidental equipment, like wires, poles, transformers and arc or incandescent lamps, for the purpose of avoiding economic waste, and in a manner such as not to interfere with the operation of the

manufacturing plant, nor to require the enlargement, for that purpose, of the electric generating plant, as such, would be purely incidental to the manufacturing business, or at least would be a corporate activity incidental to the principal purpose of manufacturing; therefore, such an enterprise would not be *ultra vires*. On the other hand, if the power plant itself, meaning now the means of generating electric current, is designedly made greater than the necessities of the manufacturing plant require, for the purpose of selling current commercially, for light or power purposes, then, the carrying on of the commercial electric business would be an independent activity of the corporation, and clearly beyond its corporate powers. The difficulty of the case arises from the impossibility, as I see it, of drawing any distinct line between what constitutes an independent business and what constitutes an incidental activity. For reasons that will hereafter appear I shall not attempt such an undertaking, but, for convenience, prefer to discuss the case where the corporation is clearly acting *ultra vires*, separately from that in which the corporation's sales of electric current are purely incidental.

Let the latter of the two imagined cases be first considered. It will at once be suggested that the general discussion in which I have already indulged myself is in point here, and furnishes an answer to the question as to whether or not a corporation which, incidentally to its principal activity, supplies electricity for light, heat or power purposes, to consumers within this state, is "engaged in the business" of so doing, within the meaning of the excise tax law, and is, therefore, a "public utility" within the meaning of other provisions of the tax commission act of 1911. However, in the prior discussion I have not considered the question as affecting a corporation, as such, it being the rule, as laid down in State ex rel. vs. Taylor, that a corporation can be organized for but one *purpose*. Does it, therefore, follow that a corporation can have but one *business*, within the contemplation of the tax laws?

Mr. Denman's answer to this question seems to have been in the affirmative. Upon careful consideration I find that I cannot agree with him. In my opinion it does not follow that, because a corporation may have but one purpose of incorporation, it may not, in pursuance of that purpose, lawfully engage in more than one "business," as the word has been defined by me, provided such business is incidental to the purpose defined.

At the risk of repetition, permit me to point out that the word "business," as used in section 5416, General Code, includes within its meaning a customary or usual pursuit, purely incidental to some other principal undertaking. This definition was framed without regard to the rule of State ex rel. vs. Taylor. Considering it in the light of that decision, however, I am satisfied that it applies to corporations as well as to individuals. Some of the authorities cited by me in framing this definition are in point here, but I need not repeat their citation. In addition thereto, however, the case of State ex rel. vs. Taylor, itself, is authority for the proposition that the word "purpose," as used in the statute, does not mean "business," except as the latter word may be used in the first sense defined by Webster, as above quoted; that is to say, unless the word "business" be used as denoting the principal activity of the one engaged therein. I have already quoted the portion of the opinion of the court in the case cited, upon which I base the conclusion reached by me, but beg leave to repeat a part of that quotation in this connection:

> "It would seem, therefore, not unnatural or improper to authorize a company to combine the business of furnishing natural gas for the *purpose* indicated with the *business* of manufacturing gas and electricity, and furnishing those commodities for the same and a kindred purpose * * *." (Page 65.)

Here is a clear statement of the principle that was in the mind of Judge Spear when he wrote the opinion in State ex rel. vs. Taylor. That principle, is, if I understand it correctly, that several *businesses*, i. e., customary activities which may be differentiated, may be carried on by a corporation in furtherance of a single *purpose* of incorporation.

I have said enough, it seems to me, to demonstrate that a purely incidental corporate activity may be, for taxation purposes, regarded as a separate "business;" and also that it is in this sense that the word is used in section 5468, General Code, in so far as the same applies to corporations.

Coming now to the second imagined case, I beg to state that in my opinion the fact, when ultimately determined, that a manufacturing corporation is carrying on the business of supplying electricity for light, heat or power purposes, in a manner so extensive as to render such activity *ultra vires*, does not alter the case so far as the application of the taxation laws is concerned. In an action in quo warranto or injunction, for the purpose of restraining the corporation from exceeding the bounds of its granted power, and those powers incidental thereto, there would inevitably arise a question of fact. The court would have to receive evidence to determine whether or not, under the peculiar circumstances surrounding the business of the respondent or defendant, its electric current supply business was so conducted as to make it an enterprise independent of and unrelated to the principal purpose of incorporation. No two cases will be exactly similar, I apprehend, and the result of any one such action could not be forecasted by the application of any hard and fast rule. It seems unreasonable to suppose, therefore, that the general assembly would frame a tax law, the application of which would depend upon such an uncertain factor.

Furthermore, I have already suggested that in my opinion the test which is laid down for the application of the police power of the state to a public service business is the same test by which to determine the application of an excise tax laid upon public service occupations as such. If that be the case, there are decisions directly in point here.

In Arkansas & Louisiana Railway vs. Stroude, 77 Ark. 100, the action was brought under a statute rendering "all telegraph companies doing business in this state" liable in damages for mental anguish for neglect in transmitting messages. It appeared that the railroad company maintained, in connection with its railroad, a line of telegraph, and held itself out to the public as a telegraph company receiving and transmitting messages at commercial rates. The plea of *ultra vires* seems to have been directly made. At least the following is found in the opinion of the court, page 114.

> "The evidence shows that appellant, though organized as a railroad corporation, and operating a railroad, was also operating a telegraph line along the line of its railroad, and was engaged in the telegraph business, serving the public generally for pay, along its said line. It is estopped to assert that it was acting beyond its power in so doing."

So also, in New York Cement Company vs. C. R. Cement Company, supra, the plea of *ultra vires* was made, eliciting the following comment on the part of the court:

> "The defendant raises the further point that the exercise by the Consolidated Rosendale Cement Company of the franchise granted by the state to the Delaware & Hudson Canal Company would be *ultra vires*. This is a question between the defendant and the state of New

> York, with which the former has no concern, as it is estopped from raising it by boldly assuming the position which it now occupied. So long as the state of New York raises no objection in the premises the defendant will not be heard to complain."

Manifestly, these cases would have had direct application to the question here involved if the same had been raised prior to the year 1902. That is to say, if the excise tax on the business done were the only tax exacted from public service corporations, surely, a corporation doing a public service business could not be heard, as a defense against liability to tax, to assert that it was without corporate power to engage in the business in question. I imagine, however, that Mr. Denman's opinion, for example, may have been inspired in part by the fact that since the date mentioned all, or rather nearly all, corporations doing business in Ohio are subject to one of two privilege taxes—the excise tax under consideration and the franchise or "Willis tax," also referred to by you. Prior, at least, to the amendment of the excise tax law, in 1911, the application of the rule, as I have defined it, would result in a loss of revenue to the state, as compared with the result if the ruling were opposite, because of the exemption clause now embodied in section 5518, General Code, section 129 of the act of June 1, 1911, and which has always been a part of the so-called Willis law. That section, in its present form, is in part as follows:

> "An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act * * * shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act."

It is obvious, of course, that a corporation engaged but incidentally in a public utility business, and producing for itself thereby but a small amount of gross receipts or gross earnings from such business, would, by virtue of this provision, escape franchise taxation entirely; and in many cases would probably pay less taxes to the state than if not considered to a public utility. As I shall hereinafter point out, I do not believe that this is the present state of the law, but inasmuch as it was at one time the law, it may be proper to consider whether or not the fact that the state might be put to a disadvantage in revenue because of the doing of a public utility business in an illegal manner, or even in a lawful incidental way, by a corporation not organized for that purpose, would give to the state the right to treat such a corporation as one other than a public utility company, without first determining the corporation's rights in the premises by appropriate ouster or injunction proceedings.

On this point Mr. Denman seems to hold in the affirmative; that is to say, he is of the opinion that, a corporation's electric light business being *ultra vires*, the state may, without intermediate action of any sort, treat the company as one liable for Willis law fees. Upon careful consideration, I have reached the opposite conclusion. I have been able to find no authority sustaining the right of the state to question the exercise of corporate franchises otherwise than by action in quo warranto or injunction. I am firmly of the opinion, in the absence of such authority, that while the state clearly has the right to restrain *ultra vires* acts of one of its corporations it must do so by one of these two means; and I am further of the opinion that until a question of this sort has been legally adjudicated, the acts of a corporation ac-

quiesced in by its stockholders will be presumed, as against the state, to have been committed within the scope of its express or implied power. Society Perun vs. Cleveland, 43 O. S. 481. In short, I do not believe that it is within the power of the taxing officers of the state, simply because a greater revenue might be produced thereby than by some other course, to ignore the fact that a corporation is engaged in a public utility business, and subject to excise taxation and property valuation, as such, when it may be apparent that the corporation has no legal right to engage in such business.

Looking at this question from another point of view, I am of the opinion that the enactment of the Willis law of 1902, even though as a part of the same scheme of taxation as that embodied in the Cole law, did not change the scope and effect of the terms used in the latter, and adapted from an act already in effect for some six years prior to that date. Whatever corporations were, prior to that time, subject to the payment of excise taxes as "railroad companies," "electric light companies," etc., continued to be so subject to excise taxation, notwithstanding the enactment of the franchise tax law and of the proviso now incorporated in section 5518, as part thereof.

Coming now to the fourth class of corporations enumerated by me, it is apparent that a somewhat different question is presented thereby, in so far as a determination of what activities are properly incidental to the principal business of constructing and maintaining buildings for office and hotel purposes is concerned. Special provision as to this class of corporations is found in section 10210, General Code; but this section does not authorize such corporations to furnish light and heat, even to their own tenants. Application of strict rules of construction to this statute, as well as to others already spoken of in this opinion, would lead to the conclusion that such power, not having been enumerated in a statute providing for the special powers of such corporation, is to be excluded from the implied authority thereof. I do not believe, however, that this strict rule can prevail. Modern business methods do not sanction its application. In the case of a hotel, for example, it is well understood that the obligation of the keeper of a hotel is to furnish his guests with light and heat, and such furnishing is a part of his ordinary business. It is not otherwise with a modern office building; and, for sufficiently apparent reasons, I am of the opinion that the furnishing of electric light to the tenants of such a building is within the implied powers of a corporation organized for the purpose of maintaining the same. Sales of surplus current, by hotels and office buildings generating the same primarily for their own use, are upon the same foundation, and governed by the same rules as have been already discussed in this opinion with respect to similar sales from factories.

In the light of the plantation storekeeper cases, above cited, it might be asserted that although the furnishing of electric light to the tenants of an office building is a recognized and essential part of the business of maintaining an office building, yet, it constitutes a separate occupation within the meaning of the excise tax law. A little reflection, however, will show the error of any such supposition. It is not those who are engaged in the business of supplying electricity for light, heat and power purposes, who are subject to the tax, but those only who are engaged in the business of supplying electricity for such purposes "*to consumers*," who are so subject. I think it is clear that one who furnishes electricity which he himself "consumes" is not within the meaning of this definition. I am of the opinion, also, that a hotel keeper, or the owner of an office building, who supplies electric light for his guests or tenants, without separate charge therefor, would be, in effect, the "consumer" of the electricity so supplied. If the current were procured from someone else and paid for by the hotel or the office building this would be clearly true; and I do not

believe that the generation of the current in the building itself by the proprietor thereof makes any material difference.

Where, however, the tenants of an office building are separately charged for the electric current that they actually consume, whoever furnishes them such current, is, in my opinion, an "electric light company" within the meaning of the statutes under consideration, even though he be the proprietor of the building itself, and even though no service outside of the building may be undertaken by him. I advise, therefore, that wherever it is made to appear that an individual or corporation, owning an office building, is charging his tenants for electricity furnished them, by so much per unit consumed and measured, such a person or corporation constitutes an "electric light company" within the meaning of an act under consideration.

In all respects other than those specifically mentioned the reasoning and conclusions heretofore expressed in this opinion apply fully to the fourth class of corporations, consisting of those organized for the principal purpose of constructing and maintaining a hotel or office building.

In this connection one other possible variation of facts has occurred to me. If a building company, organized for that purpose, should lease its building, when constructed, to another party, and should furnish to its lessee the electric current generated on the premises at so much per unit consumed, without, in addition thereto, furnishing any current to any other person or consumer, a very different question would arise. Inasmuch, however, as this is evidently not the case with any of the companies referred to by you, I need not pass upon this question.

I have set off by itself the case of the Cleveland Trust Company; not alone because it differs from many other of the corporations enumerated by you, but also because, if I am not mistaken, it affords an instance of a rather common practice. It appears that this corporation is organized with the powers of a safe deposit and trust company, which are found enumerated in section 9816 et seq., General Code. The section cited provides in part that:

> "Safe deposit and trust companies * * * may provide a proper and secure fireproof building or buildings * * *."

There is nothing in the statute expressly qualifying or explaining the meaning of the word "proper." It might be supposed that this meaning is limited to such buildings as are "proper" for the housing of the safe deposit vaults, which, in the same section, such corporations are authorized to maintain. It is a well known fact, however, that a large number of trust companies in this state have proceeded under this statute to erect large office buildings, and that, in many cases, the business of managing the office building has become as important as, if not more important than, that of doing a safe deposit and trust business, which such corporations are authorized to transact. It is generally for the purpose of conducting these buildings as office buildings, and furnishing light to the tenants thereof, that such companies operate electric light plants. Such an activity is, therefore, in a sense, incidental to the incidental power of the corporation, and is quite remotely connected with the business of receiving valuables on safe deposit, and accepting trusts. For reasons already stated, however, this condition is immaterial. Under the facts of the case corporations, like the Cleveland Trust Company, should be regarded as office building companies, and should be, regardless of the question of *ultra vires*, taxed as public utilities if current is furnished outside the building maintained by them, or if current is furnished to tenants of the building at rates based upon the amount of current consumed by such tenants, respectively.

One additional question has suggested itself to me. Inasmuch as the statutes uses the words "public utility," which is a phrase having a well understood meaning, is not this choice of terms to be given some weight, and would, therefore, so slight an embarkation into the business of supplying electricity to consumers as serving, say a half dozen, small consumers, by the use of surplus current, constitute a corporation or an individual, so far as that is concerned, a "public utility," within the meaning of the law? I have reached the conclusion, in answer to this question, that the extent of the service to consumers is immaterial as affecting the question as to whether or not an individual or corporation, supplying electricity to consumers, is a "public utility" within the meaning of the act. My reasons for reaching this conclusion have all been expressed in dealing with other points in the course of this opinion. I will enumerate them again in this connection:

In the first place the term "public utility" was unknown to our statute law until 1910, whereas, the definitions now found in section 5416, General Code, supra, were formulated for the most part in 1896, and have never been changed. Hence, as a proposition of logic, it follows that all "electric light companies" within the meaning of the original definition of such companies are "public utilities." That is, it follows that the term "public utility" is, after all, an artificial one.

In the second place, the definition of what constitutes a public utility, for purposes of regulation, as found in the public utilities act of 1911, and the definitions of the various kinds of public utilities therein enumerated and set forth, are copied verbatim, almost, from the old excise tax definitions. It is impossible to escape the conclusion that the legislature intended that whatever should be a "public utility" for excise tax purposes should be regarded as such for all state purposes. Particularly is this true as evidenced by the fact that in the so-called public utilities act of 1911 is found the following language:

> "Section 4. The term 'public utility' as used in this act shall mean every corporation * * * defined in the next preceding section (in which most of the definitions of the original excise tax law are enumerated), *except such public utilities as operate their utilities not for profit.*"

If the term 'public utility' had an independent meaning of its own, this exception would not have been necessary, and its inclusion here is a rather convincing evidence of the legislative meaning and intent.

In the third place, if the determination of what constitutes a "public utility" should be made dependent upon the facts of each case the result would be a taxing law, incapable of just and exact enforcement. It might be easy to say that the furnishing of electric current to a single consumer is not a holding out of one's self to the public as engaged in the business of furnishing electricity; the same conclusion might easily be reached in the case of the furnishing of such current to a half dozen consumers; *but there is no place where the line between what constitutes that which is not a public utility and what constitutes that which is a public utility can be drawn.* Perhaps it is true, in the abstract sense, that the intention of the producer of electric current is the determining factor; but this intention is one that must be inferred from his acts and, in the last analysis, it becomes a different question in every individual case. Now, it is not customary for legislatures to draft occupation tax laws in such an impractical manner; the definitions of such laws have been, as I think the citations in this opinion will demonstrate, rather rigidly construed,

for the very sufficient reason that there could have been no motive for enacting any such definitions, excepting for the purpose of the removing of doubtful questions and producing a law which could be easily understood and applied. If it had been the intention of the legislature to tax those individuals and corporations, and those only, who held themselves out to the public as "public service companies," within the broad meaning of the term, then, there would have been no use in adopting the rigid definitions found in section 5416, General Code. The best analogy which occurs to me here is that of our liquor tax law, wherein it is provided that "the phrase 'intoxicating liquor' as used in this chapter * * * means any distilled malt, vinous or any other intoxicating liquor." So long as the question as to whether or not liquor is "intoxicating" were left open each case arising under the laws pertaining to the traffic therein would be decided upon its own facts, and lack of uniformity in result was inevitable. There could, therefore, have been no motive for the adoption of this definition other than the elimination of this source of inequality, and of all question as to the "intoxicating" quality of distilled, malt and vinous liquor, as a question of fact. State ex rel. vs. Kauffman, 68 O. S. 635; LaFollette vs. Murray, 81 O. S. 474.

I think the same legislative motive may be found in the definitions of section 5416, and I believe that it is not a fact of any weight or materiality that an individual or corporation, found furnishing electricity to consumers, may be able to show that he or it was engaging in this activity in a purely private way, without holding himself or itself out to the public generally as being engaged therein.

I am of the opinion, therefore, with respect to each and every one of the corporations enumerated by you that, regardless of the extent (absolute) to which they may be engaged in the business of furnishing electricity to consumers, regardless of the fact that they may be engaged in some other principal enterprise, to which the furnishing of electricity is subordinate, regardless of whether the furnishing of electricity is properly incidental to such other enterprise, or is virtually independent thereof, regardless of the declared purpose of incorporation of these companies, and regardless of the question of *ultra vires*, each one of them, if habitually and customarily furnishing electric current to consumers, is "an electric light company," within the meaning of section 5416, General Code. It necessarily follows that each of said corporations must make reports to the commission and pay excise taxes on their gross receipts; it also follows that the property of such companies must be valued for taxation on the unit basis by the tax commission of Ohio, upon property reports made to the commission. These conclusions are self-evident. I think it is equally self-evident that such corporations are not required to make annual reports to the commission as domestic corporations for profit, or as foreign corporations for profit, doing business in Ohio. The language of section 5518, in this respect is so plain as to forbid discussion, and that section has already been quoted in this opinion.

Two questions now suggest themselves to me, without consideration of which this opinion would not be complete:

1. What are the "gross receipts" of these corporations, required to be reported to the tax commission, and upon which the excise tax is to be computed?

This question is sufficiently answered, I think, by the language of section 5417, General Code, which provides in part as follows:

> "* * * The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to

mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

This language is sufficiently broad, it seems to me, to include within its application corporations not organized for a public utility purpose, as well as corporations organized principally for that purpose. The test here is the same as that in section 5416, to wit: that of being "engaged" in the operation of a "public utility." In the same connection I may say that in my opinion the phrase "under the exercise of its corporate powers" does not affect the question either way. It is simply inserted here for the purpose of making sure that *all* the intrastate receipts of a corporation engaged in the operation of a public utility shall be used in computing the excise tax.

2. What propertry must be reported and valued upon the unit basis by the tax commission?

This question, it seems to me, is answered by the following language of section 5419, General Code:

"* * * In the case of incorporated companies, all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility."

The same observations may be made as to this section as have already been made respecting the meaning of the language quoted from section 5417.

Both of these sections disclose the same obvious legislative intent, which may be referred to as two-fold. In the first place, it is the evident purpose of the legislature to eliminate troublesome questions of fact, or rather of mixed fact and law, such as have already been discussed with respect to the definitions in section 5416, and such, for example, as are involved in the pending case of the State of Ohio vs. Ohio Traction Company, in the common pleas court of Franklin county, with which the commission is familiar. In the second place, it seems to be the aim of this section to equalize the taxation of corporations, so that a corporation having a large income producing investments, which it might claim to be disassociated from its public utility business, and, therefore, not subject to taxation as such, should, in no event, contribute to the revenues of the state a lesser amount, by virtue of its exemption from franchise taxes under section 5518, supra, than an ordinary corporation would have to contribute under the so-called Willis law provisions of the same act.

It is these sections, which have produced the change in the law, already referred to, which render my former opinion, in the matter of the Ely Realty Company, of no present service; they are, for reasons already suggested, of equal application to corporations organized for the principal purpose of operating a public utility, and to corporations engaged in a public utility business incidental to the furtherance of some other authorized purpose.

I do not wish to be understood, however, as expressing any definite opinion as to the full purport and meaning of section 5418, as above quoted, with reference to the method of valuing such property as has been discussed in this opinion for simple taxation.

In closing, I deem it proper to say that I have assumed that all of the

enterprises discused in the foregoing opinion are conducted as business enterprises. The commission has submitted to me the question, arising in other cases, as to whether or not the sale of electric current, without a view to profit, constitutes a "business," within the meaning of section 5416. That question will be separately considered.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

114.

TAXES AND TAXATION — PUBLIC UTILITY — LIABILITY OF OFFICE BUILDINGS, HOTEL, APARTMENT AND STORE-ROOM COMPANIES WHICH SUPPLY REFRIGERATION AND LIGHT, POWER AND HEAT TO TENANTS AND OTHERS, FOR EXCISE PROPERTY TAX.

The definition of "public utility" as intended by the tax statutes is that set out in section 5416, General Code, and does not depend upon any tax rights defined, or upon the general understanding of the term.

When persons or firms, therefore, who own an office building, hotel, apartment house or store room, are engaged in the business of supplying to two or more tenants or others, for a separate charge therefor, electricity for light, heat or power purposes, or water, steam or heat, through pipes or tubing, for the purpose of either heating or cooling, such persons or firms come within the term "public utility" as contemplated in this statute, regardless of whether or not they are holding themselves out to the public as producers or suppliers of these commodities. They must, therefore, make their reports and pay the property and excise tax required of public utilities in this statue.

COLUMBUS, OHIO, September 20, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of September 6th submitting the following statement of facts and request for opinion:

"Two individuals, brothers, during their lives erected in the city of Cincinnati certain buildings which, from the description given of them in the statement attached to your letter, I assume to be intended and used for offices, hotel, apartment and store-room purposes—at least each of these buildings is used for one of such purposes and some of them are used for more than one such purpose. In each of these buildings has been installed a steam heating system plant, designed primarily to supply the tenants of the building or the occupants of the apartments, as the case might be, with necessary heat.

"In one of the buildings a refrigeration plant has been installed primarily for the purpose of supplying cooling facilities to store-room tenants. In two of the buildings electric light plants have been installed, primarily for the purpose of lighting the rooms in the buildings themselves.

"Although such heating, cooling and electric light plants were designed merely for the accommodation and service of the buildings in connection with which they were constructed, they produce, in fact, an excess of product which, in the practice of economy, the managers of

the buildings have disposed of to parties in the neighborhood of the buildings other than the tenants thereof. Furthermore some of the tenants in the buildings in which electric light plants have been installed have been charged for electricity consumed by them upon a quantity basis, i. e., light is not included in the accommodation furnished in consideration of the rent paid but is independently furnished and charged for at so much per unit consumed.

"In one instance a public library occupies a portion of an office building rent free under rights granted by a college which formerly had an interest in this building. Heat is furnished to this tenant without charge but electric light current consumed by the library is paid for by it according to the number of units.

"The original builders of these edifices are dead and the property is now owned and operated by the widow of one of them and a trust company as trustee under the will of the other decedent, and under a deed of trust from his widow, each of these parties owning an undivided one-half interest in said properties. Upon these facts the question submitted is as follows:

"Does the business done by these parties constitute them a public utility within the meaning of the provisions of the act of May 31, 1911, and should they be required to report to the commission and be assessed by it and pay an excise tax upon the gross receipts from such business?"

As I have pointed out in an opinion of even date herewith respecting the public utility character of a number of different corporations, all definitions in the tax commission act of 1911 are dependent upon the excise tax definitions found in section 5416, General Code. So much of it as is pertinent to the present question I may quote here.

"Section 5416. Any person or persons, firm or firms, co-partnership or voluntary associations, joint stock association, company or corporation wherever organized or incorporated; * * *

"When engaged in the business of supplying electricity for light, heat or power purposes, to consumers within this state, is an electric light company; * * *

"When engaged in the business of supplying water, steam or heat through pipes or tubing to consumers within this state for heating purposes is a heating company; * * *

"When engaged in the business of supplying water, steam or heat through pipes or tubing to consumers within this state for cooling purposes, is a cooling company; * * *"

As held in the other opinion to which I have referred the phrase "public utility" as applicable to enterprises of the kinds embraced within the above definitions is descriptive merely and adds no qualification to these definitions themselves. My reasons for this conclusion are fully set forth in the opinion to which I refer.

Indeed the discussion in that opinion furnishes a complete answer to the question now presented; for although the other opinion related solely to the definition of an "electric light company" it is apparent at a glance that there is no essential difference between that definition and those of a "heating company" and a "cooling company" as above set forth.

Without further discussion, therefore I shall, in a summary manner state

my conclusions with respect to the question and an outline for my reasons therefor, all of which will be found more elaborately discussed in the other opinion.

Inasmuch as these persons are continuously and habitually engaged in furnishing the utilities mentioned, they are "in the business" of so doing within the meaning of these definitions, although as a mere incident to the transaction of other and paramount business.

The persons outside of the buildings owned by these parties who are furnished with electric current or heating or cooling facilities by them, are "consumers" within the meaning of the definition.

Tenants of said buildings who are furnished electric current under contracts requiring them to pay for the amount consumed by them in addition to their rent are "consumers" within the meaning of the definition of an "electric light company" as above quoted.

The number of consumers, as above defined, of each of the commodities in question is immaterial as affecting the question at hand excepting that seemingly a *plurality* of consumers of each of said commodities is necessary in order to constitute the parties a "public utility" as to such commodity.

That is to say, the general assembly has by its definition foreclosed inquiry into the question as to whether or not the parties are "holding themselves out to the public" in any particular.

I am, therefore, of the opinion that these parties constitute a "public utility" within the meaning of the provisions of the act of May 31, 1911, upon the facts submitted, and that under section 41 of said act (section 5417, General Code), they must report to the tax commission for imposition of excise tax measured thereby "the entire receipts for business done * * * from the operation of" the several electric light plants and heating and cooling plants owned by them and so operated as to be constituted such "public utility," "or incidental thereto or in connection therewith;" and that by virtue of section 43 of such act (section 5419, General Code), they must report to the tax commission for assessment and valuation for simple taxation by the commission, their several "plants and all real estate necessary to the daily operations" of the public utilities and "all other property, moneys and credits owned or operated, or both, by them wholly or in part within this state, used in connection with or incidental to the operation of the public utility whether the same be held in common or by the individuals operating such public utilities."

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

115.

TAXES AND TAXATION—PUBLIC UTILITY—CORPORATION ORGANIZED BY CONSUMERS FOR SUPPLYING ELECTRIC POWER FOR THEMSELVES AT COST—CORPORATION ORGANIZED TO CONTRACT FOR ELECTRIC POWER FOR CONSUMERS—LIABILITY FOR EXCISE AND PROPERTY TAXES.

The term "public utility" as employed in the tax statutes, is an artificial term and is not used in the sense generally accorded it. Its definition is that set out in section 5416, *General Code, and the businesses therein enumerated come within the term, regardless of whether or not they are capable of exercising the power of eminent domain or other powers usually considered incidental to public service corporations, and regardless also of whether or not such business is accompanied by the privileges usually considered as accompanying such companies.*

The term "business," as employed in these statutes, does not necessarily contemplate only utilities for profit. This is shown by the fact that certain statutes have taken the precaution to exempt "public utilities not operated for profit" for certain purposes.

The Factory Power Company, therefore, which was especially incorporated by certain factories for the purpose of furnishing power, heat, light and water for themselves at cost, really operates to add to the profits of these concerns, and although the activity of this corporation does not extend to the conducting of the power generated to the consumer, it is to be considered a public utility for the purpose of the excise and property taxes required by these statutes.

Inasmuch as the National Power Company is engaged solely in the business of contracting with another electric power company for a supply of power to individual shareholders, this corporation does not possess a plant which is contemplated as a necessity by the tax statutes, and it cannot be intended that such corporation be classed as a "public utility" so as to become liable for these taxes.

COLUMBUS, OHIO, October 30, 1912.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of two letters from you under date of August 21, 1912, submitting similar questions with respect to the status, under the "public utility" provisions of the tax commission act of 1911, of the Factory Power Company and the National Power Company, both Ohio corporations.

The facts respecting the two corporations, as disclosed by the correspondence and briefs of counsel submitted with your letters, are as follows:

> "The Factory Power Company is incorporated for the purpose of furnishing power, heat, light and water to consumers located, or who may hereafter be located in or in the vicinity of what is known as the Factory Colony Company tract,' in Oakley, Hamilton county, Ohio, and of constructing, owning, maintaining and operating the plant and other property, real and personal, necessary for the carrying of said purpose into effect."

It appears that this corporation was formed by the proprietors of a number of factories located on a certain tract of land. All of the stock of the cor-

poration is owned by these persons. The company operates a plant for the production of electric power which, when generated, is transmitted to conduits and wires owned by the companies and individuals who own and operate the factories referred to. The plan of operation is designed to be co-operative, i. e., the electric current while meted out and sold to the different factories upon the basis of the amount used by them is charged for, as nearly as possible, at cost, it not being the purpose of the proprietors of the corporation to produce dividends upon its capital stock. The company enjoys no franchise rights from any municipal corporation, and has never exercised, and does not deem itself capable of exercising the power of eminent domain.

The National Power Company was organized for the following purpose:

> "Manufacturing, purchasing, selling and furnishing electricity for light, heat or power, and to do all business incident thereto."

As a matter of fact this company does not produce electric current and owns no real property or tangible personal property whatever, although it does possess a certain amount of cash in the bank. It appears that subsequently to the formation of this company it was ascertained by promoters thereof that the object of the corporation could be attained through a contract with the Cleveland Electric Illuminating Company, an admitted public utility. Therefore the plan of operation is that electric current conducted through the wires and conduits of the Cleveland Electric Illuminating Company to the meters of five certain consumers, where the amount of current consumed by them respectively, is measured. The National Power Company is then charged for the current so used, presumably at a reduced rate, and is accountable to the Cleveland Electric Illuminating Company for the amount so charged. The National Power Company then collects from the five consumers in question proportionate amounts which always equal in the aggregate the gross amount paid by it to the Cleveland Electric Illuminating Company.

The contract between the National Power Company and the Cleveland Electric Illuminating Company does not authorize the sale of electric current in the manner above described to any consumers other than the five certain consumers above referred to. The same question is submitted by the commission, in my opinion, with respect to both of these companies, viz.:

> "Is this company a public utility within the meaning of the provisions of the act of May 31, 1911, and should it report as such and its property be assessed by the tax commission, and should it be required to pay an excise tax as an electric light company upon its gross receipts from intrastate business, or should it report as a domestic corporation for profit and pay an annual fee as such as required by law?"

Two questions of law seem to be involved here; at least counsel for the Factory Power Company, who have submitted a brief, rely upon two separate points as follows:

1. It is claimed that because of the purely private nature of the business conducted by these companies they cannot be regarded as "public utilities" within the meaning of the term as used in the act of 1911. As a corollary to this proposition it is pointed out that the method of operation used by these two companies is so restricted as to render them ineligible to exercise the power of eminent domain. Cases are cited in support of this point.

2. The claim is made that because the design of the proprietors of the two companies and their actual practice in pursuance thereof is not to produce

a profit from the operation of the plant or business of the company, they are not "engaged in business" within the meaning of the phrase used in the tax commission act.

I shall discuss the meaning of the tax commission act of 1911 with respect to the two points mentioned before attempting to apply the law to the specific cases in question.

To the first point above described some consideration has been given in the course of the opinion recently rendered to the commission upon the question as to whether or not the incidental furnishing of electric current to a few consumers by a corporation generating such current, primarily for its own use, constitutes such a corporation a "public utility," or, more accurately, an "electric light company" within the meaning of the act in question. Repeating in the abstract the reasoning set forth therein, I may say that the legislative history of the law incorporated in the act of 1911 is such as to make it apparent that the term "public utility," as therein used, is an artificial one which was applied, for the first time in 1910, to a certain class of business which had long been subject to excise taxation under what was formerly known as the "Cole law." The use of the term in question, therefore, cannot be given very much weight; so that it does not necessarily follow that it is the intention of the legislature to include within the class of "public utilities" created by it, those businesses only which enjoy some special privilege like the exercise of the right of eminent domain or hold themselves out as public servants to any given degree. In fact, when the foundation for the excise and property taxes imposed by the act upon such "public utilities" is carefully examined, it is found to be certain considerations which have nothing whatever to do with either of these facts. The definition which must then be examined is not any text writer's definition of the term "public utility" as he conceives it, but that employed in section 40 of the act of 1911, which is in part as follows:

> "Any * * * corporation * * * when engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state is an electric light company."

This also is an artificial term in a sense. It is evident that the legislature intended to avoid fine distinctions and troublesome questions of fact, and for that purpose adopted a definition which could easily be applied to any state of facts.

The sole question, then, as to any of these companies is: Is the company engaged in the business of supplying electricity for light, heat or power purposes to consumers? The fact that the number of consumers may be small; the fact that a contract between the company and each consumer may be in every sense of the word "private," and the fact that there is no intention on the part of the company to hold itself out to the general public as a "public service company" in furnishing electric current—all such facts are alike immaterial in this connection.

As heretofore stated, the reasoning in support of the construction which I have given the law will be found more fully stated in the other opinion to which I have referred.

Upon the second point above mentioned the following authorities are cited in the brief of counsel: State vs. Boston Club, 45 La. Annual, 585, and Live Stock Company vs. Range Stock Company, 16 Utah, 59.

I have examined both of these cases and am of the opinion that they do not support the contention upon which they are cited. The first case was an action by the taxing authorities against a social club for liquor license tax.

The ultimate conclusion of the court was that the defendant was liable for the tax even though it was claimed that each of the members of the club to whom the drinks of liquor were sold, was already a part owner of the stock of liquor kept in the club—an argument very much like that made by counsel in respect to the form of the organization of the Factory Power Company. Counsel quote the following language from the opinion of the court:

> "Business in a legislative sense is that which occupies the time, attention and labor of men for the purposes of livelihood or for profit, a calling for the purpose of a livelihood. This is its meaning in statutes relating to license taxes."

This remark was found on page 589 of the report, and in view of the decision in the case was really *obiter dictum*. However, it is preceded on the page cited by the following language:

> "The definition of business by the lexicographers is sufficiently broad and comprehensive to embrace every employment and occupation and all matters that engage a person's attenttion or require his care. * * *
>
> "The meaning of the legislators, as expressed in the statutes is not as extensive."

So that obviously, the court in using the language quoted in the brief was referring to the specific statutes before it for judicial interpretation, and did not intend to lay down any broad or general rule.

The case of Live Stock Co. vs. Range Stock Co., supra, is one which involves the interpretation of a state statute imposing license or compliance fees upon foreign corporations "doing business in the state." The exact point decided was that a foreign corporation is not doing business in a state within the meaning of such a statute when it maintains an action in the courts of the state. In this respect the case is in entire accord with the best authority; but it is difficult to understand the applicability of the definition quoted by counsel from that case to the point decided by the court.

In the former opinion to which I have referred, I held that the word "business" as used in section 40 of the act of 1911, has the second of the following two meanings given by Webster:

> "That which busies or engages time, attention or labor as a principal serious concern or interest. Specif.: a. Constant employment; regular occupation; * * * b. Any particular occupation or employment habitually engaged in, *especially* for livelihood or gain."

It is apparent from this definition that while the woord "business" is perhaps most appropriately used to define an activity which is pursued for a livelihood or gain, yet this idea is not essential in the meaning of the term. On the contrary, having regard to the underlying reasons for the two taxes imposed upon electric light companies by the act of 1911, as I have discussed them in the other opinion referred to, I am clearly of the opinion that the purpose of the proprietors of such a company to make or not to make a profit by the operation thereof, is immaterial as affecting liability for the taxes.

If I had any doubt upon this question I think the same would be dispelled by consideration of the so-called "public utility act" of 1911 passed by the general assembly with evident reference to the definitions embodied in the tax commission act already quoted. The section of that act, designated as section

614-2 contains in *haec verba* many of the definitions found in section 40 of the tax commission act. Section 4, thereof, however, which roughly corresponds to section 39 of the tax commission act, contains the following exception. "Except such public utilities as operate their utilities not for profit."

Now it is the purpose of the public utility act to exercise the regulatory powers of the state over the same subjects of legislation as those upon which the taxing power is exercised through the sections of the tax commission act now under consideration. The identity of definition could not be ascribed to any other motive. Therefore, when the legislature, in framing the public utilities act, took pains to exclude from its operation such "public utilities as operate their utilities not for profit," it is clear that it must have been its understanding that without this exception, the class of companies to which it related would have been included within the natural meaning of the phrase "public utilities."

I am, therefore, of the opinion that the fact that an electric light plant or company is not operated with a view to profit in the *shape of dividends* is immaterial as affecting the question of liability to excise taxation and to valuation for property taxation upon the unit basis under the act of 1911. As a matter of fact, it is perfectly apparent that both of the above described corporations are used by their stockholders with a view to ultimate profit. The law in question looks to the substance and not to the form of things and these are, therefore, in my opinion, none the less business corporations (if that be material at all) because the profits which they produce may be distributed through decreased cost of service rather than in the shape of dividends on the capital stock.

The foregoing comments, then, constitute my conclusions with respect to the points advanced by counsel and the officers of the company. They do not, however, entirely dispose of either of the cases in my mind. There still remains an element common to the case of both companies which must, in my judgment, be taken into consideration. I refer to the fact that the Factory Power Company does not conduct the electricity to the point of consumption or measurement, and that the National Power Company does not even produce electricity and has no wires, poles, meters or any equipment constituting an electric light plant in the popular sense of the word, but merely amounts to a contracting agency in behalf of certain consumers of electricity. The question which arises from these facts may be stated as follows:

Is an individual, partnership or corporation "engaged in the business of supplying electricity to consumers" when it does not perform all or any of the services usually involved in that business as commonly understood?

This question depends, it seems to me, largely upon the meaning of the word "supplying" as used in the statute. Webster gives the following definition of the word "supplying:"

> "To furnish with what is wanted; to afford or furnish with a sufficiency. * * *
>
> "To give or provide; to furnish."

(In strict accuracy the second of the above quoted meanings is that of the verb which takes as its object the thing supplied.)

The word "furnish" is defined by the same lexicographer as follows:

> "To provide; supply; give; afford; specif. * * * to supply * * * (something)."

It seems clear that there is not inherent in the meaning of the word "supply" itself the idea of delivery. It is just as accurate to speak of a thing as being "supplied" which is produced and made ready for transportation and delivery by another as it is to use the same word as referring to the production, transportation and delivery of a commodity. Yet the impression might arise that this was not the legislative intent, but that the general assembly had in mind in defining an electric light company a business which would not be complete without all of the attributes above referred to.

As evidence of this intention the significance of the word "consumers" may be considered. The meaning of this term is obvious and in itself offers no special difficulties. The point I have in mind is brought out by considering the different steps in a single transaction of the supplying of electric current; they are as follows:

In the first place the current is generated by the producer and becomes capable of transmission along wires designed for that purpose. In the second place the current is transported or transmitted to the place of consumption; in the third place the amount of current consumed is measured as it becomes subject to the control of the consumer.

Thinking of the matter in a natural way one would not suppose that a "consumer" would be purely such who engaged in all of these activities. That is to say, as pointed out in my opinion of recent date respecting the case of the sale of electric current from a power plant located in an office or hotel building, one who produces electric current for the purpose of supplying himself with this commodity is not a "consumer." It might also be urged that one who takes electric current at the place of production and conducts it over his own wires to the place of consumption is not, in the purest sense of the word at least, a "consumer." He has undertaken a part of the process of production, viz., that of transmission.

There is some internal evidence, however, in the act of 1911 which tends to emphasize the point now under discussion. I think it may be accepted as true that the intention of the act of 1911 is to impose the excise tax based upon gross earnings upon exactly the same subject of taxation, the property of which is to be valued upon the unit basis by the tax commission under section 46 et seq., of the act.

Section 44, which is one of the sections providing for the property tax, is in part as follows:

> "Each public utility as defined in this act * * * shall annually * * * make and deliver to the tax commission of Ohio * * * a statement with respect to such utility's *plant or plants* and property owned or operated or both by it wholly or partly within this state."

The italicized words are not of great importance in themselves, but they disclose in a measure what the legislature had in mind, viz., that a "public utility" and more specifically an "electric light company" is a company having a "plant." A mere collecting or contracting agency then cannot in the very nature of things be subject to property taxes on the unit basis, there being nothing to value in this way. Therefore, the case of the National Power Company is at once disposed of. It has no "plant" in any sense of the word; therefore, it is not within the meaning of the term as already discussed.

The case of the Factory Power Company is somewhat different. This company has a plant but not a complete once. This plant is capable of generating electric power but is not capable of delivering it to the consumers, who, if

they would use the power so generated, must, so to speak, send and get it. Upon a very careful consideration I have come to the conclusion that the Factory Power Company, though not equipped to deliver electric current at the place of consumption, and not having a complete "plant," within the common acceptation of the term, is "engaged in the business of supplying electricity to consumers" within the meaning of section 40 of the tax commission act. If a company engages *in any degree* in the business, it is within the statute. To hold otherwise would deprive the law of any definite test as to what constitutes a "plant," or, conversely, the act of "supplying to consumers."

It follows, as a matter of course, that the National Power Company not being liable for excise taxes under the act in question must report to the tax commission as a domestic corporation for profit and pay franchise fees thereon; but that the Factory Power Company must pay excise taxes based upon its gross receipts, and submit to property valuation of its "plant and property" by the commission.

In conclusion, I may observe for reasons which I think are sufficiently disclosed by the discussion of similar questions in other opinions I have not deemed the language of the articles of incorporation of the two companies to which this opinion refers, of any importance.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

150.

TAXES AND TAXATION—CORPORATION FILING REPORT AS PRIVATE CORPORATION FOR PROFIT IN MAY, AND SUBSEQUENTLY OPERATING PUBLIC UTILITY—NOT SUBJECT TO BOTH EXCISE AND FRANCHISE TAX—FIXED LIABILITY FOR FRANCHISE TAX NOT AFFECTED BY SUBSEQUENT EVENT.

The Cleveland, Alliance & Mahoning Valley Railroad Company was in existence more than six months prior to the month of May, 1912, *but it did not during that period, operate its railroad, and during the month of May filed its report as a private corporation for profit. Between the first day of June and the thirtieth thereof, said corporation became engaged in the business of operating an interurban railroad, held: under section* 5518, *General Code, it is the intention of the legislature that a corporation in no event be subject to both franchise and excise tax for the same year.*

The franchise tax is a tax upon the privilege of being a corporation during the month of May, when the report is due and this tax is not intended in any way to relate to prior or subsequent existence or activities. The excise tax is a tax upon the privilege of doing a public utility business during the year period preceding June 30th. Each tax is assessed for the same year and the funds received for each is appropriated for public purposes for the same period of time.

In accordance with the intention of section 5518, *General Code, therefore, that a corporation should not be subject to both taxes for the same year, no corporation can be required to file a private corporation for profit report in May, and at the same time be required to file a public utilities report in September.*

Under the decisions of this state, when a corporation for profit once becomes liable for the franchise tax, such liability cannot be removed by the withdrawal of the corporation from business subsequent to the time of making the report and prior to the time when the tax became a fixed charge. For the same reasons, the fact that a corporation becomes a public utility during such period cannot operate to dispense with the liability for the franchise tax.

The above corporation, therefore, is liable for its franchise tax, but not for its excise tax during the year 1912.

COLUMBUS, OHIO, March 22, 1913.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of December 31st, enclosing reports for the year 1912 made by the Cleveland, Alliance & Mahoning Valley Railroad Company as a domestic corporation for profit and as an interurban railroad company.

It appears from the reports themselves, and from facts stated by you that a corporation of this name was in existence more than six months prior to the month of May, 1912, but it did not, during that period, operate its railroad, and hence, within the meaning of the excise tax statutes of this state as uniformly construed by this department and the commission, and by the courts, was in May, 1912, a domestic corporation for profit and not a public utility.

In the month of June, 1912, the corporation began the operation of its electric road, and between the date of commencing such operation and the end of the month acquired a small amount of gross earnings from intrastate business.

Having been engaged in the business of operating an interurban railroad during a few days of the year ending with the thirtieth day of June, 1912, the company became seemingly liable for excise tax for the year 1912.

The corporation desires to pay the excise taxes, which are small in amount, but resists payment of franchise taxes on the ground that the two charges are for the same year, and that under section 5518, General Code, the liability for excise taxes exempts the corporation from the payment of the franchise taxes.

You referred the reports to me for my collection of the proper fee, and without formal request for a written opinion upon the question presented. This question, however, is of such difficulty and general interest that I have deemed it advisable to prepare an opinion for the guidance of the commission in the future.

The facts as I have outlined them create a situation which seems to be anomalous, and yet one which might frequently occur under the statutes as they are at present drawn. I quote the provisions of the statutes, the meaning of which is involved, for the purpose of showing the possibilities under them which have been realized in the case submitted.

Section 5495, General Code (section 106 of the act of May 31, 1911, 102 O. L. 224), provides:

> "Between the first day of May and the first day of July, 1911, and annually thereafter during the *month of May*, each corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission, in such form as the commission may prescribe."

Section 5498, General Code (section 109 of the act of May 31, 1911, 102 O. L. 224), provides:

> "Upon the filing of the report, provided for in the last preceding sections, the commission, after finding such report to be correct, shall on the *first Monday of July*, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the *first Monday in August*, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before *August fifteenth*, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the *first day of the following October*."

Section 5470, General Code (section 81 of the act of May 31, 1911, 102 O. L. 224), provides in part as follows:

> "* * * each street, suburban and interurban railroad and railroad company, shall, annually, on or before the *first day of September*, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe."

Section 5473, General Code (section 84 of the act of May 31, 1911, 102 O. L. 224), provides as follows:

"In the case of each street, suburban or interurban railroad company such statements shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, *for the year ending on the thirtieth day of June next preceding*, from whatever source derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross earnings of such company for such period in this state from business done within this state."

Section 5478, General Code (section 89 of the act of May 31, 1911, 102 O. L. 224), provides as follows:

"On the first Monday of October, the commission shall ascertain and determine the gross earnings herein provided, of each street, suburban and interurban railroad company whose line is wholly or partially within this state, *for the year ending on the thirtieth day of June next preceding*, excluding therefrom, as to each of the companies named in this section, all earnings derived wholly from interstate business or business done for the federal government. The amount so ascertained by the commission shall be the gross earnings of such street, suburban or interurban railroad company for such year."

Section 5518, General Code (section 129 of the act of May 31, 1911, 102 O. L. 224), provides in part as follows:

"An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, * * * shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen."

The quotations of these sections makes it apparent at a glance that there is an overlapping of the tax years as between the franchise tax and the excise tax on interurban railroad companies.

The case of the Cleveland, Alliance & Mahoning Valley R. R. Co., illustrates then the possibility under these sections of a corporation being at least nominally liable for reports under both sets of provisions. That is to say, if a corporation theretofore not operating a public utility begins the operation of an interurban railroad any time during the month of June the following conclusions seem to result:

1. In the month of May it is a domestic corporation for profit, and is not an interurban railroad company operating a public utility, and, therefore, is within the terms of section 5518, *supra*.

2. On the first day of September it is an interurban railroad company within the meaning of section 5470, and an interurban company owning or operating a public utility within the meaning of section 5518; in this capacity it is to report under section 5473 *some* gross earnings for the year ending on the thirtieth day of June next preceding.

Section 5518, General Code, is the section which gives rise to the principal difficulty involved in this case; and it is also the section first to be looked to in an effort to ascertain the intention of the legislature with respect to such cases.

This section, which has already been quoted, evinces very clearly, it seems to me, the controlling intention of the legislature, which is that the corporation shall not be liable both to franchise and excise taxes, but that the liability for excise taxes shall suffice the state for the satisfaction of its power to tax the corporate franchise.

Unfortunately, however, the legislature has not in this case given any clue as to what would constitute subjecting a single corporation to both taxes, in the face of the obvious fact already pointed out, that it is possible for a corporation at any time to pass from the one class into the other. It is true that an ingenious argument might be constructed around the mere words of section 5518 which would lead to the conclusion contended for by the company, viz., that under the peculiar facts of its case it is liable for excise taxes, and for such taxes only. Such an argument would be as follows:

The last clause of section 5518 is to the effect that the corporations enumerated therein shall not be subject to the provisions "of sections 106 to 115." The corporation which has filed its annual report in May as a domestic corporation for profit would be liable in October to pay fees based thereon. This is by virtue of "the provisions of section 5498, General Code," one of the sections referred to in section 5518, being section 109 of the original act. Meanwhile, however, if the corporation had, in the month of June, commenced the operation of an interurban railroad it would have become liable in September to report to the tax commission its gross earnings from operation during the period of time within which it had been operating such a railroad preceding the thirtieth day of June. Being liable for the report it would, of course, be liable for the tax based thereon, and this liability would discharge it from any duty which would otherwise be imposed upon it by section 109, which duty would not accrue until a subsequent date; therefore, by such a course of reasoning it would be concluded that when in any given year a corporation becomes a public utility after it has filed its annual report as a corporation for profit but before any of the other steps provided for in the assessment and collection of the franchise tax have been taken, its change of status interrupts the machinery of the franchise tax and discharges the corporation's liability to such tax.

In other words, such an argument would be based upon the assumption that section 5518 means that a corporation may be subject to the provisions of section 106 of the act of 1911 but becoming a public utility before section 109 becomes operative as to it, thereby becomes not subject to the provisions of that and the succeeding sections in the group referred to in section 5518. I cannot lend my assent to this argument, believing that it is invalid. In my opinion the clause "the provisions of sections 106 to 115" cannot be construed distributively. The group of sections referred to therein must be considered as a single legislative idea. The thought of the general assembly evidently was, in referring to these sections by number, to designate the franchise tax as such.

I am of the opinion, therefore, that it is improper to separate any of the steps in the assessment of that tax for the purpose of determining the operation of section 5518 and that, in short, the last clause of that section might properly be paraphrased as follows: "Shall not be subject to a tax on the franchise of being a corporation."

Looking now for some index to the exact legislative intent, which is surrounded by some doubt because of the possibility of the transit of a corporation from one class to another at any time, it occurs to me that both the franchise tax and the excise tax are *annual* exactions. Now it would seem to follow that it being clearly the legislative intention that no one corporation

should be subject to both of these taxes, the fact just referred to would lead to the conclusion that the intention was that no corporation should be liable to both taxes *in any one year.*

The establishment of this point, however, does not of itself solve the question presented by the facts under consideration. The word "year" must still be defined. It is possible to look at this question from various angles. The first point of view which suggests itself to me is that of the subject of taxation. It is very evident that the excise tax which is based upon the gross receipts for a certain year, and is assessed and collected after the expiration of that year must be regarded as levied upon the business of the year *preceding the thirtieth of June.* It is true that this is a privilege tax, and that its payment is enforced (as is the payment of the franchise tax) by certain penalties, among which is the revocation of the corporate charter. Because of these facts it might be urged that the privilege which is taxed is the privilege of being in business for another year. This does not necessarily follow however. It is perfectly competent for the general assembly to tax a privilege which has been enjoyed during a past year as well as to tax a privilege which is to be enjoyed during a succeeding year. In this case the former is clearly the subject of the tax. When the excise tax first went into effect it must, in the very logic of things, have fastened itself upon the receipts or earnings of the company liable therefor, for the preceding year. In fact the history of legislation will disclose that the receipts which were first taxed under the parent of the present excise tax law were those which were received during a period when there was no such law in force. From all this it follows, I think, that the excise tax is upon the business of the preceding year and the privilege of conducting the same, and not upon the privilege of remaining in business during the succeeding year.

The franchise tax is also an annual tax in every sense. In So. Gum Co. vs. Laylin, 66 O. S. 578, this tax was spoken of as being imposed upon "the continuing annual value" of the privilege originally conferred upon a corporation, i. e., the privilege of being a corporation.

It has been held by certain referees in bankruptcy that the Willis tax, so-called, of which I am now speaking, is a tax upon the right to do business during the year following the date when the report is made or the fees are paid. In re Emmerman vs. Specialty Co., 14 O. F. D. 289; In re Bank vs. Aultman, 14 O. F. D. 298.

While I yield due deference to these opinions I cannot agree with them. The better reasoning is that of the supreme court of New Jersey in the case of In re United States Car Co., 60 N. J. Eq., 514, and King vs. American Electric Vehicle Co., 70 N. J. Eq., 569, under a law substantially the same as ours. That court held that an annual franchise tax of the kind we have is simply a tax on the mere existence of the franchise at the time when it is levied precisely as the general property tax is a tax upon property in existence on the day preceding the second Monday in April.

This is the view of the case which has been taken by Sater, J., in the recently decided, but unreported case of Lathrop, Haskins & Co. vs. The Columbus Hocking Coal & Iron Co. (application of receivers for instructions). In other words the franchise tax is levied upon the right of a corporation to *be* as distinguished from its right to *do.* (So. Gum Co. vs. Laylin, supra; Lawrence, J., in State vs, C. & P. R. R. Co., Cuyahoga common pleas court, unreported.)

Now *being* does not import continuity. A tax upon mere existence is laid without reference to previous or subsequent existence; while an annual tax upon *doing* must have reference to what has been done prior to a given date or what is to be done thereafter.

Properly viewed, therefore, the excise tax is levied upon the business of a preceding year and the franchise tax is levied upon the existence of a franchise at a definite date, viz., the month of May.

It will be readily observed that no satisfaction for our purpose can be gotten out of viewing the two taxes from the standpoint of the real subject of taxation. What has been said with respect to that matter has but served to emphasize the overlapping of the dates of annual payment of the two taxes. It makes it apparent that a corporation for profit reporting in the month of May has simply laid a foundation for an annual exaction in the nature of a tax upon its existence during that month irrespective of its previous existence (except for the six months limitation in section 5519, General Code), and also irrespective of its continued existence during the succeeding year. Therefore, the same corporation which commenced the operation of a public utility after the month of May and before the thirtieth day of June would not in the philosophical sense be doubly taxed if it should also be required to pay the excise tax for the "year preceding the thirteenth day of June," yet the intention of the legislature, as evinced in section 5518 seems to be opposed to any such conclusion, and but for one view of the case, which I am about to present, a discussion from the standpoint of the subject of the taxes, serves only to confuse the question.

The consideration to which I have just alluded is this: While in the case presented by the Cleveland, Alliance and Mahoning Valley Railroad Company, the operation of a public utility did not commence until after the month of May, yet the "year preceding the thirtieth day of June" referred to in the excise tax law embraced that month of May. Therefore, it may be said that the two "years" are the *same year* which is all that it is necessary to establish at the present stage of the argument.

Looked at from another point of view, however, the two exactions are obviously made in the same year. The franchise tax becomes collectible on the fifteenth day of October (section 5503) and the excise tax on interurban railroads in the "month of November" (section 5484). These two dates are sufficiently close together to make it clear that the revenues derived from the two taxes are to be used for the support of the government of the state during practically the same period of time. I make this statement in face of the fact that the fiscal year of the state ends on November 15th, and it might be possible that the auditor of state would not make the necessary charge against an interurban railroad in a given calendar year until after the end of the fiscal year. It is well known, however, that in actual administration the fiscal year is virtually disregarded, appropriations being made for the period of time beginning and ending on February 15th. From this special point of view, therefore, the two taxes are levied for the support of the government of the state during a single year.

I am of the opinion, therefore, without looking at the question from every other viewpoint which might be suggested that the two taxes are levied and collected in and for a single year, and that it is the intention of the legislature, as evinced by section 5518, General Code, that no one corporation shall pay both a franchise tax and an excise tax during the period of time beginning with the fifteenth of October and ending with the fifteenth of December.

Having reached the conclusion just stated it becomes necessary further to consider which of the two taxes is to be charged and paid. I have already pointed out that there was no question as to the liability of the Cleveland, Alliance and Mahoning Valley Railroad Company to report as a domestic corporation for profit in the month of May; I have already pointed out that for the purpose of the discussion all of the provisions relating to franchise and

excise taxation respectively, may be regarded as legislative units. From this it follows that the corporation having been liable for a report in the month of May, nothing could occur which would interrupt the succeeding steps in the assessment of the franchise tax. In fact a question somewhat similar to that under discussion was involved in the case decided by Judge Sater, and cited herein. It was his decision in that case that a corporation liable to report in the month of May could not be divested of liability for the tax based upon that report by ceasing to exist beyond the date of such report and the day when the tax became payable. If, then, a corporation cannot so discharge its liability, does it not necessarily follow by analogy that a corporation which was liable for a report in the month of May does not become discharged from this liability by reason of taking on the character of a public utility between the end of that month and the date of the payment of the franchise taxes? I think the analogy suggested here is perfect and I am of the opinion that a corporation which was liable for a report as such in the month of May remains liable therefor for that year and cannot become discharged therefrom by any subsequent act whatever.

This being the case, then, and it being the evident intention of the legislature that no corporation should pay both taxes for any one year it follows naturally that the Cleveland, Alliance and Mahoning Valley Railroad Company under the facts submitted, is liable for taxes for the year 1912 as a domestic corporation for profit, and is not liable for excise taxes for the same year as an interurban railroad.

I have reached this conclusion on what I have regarded as the broad and controlling intention of section 5518, General Code, and must acknowledge that there is no express language in the section to the effect which I have given to that section. I am convinced, however, that the conclusion which I have reached is the only one which is consistent with the purpose of the whole act of 1911, construed as a single act of legislation.

I am of the opinion, therefore, that a corporation which begins the operation of an interurban railroad during the month of June, and has been in existence as a corporation for more than six months preceding the month of May of the same year is liable for franchise taxes for that year, and not for excise taxes.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

181.

TAXES AND TAXATION—EXCISE TAX—INTERSTATE AND INTRASTATE COMMERCE—STATE MAY NOT TAX DEMURRAGE AND STORAGE BUSINESS CHARGED FOR FREIGHT HELD BEFORE DELIVERY TO CONSIGNEE OF GOODS BROUGHT FROM OTHER STATES.

It is now definitely settled by the decisions that a state may impose no tax or other regulation upon interstate commerce as such, i. e., the transportation and transit of property, but that the state may impose such regulations or taxes upon mere aids in commerce, insofar as such state regulations do not conflict with the national regulations provided for the same subject-matter.

Under recent decisions it seems to be settled that the process of interstate commerce is not completed until actual delivery to the consignee, and that the state may not interpose any regulations whatever upon the transportation of the commodity until delivery to the consignee.

When a railroad, therefore, is engaged in the business of transporting a commodity from without the state to a consignee within this state, and charges for demurrage or storage for holding such commodity within this state, subject to directions of the consignee, the charge so made may not be regarded as earnings or intrastate business within the comprehension of sections 83 and 88 of the excise tax law: and this state may, therefore, not tax such earnings.

COLUMBUS, OHIO, April 14, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—There has been certified to me for collection a claim for four hundred and sixty-three dollars and seventy-two cents ($463.72) for excise taxes and penalty charged against the Louisville and Nashville Railroad Company on account of intrastate business done in Ohio during the year ending June 30, 1912. The collection of this claim is resisted by counsel for the railroad company upon the ground that the sum upon which the tax has been computed represents an amount made up exclusively of the earnings of the company derived from "car service" and "storage freight" on interstate shipments. That is to say, it is stated as a fact, supported by an affidavit of the comptroller of the company, that the Louisville and Nashville Railroad Company is and was during the year covered by the assessment engaged in Ohio *exclusively* in transporting interstate shipments, and that none of the shipments of freight or carriers of passengers made by it in Ohio are such as both originate and terminate within this state. It is also stated and deposed that car service, or "demurrage" and storage of freight charges are the only items comprised within the amount determined by the commisson as being the gross earnings of the railroad company from business done within this state for the year preceding the date above mentioned.

Because of the importance of the principle involved, I have deemed it proper to address an opinion to you upon the facts as presented by counsel for the railroad company. If the commission should have a different understanding of the actual facts in the case, the conclusion which I shall announce may not, of course, be regarded as finally disposing of the claim which is in my hands for collection.

Upon a careful investigation, I have come to the point that all the earnings of the Louisville and Nashville Railroad Company which, as stated by its counsel, comprise the amount upon which the excise tax for the year in question was computed, are "earnings derived wholly from interstate business" within the meaning of section 83 of the act of June 2, 1911, (102 O. L., 224), and conversely

do not represent "intrastate business" within the meaning of section 97 thereof. The sections of the act just cited involved here are as follows:

> "Section 83. In the case of each railroad company, such statement shall also contain the entire gross earnings, including all sums earned or charged, whether actually received or not, for the year ending on the thirtieth day of June next preceding, from whatever source derived, for business done within this state, *excluding therefrom all earnings derived wholly from interstate business or business done for the federal government.* * * *"
>
> "Section 88. On the first Monday of October, the commission shall ascertain and determine the gross earnings as herein provided, of each railroad company whose line is wholly or partially within this state, for the year ending on the thirtieth day of June next preceding, *excluding therefrom all earnings derived wholly from interstate business or business done for the federal government.* * * *
>
> "Section 97. In the month of November, the auditor of state shall charge for collection, from each railroad company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission, as the gross earnings of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross earnings, which tax shall not be less than ten dollars in any case."

In a recent opinion in the matter of The Connecting Gas Company, I held, as the commission will recall, that all transportation services in connection with the journey of an article in commerce from a point in one state to a point in another state constitute the carrying on of interstate commerce, even though one or more of such services may be actually performed wholly within the territorial limits of a single state. I need not repeat the citation of authorities mentioned on that point, nor elaborate by discussion upon the statement of this principle, which is the starting point in the course of reasoning which I think must be followed for the solution of the question now under discussion.

It is, therefore, not conclusive in the present case that the service performed by a carrier in holding loaded cars on terminal tracks subject to the order of the consignee and the retention of unloaded freight in the warehouse of the carrier pending its delivery as the consignee demands are both performed wholly within the state; nor is it conclusive that each of the services is essentially separable and distinguishable from the principal service of actual transportation.

In the other opinion already referred to it was held also that a state may not by taxation burden—and therefore inferentially "regulate" the carrying on of any of the processes of interstate transportation, and I need cite no further authorities upon this proposition.

The precise point at issue is then as to whether or not car service and the storage of freight are services which constitute a part of the main service of transportation and are therefore a part of interstate commerce. If they are it would seem that the earnings derived from them would constitute earnings from interstate business within the meaning of the provisions above cited, for I take it that the legislature evidently intended to use the phrase "interstate commerce" in its established and customary sense.

Counsel for the railroad company have relied in their memorandum, with which they have courteously supplied me, upon a line of federal and state de-

cisions construing and applying the provisions of the so-called Hepburn act relating to the power of the interstate commerce commission, (U. S. compiled statutes, 1911, page 1285). I have, however, rejected these authorities as inconclusive. The present case, and the citation of these authorities, illustrate a refinement of the rule respecting the distinction between interstate and intrastate commerce to which I have heretofore not been called upon to refer to in any opinion to the commission. It has become very definitely settled that, with respect to the relative powers of congress and the states there are two spheres of jurisdiction, so to speak, each comprising a definite kind of commercial service or regulation.

The congress of the United States is vested by the constitution with general power "to regulate commerce among the several states." In early cases, some of which I have cited in former opinions, it was held that this general power was exclusive, i. e., that the mere imposition of it in congress by the federal constitution operated to restrain the states from exercising any like power whether congress had legislated or not.

By later cases, however, it was held that as to certain matters the states do have regulatory powers, so that in the absence of legislation by congress, regulation by the states is permissible in such cases, and that such state regulations are merely supplanted by the subsequent acts of congress upon the same subject-matter.

These two spheres of activity which might be designated respectively as that within the exclusive jurisdiction of congress and that within the concurrent jurisdiction of congress and the states, or, more accurately, that within the optional jurisdiction of congress, were clearly defined in the case of Mobile County vs. Kimball, 102 U. S., 691. Mr. Justice Field, in delivering the opinion of the court in that case, discusses the line of authorities beginning with Gibbons vs. Ogden, 22 U. S. (9 Wheat. 1); extending through Colley vs. Port Wardens and Welton vs. Missouri, 91 U. S., 275, and concludes with the following general observations:

> "Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as above defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be if so applied to legislation upon subjects which are merely auxiliary to commerce."

Now, I apprehend that it must be conceded that insofar as taxation amounts to a regulation of commerce, the taxing power of a state does not extend at all to the subjects within the exclusive power of congress, but that it may extend perhaps to subjects within the other category above mentioned. Whether or not a state may impose a tax either directly or indirectly upon the doing of such acts as to which the state might enact regulations in the absence of congressional legislation, is perhaps a doubtful question; but it is one at least that need not

even be considered in this opinion if it appears that the services in question are subject to the exclusive regulatory powers of congress.

The question which is then raised is as to whether within the language of Chief Justice Field what are known as car service and freight storage respectively are part of "the transportation and transit of property." If they are, they are clearly operations of interstate commerce within the meaning of the Ohio statutes now under consideration, and the fact that congress has legislated upon this subject-matter as shown by the statutes quoted in the memorandum of counsel is immaterial.

In Rhodes vs. Iowa, 170 U. S., 412, the supreme court of the United States held unconstitutional a statute of the state of Iowa prohibiting an express company or railroad company or any agent of either from transporting within the state intoxicating liquors intended for delivery in the state without receiving a certificate that the consignee or person to whom the liquor was to be delivered was authorized to sell intoxicating liquors in the county of delivery. The statute by an explicit provision declared it to be the intention of the legislature that the offense should be completed and be held to have been committed in any county, "through or to which intoxicating liquors are sold or transported or within which they are unloaded or transferred or in which such liquors are conveyed from place to place and delivered." The defendant was arrested and convicted under this statute for receiving, in his capacity as agent of a railroad whose line was entirely within the state of Iowa, a package shipped from without the state on the station platform and moving it into the freight warehouse of the railroad company—a distance of about six feet. It was claimed that a statute of congress which permitted a state to regulate the disposition of intoxicating liquors transported into its territory "upon arriving therein" sustained the constitutionality of the Iowa statute and convictions thereunder. The case turned upon the construction of the word "arrival." The court first held that this word did not mean "arrival at the state line." To state the court's conclusion as to the true meaning of the statute, Mr. Justice White used the following language.

> "The provisions of the act were intended by congress to cast the legislative authority of the respective states to attach to intoxicating liquors coming into the states by an interstate shipment only after the consummation of the shipment, but before the sale of the merchandise. * * *"

Referring to a consideration of the earlier case of Leisy vs. Hardin, 135 U. S., 100, Mr. Justice White points out that under that decision without the enabling act of Congress, the right of the consignee of freight shipped in interstate commerce to dispose of it in the original package, could not be impaired, but that the statute subsequently passed had the effect of permitting the state to regulate the exercise of hat right, and thereupon he uses the following language:

> "On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state."

Concluding, he made use of the following language:

> "We think that, interpreting the statute by the light of all its pro-

visions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee * * *."

"It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous. * * *"

The significance of this opinion is best illustrated by the vigorous language used by Mr. Justice Gray in dissenting. I need not quote his language; suffice it to say that he insisted upon the point that the package had actually been deposited upon the soil of Iowa, and hence should be held to have "arrived" within the state within the meaning of the federal statute.

This decision is not as clear upon the point upon which I have cited as it might be desired; it seems to me, however, that it establishes the conclusion that the process of interstate commerce transportation of freight is not completed until actual delivery to the consignee is consummated. While the freight is in the car subject to the order of the consignee it is still in transit. Similarly, it remains in transit while at the freight warehouse of the carrier.

A somewhat clearer application of the principle here involved is found in the case of the Central Stockyards Company vs. The L. & N. Railroad Company, 55 C. C. A., 63. in the decision of the United States circuit court of appeals, per Day, circuit judge. The action was for a mandatory injunction to require the railroad company to deliver at the order of a consignor or consignee shipments of live stock at the plaintiff's stock yards, the railroad company having refused to deliver live stock elsewhere than at arrival stock yards. The court, held, in effect, after reviewing the authorities embodying the distinctions made in the case of Mobile County vs. Kimball, supra, that congress alone had the power to regulate the place of delivery of interstate shipments.

I may have overlooked some authorities bearing on the question, but I have been unable to find any relating directly to the subject-matter of taxation; while the meagerness of authorities relating to the extent of regulatory powers of the states may be explained by the fact that congress has legislated respecting the matters of car service and freight storage.

Upon the principles laid down in the authorities cited rather than upon any authorities directly in point, I have reached the conclusion that "the delivery" which is spoken of in this case means the actual and ultimate delivery to the consignee, and such delivery is not completed while the freight remains in the possession of the carrier, although it is subject to the consignee's orders. It seems reasonable to suppose that matters of this sort are within the principle upon which the exclusive power of congress is founded, being such as to which "there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system."

I am therefore of the opinion that those features of the business of transportation are interstate in character for the purposes of taxation when the transportation itself is interstate and that earnings arising from the performance of such services are "earnings derived wholly from interstate business" within the meaning of the tax commission act of 1911.

Pending the commission's vertification of the facts upon which this opinion

is based, I shall make no effort to collect the claim which has been certified to me; and if the facts be correct, I recommend that the claim be compromised by remitting the entire tax and penalty.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

260.

STATE MAY COLLECT EXCISE TAX ON BUSINESS OF STEAMER ON VOYAGE WHICH BEGINS AND ENDS IN THIS STATE, ALTHOUGH PART THEREOF MAY EXTEND OUT OF THIS STATE.

In the decisions of the supreme court, a distinction is made between the exercise of the taxing power and the police power of a state with reference to the journey made by a steamer, the beginning and end of which lies within this state, and a part of the course of which extends outside of this state.

The state is permitted to impose an excise tax on the receipts realized by such journey, but it may not impose police regulations upon the same.

COLUMBUS, OHIO, May 16, 1913.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On March 27, 1912, I wrote to the commission an informal letter, stating that in my judgment the steamer "Greyhound" was not liable for excise taxes as a "water transportation company" under the so-called "Cole law" provisions of the tax commission act of 1911.

On April 10, 1912, you replied to this letter, calling my attention to the fact that the owners of the steamer had themselves reported for the year 1911 certain receipts for excise tax purposes in the following language:

> "Intrastate business points in Ohio to points in Ohio on Ohio river, $4,027."

I did not at that time immediately take up and dispose of this matter for the reason that I had been convinced by an examination of the authorities submitted to me by Hon. A. R. Johnson, who then represented the owners of the vessel that inasmuch as the greater part of the route which the steamer would necessarily traverse in making its regular voyages from point to point along the Ohio river is located in the state of Kentucky. The entire business is necessarily interstate in character. The authorities which he cited are typified by Railroad Commission vs. Railway Co., 187 U. S. 617, in which it is held that:

> "Rates for the carriage of commerce by a road traversing more than one state, although the transportation begins and ends in the same state, are not subject to regulation by or under state laws, because this commerce for the purpose of regulation is 'interstate.'"

It seems to me at the time that the test of what constitutes "interstate commerce" for the purposes of the excise tax law must be precisely the same as that by which, on application of the same term to the public service commission act and legislation of like character, would be determined.

Upon a more extended research I have, since receiving your letter above referred to, discovered that I was in error in supposing that the authorities cited by Mr. Johnson were conclusive of the question. In fact, I find that the peculiar facts presented by the case of the steamer "Greyhound" illustrate one of the few exceptions to a general rule that the taxing power of a state with respect to commerce is co-extensive with its regulatory power with respect to the same subject matter.

The case of Lehigh Valley Railroad Co. vs. Pennsylvania, 145 U. S. 192, seems to be directly in point. This case arose under a law of the state of Pennsylvania exacting a tax upon the gross receipts of railroad companies from transportation in the state. The track of the plaintiff in error was located partly in Pennsylvania and partly in New York. A portion of the gross receipts upon which the auditor general of the state assessed a tax under this law was derived from transportation between points in the state of Pennsylvania over track which passed through a portion of the state of New York. That is to say, the transportation began and ended in Pennsylvania but traversed a portion of the other state en route. The court held that the tax as assessed should be sustained as not being in conflict with the federal constitution. In the case which Mr. Johnson cited, Railroad Commission vs. Railway Co., supra, the earlier case was distinguished as follows:

> "That was a case of a tax and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside of its boundaries * * * and although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover the tax 'was determined in respect to the receipts for the proportion of the transportation within the state' * * *. Such a proportional tax had been sustained in the case of commerce admitted to be interstate. Maine vs. Grand Trunk Ry. Co., 142 U. S. 217 (p. 621)."

It is apparent, therefore, that the later decision does not by any means overrule the earlier decision. It might be intimated that the court in the subsequent case distinguishes the earlier case because of the fact that the tax therein was apportioned according to mileage within and without the state of Pennsylvania. Careful examination of the facts in the Pennsylvania case, however, will disclose that this distinction is inadmissible. The original tax was assessed upon the apportioned part of the entire receipts of the company whether in Pennsylvania or not and whether originating from transportation between points in Pennsylvania and points in other states or not. The courts of the state held that the tax could not constitutionally be assessed upon those items of receipts which arose from transportation between points in Pennsylvania and other states or between points both of which were outside of the state of Pennsylvania. If the court had had the point of apportionment in mind it would on the authority of Maine vs. Grand Trunk Ry. Co., cited in the above quotation, have held that receipts from transportation originating in Pennsylvania and ending in another state, and vice versa, would have been subject to the tax.

Upon careful consideration of both decisions I am unable to reach any conclusion other than that the supreme court of the United States holds that transportation between points in one state over a road partly located in another

state is interstate for the purpose of rate regulation and intrastate for the purpose of taxation.

I accordingly am of the opinion that the portion of the receipts of the steamer "Greyhound" arising from business carried on between points in Ohio may be used for the purpose of computing the excise tax payable by it, and that, therefore, the company is liable for some excise tax.

I owe the commission an apology for so long delaying this opinion, and I can only assign as reasons for the delay, the fact that there was not a formal request for an opinion as such, and that when I had reached the conclusion which I have expressed the files relating to the matter were mislaid and lost sight of in the press of other business.

I am sending a copy of this opinion to Mr. Johnson and shall, without further certification, take up with him the matter of the excise tax for the year 1911, the collection of which has already been certified to this department, being our file No. 13724.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

270.

HOUSE BILL No. 500 PROVIDING FOR AMENDMENT OF SMITH ONE PER CENT. LAW NOT A LAW PROVIDING FOR A TAX LEVY WITHIN THE MEANING OF SECTION 1-*b*, ARTICLE II OF THE CONSTITUTION, AND THEREFORE, SUBJECT TO INITIATIVE AND REFERENDUM.

The grammatical construction and the use of the term levy, and the intransitive form "providing for" in the phrase "laws providing for tax levies," section 1-b, article II, of the constitution, compel the conclusion that this section is intended to comprehend only such acts as provide for a specified levy and impose upon some office the mandatory duty of making the same at a defined rate on the grand duplicate of the state or some subdivision thereof.

A law, therefore, such as is House Bill 500, which merely provides for the making of tax levies generally and prescribes the machinery by which such levies are to be carried out, is not subject to the exception provided in this section of the constitution, and is therefore subject to the initiative and referendum.

COLUMBUS, OHIO, May 10, 1913.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 7th wherein you request my opinion upon the following question:

> House Bill No. 500, passed by the general assembly, approved by the governor and filed by him in the office of the secretary of state, amends certain portions of the so-called Smith one per cent. law, being sections 5649-2 and 5649-3b thereof and repeals section 5649-3 of the same measure. Does this act take effect immediately or is its effectiveness postponed for a period of ninety days?"

The question involves the operation of the referendum provisions of the constitution as recenly amended and in particular the following:

"Article II, section 1c. * * * No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition signed by six percentum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. * * *

"Section 1d. *Laws providing for tax levies,* * * * shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to the referendum."

The question presented by your inquiry is a clear cut one. Is a law of the nature exemplified by House Bill No. 500 one of the class of laws described as laws providing for tax levies, and, therefore, under section 1d, as above quoted, not subject to the referendum; or is it not such a law, and, therefore, by virtue of the general provisions of section 1c does it remain ineffective for a period of ninety days so as to afford an opportunity for ordering a referendum?

In my opinion the law to which you refer does not belong to the class of laws "providing for tax levies" within the meaning of section 1d, and, therefore, there being no other provision of such section that could be regarded as applicable to it, is subject to the referendum under section 1c and must remain ineffective for a period of ninety days after it has been filed by the governor, with his approval, in the office of the secretary of state (not after its approval by the governor as you erroneously suppose.

No authority can be cited at this time in support of this conclusion. This portion of the amended Ohio constitution is modeled closely after the constitution of Oregon which has contained similar features for some years. I am unable to find, however, that the question has arisen in that state. In the absence of authority I have found it necessary to come to my conclusion by taking heed to what has impressed me as being the manifest purpose of the framers of the constitutional amendment.

Of course the intention of the framers of the constitution must be primarily ascertained from the language which they have used. In the clause now under consideration the operative words are "providing for tax levies." The term "providing for" is the participle of the verb "provide" used in the intransitive sense. The verb itself is capable of being used also in the transitive, and if it were so used in this clause the meaning would at once become clear. That is, if the phraseology were "laws providing tax levies" which is grammatically correct, it would at once become apparent that the phrase could refer only to such acts as in themselves had the effect of making specific tax levies. The fact that the verb is used in the intransitive somewhat weakens its force and broadens its meaning. *To provide for a tax levy* is not the same language as *to provide a tax levy.* The one is indirect, and the other direct, and the shade of meaning is by no means a slight one.

On the other hand, there is significance in the choice of the principal noun "levies." The choice of phraseology here was between this word and the related but not equivalent term "levying," or rather between the phrase as

formulated and the phrase "laws providing for the levying of taxes." The constitutional convention's choice of nouns somewhat tends to confuse the question because it points in a different direction from that indicated by its choice of verbs. If "providing for" is a broader term than "providing" would have been, yet the noun "levies" is a narrower and more exact term than the participle substantive "levying." A "levy" is a completed thing; the word refers to an act which has already taken place. It would be incorrect to say "the levy of taxes" if the meaning of the speaker were to refer to the process by which taxes became levied: rather he should choose the participle "levying" if that were his meaning.

"Tax levies" then are not the same things as would be meant by the phrase "the levying of taxes." The latter refers to the process which is a part of the taxing machinery; the former refers to the act itself when completed by the use of such process. For example, the title of chapter XII, title I, part second, General Code, is "levying taxes." The whole subject-matter of the chapter, in which the sections amended by the bill of which you speak are found, relates to the process of making levies, and hence the term "levying" in the title of the chapter is used in its exact sense. On the other hand, in section 5649-2, one of the sections amended in this bill, is found a broader use of the word "levies" in the sense in which it is used in the constitution, viz., "the maximum rate of tax that may be levied for all purposes * * * shall not in any one year exceed ten mills on each dollar * * * and such *levies* in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness * * *."

So also in section 5649-3*a* of the same group of sections is found the following: "The total tax *levy* for all school purposes shall not exceed in any one year five mills * * *. Such limits for county, township, municipal and school *levies* shall be exclusive of any special *levy* provided for by a vote of the electors * * * levies for road taxes that may be worked out, * * * and levies * * * in special districts created for road or ditch improvements."

Obviously the word "levy" as used in these connections means the rate or amount placed upon the duplicate of the subdivision through the act of levying. This, in my judgment, is the exact meaning of the word in the sense in which it is used in the constitution.

Having then some insight into the clause of the constitution now under discussion the meaning of the whole phrase becomes somewhat clearer. "Laws providing for tax levies" are laws relating to the completed act itself, and not to the process by which it is effected.

Perhaps this distinction is sufficient to afford ground for the conclusion which I have reached. However, I have looked into the question from still another angle, in which I have returned to a consideration of the word "providing." While the verb used in the intransitive has a broader meaning than it would have had, had it been used transitively, yet, in my opinion it is not equivalent in meaning to "authorizing" for example. We are dealing here with a word, the use of which in the statutes is almost notoriously common. I do not think that it can be seriously disputed that the word "provide" as used legislatively carries with its the significance of self-execution. That is to say the law does not "provide" for a tax levy unless it imposes upon some officer the mandatory duty of making a levy. If the law provides that some officer or board shall be authorized to levy, or even if it commands that some levy shall be made for a given purpose, and leaves the amount thereof subject to the discretion of the officer or board, then the law itself does not *provide* for the levy; it simply *authorizes* the levy which in its completeness is *provided for* by the act of the officer or board. Summarizing, then, I am of the opinion that the phrase "laws

providing for tax levies" is restricted in its meaning to those laws which impose upon some officer the mandatory duty of levying a tax at a certain rate or at a rate to be determined otherwise than by the exercise of the officer's discretion, on the grand duplicate of the state or some subdivision thereof. Laws authorizing tax levies to be made and laws providing for the making of tax levies generally, i. e., prescribing the machinery by which the levying act shall be carried out are alike outside of the pale of the definition of the term.

This conclusion reached by considering what are perhaps fine shades of meaning of the operative terms used in the phrase under discussion, is supported by consideration of the consequences of a more liberal construction. There is a well recognized principle of statutory and constitutional construction, that exceptions in a statute to the general rules and provisions thereof, are to be strictly construed. Lewis Sutherland on Statutory Construction, 352.

This rule has an application in the present instance. The obvious intention of the constitution is that the great bulk of the laws passed by any session of the legislature shall be subject to a referendum and that a comparatively small number of legislative acts shall not be subject thereto. If the broad construction which is the only alternative to the one which I have adopted were given to section 1d, as above quoted, then its object would be very easily evaded. Practically all new policies of legislation require the raising of money to carry them into effect. Money is ordinarily raised for governmental purposes by taxation. A very large portion of the bills passed by any legislature will be found to contain authority to levy taxes in order to carry out their objects and purposes. Accordingly, if the mere fact that the law relates in some way to the levying of taxes is sufficient to exempt it from the referendum. The latter will have a very restricted application and most laws will be in the exempted class.

The obvious intention of the framers of the constitution was, I think, to limit the exempted class of legislation to such legislation as is necessary in order to enable the state itself to carry on the functions of government. The other exempted laws not quoted in the above quotation of section 1d, are "appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety * * *."

This context sheds light upon the meaning of the phrase "laws providing for tax levies" in that it evinces the single and controlling intention of the framers of the constitution, which is that which I have already referred to.

I am aware that it is somewhat difficult to express in exact language the distinctions which I have made, and in order that there may be no misunderstanding of my meaning I beg leave to cite certain examples of laws which I believe are within the meaning of this provision of "laws providing for tax levies."

> "Section 7575. For the purpose of affording the advantages of a free education to all the youth of the state, there shall be levied annually a tax of three hundred and thirty-five thousandths of one mill on the grand list of the taxable property of the state to be collected as are other state taxes and the proceeds of which shall constitute 'the state common school fund,' and for the payment of interest on the irreducible or trust fund debt for school purposes, three hundred and thirty-five thousandths of one mill, such fund to be styled 'the sinking fund.'
>
> "Section 7924. For the purpose of affording support to the Miami university, there shall be levied annually a tax on the grand list of the taxable property of the state, which tax shall be collected in the same manner as other state taxes and the proceeds of which shall con-

stitute 'the Miami university fund.' The rate of such levy shall be eighty-five thousandths of one mill upon each dollar of valuation of such property. The sum raised by such levy, or its equivalent in money, in case the levy is abolished, shall be the sum total received either from the proceeds of the levy or from appropriations for the support of the college of liberal arts, and shall be used only for the purposes set forth in the next preceding section. This levy shall not hereafter be increased. But this shall not prevent such appropriations from time to time as may be necessary for apparatus for university purposes, exclusive of buildings."

A similar law was passed by the present session of the general assembly, and I believe signed by the governor and filed in the office of the secretary of state. I do not recall the number of the bill I have in mind; it "provides for the levy" of a certain rate annually on the grand duplicate of the state for the purpose of building inter-county highways and is known as the "Hite bill."

Such laws are clearly laws "providing for tax levies," so also would be in my judgment a law which would provide for a levy to be made by some officer such as the auditor of state or a county auditor, the amount or rate of which might be uncertain, and which would be ascertained and determined by mere computation, contingent upon the existence of facts and not subject to the discretion of the levying officer.

In short then, the law must *itself* provide for the tax levy; and a law does not do this if it merely authorizes the levying power to be exerted at the discretion of an executive or local legislative officer or tribunal.

The sections amended by the bill to which you refer relate to two subjects connected with taxation and with the levying of taxes, viz.: 1. Certain limitations upon the aggregate of all levies. 2. The machinery through which the levying process must be carried on in order to enforce these limitations.

A law providing for limitations on tax rates is not a law " providing for tax levies" as I have construed that phrase; neither is a law providing the machinery by and through which local levying authorities must exercise their levying power such a law.

I may add that I have attempted to examine the debates of the late constitutional convention for light upon the question which is presented by your letter. The publication of the debates is not, however, complete and the volumes now in print are not indexed so that within the time in which I was obliged to consider the question, I was unable to find anything bearing thereon.

I repeat, then, in conclusion that it is my opinion that house bill No. 500 to which you refer, will take effect ninety days after it was filed by the governor in the office of the secretary of state and not before that time.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

320.

LIABILITY OF CORPORATION, AFTER VOLUNTARY DISSOLUTION, FOR TAXES UPON PROPERTY REPORTED PRIOR THERETO, BUT THE CLAIM OF WHICH ACCRUED SUBSEQUENTLY TO SAID DISSOLUTION.

Under sections 8740, 8741, 8742, 8743 *and* 11969, *General Code, a corporation for profit after voluntary dissolution for the purpose of winding up its affairs is to be governed by the directors, trustees or manager of the affairs of such corporation acting last before the time of its dissolution, and such dissolved corporation may be sued upon all existing claims and liabilities existing at the time of dissolution, of which but for the dissolution, would have accrued against it in its corporate name, and in the same manner and to the same effect as if is were not dissolved.*

All moneys and assets of such corporation coming into the hands of the persons acting as such trustees, represent a trust fund, which is liable for the payment of claims against a corporation which are unapproved at the time of the dissolution, and which except for the dissolution would have accrued against the corporation itself and the trustees may be personally liable when they distribute to the stockholders such assets without making provision for such unaccrued claims.

When a corporation prior to such dissolution has filed a report of its properties with the county auditor, but has so dissolved prior to the time of the accrual of the claim for taxes on the same, the county treasurer, under section 2658 *may distrain sufficient goods and chattels remaining in the hands of such trustees as assets of the corporation. When there are no such properties within the hands of the trustees, the county treasurer may proceed, under section* 2660, *General Code, to have the court enter a judgment against the trustees for the amount of the taxes.*

Against such judgment, the trustee may defend that the assets were insufficient to pay the taxes with other claims. When the assets are sufficient, however, and they have been distributed to stockholders without paying the claim for taxes, a judgment so obtained against such corporation will entitle the county treasurer to a proper action against the stockholders for the reason that such assets constitute a trust fund for the payment of existing creditors.

COLUMBUS, OHIO, May 26, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge the receipt of your letter of April 17th, submitting for my opinion thereon the following question:

> "In the month of May, 1911, the W. E. Scott Company, of Montpelier, Ohio, a domestic corporation for profit, filed its annual report as an incorporated company with the county auditor of Williams county, who thereupon proceeded to ascertain and determine the value of the property of said company, which he found to be $18,400.00, all in personal property, and placed the same upon the tax duplicate, and taxes were levied thereon for the year 1911, in the manner provided by law. The taxes so levied amounted to $246.56, and the company having paid no part of the same, a penalty of ten per cent was added by the county treasurer, and there remains due and unpaid in the delinquent personal tax duplicate in the hands of the treasurer of Williams county the sum of $271.22.

"The W. E. Scott Company was incorporated February 7, 1908, and filed a certificate of voluntary dissolution with the secretary of state on September 19, 1911, and the county treasurer has been unable to collect such delinquent taxes. He now requests the advice of this commission as to whether such taxes are collectible and what his remedy, if any, is."

In the consideration of this question the following statutory provisions must be taken into account:

"Section 8738. When a majority of the directors, trustees, or other officers of a corporation not for profit desire to abandon its corporate existence and *it has no debts*, or in case of a corporation for profit when a majority of such officers become satisfied that the objects of the corporation cannot be accomplished, and no installment of its capital stock has been paid, no investments made, and that *it has no debts*, they, or the president of the board of directors, trustees, or other officers, may call a meeting of the members or stockholders of the corporation at such time and place as he or they designate by at least two weeks' publication in a newspaper published and of general circulation in the county wherein the principal office is located.

"Section 8739. If a majority of the members of such corporation not for profit present at such meeting desire such abandonment, or a majority in amount of the stockholders of such corporation for profit present in person or by proxy decide that the objects of such corporation cannot be accomplished then such corporation shall be abandoned or dissolved upon the filing of a certificate of such abandonment or dissolution with the secretary of state in the manner provided by law.

"Section 8740. When a majority of the directors or other officers having the management of the concerns of a corporation for profit, which has completely closed its business, *and paid all the debts and liabilities incurred by it*, desire to surrender its corporate authority and franchises, they, or the president of such board of directors, may call a meeting of the stockholders at such time or place as he or they designate by publication for four weeks in some newspaper published and of general circulation in the county wherein the principal office of the corporation is located and by written notices addressed to each of the stockholders whose residence is known, of the object, time and place of the meeting."

"Section 8741. If all the stockholders present at such meeting in person or by proxy decide to surrender and abandon its corporate authority the corporation shall be abandoned and dissolved upon the filing of a certificate of the abandonment or dissolution with the secretary of state in the manner provided by law.

"Section 8743. Upon the dissolution of a corporation by the expiration of the terms of its charter, or otherwise, and unless other persons be appointed by the legislature, or by the stockholders, directors, or trustees of the corporation, or by a court of competent authority, the directors, trustees, or managers of the affairs of such corporation, acting last before the time of its dissolution, by whatever name known in law, and their survivors, shall be the trustees of the creditors and stockholders of the dissolved corporation, and have full power to settle its affairs, collect and *pay outstanding debts*, and divide among the stockholders the money and other property remaining, in proportion to the

stock of each stockholder paid up, *after payment of debts* and necessary expenses.

"Section 8743. The persons so constituted trustees, may sue for and recover the debts and property of the dissolved corporation, by the name of trustees of the corporation, describing it by its corporate name, and jointly and severally they shall be responsible to the creditors and stockholders of the corporation, *to the extent of its property and effects coming into their hands. Such trustees may be made or become parties to any action, by or against the corporation.* All liens of judgments existing at the time of the dissolution either in favor of or against the corporation, shall continue in force as if the dissolution had not taken place.

"Section 11969. Such dissolved corporation may be sued by its corporate name, for or upon a cause of action accrued, *or which, but for the dissolution, would have accrued against it,* in the same manner, and with the like effect, as if it were not dissolved. Process by which an action is instituted against it may be served by the sheriff, or other proper officer, by delivering a copy thereof to an assignee, trustee, receiver thereof, or person having charge of its assets, or by leaving such copy at his residence."

Although the section last quoted is widely separated in the present General Code from the other sections above quoted, yet by investigation of its legislative history it will be ascertained to be strictly in *pari materia* with the other sections, and it will appear that the reference in the first line of said section to "such dissolved corporation" means "any dissolved corporation.'

By virtue of the foregoing related provisions of law it is clear, I think, that a corporation cannot escape payment of an unaccrued liability merely by dissolving. It is true that if the corporation has dissipated or otherwise lost its assets before its dissolution, so that the property and effects coming into the hands of those upon whom the duty of acting as winding up trustees is cast by the above quoted provisions, is insufficient to discharge such unaccrued liabilities, they will not be personally liable therefor; and in case the liability of stockholders has been exhausted the creditor or other person holding a claim against the corporation will, upon its accrual, simply lose.

I am of the opinion, however, that the amount of property coming into the hands of the persons acting as the last board of directors or other persons acting in their stead as trustees of a dissolved corporation at the time of dissolution, represents a trust fund which is liable under the express provisions of the statute for the payment of claims against the corporation which are unaccrued at the time of the dissolution, which, except for the dissolution, would have accrued against the corporation itself.

The practical effect of such a holding is that if the trustees charged with the duty of winding up a corporation fail to provide for the payment of such unaccrued liability, and distribute to the stockholders the assets coming into their hands, they may be made personally liable at the suit of the owner of the unaccrued claim when it does ultimately accrue.

All the foregoing conclusions seem to me to follow without any special difficulty from the express language of the statute. Whether or not trustees could absolve themselves of liability on an unaccrued claim by paying bona fide debts that had accrued, and thus exhausting the fund coming into their possession, is a question not necessarily involved in your inquiry but one which I would answer in the affirmative, without full consideration, at least.

I am assuming, however, that in the case presented by you there may have

been a fund existing at the date of dissolution which was more than sufficient to pay the debts of the concern, leaving a balance sufficient to pay the taxes. The case wherein such a balance, instead of being held to pay the taxes, is distributed to the stockholders, is the one which I am more particularly discussing.

The only confusion which arises from the statutes which are otherwise clear on their face, is caused by the fact that seemingly it is a condition precedent to the lawful voluntary dissolution of the corporation that it has paid all of its debts. Both the sections above quoted, which provide for the different methods of voluntary dissolution, require this. On the other hand, however, the sections providing for the board of winding up trustees explicitly authorizes and directs such trustees to pay all outstanding debts. These seeming inconsistencies may possibly be accounted for upon the assumption that the legislature supposed that the stockholders of a corporation might, in good faith, believe that all its debts were paid and so believing cause it to be dissolved; but that thereafter a forgotten liability would appear, or it may be supposed that while it is a condition precedent to the voluntary dissolution of a corporation that *all debts* be paid, yet there are different claims and demands other than those which are technically "debts" such as liabilities in tort, and perhaps taxes themselves, which need not be paid or discharged before the dissolution and are to be taken care of by the winding up trustees; or, again, it may be that the meaning of the word "debts" in the first two sections above quoted is to be interpreted as including accrued liabilities only, so that the legislative intent was to permit a corporation voluntarily to dissolve when all of its accrued liabilities had been discharged, leaving to the winding up trustees the duty of preserving the assets coming into their hands for the purpose of meeting the unaccrued demands when due.

Any one of these hypotheses affords a satisfactory explanation for the seeming paradox which is presented by the sections which I have quoted. At any rate it seems very clear to me that, as I have already stated, the winding up trustees are liable to "creditors" of the corporation to the amount of the assets coming into their hands upon all claims against a corporation which are unaccrued at the time of its dissolution.

This conclusion having been reached, the further question remains to be considered, viz.: Is the claim of the state for taxes one that can be so enforced?

In this connection I quote the following sections of the General Code which seem to have some bearing upon the subject:

> "Section 2658. When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken, the time and place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs.
>
> "Section 2660. If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation,

executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the cost of the proceedings, which rule shall have the same force and effect as a judgment at law and shall be enforced by attachment or execution or such process as the court directs."

I am clearly of the opinion that under the first of the above quoted sections the county treasurer may distrain in specific cases the chattels which he may find in the possession of the winding up trustees. That is, if the property of the corporation has not been sold and the proceeds distributed but some of it remains in the possession of the last board of directors or any other agent of the company, it may be seized and sold for taxes against the corporation. In contemplation of law the property is still the property of the corporation, and the taxes having been charged against the corporation as such, they may be collected from such property even though the corporation for many purposes has ceased to exist.

If the tangible assets of the corporation have been dissipated or turned into money or other intangible things of value, then the proper proceeding, in my judgment, would be that provided for by section 2660. The proper party defendant in such a proceeding would be the corporation itself as provided by section 11969, General Code. Lareman vs. Insurance Co., 11 N. P. N. S. 58; Glass Co. vs. Stoehr, 54 O. S. 157.

Service of process, which in this case consists of the notice to show cause, should be made upon the trustees as therein provided. Treasurer vs. Dale, 60 O. S. 180.

It would, in my judgment, be a defense to this proceeding, on the part of the trustees representing the corporation, that on the dissolution of the corporation all of the assets of the corporation had been distributed or that an amount insufficient to pay the taxes had been left in their hands (in which latter case in all probability the judgment should be only for the amount left in the hands of the trustees and not paid out to bona fide creditors of the corporation prior to the service of the notice). This is because the claim of the state for personal taxes does not constitute a specific lien like that for taxes on real estate does constitute. If, however, the trustees are unable to show the facts which I have just mentioned, which in a proceeding like this would be matters of defense, in my judgment, then the judgment provided for in the section last above quoted should be entered against the corporation as such. The payment of this judgment could, in my opinion, be enforced against the trustees personally in the manner in which the payment of any other judgment is enforced; whether or not having obtained a judgment (which constitutes a technical debt for this purpose) the county treasurer would then stand in the relation of a "creditor" to the trustees, within the meaning of section 8743, supra, might be a difficult question. Yet, in my opinion, the question is to be answered in the affirmative. It is held in numerous authorities in this state and elsewhere that taxes are not debts within the meaning of that word as customarily used. Peter vs. Parkinson, 83 O. S. 36. However, they are enforceable claims and may be made the basis of a judgment even after the "person" liable has passed out of existence, if there is survivorship of the cause of action as against others standing in a representative capacity. Hopkins Treas. vs. Osborne, 14 N. P. N. S. 94.

A judgment, on the other hand, once obtained, is a debt, and although this judgment itself might have to be sued upon for the purpose of obtaining

separate judgments against the trustees under section 8743, yet it could, in this way, I think, be enforced against them personally.

If it should develop that the assets of a corporation after its dissolution had been distributed among the stockholders, and that the surviving trustees, being the last board of directors, as aforesaid, were proof against execution under proceedings like those just discussed then, the judgment having been obtained against the corporation by service upon them as above described, the county treasurer would, in my opinion have a right of action against the stockholders as such to be enforced by proper proceedings. Compton vs. Railway, 45 O. S. 592-613-614.

That is to say, as stated in the case last cited the assets of a corporation remaining in existence at the time it is dissolved, constitute a trust fund for the payment of creditors, and for the discharge of legal demands whether accrued or not. Therefore, even though at the time of the dissolution, the county treasurer in his official capacity would not be a "creditor" of the corporation under the facts stated by you, yet he would have an equitable right in this trust fund which, upon the accrual of this claim and its reduction to judgment in the manner above referred to, he could enforce by the remedies which the statutes and courts of equity afford to those entitled to participate in a trust fund.

Some of the authorities which I have cited are closely analogous to different phases of the question stated by you. Others are perhaps more remotely analogous. The complete working out of the question upon various propositions that might be conceived involves the expression of an opinion upon many points which do not seem to have arisen under the laws of this state.

The language of section 2660, supra, especially that with relation to the enforcement of the judgment thereunder once obtained, is, however, so comprehensive as to afford to me considerable confidence that, at least under the direction of the court as therein provided, the treasurer might avail himself of all the ordinary remedies for such enforcement.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

321.

PUBLIC UTILITIES—LIABILITIES OF FREIGHT LINE COMPANIES FOR TAX ON ROLLING STOCK IN NATURE OF EXCISE TAX—NOT SUBJECT TO PROPERTY TAX BY TAX COMMISSION—LIABILITY OF DOMESTIC FREIGHT LINE CORPORATION OR FRANCHISE TAX—NON-LIABILITY FOR SUCH OF FOREIGN FREIGHT LINE COMPANIES. EMERY CANDLE COMPANY; GRASCELLI CHEMICAL COMPANY; PROCTOR AND GAMBLE TRANSPORTATION COMPANY.

Under sections 5415 *and* 5416, *General Code, freight line companies are included in the general use of the term "public utility."*

Under sections 5462 *and* 5468, *General Code, freight line companies are subjected to a tax in the nature of an excise tax, which tax is assessed upon the amount of rolling stock of such companies which is located in Ohio, and which amount is to be determined by the proportion of the capital stock of the company representing rolling stock which the miles of railroad over which the company runs cars or its cars are run in this state, bears to the entire number of miles in this state and elsewhere over which the company runs cars and its cars are run, and such other rules as may conduce to an equitable proportionment of value.*

Although freight line companies would seem to be included within the terms of section 5420, *General Code, requiring all public utilities to deliver before the first day of March to the tax commission a statement with respect to its property, nevertheless, no method of proportionment of value is provided for freight line companies as is the case with respect to other forms of public utilities, enumerated in section* 5422, *General Code.*

From a legislative history of these statutes the intended plan is disclosed to make an assessment of the whole system of public utilities upon a unit basis as a going concern and to apportion the value so ascertained upon the mileage or some other similar basis to the state of Ohio and the various subdivisions therein.

A prescribed method of apportioning such value would seem to be a necessary part of the procedure and the omission of such prescribed plan with reference to freight line companies must be deemed significant.

Inasmuch as this tax stated to be in the nature of an excise tax operates equally upon the property of such freight line companies, whether they are engaged in the business of interstate commerce or intrastate commerce, such tax must not be seemed to be made upon the privilege of doing business and therefore not properly an excise tax, but rather a tax upon the instrumentalities of the business, i. e., the physical properties.

Under the rule of uniformity, therefore, prescribed by article 12, *section* 2 *of the constitution the legislature could not well have intended that the physical properties of such company should be subjected in addition to this tax designated in the nature of an excise tax, but which is in reality a property tax, should also be subject to the general property tax upon its physical properties, which is applied to other forms of public utilities.*

Inasmuch, therefore, as in the plan of procedure set out, no provision is made for a complete report of the properties of freight line companies and no plan of procedure is set forth for the apportionment of the value of such properties, and as a property tax is to all particular purposes imposed by the statutes and described as a tax in the nature of an excise tax upon the rolling stock of such companies, they are not to be deemed within the terms of the statutes prescribing a method of property tax for public utilities generally.

Although the statutes provide for a report of the gross receipts of public

utilities generally, nevertheless freight line companies are not included in the provisions defining the duty of the tax commission in ascertaining the gross receipts and gross earnings of the public utilities for the regular excise tax purposes. A statement of gross receipts is, therefore, not required by the statutes of freight line companies.

The legislature has failed to affect, therefore, that freight line companies be made subject to the excise tax provisions of the Cole law.

Under section 5495, General Code, all corporations for profit, are subject to the Willis franchise tax unless excepted therefrom by section 5519, General Code, and therefore, domestic freight line companies are liable for this tax. Foreign freight line companies, however, not being subject to compliance with the provisions of both sections 179 and 183, are not liable for the franchise tax.

Under the terms of the statutes, only the rolling stock of freight line companies is to be assessed for taxation by the tax commission; the other property being returned locally.

COLUMBUS, OHIO, April 2, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of August 21st enclosing a copy of the purpose clause of the Emery Candle Company, a domestic corporation, together with a copy of a statement contained in the annual report of the company, as a freight line company, for the year 1912, made under protest.

You advise as to this company that it is its contention that if it is required to report at all as a freight line company or "public utility" for any purpose, its report as such should treat only of the freight line business of the company, if any, and should not include a statement of tangible property used otherwise than in the transaction of such business or its gross receipts other than from that business; and that the company should also report annually as a domestic corporation for profit and pay franchise taxes. As to this company you submit in your letter of August 21st the following questions:

> "(1) Is the above named company a 'public utility' within the meaning of the provisions of the act of May 31, 1911, and as such required to report to the commission all its property, real and personal, to be assessed by the commission, and to pay an excise tax upon its entire gross receipts from all intrastate business? Or
>
> "(2) Should it report as a domestic corporation for profit?"

Subsequently you transmitted to me a brief prepared by Messrs. Squires Sanders and Dempsey on behalf of the American Tank Line, a freight line operated as a part of its business by the Graselli Chemical Company, evidently an Ohio corporation, and in connection with the facts respecting that company as disclosed by the brief as well as those arising out of the report made by the Emery Candle Company you submit in your letter of September 10th, the following questions:

> "(1) Whether the company is a freight line company?
>
> "(2) If so, should it be treated as a public utility and all of its property be assessed by the commission, and should it pay an excise tax upon its entire receipts from all business?
>
> "(3) Or pay an excise tax upon the proportion of its capital stock represented by the freight line business and a franchise tax as a domestic or foreign corporation for profit? And

"(4) A property tax upon the value of its property used in the freight line business in addition to its other property?"

On the last named date you also submitted to me a statement of facts and an argument submitted to you by Messrs. Paxton, Warrington and Seasongood, counsel for the Proctor & Gamble Transportation Company, a domestic corporation exclusively engaged in freight line business, raising the question as to what property of that company should be assessed by the tax commission of Ohio for local taxation, assuming that the company owns a large number of cars of which five are continuously in Ohio, and the remainder during the greater portion of a given year are operated entirely outside of the state of Ohio. The commission has submitted this question to me in connection with the other matters heretofore referred to and for my advice on the following specific question which relates solely to the Emery Candle Company:

"Whether the commission should assess the value of the moneys and credits and certify this value to the auditor of Hamilton county, and should it assess the value of any cars against the company for local taxation, and, if so, what proportion of the cars is taxable in Ohio?"

In the same connection and in the same letter you state that a partnership known as Isaac Winkler & Bro., domiciled in Ohio, operates some freight line cars and reports to the commission in addition to said cars some money and office furniture at its office. The statement is that the firm is also engaged in business other than the freight line business, and my opinion is requested upon the following question:

"Whether it is the duty of the commission to assess any of the property of the partnership other than the cars?"

Many specific questions are involved in the various queries thus submitted to me, and it would be confusing at this time to state these questions in detail. At the outset of any consideration of any one of these questions, or all of them together, a single fundamental question arises and must be answered, viz.:

What is the scheme of taxation of property and privileges of freight line companies in Ohio at the present time?

That this is a question by no means easy of determination becomes apparent upon consideration of the following sections of the General Code, enacted as sections of the tax commission act of 1911, 102 O. L. 224.

"Section 5415. The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, *sleeping car company, freight line company, equipment company,* electric light company, gas company, pipe line company, waterworks company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railroad company, suburban railroad company, and interurban railroad company, and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations. (Sec. 39, 102 O. L. 230.)

"Section 5416. That any person or persons, firm or firms, co-partner-

ship or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * *

"When engaged in the business of operating cars for the transportation, accommodation, comfort, convenience or safety of passengers, on or over any railway line or lines, in whole or in part within this state, such line or lines not being owned, leased or operated by such company, whether such cars be termed sleeping, palace, parlor, chair, dining or buffet cars, or by another name, is a sleeping car company;

"When engaged in the business of operating cars for the transportation of freight, whether such freight is owned by such company, or any other person or company, over any railway line or lines in whole or part within this state, such line or lines not being owned, leased or operated, by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars or by any other name, is a freight line company.

"When engaged in the business of furnishing or leasing cars, of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partly within this state, such line or lines not being owned, leased or operated, by such company, is an equipment company. (Sec. 40, 102 O. L. 230.)

"Section 5417. Section 41. The term 'gross receipts' shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of *any public utility*, or incidental thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of *a public utility*, shall be held to mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the *public utility* itself or from any other business done whatsoever.

"Section 5420. Section 44. *Each public utility*, as defined in this act, except express, telegraph and telephone companies, shall annually, on or before the first day of March, make and deliver to the tax commission of Ohio, in such form as the commission may prescribe, a statement with respect to such utility's plant or plants and all property owned or operated, or both, by it wholly or in part within this state.

"Section 5422. Section 46. Such statement shall contain: (here follow numerous items of general information, required to be included in such statement) * * *

"13. In the case of street, suburban or interurban railroad companies and railroad companies, such statements shall also give: (Here follows certain specific information exacted from such company) * * *.

"14. In the case of pipe line, gas, natural gas, waterworks and heating or cooling companies, such statement shall also show: (Here follows an enumeration of specific items of information exacted from such company).

"Section 5423. Section 47. On the second Monday of June of each year, the commission shall ascertain and assess, at its true value in money, all the property in the state of *each such public utility, subject to the provisions of this act*, other than express, telegraph and telephone companies.

"Section 5424. Section 48. In determining the value of the property

of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility.

"Section 5425. Section 49. The property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section forty-three of this act.

"Section 5428. Section 52. The commission shall deduct from the total value of the property of each of such public utilities in this state, as assessed by it, the value of the real property owned by such public utilities, if any there be, as otherwise assessed for taxation in this state, and shall justly and equitably equalize the relative values thereof.

"Section 5446. Section 57. The commission shall apportion the value of the property of all other public utilities (than railroad and street suburban and interurban railroad companies) assessed according to the provisions of this act as follows:

"(a) When all the property of such public utility is located within the limits of a county, the assessed value thereof shall be apportioned by the commission between the several taxing districts therein, in the proportion which the property located within the taxing district in question, bears to the entire value of the property of each such public utility, as ascertained and valued as herein provided, so that, to each taxing district there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located, to the whole value thereof.

"(b) When the property of such public utility is located in more than one county in this state, the assessed value thereof shall be apportioned by the commission between the several counties and the taxing districts therein, in the proportion which the property located therein bears to the entire value of the property of such public utility as ascertained and valued, as herein provided, so that to each county and each taxing district therein, there shall be apportioned such part of the entire valuation as will fairly equalize the relative value of the property therein located to the whole value thereof.

"(c) When the property of such public utility, required to be assessed by the provisions of this act, is located in more than one state, the assessed value thereof shall be apportioned by the commission in such manner as will fairly and equitably determine the principal sum for the value thereof in this state, and after ascertaining such value it shall be apportioned by the commission, as herein provided.

"Section 5447. Section 58. On the second Monday of July, the commission shall certify such apportionment to the auditor of each county in which any of the property of the public utility is located.

"Section 5448. Section 59. The county auditor shall place the apportioned value on the tax list and duplicate and taxes shall be levied and collected thereon, in the same manner and at the same rate, as other personal property in the taxing district in question.

"Section 5460. Section 71. Public utilities shall not be required

to make returns under, nor be governed by the provisions of sections fifty-four hundred and four, fifty-four hundred and five and fifty-four hundred and six of the General Code.

"Section 5462. Section 73. Annually, between the first and thirty-first days of May, every sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, shall under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe.

"Section 5463. Section 74. Such statement shall contain:

* * * * * * * * * *

"6. The number of shares of capital stock.

"7. The par and market value, or, if there is no market value, the actual value of the shares of stock on the first day of May.

"8. A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation.

"9. The total value of the real estate owned by the company and situated outside of this state.

"10. The whole length of the lines of railway over which the company runs its cars, and the length of so much of such lines as is without and is within this state.

"11. The whole number and value of the cars owned or leased by the company classifying the cars according to kind, and the daily average number of cars operated in this state.

"Section 5465. Section 76. On the first Monday in July, the commission shall ascertain and determine the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state, and in so determining shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars, or its cars are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run, and such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state.

"Section 5468. Section 79. On the first Monday in August of each year, the commission shall certify such amount to the auditor of state, who shall charge a sum *in the nature of an excise tax*, to be collected from each sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, to be computed by taking one and two-thirds per cent. of the amount fixed by the commission as the value of the portion of the capital stock representing the capital and property of each company owned and used in this state.

"Section 5470. Section 81. Each public utility, except express, telegraph and telephone companies and street, suburban and interurban railroad and railroad companies, doing buines: in this state, shall, annually, on or before the first day of August, and each street, suburban and interurban railroad and railroad company, shall annually on or before the first day of September, under the oath of the person constituting

such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe.

"Section 5471. Section 82. (Provides for certain general information to be furnished by all public utilities in the statement provided for in the foregoing section.)

"Section 5474. Section 85. In the case of all such public utilities except railroad, street, suburban and interurban railroad companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received, or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within this state.

"Section 5475. Section 86. On the first Monday of September, the commission shall ascertain and determine the entire gross receipts of each *electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company* for business done within this state for the year then next preceding the first day of May, and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government.

"Section 5481. Section 92. On the first Monday of October, the commission shall certify to the auditor of state, the amount of the gross receipts so determined, of *electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling and water transportation companies*, for the year covered by its annual report to the commission, as required in this act.

"Section 5483. Section 94. In the month of October, annually, the auditor of state shall charge, for collection from each *electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, a sum in the nature of an excise tax, for the purpose of carrying on its intrastate business*, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and two-thirds per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case.

"Section 5490. Section 101. Nothing contained in this act shall exempt or relieve electric light, gas, natural gas, pipe line, waterworks, street, suburban or interurban railroad, express, telegraph, telephone, messenger or signal, union depot, railroad, heating, cooling, *sleeping car, freight line, equipment* and water transportation companies from the assessment and taxation *of their property* in the manner authorized and provided by law.

"Section 5495. Section 106. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make a report, in writing to the commission, in such form as the commission may prescribe.

"Section 5498. Section 109. Upon the filing of the report, provided for in the last three preceding sections, the commission, after finding such report to be correct, shall on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, who shall charge for collection, on or before August fifteenth, as herein provided, from such corporation, a fee of three-twentieths of one per cent. upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following October.

"Section 5499. Section 110. Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe.

"Section 5503. Section 114. On or before October fifteenth, the auditor of state shall charge for collection as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following December.

"Section 5519. Section 129. An incorporated company, whether foreign or domestic, owning or operating a public utility in this state, and as such required by law to file reports with the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, * * * shall not be subject to the provisions of sections one hundred and six to one hundred and fifteen, inclusive, of this act."

A cursory reading of the foregoing sections discloses that there are therein provided for three special taxes and one special method of valuation for taxation, to wit:

1. A method of valuation of the properties of each public utility as defined in the act except express, telegraph and telephone companies, to be employed by the tax commission of Ohio (sections 44 to 59, inclusive, supra). As is apparent from sections 58 and 59 above quoted, the result of this method of valuation is the placing of the value so determined on the general duplicate of the counties in which such property is located, apportioned among the taxing districts thereof for the levy of taxes thereon by the state and by the local taxing authorities empowered to levy current rates.

2. A special tax denominated a "sum in the nature of an excise tax" upon sleeping car, freight line and equipment companies and based upon the proportion of the value of the capital stock of such companies representing property

and business in Ohio, ascertained by comparison of the route mileage of such companies in Ohio with the entire route mileage. (Sections 73 to 79 inclusive, supra.)

3. A special excise tax, *seemingly* (section 81) exacted from each public utility as defined in the act and declared to be upon the privilege of carrying on intrastate business, the value of which is ascertained by the use of the gross receipts or earnings of such business. (Sections 81 to 94 inclusive, supra.)

4. A franchise tax exacted from domestic and foreign corporations, excepting the public utilities enumerated in section 129, supra, and based upon the amount of the subscribed or issued and outstanding capital stock of domestic corporations, and the portion of the authorized capital stock of foreign corporations represented by property owned and used and business done in Ohio by such corporations. (Sections 106 to 114, supra.)

To how many of these special taxes then, are sleeping car, freight line and equipment companies subject, and are such companies under obligation to make reports to the tax commission for the valuation of their property in Ohio by the special method above described?

I call attention to the following peculiarities in the legislation above quoted, the significance of which, in connection with this question will at once become apparent:

1. The general definitive sections being sections 39, 40 and 41 as above quoted when considered apart from the other sections of the act certainly establish the following points:

(a) Sleeping car, freight line and equipment companies are within the meaning of the term "public utilities" as used in the entire act from which all of the sections above quoted in full are taken. (Sections 39 to 140, supra.)

(b) The entire receipts for business done by a person, firm or corporation engaged in the operation of a sleeping car, freight line and equipment company constitute the "gross receipts" of such company within the meaning of that term wherever it may be used in the act. (Section 41, supra.)

2. The first point being established it follows as a matter of course that sleeping car, freight line and equipment companies are within the intendment of section 44, supra, and are required to have their property valued for simple taxation according to the special method provided in the succeeding sections by the tax commission.

Yet section 46, which provides in detail the contents of the statement which shall be made to the tax commission for this purpose, contains certain specific requirements as to street, suburban and interurban railroad companies, railroad companies, pipe line companies, gas companies, heating companies and cooling companies, *and does not contain any such specific provision for special information to be furnished by sleeping car, freight line and equipment companies.* In this connection I may be permitted to point out that express, telegraph and telephone companies are required to report to the tax commission for assessment of their property for local taxation under section 60 to 70 inclusive, which said sections contain explicit directions as to the nature of the information to be furnished to the tax commission by such companies similar to the explicit provisions of paragraphs 13 and 14 of section 46.

Therefore, it is apparent that as to all the "public utilities" enumerated in section 39 there is, either in paragraph 13 or 14 of section 46 of the act or in section 61 thereof explicit provision for the furnishing of particular information to the tax commission in the statement required to be made by such companies for valuation of property purposes, except the following: (a) Sleep-

ing car, freight line and equipment companies. (b) Messenger and signal companies. (c) Union depot companies and (d) water transportation companies.

This fact can be ascertained by comparing the catalogue of section 39, supra, as repeated in section 40, with the provisions of paragraph 13 and 14 of section 46 and sections 13 to 17 inclusive of section 61 of the act.

What then is the nature of the special provisions as to other companies which are omitted with respect to the above mentioned public utilities?

I have quoted the provisions of paragraphs 13 and 14 of section 46 and 13 to 17 inclusive of section 61 to which I have referred in the quotation already made. In this connection, however, I think it would be well to consider these provisions in their entirety:

> "In the case of street, suburban or interurban railroad companies, and railroad companies, such statements shall also give:
>
> "(a) The whole length of their lines and the length of so much of their line as is without and is within this state, including branches in and out of the state, which shall include lines and branches such companies control and use under lease or otherwise.
>
> "(b) The railway track in each county in the state, through which it runs; giving the whole number of miles of road in the county, including the track and its branches and side and second tracks, switches, and turnouts therein and the true and actual value per mile of such railway in each county, stating the valuation of main track, second or other main track, branches, sides, switches and turnouts, separately.
>
> "(c) Such statement as to character, classes, number, amounts, values, locations, ownership or control and use of rolling stock, as the commission may require.
>
> "(d) The depots, station houses, section houses, freight houses, machine and repair shops and machinery therein and all other buildings, structures and appendages connected thereto or used therewith, including tool houses, and the tools usually kept therein, together with telegraph and telephone lines owned or used, and the true and actual value of all buildings and structures, and all such machinery, tools and appendages, including such telegraph and telephone lines; and the true and actual value thereof in each county in this state in which it is located.
>
> "(e) The gross earnings for the year, including earnings from telegraph lines, which shall be stated separately, on the whole length of the road, including the branches thereof, in and out of the state, and also such earnings within this state on way freight and passengers.
>
> "14. In the case of pipe line, gas, natural gas, waterworks and heating or cooling companies, such statement shall also show:
>
> "(a) The number of miles of pipe line owned, leased or operated within this state, the size or sizes of the pipe composing such line, and the material of which such pipe is made;
>
> "(b) If such pipe line be partly within and partly without this state, the whole number of miles thereof within this state and the whole number of miles without this state, including all branches and connecting lines in and out of this state.
>
> "(c) The length, size and true and actual value of such pipe line in each county of this state, including in such valuation the main line, branches and connecting lines, and stating the different value of the pipe separately;

"(d) Its pumping stations, machines and repair shops and machinery therein, tanks, storage tanks and all other buildings, structures and appendages connected or used therewith, including telegraph and telephone lines and wires, and the true and actual value of all such stations, shops, tanks, buildings, structures, machinery and appendages and of such telegraph and telephone lines, and the true and actual value thereof in each county in this state in which it is located; and the number and value of all the tank cars, tanks, barges, boats and barrels.

"Section 61. * * *

"13. In the case of telegraph and telephone companies, such statement shall also set forth, the whole length of their lines, and the length of so much of their lines as is without and is within this state, which shall include the lines such telegraph and telephone companies control and use under lease or otherwise and the miles of wire in each taxing district in this state.

"14. In the case of telegraph and telephone companies, such statement shall also contain the entire gross receipts, including all sums earned or charged, whether actually received or not, for the year ending the thirtieth day of June, from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state.

"15. In the case of express companies, such statement shall also contain the entire receipts, including all sums earned or charged whether actually received or not, from whatever source derived, for business done within this state, for the year ending the thirtieth day of June, for and on account of such company, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state.

"16. In the case of express companies, the gross receipts for the year ending the thirtieth day of June, from whatever source derived, of each office within this state, giving the name of each office in this state.

"17. *In the case of express companies, such statement shall also contain the whole length of the lines of rail and water routes, over which the company did business on the thirtieth day of June, and the length of so much of such lines of land and water transportation as is without and within this state, naming the lines within this state.*"

A glance through the provisions just quoted will at once disclose their significance when it is realized that there is no like provision as to sleeping car, freight line and equipment companies. All of these provisions require statements of facts upon the basis of which the apportionment of value required by section 57, supra, can be made.

At this point it might be well to consider the legislative history of the idea embodied in the sections now under direct consideration; I refer, of course, to the sections providing a special method of assessment of property for local taxation. The commission is familiar with the fact that the act of 1911, the provisions of which have been quoted, is intended as a formal revision of the corresponding act of June 10, 1910, 101 O. L. 399, familiarly known as the "Langdon law." That act created the tax commission of Ohio and reposed in it various functions relating to taxation formerly exercised by numerous ex- officio boards and state officers. It also embodied one or two ideas in taxation not new in themselves, which were extended and made applicable to a larger group of subjects. In particular, it was the intention, I think I may say, as evinced by that act, to apply to the businesses formerly taxed on the excise basis by the so-called "Cole law," which was originally enacted in 1896, and was re-enacted under that name in 1902, the principles of the so-called "Nichols law," which related to the assessment for property taxation, of express, telegraph and telephone companies. Practically all of the latter law is found now in sections 60 to 70 inclusive of the act of 1911, some of which are above quoted. The idea of the Nichols law thus intended to be extended to other subjects of taxation than express, telegraph and telephone companies was described in a philosophical way by the supreme court of the United States, which sustained its constitutionality in the case of Adams Express Co. vs. Ohio State Auditor, 165 U. S. 195, and 166 U. S. 185 (rehearing).

Paraphasing the language of the court used in these two opinions (which I need not qoute), the scheme of that law was a method of assessing and apportioning the entire value of the property of such companies located in Ohio, considered with respect to the enhancement of value contributed to that property by reason of its use in connection with other property elsewhere located, as a part of a single plant or system. That is to say, the assessing body first ascertained the value of the entire plant or system wherever the parts thereof might be located, and then upon the mileage basis apportioned to Ohio and to the various counties and taxing districts in the state so much of that entire value as was properly attributable to the plant or system in this state, due allowances and deductions being made for property owned by the company but not used in connection with the system and property which for any other reason ought to contribute especially to the revenues of a given locality. Summarizing this statement then, the two essential elements of the legislative idea embodied in the "Nichols law" were:

(a) *Assessment* of the whole system on the unit basis *as a going concern;* and

(b) *Apportionment* of the value so ascertained upon the mileage or some similar basis to Ohio and to the various counties and taxing districts therein, in which the plant was located on the system operated.

I think I may say without fear contradiction that the legislative idea under discussion was not complete without either of these elements; and that it could not be effectively applied *without machinery designed for carrying either of them into effect.*

Before leaving this particular subject I call especial attention to paragraph 17 of section 61 which is quoted above. This paragraph provides for certain specific information to be furnished by express companies for assessment of their property under the "Nichols law." It requires a statement of "the whole length of the lines of rail and water routes, over which the company did business * * * and the length of so much of such lines of land and water transportation as is without and within this state, naming the lines within the state."

In connection with this provision I call attention also to paragraph 10 of

section 74 of the act of 1911, and to section 76 thereof, above quoted. These provisions are found in the sections especially relating to sleeping car, freight line and equipment companies, and affording the machinery for the assessment of the so-called "excise tax" on such companies as already described.

For the purpose of apportioning the value of the capital stock of sleeping car, freight line and equipment companies information is required to be furnished the commission as to the routes of travel of such sleeping car, freight line and equipment companies within and without the state, *and the apportionment is upon that basis.* Why then is there, in section 46 of the act no provision of this sort as to sleeping car, freight line and equipment companies?

I have said that one of the ideas embodied in the "Langdon act" of 1910, was the extension to the subjects of the "Cole law" of the principles of the "Nichols law." In carrying this idea into effect the general assembly coined a new term—that is, one new at the time, to wit, "public utility." This term was applied to all the subjects of the "Cole law," to those of the "Nichols law" and, as I have pointed out, to sleeping car, freight line and equipment companies (although in the act of 1910, the definitions of sleeping car, freight line and equipment companies were not only found in a section other than that including the definitions of other public utilities, but also the definitions themselves were unlike, in an essential particular, the corresponding definitions of the act of 1911). See sections 121, 46 and 39 of the act of 1910, which I need not quote, and compare the same with sections 39 and 40 of the act of 1911.

With this legislative history in mind, and having regard to the fundamental idea of the "Nichols law" and the two essential elements thereof as above pointed out, it seems strange and yet by no means inexplicable that sleeping car, freight line and equipment companies doing a business in all essential respects similar to that transacted by express companies, which said business presents exactly the same difficulties of apportionment and localization of property values as are presented by express companies, and in a lesser degree, by railroad, street, suburban and interurban railroads, telegraph, telephone, pipe line, gas, natural gas, waterworks and heating and cooling companies have been treated in the act of 1911 (and in the act of 1910 as well) differently from these companies, and like such utilities as electric light companies, messenger companies, signal companies, union depot companies and water transportation companies. In short there is at least an incongruity in legislation which requires the value of the property of a railroad company or an express company for example to be apportioned upon a certain definite basis in the light of certain definite information required to be furnished to the tax commission, but which apparently while requiring the value of sleeping car, freight line and equipment companies to be ascertained upon the unit basis and "apportioned" (see section 67, supra), does not prescribe any method of apportionment nor afford any information by which any equitable apportionment whatever can be made (unless this matter is left to the discretion of the commission); and this too, in spite of the fact that a perfect mode of apportionment was before the legislature, not only in the case of express companies, but also in the case of sleeping car, freight line and equipment companies themselves, in the act providing for the excise tax upon such companies. The significance of this peculiar state of legislation will be hereafter considered.

3. The first point above noticed, viz., the sleeping car, freight line and equipment companies are apparently public utilities for all purposes of the act of 1911, by virtue of the provisions of section 39 and 40 thereof, seems also to establish the conclusion that the excise tax provisions, beginning with section 81, which provisions are sufficiently quoted above, apply to such companies. That is to say, section 81 taken in connection with section 60, and paragraphs

14 and 15 of section 61, supra, seems to exact reports of gross receipts or gross earnings from all "public utilities." Sleeping car, freight line and equipment companies being "public utilities" for the purposes of the whole act, by virtue of section 39, seem to be subject to this duty. Here, however, another incongruity asserts itself. Sections 86 to 91 inclusive of the act, which prescribe the duties of the tax commission in ascertaining the gross receipts and gross earnings of the different public utilities for excise tax purposes, enumerate the various utilities instead of using any general all-inclusive phrase to describe them. From this enumeration, *sleeping car, freight line and equipment companies are omitted.*

In like manner, sections 94 to 98 inclusive, which provide the different rates of excise taxation to be charged against the different public utilities, enumerate the various utilities to which they apply, and fail to mention sleeping car, freight line and equipment companies.

The provisions now under examination constitute the embodiment of the "Cole law" already referred to. This act in its original form, as it existed prior to the act of 1910, did not apply to sleeping car, freight line and equipment companies. I have already stated that seemingly from the language of sections 39, 40 and 41 of the act of 1911 (the subject-matter of which is all found, with certain differences, in the act of 1910) the legislature intended to make sleeping car, freight line and equipment companies subject to the excise tax. *Obviously, however, it failed to effectuate this intention.* The act while seemingly requiring a report for excise tax purposes from sleeping car, freight line and equipment companies, does not require that such report contain a statement of the gross receipts or gross earnings of such company; does not authorize the tax commission to determine the amount of such receipts or gross earnings, and does not provide any rate of excise taxation against such companies.

Therefore, it is very clear to me that sleeping car, freight line and equipment companies are not subject to the excise tax or "Cole law" provisions of the act of 1911.

4. Sleeping car, freight line and equipment companies incorporated under the laws of Ohio for profit, are subject to the franchise tax provisions of section 106, etc., unless they are exempted therefrom by section 129. That section, however, does not in terms exempt such companies. Only such companies are within the purview of section 129 and its exemptions as are "required by law to file reports with the tax commission and to pay an excise tax upon * * * gross receipts or gross earnings."

I have just pointed out my reasons for concluding that sleeping car, freight line and equipment companies, while required to file reports with the tax commission, and to pay a certain kind of an excise tax under the provisions of sections 73 et seq., are not required to pay an excise tax upon gross receipts or gross earnings; therefore, such domestic sleeping car, freight line and equipment companies are subject to the franchise or "Willis law" taxes.

In this particular section 129 differs from the corresponding section of the act of 1910, which was section 101 thereof. The public utilities exempted by that section from the franchise tax were those "required by law to file annual reports with the commission." The additional language, already commented upon, was added in the act of 1910, and for the reason just suggested has affected a change in the meaning of the law.

But while it is true that *domestic* sleeping car, freight line and equipment companies are subject to the franchise tax, the same is not true of foreign corporations organized for such purposes. In a recent opinion to the commission in the matter of the Detroit & Cleveland Navigation Co., I stated my opinion, based upon the legislative history involved as to the meaning of the

phrase, "subject to compliance with all other provisions of law" as found in section 110 of the act of 1911, above quoted. Tracing this phrase back to its origin I showed that those foreign corporations, and those only are subject to franchise taxes in this state, which are required to comply with the provisions of both sections 179 and 183, General Code, formerly sections 148d and 148c, Revised Statutes, now section 183, General Code, did not apply to foreign corporations engaged in Ohio in interstate transportation.

Now sleeping car and freight line companies at least and possibly equipment companies are engaged in this kind of business. See Pullman Co. vs. Kansas ex rel., 216 U. S. 56.

Therefore, foreign sleeping car and freight line companies, and possibly foreign equipment companies are not subject to the franchise taxes upon foreign corporations, not because of the exemption of section 129 of the act of 1911, which does not apply to them, but because they are not "subject to compliance with all other provisions of law."

An anomalous situation exists here in that domestic freight line companies engaged in that business are the only class of corporations which are subject to an excise tax and a franchise tax both under the laws of Ohio. I do not believe that any constitutional difficulty is involved upon this exact point but I apprehend that this fact may have some bearing upon other and more puzzling questions which are encountered in connection with the general topic now under discussion.

5. It has been at least once demonstrated in the course of this opinion that sleeping car, freight line and equipment companies *are not public utilities for all purposes* of the act of 1911. An interesting question arises now as to the meaning of section 101 of the act of 1911 in this connection. I have quoted the section in full. It contains the solemn declaration that "nothing contained in this act" shall exempt the enumerated public utilities, consisting of each and every one of the companies mentioned in section 39, including *sleeping car, freight line and equipment companies*, from the assessment and taxation of their property in the manner authorized by law. This section perhaps does not add anything to the meaning of the act of 1911. It was brought over into the act of 1910, from the "Cole law" and inasmuch as there is explicit provision in the act of 1910, and that of 1911, for the assessment of the property of all public utilities for simple taxation, its inclusion here is an absurdity even if it be regarded as having been inserted through an abundance of caution. If, therefore, it be ascertained that the act of 1911 does contain a provision for the assessment of the property of sleeping car, freight line and equipment companies the importance of this section is reduced to nothing. If, however, it be ascertained that there is no method provided by the act of 1911 for the assessment of the property of sleeping car, freight line and equipment companies, while there is some other tax provided for by that act against companies, then the significance of this section must be taken into consideration.

This subject might as well be dismissed, however, with the statement that in my opinion "this act" as used in section 101, supra, refers not to the whole act but only to the sections immediately preceding, and beginning with section 81 thereof, heretofore referred to as the "Cole law" provisions thereof. I have already referred to the legislative history upon which this conclusion is based. That being the case, I am of the opinion that in spite of the fact that sleeping car, freight line and equipment companies are expressly mentioned in section 101, that section does not apply to them at all, because sections 81, et seq., for reasons already stated, do not apply to such companies, and because, further, section 101 applies only to the companies to which sections 81 to 100 inclusive, apply.

The points which have just been mentioned and discussed give rise to and make difficult of solution the fundamental question which I have already stated. You have evidently apprehended the existence of this question, for in your letter respecting the status of the "American Tank Line" you specifically ask what taxes the Graselli Chemical Company is subject to on account of this business. You have yourselves suggested some certain alternatives, which I thing are apparent upon the fact of the statutes as above outlined. Fundamentally, however, the question here presented resolves itself into a consideration of the applicability of the three special taxes, and the one special method of taxation already spoken of to freight line companies. The discussion in which I have indulged has eliminated, I think the excise tax based upon the gross receipts, from consideration in this connection. Sleeping car, freight line and equipment companies are not subject to this tax. This conclusion leaves three factors for further consideration, viz.: The so-called excise tax based upon the proportion of capital stock represented by property owned and used in Ohio, apportioned on the track mileage basis, the property tax upon the unit value basis, ascertained and apportioned by the tax commission without any definite or specific rules for the guidance of that body, and the franchise tax which, as already pointed out, applies only to domestic corporations engaged in these businesses.

It will simplify the discussion here, if, for the purpose of the argument, further consideration of the application of the franchise tax be deferred temporarily. In other words, let the issues of law involved be narrowed to the one specific question: Are sleeping car, freight line and equipment companies subject both to the capital stock excise tax above described, and to property taxation on the unit basis under the principles of the "Nichols law" as extended to public utilities?

The question here is more fundamental than one of mere legislative intent. Pursuasive reasons might be marshaled in support of both of an affirmative answer to the question just formulated, and of a negative one thereto, if the intention of the legislature, as deduced from the language used in the act of 1911 and that of 1910 were the only object of inquiry. That is to say, on the one hand the legislature must have had some motive in classifying sleeping car, freight line and equipment companies as "public utilities," it being apparent that the general assembly did not intend by the use of its definitions, and especially that in section 39 of the act of 1911, already commented upon, to make sleeping car, freight line and equipment companies subject to the excise tax based on gross receipts, formerly known as the "Cole law tax," and, there being no other portion of the entire act of 1911, than the sections which extend the principles of the "Nichols law" to which this term could have any application, it seems reasonable to suppose that the legislature did intend that such companies should be subject to valuation of their properties in Ohio upon unit basis under said sections. I am not sure that this was not the legislative intent, yet on the face of the statutes themselves there are reasons for denying the existence of any such intention. These reasons have already been discussed, and I shall do no more than to restate them in summary form. If the legislature did intend, by use of the definition contained in section 39, to make sleeping car, freight line and equipment companies subject to taxation on their property in Ohio upon the unit valuation by the tax commission, it certainly failed to provide adequate machinery for carrying that intention into effect. There being in the mind of the legislature an evident conviction that some definite basis of apportionment of the gross valuation of the properties of those public utilities which are most similar to sleeping car, freight line and equipment companies was an essential element of the scheme of valuation as to such

other utilities. The failure of the legislature to provide any such definite basis of apportionment as to sleeping car, freight line and equipment companies argues strongly to the conclusion that it was not intended that such companies should be subject to taxation by this method. This argument is strengthened by the fact that, of all the subjects of taxation, the property of sleeping car, freight line and equipment companies undoubtedly offers the greatest difficulty, especially with respect to the apportionment of ascertained values to specific taxing districts. The nearest approach to the property of such companies, with respect to this difficulty is afforded by the case of express companies and the rolling stock of railroad and interurban railroad companies. These subjects of taxation, like the property of sleeping car, freight line and equipment companies are in a large part continuously in motion, passing not only across the boundaries of specific taxing districts but also beyond the boundaries of the state itself. Recognizing that fact and the difficulties arising therefrom, the legislature has provided adequate and appropriate rules for the equitable apportionment of the total valuation of rolling stock of railroad and interurban railroad companies and property of express companies, both to the state itself and among the various counties and subordinate taxing districts thereof. The statements required to be made to the taxing commission are to furnish the information to which these rules are to be applied. *Not so, however, with respect to sleeping car, freight line and equipment companies if they be subject to this form of valuation.* The statute does not require the statements to be filed with the tax commission by those companies for property valuation purposes (if any) to set forth any information upon the basis of which the commission may make any equitable apportionment whatever; and I am seriously in doubt as to whether or not the tax commission under the power to prescribe the form of the statement which it has by virtue of section 44 of the act, or under its general powers of investigation possessed by it under sections 14 to 24 inclusive thereof, has authority to compel sleeping car, freight line and equipment companies to furnish the kind of information which would be required by the commission in order that it might make the apportionment of which section 57 speaks. There are certain provisions, especially in section 20 of the act, which I need not quote, which would seem to indicate the existence of such power. My doubt arises from the fact that paragraph 15 of section 72 of the act of 1910, which specifically authorizes the commission to require other facts and information in addition to the facts and information therein specifically required to be given, was left out of section 46 of the act of 1911, which otherwise closely corresponds to said section 72. At the same time, however, section 19 of the act of 1910, which corresponds roughly to section 20 of the act of 1911, was not as comprehensive as the latter section in this particular. So that on the whole it seems that the commission itself has power to require other facts and information in the form of returns prescribed by it under the property valuation provisions of the law and to require the statement of facts and information not specifically required by the law itself. But if the law only inferentially authorizes the commission to acquire the necessary information upon which to base an apportionment of the value of the property of a sleeping car, freight line or equipment company, it clearly fails to furnish any rule by which such apportionment shall be made.

Section 57 of the act furnishes no such rule. To be sure it requires such an apportionment as will "fairly equalize the relative value of the property" located within the state or the county or the taxing district, as the case may be "to the whole value thereof" but it does not contain any statement of the legislative intention as to how this equitable apportionment shall be made, whereas sections 53 to 56 inclusive do contain such specific requirements as to railroad companies.

Section 68 (not above quoted) contains such an explicit direction as to express companies, which is different from those with respect to railroad companies, in that gross receipts and not mileage is the basis of apportionment, and section 46, paragraph 14, already commented upon, by inference at least, suggests the rule which is to be followed in the cases of pipe line, gas, natural gas, waterworks and heating and cooling companies.

Without pursuing the critical analysis of the sections involved further, I think it may be said that the legislature by its peculiar and anomalous treatment of sleeping car, freight line and equipment companies, has at least created a serious doubt as to whether or not it was intended that such companies should be subject to valuation of their properties upon a unit basis as a going concern, because it has failed clearly and adequately to provide for the *apportionment* of such unit value.

I should be inclined, I think, to resolve the doubt which exists here in favor of the inclusion of sleeping car, freight line and equipment companies within the so-called "Nichols law" scheme, although to do so would necessitate reading into the law authority on the part of the tax commission to choose one of several possible methods of apportionment as to such companies; that is to say, a holding to this effect would necessitate a further holding to the effect that the tax commission in valuing the properties of sleeping car, freight line and equipment companies upon the unit basis as going concerns, is authorized to apportion and distribute such valuation, when ascertained, to the state, the counties and the taxing districts therein on the basis of track mileage, car wheelage, gross receipts, the average number of cars therein during the year of such other basis as might be selected in its discretion for the purpose of applying the mandate of section 57. This would be a rather radical interpretation to place upon the law in view of the nature of the property in question, but I would be inclined to adopt it were it not for certain other considerations to which I shall now call attention.

It is a cardinal principle of statutory construction that laws will be interpreted so as to conform to the constitutional limitations. The question of legislative intent being doubtful, as it is here, that construction will be put upon a legislative act which does not violate any such limitation. There is a constitutional limitation upon the exercise of the taxing power with respect to property, as such, viz.: article 12, section 2, which provides that: "laws shall be passed, taxing by uniform rule all moneys, credits, investments in stocks, bonds, joint stock companies and otherwise; and also all real and personal property at its true value in money * * *."

The rule of uniformity thus enjoined has always been interpreted so as to preclude the imposition of more than one property tax upon the same property or subject of taxation. Telegraph Co. vs. Mayor, 23 O. S. 521; State ex rel. vs. Guilbert, 70 O. S. 229 and Railway vs. State 49 O. S. 189.

In the case last cited it was held that an act requiring a railroad company to pay a license fee of $1.00 for each mile of track operated within the state, imposed a tax upon the property of such company in addition to the tax assessed and levied against such property under the general statutes of the state, and it was, therefore, unconstitutional and void.

That is to say, the nature of the tax and the real subject thereof—i. e. the thing upon which the burden of the tax is laid, and which contributes to the revenues of the taxing corporation—is not to be ascertained wholly by reference to the name given thereto. The operation and effect thereof will govern courts in the determination of such questions.

If the tax in question be, properly and purely, an excise tax, it is, of course, not a tax on the property of the companies affected by it. I need not cite

authority upon a proposition so elementary as that the subjects of excise taxation are privileges, franchises, businesses requiring governmental regulation and the like. The philosophy of such taxation was commented upon to a considerable extent in a recent opinion to your department in the matter of the status as to "public utilities" of corporations incidentally furnishing electricity to consumers.

It is also an elementary proposition that no state may lay a tax upon a subject of taxation not within its jurisdiction. In order that a privilege may be subject to the taxing jurisdiction of the state it must be one that exists by virtue of, or the exercise of, which, is protected by the laws of the state. In order that a franchise may be taxed by a state it must owe existence or recognition to the laws of the state. In order that a business may be taxed by a state it must either be carried on under privileges or franchises granted or protected by the state or its transaction in the state must give rise to governmental burdens upon the state. These propositions are self-evident.

There is one class of privileges, franchises and business, however that, whatever may be the degree of protection afforded to the exercise thereof by state laws, or the weight of the burden imposed thereby upon the regulatory power of the state, is not subject to state taxation. I refer to such privileges, franchises (other than those of the state's own creation) and businesses which are themselves the instrumentalities of carrying on commerce among the several states. The constitution of the United States vests in congress the power to regulate such commerce. It having been declared by the supreme court of the United States in the early case of McColloch vs. Maryland, 4 Wheat. 416, that "the power to tax is the power to destroy," it has followed logically that a state may not by taxation impose burdens upon commerce among the several states. I need not cite or quote from any of the multitude of authorities which establish this fundamental principle.

Equally well settled, on the other hand, is the principle that the physical instrumentalities of interstate commerce when within the taxing jurisdiction of the state or when enjoying the protection of its laws may be compelled to contribute to its revenues without violating the rule just defined. Putting it in another way, a state may tax the locomotive, cars and other equipment of a railroad doing an interstate business exclusively or, in part, *as property;* but the state may not by excise laws or otherwise tax the *privilege* of operating such a railroad in interstate commerce. Postal Telegraph Cable Co. vs. Adams, 155 U. S. 688; LeLoup vs. Mobile, 127 U. S. 640; Phil. & S. S. Co. vs. Pa., 122 U. S. 326; Gloucester Ferry Co. vs. Pa., 114 U. S., 196; Galveston H. & S. A. R. R. Co. vs. Texas, supra; Western Union Telegraph Co. vs. Kansas ex rel., supra, and numerous other authorities to the same effect.

Again, it is equally well settled that a state may impose an excise tax upon the business conducted by an individual, firm or corporation engaged in carrying on interstate commerce, to the extent that such business is confined within the territorial limits of the state or is "intrastate." That is to say, the mere fact that a company may be engaged in interstate commerce does not prohibit a state from taxing it upon the excise basis as to any business which it may carry or which is wholly intrastate. The application of the discussion here involved is perhaps very difficult in specific cases. The problem is as follows:

It being granted that a state may not by excise taxation lay a burden upon interstate commerce, and it being granted also that a state may by excise laws, tax intrastate business carried on by those who are also, and by the use of the same equipment, carrying on interstate commerce, what measure of the value

of the privilege of carrying on intrastate business may be employed by the state without amounting to a regulation of interstate commerce.

The subjects of excise taxation are, of course, not susceptible to any accurate valuation. It is impossible, I think, for any court or taxing body to appraise the value of the franchise to be a corporation or of the privilege to carry on an intrastate railroad business or the like. Legislatures have, therefore, resorted to various devices in an endeavor to secure equitable results. Sometimes, the subject of the excise tax being considered of uniform value, regardless of the value of the property employed or its productivity, the tax has been assessed in bulk, as in the case of our own tax on the business of trafficking in intoxicating liquors; again, gross receipts or gross earnings of a business are used for the purpose of approximating the value of the privilege, as in the case of the so-called "Cole law" provisions of the act now under consideration; again, net income has been employed for the same purpose, as in the case of the federal corporation excise tax; and again the amount of capital stock employed has been used for this purpose, especially when the subject of taxation is the franchise to be a corporation, as in the case of our own "Willis law" so-called. The specific question which I have in mind here, then, is as to what receipts, earnings, income or property may be used by a state as an index of the value of the privilege enjoyed by the taxpayer when the latter is reaping receipts, earnings and income from, and using property in, the carrying on in a more or less indiscriminate manner, of both intrastate and interstate commerce.

I do not thing it is worth while to discuss this question further in this connection for the reason that before it may even be questioned whether or not a state may constitutionally employ the property of an interstate commerce carrier, located within the state, for the purpose of measuring a privilege, taxable by it, it must be ascertained that it is not the state's intention to assess a tax upon a privilege which is clearly not taxable by it.

If the tax be exacted from the taxpayer for the doing of a thing which amounts to interstate commerce purely, or, conversely, *if the liability for the tax does not cease upon the discontinuance of the business of carrying on intrastate commerce without a corresponding withdrawal from the business of carrying on interstate commerce*, then the tax must be adjudged to be unconstitutional as an attempt to tax the carrying on of commerce among the states.

How is it then with respect to the tax now under consideration? The privilege which is intended to be reached, if this be a privilege tax, is not defined; but the acts which give rise to liability for the tax are clearly defined in section 40 above quoted. I need not repeat the definitions of that section. Suffice it to say, that it is clear therefrom that the business which constitutes an individual, firm or corporation a "sleeping car, freight line or equipment company" within the meaning of that section, *is not such business as is limited to intrastate commerce exclusively.* Turning then, to sections 73 et seq., and especially to sections 76 and 79 already quoted, it is found that apparently the taxes therein provided for are due, as explicitly provided for in such sections from "each sleeping car, freight line and equipment company doing business or owning cars which are operated in this state."

If, therefore, a foreign corporation be engaged in the business of operating cars in Ohio, although wholly in interstate commerce, and not to any extent whatever in intrastate commerce, it would be liable for the tax unless a violently artificial construction be given to the statute.

If, then, sections 73 to 79 inclusive of the act are intended to impose a privilege tax they violate the constitution of the United States because no discrimination is made between companies engaged in interstate and intrastate

business respectively, and because, therefore, these sections attempt, if regarded as imposing such tax, to lay a direct burden upon interstate commerce.

Looking at the question as to the nature of this tax from a positive rather than a negative standpoint there is ample authority for characterizing it as a property tax, or at least as a tax in commutation of all property taxes.

Sections 73 et seq., are almost identical in purport with an act of the state of Pennsylvania, passed upon by the supreme court of the United States in Pullman Palace Car Co. vs. Pa. 141 U. S. 613. I quote from the official report of the case to show that this is so:

> "This was an action brought by the state of Pennsylvania against the Pullman Palace Car Company, a corporation of Illinois * * * to recover the amount of a tax settled by the auditor general * * * on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other states over which its cars were run."

This language compared with that of section 76 supra, not only establishes the essential similarity of the two laws but shows, if anything, that the Ohio law, which gives to the tax commission the right to reply upon such other "rules and evidence as will enable the commission to determine * * * the amount and value of the capital stock of such company representing capital and property owned and used in the state of Ohio" is a more palpable attempt to reach the property of the subject of taxation than was the Pennsylvania law itself.

Speaking of the act of Pennsylvania, Mr. Justice Gray, delivering the opinion of the court used the following language (page 617):

> "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the state or other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property. Gloucester Ferry Co. vs. Pennsylvania, 144 U. S. 196, 209 (29: 158, 164); Western U. Teleg. Co. vs. Massachusetts, 125 U. S. 530, 552 (31: 790, 794). This is not only admitted, but insisted on, by the plaintiff in error.
>
> "The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot effect the power of the state to levy a tax upon them. The state, having the right

for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania and had about one hundred cars within the state.

"The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

In addition to the authority of this decision section 79 of the act contains certain language which while not inconsistent with other portions of the act shows rather clearly what was in the legislative mind at the time of its enactment. That section provides that there shall be collected "from each sleeping car, freight line and equipment company doing business *or owning cars which are operated in this state*" a certain tax

Now manifestly the tax cannot be collected from those which merely own cars which are operated in this state because such a company would not be a "sleeping car, freight line or equipment company" as defined in section 40. Nevertheless the seemingly inadvertent use of this phrase (which may possibly be explained by the history of the legislation) does show that the legislature had in mind that the tax for which it was providing here embraced the property tax. In Flint vs. Stone, Tracey Co. 220 U. S. 126 will be found a very lucid explanation of the test by which a property tax may be distinguished from a privilege tax. In discussing the earlier case of Pollock vs. Farmers Loan & Trust Co., 157 U. S. 42, Mr. Justice Day pointed out that the principle therein decided was that,

> "A tax which was in itself direct *because imposed upon property wholly by reason of its ownership* could not be changed by affixing to it the qualification of excise or duty."

Such a principle, however, was held not applicable to the federal corporation income tax because that was "not payable unless there be a carrying on or doing of business in a designated capacity * * *. *The requirement to pay such tax involves the exercise of privileges*, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner prescribed in the statute no tax is payable."

Of course this distinction is not applicable to the whole tax under consideration, but it would be perfectly applicable if it were possible to reconcile the language just quoted from section 79 with the rest of the related provisions. So that the significance of this portion of section 79 at once becomes apparent.

Now it is possible to characterize the tax in question, as the general as-

sembly has characterized it. as an "excise tax" without depriving it of its characteristics a property tax. Courts have recognized that a state may properly impose what are sometimes called "commutation taxes" upon subjects of taxation most difficult of equitable assessment and valuation in a fair effort to reach all the value that inheres both in the property and in the business of the subject of taxation, which may be subject to the taxing power of the state. For example this principle was recognized in Maine vs. Grand Trunk R. R. Co., 142 U. S. 217 and Galveston, etc., R. R. Co. vs. Texas, supra. The practice of many states other than Ohio sustains this view. It is customary in many states to exact from railroads and other public utilities a stated proportion of gross receipts and gross earnings in lieu of all other taxes. Such a tax is in reality a hybrid; but it is clear that it includes the property tax and that its exaction precludes the imposition of any other property tax, upon the same property.

The only difficulty which I have apprehended in reaching the conclusion that the tax in question is inclusive of the property tax is one which might arise under the constitution of Ohio, article 12, section 2 already quoted whether or not any special difficulties of local taxation would justify the legislature in the face of the rule of uniformity therein prescribed, in commuting all local taxes by the assessment of a single tax for state revenue, by a single rate, ignoring the rates of taxation imposed upon other property in the various taxing districts of the state, is a doubtful question, and one which has never been passed upon in this state. However, if sections 73 to 79 inclusive of the act of 1910, construed as I have felt obliged to construe them in the light of the federal authorities cited and commented upon, and regarded as imposing a tax that it is part a property tax, are unconstitutional because of the implied limitations of section 2 of article 12 of the constitution of 1851, they are no more unconstitutional than the original acts applicable to sleeping car, freight line and equipment companies were and always have been. These acts may be found in 91 O. L. 408 (sleeping car companies) and 92 O. L. 89 (freight line and equipment companies). I shall not burden this opinion with extensive quotation from these acts. Sections 73 to 79 follow the language of the original laws so closely as to make this unnecessary. There is one fundamental difference however, between the old law and the new. The original definition of sleeping car, freight line and equipment companies containing the following clause, qualifying cars or equipment operated or furnished by the company, to wit, "not otherwise listed for taxation in Ohio."

Following the history of this legislation it appears that this qualifying clause was merged into the Langdon act of 1910, and was dropped when the act of 1911 was passed. The change in the meaning of the law which resulted from this verbal change is obvious. Nevertheless, this language clearly shows what the nature of the original tax on sleeping car, freight line and equipment companies was. It is a fact of common knowledge that the only sleeping car companies that now do business in Ohio or ever did business in Ohio were foreign corporations; and that these corporations never listed any of their property for taxation in Ohio, because it had no definite legal situs here. Therefore, as to such companies the designation of them as "engaged in the business of operating cars not otherwise listed for taxation in Ohio,, was merely descriptive. So also with freight line companies. If I am correctly informed, it is not until very recently that any freight line companies domiciled in Ohio have been discovered by the taxing officers, and it is not to be doubted that the legislators who passed the original law never thought of domestic companies at all. The original laws, then, were clearly passed to response to a feeling that valuable property subject to the taxing power of the state was escaping contribution to its revenues.

If, therefore, the question as to whether or not sections 73 to 79 of the act of 1911 impose a property tax is doubtful, it is, on the other hand, quite clear that the original tax on sleeping car, freight line and equipment companies was intended to be a property tax. That being the case light is shed upon the interpretation of the present law; that being the case too, it may be said that if the present law is unconstitutional because of the uniformity of rule applicable to the imposition of property taxes, the old law, which has been in force for many years, was equally unconstitutional. Acquiescence in the law by all concerned for so long a time would seem to me to foreclose further consideration of the constitutional question last suggested.

For all the foregoing reasons then I am of the opinion that the capital stock excise tax, so-called, imposed by sections 73 to 79 inclusive of the act of 1911 includes within its purview the assessment of all of the property, interests and privileges of sleeping car, freight line and equipment companies subject to taxation in Ohio with the possible single exception of the franchise to be a corporation in the case of domestic corporations.

I am further of the opinion, therefore, that this tax must be regarded as a "commutation tax," and that accordingly such companies are not subject to have their physical and specific property assessed by the tax commission under the provisions of sections 44 to 59 inclusive of the act.

This conclusion makes unnecessary consideration of many of the questions which you have submitted. Coming now to these specific questions I beg to state that in my opinion the Emery Candle Company, whether or not it is a "public utility" for any purpose within the meaning of the provisions of the act of May 31, 1911, is not, as such, required to report to the commission all its property, real and personal, to be assessed by the commission, nor to pay an excise tax upon its entire gross receipts from all intrastate commerce.

Answering your second question, I am of the opinion that the Emery Candle Company should report and pay fees as a domestic corporation for profit. I am somewhat in doubt upon this point, but in the absence of authority to the contrary I am of the opinion that the state may lawfully exact a franchise tax from one of its own corporations, although foreign corporations engaged in similar business are not subject to such taxes in this state. I am further of the opinion that because of the peculiar manner in which sleeping car, freight line and equipment companies are taxed there is no discrimination as to them in withholding from them the benefit of the exemption in section 121 of the act.

Answering the first question in your letter of September 10th respecting the Graselli Chemical Company and its "American Tank Line" I beg to advise that in my opinion the Graselli Chemical Company is a freight line company.

On this point an able brief is submitted by Messrs. Squire, Sanders and Dempsey which I have already mentioned. I have read this brief with considerable interest but it fails to convince me upon the point on which it is submitted because it does not explain away the phrase "whether such freight is owned by such company or any other person or company," as expressly included in the definition found in section 40. In other words, the statute itself destroys the force of the argument that one engaged in the business of operating cars for the transportation of his *own* freight cannot be considered a freight line company. Therefore, I am of the opinion that the fact that the freight line activities of a company or partnership may be limited to the transportation of freight belonging to the company or partnership is immaterial as determining whether or not the company or partnership is a "freight line company" and a "public utility" within the meaning of the law.

Upon the other point involved, viz.:

As to whether a corporation or individual which is only incidentally en-

gaged in a freight line business in connection with some other and paramount activity, is within the scope of the definitions of section 40 of the act, and subject to the provisions thereof, I beg to state that my conclusion and reasoning on this point may be found in a somewhat lengthy opinion heretofore transmitted to the commission in the matter of certain corporations incidentally furnishing electric current to consumers. My conclusion was, as will be observed upon consulting that opinion, that the fact that one of the businesses defined in section 40 of the act may be carried on by a corporation in a subordinate or incidental way, the principal activity of the corporation being something other than the "public utility" business, is immaterial, and that a corporation so engaged in such business is a public utility within the meaning of the act.

Indeed, this conclusion is even clearer with respect to freight line companies than it is with respect to some of the other companies defined in the same section. It is perfectly obvious, I think, that if a corporation be engaged in the business of operating cars for the transportation owned by itself, the transportation must be, in the very nature of things, subordinate or incidental to the other business of the company.

Answering your second question submitted in this letter in accordance with what has already been said I am of the opinion that the tax commission is without power to assess all of the property of the Graselli Chemical Company as such or to accept from this company an excise tax upon its entire receipts from all business.

The third question asked in connection with the Graselli Chemical Company requires further examination and analysis of section 76 of the act. In order to facilitate such examination I again quote that section in this connection:

> "On the first Monday in July, the commission shall ascertain and determine the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state, and in so determining shall be guided in each case by the proportion of the capital stock of the company *representing rolling stock*, which the miles of railroad over which such company runs cars, or its cars are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run, and such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state."

The question is at once presented as to whether or not, having ascertained the proportion of the capital stock of the company representing the rolling stock, the tax commission is to apportion this part of the property between Ohio and the rest of the world on the route mileage basis, and then to proceed to determine the value of the remaining property of the company in Ohio, and to assess the excise tax upon the basis of the amount of the capital stock represented by rolling stock assigned to Ohio and fixed property located in Ohio together; or on the other hand to content itself with the ascertainment of the capital stock represented by the rolling stock alone, leaving the fixed property to be assessed under the general laws.

This section suggests consideration of another section which has so far not been mentioned, viz., section 5419, General Code, section 43 of the act of 1911. That section provides in effect that the property owned or operated by a public utility "required to make return to the commission of its property to be

assessed for taxation by the commission" shall be deemed to include all property used in connection with or as incidental to the operation of the public utility, or in case of incorporated companies all the property of whatever kind whether used in connection with the public utility or not.

It might be urged that this section makes clear the purpose of the legislature in defining freight line companies to be "public utilities;" so that although not public utilities, for excise tax purposes or for general property tax purposes, such companies must be regarded as public utilities within the intendment of the section which requires that all of the property be reported to the tax commission. The conclusion of such an argument would be that the thing to be ascertained by the tax commission under section 76 is all the property of the company located in Ohio and used in connection with the freight line business, and in the case of a corporation, all of its property whether so used or not. Upon carefully considering this hypothesis I have rejected it. The phrase which I have quoted from section 43 "required to make return to the commission of its property to be assessed for taxation by the commission" qualifies the entire section and discloses very clearly that it was not intended to refer to statements filed by sleeping car, freight line and equipment companies under sections 73 et seq., of the act of 1911. That is to say, it only relates to property which is to be assessed for general taxation by the commission and the statements thereof to be filed with the commission.

I have reached the conclusion, after careful consideration that, having regard to the history of the special excise tax on sleeping car, freight line and equipment companies, and its evident phylosophical nature, the thing which the tax commission must determine under section 76 is solely the capital stock, representing rolling stock, and the proportion thereof assessable by the excise method under the rule of apportionment adopted by the section. I do not base this conclusion solely upon the language of section 76, which I acknowledge is open to somewhat different construction. I take into consideration the language of paragraph 8 of section 74, which prescribes one of the items of the statement which shall be furnished by this class of companies to the tax commission in order to enable the commission to determine the basis for the assessment of the excise tax. The paragraph is as follows:

> "A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof *as assessed for taxation.*"

Evidently, then, the legislature contemplated that the real estate of the company (and no distinction is made as between such real estate used in daily operations, and that not so used) was to be taxed locally. Therefore, it does not seem that it could have been the intention of the legislature that all of the property of a freight line company, or even all of the property of such companies used in Ohio in the operations thereof, should constitute the basis for the assessment of the capital stock excise taxes.

In other words, I think it is the intention and meaning of the capital stock excise tax provisions of the act of January 1, 1911, relating to sleeping car, freight line and equipment companies, that the tax shall be laid upon and measured by the capital stock of such companies representing the rolling stock, which is a species of property having no permanent abiding place, and which in the customary use thereof is moved across state boundaries and by the laws of other states is subject to a kind of taxation therein. I do not believe that the reasons of these provisions extends further than this, and I believe further that the maxim which is to the effect that "the reason of the law is its life, "applies with peculiar force to the interpretation of these provisions.

I am aware that the conclusion at which I have arrived does not eliminate all inconsistencies. Thus it does not give any force whatever to the definition of sleeping car, freight line and equipment companies as "public utilities." As to this I can only say that whatever may have been the intention of the general assembly in changing the form of the statute from that in which it was enacted in the Langdon law of 1910 to that which it is found in the act of 1911, that purpose must avail because the legislature did not make any other changes than the two already pointed out, which for reasons already discussed are not sufficient to change the substance of the law except to the extent of subjecting Ohio sleeping car, freight line and equipment companies to the capital stock excise tax.

Another inconsistency which cannot be reconciled with the conclusion which I have reached is that section 76 viewed in one light seems to indicate that the "proportion of the capital stock of the company representing rolling stock" is not the ultimate thing to be ascertained, but is something which in connection with "other rules and evidence" is to be taken into consideration by the commission in determining "the amount and value of the capital stock * * * representing capital and property owned and used in this state." As to this it may be said that the language of the section is, in this respect, no different from what it always has been; yet it has never been the intention to withdraw from the general property tax, for example, the real estate of a sleeping car, freight line or equipment company located in Ohio, whether used in operations or not, item 8 of the statement being precisely the same under former laws as in present section 74. And if it never was the intention to withdraw real estate from general property taxation, then it cannot be said to have been the intention to incorporate the value of the real estate in the total value of property representing capital in Ohio because to do so would, for reasons already discussed be unconstitutional. Therefore, although there is an inconsistency here as between the conclusion I have reached and a possible interpretation of section 76, I believe that my conclusion is at least the safer one from the standpoint of the constitutionality of the tax.

I am, therefore, of the opinion that the phrase, "the amount and value of the capital stock of such company representing capital and property owned and used in this state" means the amount and value of the capital stock representing rolling stock property owned and used in this state under the rules provided for in the section.

Applying this conclusion to the question asked respecting the Graselli Chemical Company it follows that this corporation is required to pay excise taxes upon the proportion of its capital stock represented by rolling stock only; and that this company is also, if a domestic corporation, liable for franchise taxes as a domestic corporation for profit. If the corporation is a foreign one, however, and is engaged as it presumably is in transporting interstate commerce, it is not liable for franchise taxes as a foreign corporation for profit. My reasons for making this distinction between domestic and foreign corporations have already been stated.

Answering the fourth question submitted in your letter regarding the Graselli Chemical Company, I beg to state that in my opinion this company is liable for no specially assessed property tax whatever in the pure sense, either upon the value of its property used in the freight line business or upon its other property located in Ohio.

Coming now to the question submitted on September 10th with respect to the Emery Candle Co., I beg to state that in my opinion the moneys and credits of that company are not subject to assessment by the tax commission at all.

It is a logical corollary to what I have already stated as my opinion, that the

capital and property representing things other than rolling stock of a sleeping car, freight line or equipment company are subject to local taxation. It is only the rolling stock which is withdrawn from that species of taxation by necessary inference.

I am, therefore, of the opinion that the Procter and Gamble Transportation Company should report to the auditor of Hamilton county as an incorporated company all of its property excepting rolling stock. The fact that the entire business of this company is the freight line business does not affect the question as to it because as I have already pointed out there is no distinction in the entire act insofar as it relates to sleeping car, freight line and equipment companies between properties used in operation or in connection with the freight line business and property not so used. The line of demarcation seems to be drawn where I have already drawn it, that is between the rolling stock and other property.

It follows from what I have said that the commission should not assess the value of any cars owned by the Procter and Gamble Transportation Co., as such for certification to the auditor of Hamilton county, but should ascertain as to that company the total value of all the cars owned by the company wherever located or used and apportion such total value as between Ohio and the rest of the world on the basis of the route mileage regardless of the place in which such cars are customarily kept or to which they ordinarily return when not in use. Upon the result thus ascertained the capital stock excise tax is to be collected but no property taxes are to be levied. Therefore, the county auditor of Hamilton county should be instructed not to assess or attempt to assess any rolling stock of the Procter and Gamble Transportation Company although there may be cars belonging to that company which are kept in Hamilton county and which never move outside of its limits.

With respect to the case of Isaac Winkler & Bro., the only difficulty here is the fact that this concern being unincorporated has no "capital stock" in the technical sense in which the phrase is used in reference to a corporation. However, the substantial purpose of section 76 may be achieved by ascertaining the whole value of all the cars belonging to the partnership and apportioning the amount thus ascertained in the manner already described.

I beg leave to point out in closing that the capital stock of a corporation which is to be taken as the basis of the valuation required by section 76 is not the authorized capital stock, as in the case of foreign corporations, or the actual property of the corporation as such, but is the actual aggregate value of the shares of capital stock of the company.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

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CORPORATION ORGANIZED IN OHIO MUST RETURN PERSONAL PROPERTY AT PLACE WHERE PLACE OF BUSINESS STATED IN ARTICLES OF INCORPORATION IS SITUATED—WHEN ITS ACTUAL PLACE OF BUSINESS IS LOCATED IN THE COUNTY OTHERWISE WHEN ACTUAL PLACE OF BUSINESS IS OUTSIDE OF COUNTY WHERE PROPERTY IS LISTED.

Under the rule applicable to persons described by section 5371, General Code, a corporation whose place of business is stated in its articles of incorporation to be at Mentor, Ohio, but whose actual place of business is in Cleveland, must return its personal property at the place where such property is located for the reason that the owner resides outside of the county where the property is listed.

Moneys on deposit in banks of the City of Cleveland, and credits, however, have no situs of their own and so the law presumes their situs to be that of the domicile of the owner. Such moneys and credits must be given a situs and be subjected to taxation by listing in Mentor, Ohio.

COLUMBUS, OHIO, May 26, 1913.

The Tax Commission of Ohio,

GENTLEMEN:—I acknowledge receipt of your favor of May 13th, requesting my opinion upon the following questions:

> "A corporation organized under the laws of the State of Ohio, engaged in the business of operating a line of freight boats upon the Great Lakes, designates in its charter that its principal office is located in Mentor School District, Lake County, Ohio, that being the home port of its boats. Such company has a business office in the city of Cleveland, from which its principal business is conducted. Under the decision of the Supreme Court, in the case of Pelton vs. Transportation Co., 37 Ohio State, the boats of such a company are taxable at the home port, or, in this instance, in Mentor School District.
>
> "Are the moneys of such a company on deposit in banks in the city of Cleveland taxable in the city of Cleveland or in Mentor School District, Lake County?
>
> "Are the credits of such a company taxable in the city of Cleveland or in Mentor School District, Lake County?"

The general statute of this state fixing the situs of property for taxation is section 5371, General Code, which is in part as follows:

> "Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed."

This very ancient statute is abiguous on its face, but prolific as it has

been of difficulties it has never been amended. That it applies to and determines the situs of the property of corporations, as well as individuals, has become well established; and indeed it seems to follow, without special difficulty, from the provisions of section 5405, requiring corporations to make return of their property "to the several auditors of the respective counties where such property is situate, together with a statement of the amount thereof which is situated in each township, village, city or taxing district therein," thus leaving it to the other section just cited to fix the situs of each kind or class of property owned by the corporation.

You refer to the case of Pelton vs. Transportation Co., 37 O. S. 450, as bearing upon the question. As you state, this case holds that where the principal office of a corporation, fixed by its articles of incorporation, is in one township of a county, and its actual business office is in another township of the same county, a boat owned by the company should be listed for taxation in the township in which the place fixed in the articles of incorporation as the principal place of business is located. The decision is by Judge McIlvaine, and is very clearly reasoned throughout. It establishes in the first instance the proposition that the "residence" of a corporation for the purposes of section 5371 must be conclusively presumed to be the place fixed in its articles of incorporation. It is then held that, under the facts in that case, the boat, being personal property, other than merchants' or manufacturers' stock or personal property on a farm, and being situated in the county in which the person—i.e. the corporation—required to list it for taxation "resided," it should be listed in the township where the "principal place of business" was located.

After reaching this conclusion Judge McIlvaine, in the opinion, makes use of the following language; which, I suspect, has given you the difficulty which you have encountered respecting this question:

> "In thus deciding this case, we have been guided solely by the statute, without calling to aid the familiar doctrine of the common law, that the *situs* of personal property follows the domicile of the owner; for we admit, that if the owner had not resided in Cuyahoga county, the result would have been different. And on the other hand, if the *situs* of the property had been in another county, subject to be listed and taxed under the statute, the residence of the owner in Cuyahoga county would not have given the latter county any right whatever to tax it. The residence of the owner in a particular taxing district fixes the place where his personal property is subject to taxation only in case the property is required to be listed in the same county; in which case, if the property be other than merchants' or manufacturers' stock, articles enumerated in said 7th section, or personal property on farms or on real property not in towns, it must be taxed in the district of the owner's residence, otherwise, it must be taxed where it is situated."

As I interpret this language, it means that if the law, i.e. either a statute or some settled principle of common law, assigns a particular situs for taxation purposes to a given kind or class of personal property, that situs is to be given to the property, other than merchants' or manufacturers' stock or personal property on farms, if such situs is located outside of the county wherein the owner resides. I do not interpret the paragraph as indicating that if the law assigns conclusively, to be a certain kind or class of property, as a situs for taxation, the domicile of the owner thereof, such property can be for any purpose under this section regarded as being in any county other than the county of such domicile.

It is true that the ambiguous provisions of section 5371 must be given some effect. The legislative choice of terms used therein makes it clear that whatever the seemingly vague legislative idea was, it contemplated the possibility of some kind of personal property other than merchants' and manufacturers' stock, and that on farms, being in a county other than that of the residence or domicile of its owner for purposes of taxation. Thus, the statute itself must be regarded as an effort to fix a statutory situs for some kinds of personal property; for it was the maxim of the common law that all kinds of personal property, whether tangible or intangible property—i.e. all movable things the subject of ownership—took, in the absence of a statute, the taxable situs of the owner's domicile. If, then, section 5371 did not mean in some way to disturb that common law rule, its provisions would be absolutely meaningless and absurd, for personal property could not, in contemplation of the common law "be" in a county other than that in which the owner thereof is domiciled.

I think perhaps some light is shed upon the meaning of this seemingly obscure provision by consideration of section 5328, which in a sense controls the interpretation of all of the sections relating to the assessment of taxes, inasmuch as it is the introductory provision of the entire title. That section provides:

> "All real or personal property *in this state* * * * and all moneys, credits, investments in bonds, stocks, or otherwise, of persons *residing in this state*, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

I need not quote the definition sections of the General Code, nor refer to the constitution itself to demonstrate that the term "personal propery," as used in this section, does not comprise moneys, credits, investments in bonds, stocks or otherwise," which, in the mind of the legislature, constituted separate classes of property. Certain intangible things are within the definition of the term "personal property," as fixed by section 5325 which I do not quote. In the main, however, the term refers to tangible things having a physical existence. "Moneys" and "credits," on the other hand, are intangible things not having physical existence, (except, of course, as to actual cash, which constitutes a very small portion of the "moneys" which are returned for taxation).

Now, it is clear that under section 5328, which as I have said must be applied in the construction of all the other provisions in the taxation code, all "personal property" in the state, whether *belonging to residents of this state or not*, is to be taxed; while the "moneys" and "credits" of persons *residing in this state*, and those only, are to be taxed in this state.

Under this section, then, it is possible for "personal property" to be taxed when the owner does not even reside in the state. It is not so possible as to "money" and "credits." Some residents in this state on the part of the owner, or on the part of an agent or trustee with power of control, is necessary in order to give the state under its own statutes jurisdiction to assess taxes upon "moneys" and "credits;" but the state asserts its jurisdiction to tax the *tangible* effects, which it may find within its borders, whether owned by residents of this state or not.

There is therefore a fundamental difference in the theory of taxation as applied to tangible property and intangible interests, which is established by the statutes of this state themselves. This serves to throw light upon the

meaning of section 5371. It is clear that by reason of the statute just discussed it is possible for "personal property"—i. e., tangible property—to be located in a county and taxable there, although the owner thereof may not be a resident of the state at all. The statute was evidently designed to provide for this contingency.

Now, it is possible for the legislature of the state to create what might be termed an artificial situs for the taxation of moneys and credits. In my opinion, however, section 5371 does not have this effect. It provides that moneys and credits shall be taxed at the owner's residence, if he resides within the county, and if not, then, where they are when listed. This, however, leaves undetermined the question of where "moneys and credits" are. The answer to this question must be sought, in my judgment, in the principles of the common law, which in this instance are founded upon considerations of reason and common sense.

It is the well settled rule, as stated in Cyc., Volume 37, 955, that,

> "Property of an intangible nature, such as credits * * * bank deposits * * * and corporate stock, has no situs of its own for the purpose of taxation, and is therefore assessable only at the place of its owner's domicile."

Numerous authorities are cited in support of this general rule, from which there is no dissent except as to the possibility of legislation clearly and unequivocally changing the situs of credits arising out of the transaction of business, so as to make them referable to the place where business is transacted, and even, in some instances, to the place where the debt is owned rather than where the credit is owned. In another opinion addressed to your department, in the matter of the credits of the W. M. Ritter Lumber Company, I have commented upon statutes of this sort. There are no such statutes in Ohio.

The general rule, as I have already stated, is based upon considerations of reason. A depositor in a bank may be thought of as the owner of so many silver dollars or currency notes, lying in the vaults of that financial institution; such, however, he is not. In essence he is a mere creditor of the bank, although the statute by an artificial rule constitutes his credit "moneys" for the purposes of taxation. No bank ever has on hand at any one time actual cash enough to pay its deposits. Therefore, the thing which the depositor owns is a mere right, and it is immaterial whether or not he may have some tangible evidence of right, such as a certificate of deposit or pass book; the right exists, just the same. This right is incapable of "location" in the sense that household furniture can be said to be situated in a given place. It travels with the owner and is found wherever he is found. In the absence of a statute expressly making bank deposits taxable at the place where the bank is located, or at the place where the business in which the deposit is used is carried on, the legal residence or domicile of the depositor must be regarded as the place where in fact, as well as in law, the deposit is situated.

The same considerations are true of "credits," whether evidenced by book accounts or notes, or not evidenced at all. This form of property consists merely of a right of action, either accrued or subject to accrual. It is not located where some evidence of its existence may be found, but it, like a bank deposit, is found, in the absence of a statute fixing a different situs, wherever the owner may be.

I am, therefore, of the opinion that under the facts stated by you, both the moneys on deposit and the credits of the corporation to which you refer are tax-

able in Mentor School District, Lake County, Ohio, and not in the city of Cleveland. The case of Pelton vs. Transportation Company, supra, is sufficient authority for the proposition that the taxable domicile of the corporation is in the school district and not in the city. My reasons for assigning that domicile to the moneys and credits as their taxable situs have just been stated. My conclusions, however, are supported by the case of Sims vs. Best, 10.C.C. n.s. 41, in which it was held that certain investments, viz.: bonds owned by a foreign corporation having a designated place of business in Ohio (which happened to correspond with and not differ from its actual place of doing business), were taxable in the county in which such place was located, and not in the county in which they were held on deposit by the treasurer of state. The case is of value, because the Pelton case is cited as an authority for the court's conclusion. Inasmuch as the only point decided in the Pelton case which could have been applicable to the case of Sims vs. Best was the conclusion that a corporation's domicile is that fixed by its articles of incorporation or certificate of compliance, and not that in which it is actually carrying on business it will be seen that the circuit court reached the conclusion that the bonds were taxable in Hamilton county, because that was the place named in its articles of incorporation as its principal place of business, and not because its business was conducted there in point of fact. To the same effect see Insurance Company vs. Halliday, 126 Fed. 257; 127 Fed. 830.

In short, then, under present statutes of this state, moneys and credits arising out of a business are not taxable where the business is carried on, as is the case under the laws of many other states, and as should, in equity, be the case in all states. The common law rule as to the situs of moneys and credits obtains in Ohio and is not changed by the provisions of section 5371, the latter portion of which relates solely to tangible personal property.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

327.

ROAD TAXES—AMENDING OF SECTION 5649, GENERAL CODE, AND REPEALING OF ORIGINAL SECTION, HAS NO EFFECT UPON SECTION 7488, GENERAL CODE—RATE OTHER WORK IS PAID FOR AS SHOWN BY OTHER STATUTES IS $1.50 A DAY—HOUSE BILL 389 WHICH AMENDS SECTION 5649, GENERAL CODE, BECOMES EFFECTIVE IN AUGUST, 1913.

From a legislative history of the statutes, the reference in section 7488, *General Code, to the rates other work of a similar nature is paid for, where such section provides for the working out of road taxes assessed against property, discloses that this reference does not depend upon original section* 5649, *General Code, but is supported by other statutes, which prescribe* $1.50 *a day as compensation for such work.*

The amending of section 5649, *General Code, therefore, by house bill* 389, *in no wise effects section* 7488, *General Code.*

COLUMBUS, OHIO, June 16, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 17th, wherein you ask the following questions:

"1. What effect will the passage of House Bill 389, amending section 5649, General Code, have upon section 7488, General Code?

"2. On what date will said House Bill 389 become effective?

"3. If said House Bill 389 becomes effective after taxes have been levied under favor of section 7488, what will be the rights of the taxpayers as to the payment of taxes so levied?"

House bill 389, in full, is as follows:

"An act to amend section 5649 of the General code, relating to the payment and distribution of township road tax.

"Be it enacted by the General Assembly of the State of Ohio:

"Section 1. That section 5649 of the General Code be amended to read as follows:

"Sec. 5649. Any person charged with a road tax shall pay it in money to the county treasurer in like manner as other taxes are collected and paid. Road taxes paid to or collected by the county treasurer shall be paid over to the treasurer of the township or municipal corporation from which they were collected, and be expended on the public roads and in building and repairing bridges in the township and municipal corporation from which they were collected under the direction of the trustees of the proper township or council of such municipal corporation. All funds heretofore levied for road purposes and not expended, shall be expended by the trustees of the township or council of the municipal corporation from which the funds were collected as other taxes collected under the provisions of this title.

"Section 2. That said original section 5649 of the General Code be, and the same is hereby repealed."

This act was signed by the governor and filed by him in the office of the secretary of state on May 8, 1913.

Answering your second question first, I am of the opinion that this bill will become effective ninety days after May 8, 1913, or some time in August of this year. This is for the reason that it clearly does not fall within any of the classes of laws exempted by article 2, section 1d, of the constitution as amended, from the operation of the ninety days' stay, so to speak, which applies to all laws excepting laws providing for tax levies; those making appropriations for the current expenses of the state government and state institutions; and emergency laws necessary for the immediate preservation of the public peace, health or safety, when declared to be such by the legislature.

The answer to your first question depends upon the joint construction of this section and section 7488, to which you refer. Said section 7488 is as follows:

"In addition to such levies (for road purposes) the township trustees, at any time, if they deem necessary, may levy an amount not exceeding one mill upon each dollar of valuation of the taxable property of the respective townships, for road purposes, which may be worked out at the rates other work is paid for, of a similar nature * * * "

It is essential to the completion of the legislative idea involved in the section just quoted that some means be afforded by law for ascertaining the "rates other work is paid for, of a similar nature." It was not the intention of

the general assembly, I think, to leave the determination of the rates at which the taxes should be worked out to the determination of any administrative officer or board. The reference in the statute is obviously to some other statute fixing such rates. At first blush, one would think that the reference in the statute must be to original section 5649, which fixes the rate of $1.50 per day, and a ratable allowance for team and implements, as the rate at which taxpayers may discharge road taxes by labor on the public highway. If this assumption were correct, then, it would necessarily follow that, original section 5649 having been repealed and the amended section substituted in its place by House Bill 389, providing as it does that any person charged with a road tax shall pay the amount into the treasury, such repeal and amendment would necessarily repeal section 7488 in toto.

Consideration of the legislative history of the two sections involved, however, negatives this assumption. Singularly enough, the two statutes were at one time before the legislature in a single act; being the act found in 99 O. L. 436. Section 7488 was originally a part of section 1 of an act entitled "An act to authorize and empower the trustees of townships having a population, at the last federal census of not more than 2,116, nor less than 2,112, to levy a road tax," which original act was clearly unconstitutional. This section, however, was amended in the act just referred to, so as to be of general application.

In the same act section 2830, Revised Statutes, which has become section 5649, General Code, was amended so as to read substantially as section 5649 as amended by House Bill No. 389 reads. In fact, the only verbal difference between the two sections is that in section 2830, as amended in act referred to, there was an exception in favor of the township to which the special act above referred to applied. This, of course, made section 2830, or at least the exception therein, unconstitutional. It may have been the design of the legislature, in amending the two sections in 1908, to make the sentence which has now become section 7488, General Code, apply only to "townships having a population, at the last federal census, of not more than 2,116, nor less than 2,112." Such an unconstitutional intention, however, cannot be imputed to the legislature.

This legislative history shows that if the legislature intended what has now become the substance of section 7488, General Code, to be of general application, it did not mean that "the same rates as other work is paid for, of a similar nature" should be determined by reference to what subsequently became section 5649, General Code.

These considerations are, of course, by no means conclusive of the question, as it is possible that amended "section 1," as found in 99 Ohio Laws, 436, was simply inoperative for lack of a provision fixing the rates at which the extra tax levied by the township trustees might be worked out.

There were in force at the time, however, provisions sufficiently definite to supply the need suggested by what has since become section 7488, General Code. I call attention to what is now section 7147, General Code, prescribing the compensation of road superintendents, turnpike directors and pike superintendents, for road work employed by them. I find it unnecessary to cite other sections, as the one section is sufficient, and as it happens that all the sections to which my attention has been directed, provide $1.50 as the rate for day labor on the roads.

If that portion of amended "section 1," in 99 O. L. 436, which has since become section 7488, General Code, was designed to have general application, then, the broad language of section 2830, Revised Statutes, as amended in the same act, and which has since become section 5649, General Code, and corresponds with the amendment thereto in House Bill 389, cannot be regarded

as all inclusive. That is to say, although the legislature, in amending section 2830, Revised Statutes, provided that "any person charged with a road tax shall pay the same in money," yet, in the same act, it also provided for the levy of a road tax "which may be worked out at the same rate as other work is paid for."

So far as these two sections are concerned, then, it seems that the legislature of 1908 did not regard them as inconsistent. It also appears that without present section 5649 there is a rule furnished by the statutes by which the rates of day labor on the roads may be determined.

In the face of these facts I am of the opinion that the amendment of section 5649 by House Bill 389 will have no effect upon the operation of section 7488.

This conclusion makes it unnecessary for me to consider the other question which you ask. This question, however, is perhaps more directly presented with reference to certain other sections of the General Code, authorizing road labor certificates to be used in payment of road taxes. If the commission desires I will further consider this question, with reference to such statutes.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

358.

TAXING AUTHORITY IN TAXING DISTRICT—HOUSE BILL 500 NOT EFFECTIVE UNTIL NINETY DAYS AFTER DATE OF FILING IN OFFICE OF SECRETARY OF STATE—ACT OF BUDGET COMMISSION—SMITH ONE PER CENT. LAW.

1. *The taxing authorities of a taxing district may levy a tax in addition to that which may be levied within the ten mill levy, now imposed by the amended section as section* 5649-2, *for the purpose of providing for indebtedness incurred prior to June* 2, 1911, *or after that date by a vote of the people, and for no other interest than sinking fund levies whatever, except those specifically authorized to be levied by the earlier provisions of section* 5649-2, *General Code. However the budget commission act does not become effective until ninety days after its filing in the office of the secretary of state by the governor.*

2. *The action of the budget commission to be taken in the year* 1913, *is to be governed by the provisions of the original Smith one per cent. law and not by the provisions of house bill, No.* 500, *and the limitations of section* 5649-3, *which is repealed by house bill No.* 500, *will be operative upon the* 1913 *levies.*

COLUMBUS, OHIO May 23, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 9th, written in connection with your previous letter, respecting the date when house bill 500, passed by the recent session of the general assembly and approved by the governor, will take effect.

In your letter of May 9th you submit the following additional questions respecting this bill:

> "1. May the taxing authorities of a taxing district levy a tax under the provisions of section 5649-2 of the General Code, as amended, in ad-

dition to the ten mill limitation, to provide for any indebtedness incurred between the date of the passage of the Smith one per cent. law and the date of the passage of house bill No. 500, without a vote of the people?

"2. If your ruling is that house bill No. 500 does not take effect until ninety days after its approval by the governor, will the provisions of said bill eliminating the provision of the Smith bill, to the effect that no greater amount of taxes shall be levied in the year 1913, than was levied in the year 1910, plus nine per cent., be effective as to the levies for the year 1913? That is to say, may the aggregate amount of taxes for all purposes levied in any taxing district for the year 1913, exceed the amount levied in the same district in 1910, plus nine per cent?"

In order to answer your first question consideration of section 5649-2, as originally enacted and as amended by house bill No. 500, is necessary. I quote the section in both forms:

"Section 5649-2 (As enacted 102 O. L. 268). Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, *for the year* 1911, *and any year thereafter, including taxes levied under authority of section* 5649-1 *of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county. township, city village, school district or other taxing district, for all purposes in the year* 1910, *provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein*, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.

"Section 5649-2 (As amended). Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto or sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

By careful comparison it will be ascertained that the italicized portion of original section 5649-2 was omitted from the section in the course of its amendment, and that this was the only change made in the section. Broadly speaking, the omitted matter provided the limitation known as the "1910 tax limitation," and the effect of its omission was to abolish that limitation.

The part of the section which is involved in your first question was un-

changed verbally. The phrase "any indebtedness *herctofore* incurred or any indebtedness that may *hereafter* be incurred by a vote of the people" occurs in both sections.

Your first question, then, resolves itself to this: Was the meaning of the words "heretofore" and "hereafter" changed by amendment which was made in another part of the section? Putting it in another way, the question is as to whether or not the meaning of these words is to be determined by reference to the act of which the amended section is a part. I am of the opinion that the meaning of the words "heretofore" and "hereafter" is to be primarily determined by reference to the date of the passage of original section 5649-2, viz.: May 31, 1911, or its approval on Jun 2, 1911. That was the date when the language first appeared in the statutes, although it then made its appearance in the form of an amendment to Section 5649-2, which, as such, had been first enacted at the previous session of the general assembly in 1910. The meaning of these terms then became fixed. Such meaning is not to be changed by any subsequent legislation unless the intention to effect such a change is clearly apparent therein. No such intention appears in house bill No. 500. The title of the act is "an act to amend sections 5649-2 and 5649-3b and repeal section 5649-3 of the General Code, relative to the limitation of the tax rate."

In order to carry out the intention expressed in this title it was necessary to repeal and re-enact section 5649-2, and to set forth the amended section in full, because the constitution so requires. Compliance with the constitutional rule must be deemed to be the sole motive of the legislature in re-enacting section 5649-2; and an intention to change the meaning of the words "heretofore" and "hereafter," which had previously become fixed, cannot be imputed to the general assembly.

I am of the opinion, therefore, that the words "heretofore" and "hereafter," in amended section 5469-2, mean precisely the same as they meant in original section 5649-2, and that for the reasons I have suggested levies in addition to those which may be made within the ten mill limitation, now imposed by the amended section, may be for the purpose of providing for indebtedness incurred prior to June 2, 1911, or after that date by a vote of the people, and for no other interest and sinking fund levies whatever, excepting those specifically authorized to be made outside of said limitation by the earlier provisions of section 5649-2.

I have already, in another opinion, stated that in my judgment house bill 500 does not take effect until 90 days after the date of its filing in the office of the secretary of state by the governor.

Your second question, then, involves the query as to whether the bill, which will become effective some time in August of this year, will apply to and govern the proceedings of the budget commission for the year 1913; or whether such proceedings will be governed by the provisions of the original Smith one per cent. law, so called.

Section 5649-3b, General Code, a portion of the original Smith one per cent. law and one of the sections which are amended by house bill 500, provides in the original that "the budget commission shall meet at the auditor's office in each county on the first Monday of June, annually, and complete their work on or before the first Monday in July next following."

The provision as to the date when the commissioners are to meet is probably mandatory; that prescribing the time within which their work shall be completed is undoubtedly merely directory. As a matter of fact it has been the practice thus far, under the Smith one per cent. law for budget commissions to remain in session long after the date fixed for the completion of their work.

In contemplation of law, however, the budget commission is to be in session

on and after the first Monday of June. It must be conceded, therefore, that so far as their earlier deliberations are concerned they are governed by the law which will be in force during the month of June; which will be, of course, the original Smith one per cent. law, including the 1910 limitation, with the percentages of increase provided by section 5649-3.

Could, then, the budget commissioners, by remaining in session until house bill 500 becomes a law, complete their proceedings in accordance with its provisions?

It would probably be a sufficient answer to this question to state that inasmuch as the law fixes the first Monday in July as the limit of the time within which the work shall be done, the law in force on that date must be deemed to control all the actions of the budget commission, even though that date be held to be directory merely. It is not necessary, however, to place a decision upon this ground. I call attention to the provisions of section 26, General Code, which is in part as follows:

> "Whenever a statute is * * * amended, such * * * amendment shall in no manner affect pending * * * proceedings * * * unless otherwise expressly provided in the amending * * * act."

It was held in Alexander vs. Spencer, 13 C. C. 475, that the levying of general taxes is not "a part of any other proceeding." This decision is not to be regarded as a holding to the effect that the levying of taxes is not in itself a "proceeding." The holding is merely that the levying of a general tax is not a part of the proceeding looking toward the improvement for which the tax is to be levied.

Within the rule as the court defines it in the case cited, the act of levying taxes through the budget commission would have to be regarded as a "proceeding." The budget commission acquires jurisdiction of the subject-matter on the first Monday of June. A proceeding is then commenced, the object of which is to enforce the limitations of the Smith law. By force of the provisions of section 26, General Code, this proceeding must go forward to termination under the original law, and not under the amendment, regardless of the failure of the budget commission to complete its work within the time limited by section 5649-3b.

I may add that house bill 500 contains no express provision to the effect that it shall, upon taking effect, operate upon pending proceedings.

I am, therefore, of the opinion that the action of the budget commission to be taken in the year 1913 is to be governed by the provisions of the original Smith one per cent. law, and not by the provisions of house bill 500. Therefore, the limitation of section 5649-3, which is repealed by house bill 500, will be operative upon the 1913 levies, and will limit the aggregate amount of such levies, exclusive of emergency levies and levies provided for by vote of the people under section 5649-5 of the Smith law, within an amount determined by the total amount levied in the year 1910, plus nine per cent. thereof.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

391.

TELEPHONE—WHAT CONSTITUTES A TELEPHONE COMPANY—PUBLIC UTILITY—SINGLE LINE TO SWITCH BOARD DOES NOT CONSTITUTE TELEPHONE COMPANY—REPORT TO TAX COMMISSION.

1. *Where a number of telephone instruments and secondary wires leading thereto are connected with a switch board, such constitutes a public utility and renders the persons who have so associated themselves for the purpose of transmitting telephonic messages among themselves, a telephone company within the meaning of the statutes.*

The tax commission should value the entire system as a unit for the purpose of taxation in accordance with the rule laid down in section 5456, *General Code.*

2. *Where a number of persons own wires and poles separately, these being connected with an exchange by means of a single wire or line, such an arrangement does not constitute a telephone company.*

3. *All lines connected with a switch board, including the telephones of the individuals connected with the switch board should be included by the switching company in its report to the Tax Commission and should be valued in connection with the other property of the switching company.*

COLUMBUS, OHIO, July 17, 1913.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 14th, requesting my opinion on the following questions, involving the application of the laws relating to the assessment and valuation of the property of telephone companies and the excise tax on such companies:

"(1) A number of farmers associate themselves together for the purpose of securing telephone service between the members of the association. They purchase in common and establish a switchboard at some central point. Each member of the association purchases his own telephone and constructs his own line of poles and wire from his home to the switchboard. The expense of operating the switchboard is borne by the members of the association jointly.

"Is such an association a 'telephone company' within the meaning of section 5415 of the General Code, the property of which the Tax Commission is required by the provisions of section 5451 et seq. to value and assess for taxation, and the gross receipts of which the commission is required by section 5475 to ascertain and determine for the purpose of assessing and levying of excise taxes?

"(2) A number of farmers associate themselves together, each one purchasing his own telephone, and building his own line of poles and wire to a common point from which the line is constructed jointly by all the members of the association to a village and there connecting with a telephone company operating a switchboard, which company by contract agrees to switch the messages of the farmers' association.

"Is the farmers' association in this instance a 'telephone company' within the meaning of section 5415 of the General Code, the property of which the Tax Commission is required by the provisions of section 5451 et seq. to value and asess for taxation, and the gross receipts of

which the commission is required by section 5475 to ascertain and determine for the purpose of assessing and levying of excise taxes?

"(3) In the second case above referred to, is the property, including the telephone, wires and poles of the individuals and the common property of such association operated by the company doing the switching, within the meaning of section 5419, and should such switching company include the property of such association in its report to this commission to be valued in connection with the other property of said switching company?

The sections of the General Code which must be considered in connection with these questions are as follows:

"Section 5415. The term "public utility" as used in this act means and embraces each corporation, company, firm, individual and association * * * herein referred to as * * * telephone company * * * and such term "public utility" shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations.

"Section 5416. * * * any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * *

"When engaged in the business of transmitting to, from, through, or in this state, telephonic messages, is a telephone company; * * *

"Section 5417. The term 'gross receipts' shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever.

"Section 5419. The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility's plant or plants and all real estate necessary to the daily operations of the public utility and all other property, moneys and credits owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by individuals operating such public utility. In the case of incorporated companies, all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility.

"Section 5449. On or before the first day of August, annually, every express, telegraph and telephone company, doing business in this state, under the oath of the person constituting such company, if

a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, shall make and file with the commission a statement in such form as the commission may prescribe."

Section 5450. Such statement shall contain:

* * * * * * *

"13. In the case of telegraph and telephone companies, such statement shall also set forth, the whole length of their lines, and the length of so much of their lines as is without and is within this state, which shall include the lines such telegraph and telephone companies control and use under lease or otherwise and the miles of wire in each taxing district in this state.

"14. In the case of telegraph and telephone companies, such statement shall also contain the entire gross receipts, including all sums earned or charged, whether actually received or not, for the year ending the thirtieth of June, from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state. * * *

"Section 5451. On the first Monday in September, of each year, the commission shall ascertain and assess the value of the property of the express, telegraph and telephone companies in this state.

"Section 5452. In determining the value of the property of such companies in this state, to be taxed with the state and assessed as herein provided, the commission shall be guided by the value of the property as determined by the value of the entire capital stock of the companies, and such other evidence and rules as will enable such commission to arrive at the true value, in money, of the entire property of such companies within this state, in the proportion which such property bears to the entire property of the companies, as determined by the value of the capital stock thereof, and such other evidence and rules.

"Section 5455. The commission shall deduct from the total value of the property of each express, telegraph and telephone company in this state, the value, as assessed for taxation of any real estate situated within this state and owned by such company.

"Section 5456. The value of the property of telegraph and telephone companies of this state, after deducting the value of the real estate, shall be apportioned by the commission among the several counties through or into which the lines of such telegraph or telephone companies run, so that to each county shall be apportioned such part of the entire valuation as will equalize the relative value of the property of the company therein, in proportion to the whole value of the property of the company in the state, and in the proportion that the length of the lines of wire owned by the company in the county, bears to the whole length of the lines of wire in all the counties in the state, and to each city, village and taxing district, or part thereof, therein.

"Section 5475. On the first Monday of September the commission

shall ascertain and determine the entire gross receipts of * * * each * * * telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom * * * all receipts derived wholly from interstate business or business done for the federal government.

"Section 5481. On the first Monday of October the commission shall certify to the auditor of state, the amount of gross receipts so determined, of * * * telephone * * * companies, for the year covered by its annual report to the commission, as required in this act.

"Section 5483. In the month of October, annually, the auditor of state shall charge, for collection from each * * * telephone * * * company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

In other opinions to the commission I have discussed at some length the theory of property assessment under what is known as the "unit rule" or "going concern" plan. I have shown that the basic principle upon which this method of assessment is founded is that of unity of *use* as distinguished from unity of *ownership*. Adams Express Company vs. Ohio State Auditor, 165 U. S. 194; 166 U. S. 185.

In dealing with so much of your first question as relates to the assessment of property of telephone companies, under that group of the above quoted sections which relates to property taxation, this fundamental principle must be at all times borne in mind.

The sections themselves clearly recognize and effectuate this principle; thus, section 5415 gives two distinct meanings to the term "public utility," one of which relates to the person to be assessed, so to speak, and the other to the thing to be assessed; the second definition expressly includes property operated by a public utility (in the first tense) whether owned by it or not.

So, also, section 5419 recognizes the above stated principle and embodies it, in that it makes even plainer the legislature's intention to make unity of use the test by which to determine what property shall be assessed as a going concern.

Indeed, section 5419, read in connection with the other sections, really contains a complete answer to so much of your first question as relates to property assessment. The clause which is most important in this connection is as follows:

"The property owned or operated by a public utility * * * shall be deemed and held to include * * * all * * * property * * * owned or operated, or both, by it* * * used in connection with or as incidental to the operation of the *public utility, whether the same be held in common or by the individuals operating such public utility.*"

It is obvious that the phrase "public utility," as used in the italicized portion of the above quotation, is employed in the second sense defined by section 5415. It is also obvious that the legislature intended that whenever any aggregation of property should be ascertained to be used or, as the statute

has it, "operated" as a unit plant or system, for any of the purposes constituting one of the "businesses" defined in section 5416, all such property should be assessed as a unit, regardless of the ownership of the separate items or parts thereof. Thus, the mere fact, in the first case stated by you, that the separate telephone instruments, poles and wires, would constitute parts of a system, are separately owned by individuals who have associated themselves together for this purpose, is of no importance whatever, in the light of the italicized portion of section 5419, as above quoted from.

Again, in the 13th paragraph of section 5450 is found recognition of the basic principle already referred to, in the requirement therein embodied that telephone companies shall include in their statement of property "the lines such * * * companies control and use, under lease or otherwise;" thus, obviously dispensing with the necessity of considering the ownership of any telephone lines when the source of their operation has been ascertained.

Other portions of the sections above quoted from might be employed to emphasize the facts already referred to. It is safe, I think, in this instance, to generalize by saying that section 5416, except in so far as it relates to "equipment companies," by its definitions fixes in each instance upon the *operating* company as the "public utility," the subject of taxation. Thus, that is not a "sleeping car company" which does not *operate* cars; nor a "freight line company" which does not *operate* cars; nor a "pipe line company" which does not itself carry on the transportation which constitutes it such, whether by the use of agencies which it owns or not, etc.

It is easy, therefore, to eliminate from consideration in connection with so much of your first question which relates to property assessment the fact stated by you that "each member of the association purchases his own telephone and constructs his own line of poles and wires from his home to the switchboard." That fact, of itself, is immaterial. The remaining fact for consideration is the statement that in the case supposed the persons who thus own instrument, poles and wires, associate themselves together in the common ownership of an exchange switchboard, which is "operated" at the joint or common expense of them all.

In considering this fact I have, in a general way, made some study of the nature of the applied science of telephony, with a view to applying to the methods thereof and appliances used therein the definition above quoted from section 5416. I find that the telephone is an instrument which operates by the force of magnetism and resultant electrical vibrations. The telephonic apparatus is not complete without three distinct parts, namely: the transmitter, the wire or wires, and the receiver. The transmitter and the receiver, though essentially different in many technical respects, both consist of sensitive disks, placed in juxtaposition with magnets wound with insulated wire. Sound waves, produced by the human voice or otherwise, when projected upon the disk, produce vibrations therein and thus effect rapid alterations corresponding to such waves in the magnetic fields. Thus, currents of electricity are induced in the coiled wire and are transmitted along the secondary wire to the receiver, where they induce vibrations of a similar disk therein. When the disk in the transmitter is held close to the human ear its vibrations set up air waves in the ear passages which correspond to the sound waves received at the other end of the line; thus, the effects of sound, including the articulations of speech and the influences of the voice, are reproduced.

What I have described is known as the magnetic telephone. There are variations of the apparatus wherein batteries are used to generate the primary current in an induction coil; in which instance there is always some current in the wires, and the audible sounds are caused by variations therein induced

in a manner essentially similar to, although not identical with, that already described. In such instances, however, the batteries themselves are and constitute a part of each separate instrument.

I mention these somewhat technical facts because it is apparent, upon consideration thereof, that the process of telephoning can be carried on without the intervention of any switchboard. Any transmitter connected by secondary wire with any receiver, may, when the circuit is completed by the return wire, be used for the purpose of transmitting telephonic messages between two persons; and when, at either end of the wire, there is both a receiver and a transmitter the complete operation, in the popular sense of the word, may be carried on without the intervention of any other apparatus whatever. Yet, two telephone instruments, thus connected and used by two individuals, could scarcely be said to constitute a "plant" or a "system." Nor would their use under such circumstances amount to "operation," in the ordinary or statutory sense of the word. The two individuals who would be using such a device could scarcely be said to be "transmitting" telephonic messages. As a matter of fact, the individuals do not themselves "transmit" anything; the transmission of the message would be effected through the automatic agency of the instruments themselves, without any human intervention or control whatever, once the apparatus is set up and in working order.

In this particular the use of the telephone is essentially different from that of the telegraph, the most similar other invention which human genius has devised for general use. In the case of the telegraph the messages, which it is desired to transmit, can be received and transmitted only by persons skilled technically in the use of telegraph instruments, and possessing a knowledge of the codes of signals necessary to be known by one who would make use of such instruments. Therefore, in order that the general public may make use of the telegraph, it is necessary that it rely upon the human agency of the telegraph operator.

The use of the telephone apparatus, in its simplest form, as above described, however, does not present such practical difficulties. It is not necessary that two persons wishing to communicate with each other by means of two directly connected telephone instruments should invoke the services of any third party. In such case it is necessary only that, by means of a signal, apparatus for which is easily attached to any telephone, the one summon the other to his instrument; then, the two may converse freely.

How, then, is it possible for any "person or persons," "firm or firms," etc., to "transmit telephonic messages" if such transmission is the result of the automatic workings of specially designed apparatus? This question cannot be answered by saying that the ownership of such specially designed apparatus, and the renting or leasing threof to others, for use as above described, constitutes the business of transmitting telephonic messages, because, as already seen, mere ownership does not and cannot enter into the question.

In my judgment the answer to the question which has been raised lies in the fact that, while two directly connected telephones may be used as I have already indicated, an apparatus having such a limited field of utility would be of little practical value, and, as a matter of fact, such apparatus is not in common use. People do not install telephones for the purpose of annihilating space in conversation with single other individuals, or with the occupants of single other places; but for the purpose of enabling themselves so to communicate with a large number of other persons. Hence, in order that the telephone might have a utility which is "public," and might therefore become a necessity, it is necessary to devise some means by which one telephone instrument, instead of connecting directly with another, might have its secondary wires

conducted to some central point, there to be connected at the will of some human agency or through the medium of some automatic machinery with the secondary wire leading to any one of a large number of other similar instruments. The means or medium of exchange came to be known as the "exchange" or "central station," and the instrument or appliance by which the switching is effected came to be known as the "switchboard," which is a device operated either by human agency or by machinery, and through which the wires leading to any one instrument may be connected with those leading to any other.

Without a central exchange and a switchboard there is certainly no such thing as a "telephone system;" and while two or more instruments might be directly connected without such an apparatus, it would be impossible for any one instrument to be exclusively connected with any other single instrument.

I think it must be conceded that the general assembly, in using the language which it has used in section 5416, as above quoted, had in mind the familiar facts which I have above set out. It is true that the choice of terminology is somewhat inaccurate and confusing, in that no individual or corporation ever does, nor, in the nature of things, could "transmit telephonic messages," for reasons already pointed out. In my opinion, however, the transmission of telephonic messages, as that term is used in the statute, consists of the operation of a switchboard or switchboards by which, at the will of the operator or by machinery, and at the will of the subscriber, the telephonic message may be transmitted from one station to another designated station.

Concisely stated, then, the "business of transmitting telephonic messages" consists of the operation of an exchange; without a central exchange, and the necessary switchboard, there can be no such "transmission" as the statute requires. Hence, an association of individuals, or a corporation, which might own and use two or more telephone instruments directly connected with one another, without the interposition of a switchboard, would not be "engaged in the business of transmitting telephonic messages."

Now, when a large number of separate telephone instruments, and secondary wires leading thereto, are connected with a central exchange or switchboard, for the purpose above described, the use of all the instruments and all the wires and poles, together with the switchboard, is necessary in order that the purpose for which such connection is made can be completely achieved. In other words, all of the wires leading to such an exchange; all of the poles upon which they are strung, and all of the instruments with which they connect, are a part of a single telephone "system" or "plant." Then, in my opinion, the connection of any one of these lines with any other one line, by means of the switchboard at the central office, constitutes not only the "transmission" of messages within the meaning of section 5416, but also the "operation" of all of the property necessarily involved within meaning of section 5415 and 5419, and the "control and use" threof within the meaning of section 5450, above quoted from and commented upon.

It follows from what I have said that the fact that the switchboard, in your first question, is operated as a joint or communistic enterprise is material and, regardless of the diversity of ownership of poles, wires and telephonic instruments, constitutes all such poles, wires and instruments so owned a part of a single "public utility," and renders the persons who have so associated themselves for the purpose of transmitting telephonic messages among themselves a "telephone company" within the meaning of the statutes. Therefore, the commission should, under sections 5450 et seq., General Code, value the entire plant or system as above defined as a unit, for property taxation purposes, and assess the same to the association as such, by whatever name it may have, apportioning the unit valuation so ascertained and assessed among

different taxing districts, in accordance with the rule laid down in section 5456.

It follows, as a necessary corollary, from this conclusion, of course, that the property of the individual members of the association, used in connection with such plant or system, and considered in determining the value of the whole, should not be returned by and assessed to such individual members as their personal property.

The question of excise taxation, as raised by your first question, will not be considered. I have already pointed out the reasons for holding that an association of individuals engaged in the activities described in the first question does constitute a "telephone company" within the meaning of section 5416. Being such, the association is, in my opinion, required to make the single report exacted from express, telegraph and telephone companies by section 5450, General Code; and to include therein something, at least, under item 14 of such report or statement. Said item 14, it will be observed, requires the statement to contain "the entire gross receipts, including all sums earned or charged whether actually received or not, for the year * * * from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state." This language, in my opinion, is broad enough to apply to the first case given by you and to constitute the assessments made against the individual members of the association, on account of the expense of operating a switchboard, the "gross receipts" of the association for the purposes of such statement.

Now, it is upon the basis of this statement that the Tax Commission, under section 5475, General Code, supra, determines the amount upon which the excise tax of 1.2 per cent., charged under section 5483, is to be computed. I am of the opinion, therefore, that the charges against individual members of the association on account of the expense of operating a switchboard constitute the gross receipts of the association as a "telephone company" for excise tax purposes.

One question arises in connection with the foregoing which has not been considered in this opinion, namely: as to whether or not the method of doing business described in the first question, being co-operative in its nature and not pursued for the purpose of profit, constitutes a "business" within the meaning of section 5416. This question, however, has been considered and answered in the affirmative in other opinions to the commission, notably that in the matter of the Factory Power Company, given to you some months ago. As the commission knows, it is the purpose of the Factory Power Company to contest the opinion rendered in its case, and to raise the question as to whether a co-operative enterprise, conducted not for profit, constitutes a "business." The conclusion which I have reached upon the first question in your letter of May 14th is based upon the premise which I have heretofore adopted in the other opinions referred to, and if the court should hold that that premise is invalid the conclusion would, of course be opposite to that which I have reached.

Your second and third questions may be considered together. For reasons already sufficiently discussed, I am of the opinion that the mere association of a number of individuals, owning wires and poles separately, and a single line or group of lines of wires, strung on a line of poles in common, for the purpose of contracting with a telephone company operating an exchange switchboard and thus securing exchange service from such company does not constitute the associated individuals a "telephone company" within the meaning of the statutes above quoted. The only thing which these persons do jointly is to own and maintain the poles carrying their respective wires from a certain meeting point to the company's exchange. This is unity of ownership, but not complete and separate unity of use; because the evident purpose of the asso-

ciated individuals in so conducting their separately owned wires and poles to the exchange of the company is to enable their instruments and wires to be connected through the switchboard with the other instruments reached by the company. Therefore, the unit consists of all the instruments and wires connected with the company switchboard. Having held that the operation of a switchboard constitutes the transmission of the messages, it follows, of course, that I must hold that the operating company in the case imagined in your second question is the company and not the associated individuals. Your second question must, therefore, be answered in the negative.

For the reasons already stated, your third question must be answered in the affirmative. Inasmuch as by the use of a single exchange switchboard, which is admitted to be operated by the company, the telephone instruments belonging to the associated individuals are connnected with other telephone instruments belonging to the company, and leased by its subscribers, all the telephone instruments and wires are designed for use and actually are used in connection with a single system. Inasmuch, also, as the operation of the exchange switchboard constitutes the operation of the system, I am of the opinion that, at the very least, the property of the associated individuals, under the facts stated by you, constitutes "property * * * operated * * * by" a telephone company, and "used in connection with * * * the operation of a public utility" within the meaning of section 5419, above quoted.

The answer to your third question suggests the general observation, not necessarily evoked by the particular case to which it refers, but which may be of some value to the commission as a general principle, that wherever property, owned by another, is required, because of the application of the unit rule, in the manner required by the statutes which have been discussed, to be included in the valuation of property assessed to the operator, it should not again be assessed to the owner. This is not only the manifest intention of the statutes, but to construe them otherwise would result in *real* double taxation. The phrase "double taxation" is a loose one, often improperly used. In its proper application, however, it means that, especially under a constitution enjoining, as ours does, the so-called "uniform rule" in property taxation, the same property shall not be more than once assessed for contribution to the public revenues for the same period of time. It is perfectly competent for the legislative power of the state to provide that property shall be assessed to one not its technical owner, leaving the rights of the parties, as between the taxpayer and the real owner, to be worked out between them. This is particularly true of property used in a given business and, therefore, impressed with a peculiar situs for taxation purposes; but it is not proper that property so used be taxed because of its business use as property and again taxed in respect to its simple ownership.

I mention this fact because, in my study of the question which you present, my attention is called to the fact that "equipment companies," so-called, are assessable upon a basis which I have defined in a recent opinion to the commission as being a property basis for cars furnished or leased by them to railroads, for the purpose of being used in the operation of the railroad. This is clearly a special provision, which controls to the exclusion of any general provision. This being the case, all rolling stock, on account of which the so-called excise tax may be assessed under sections 5462 et seq., General Code, should not be considered as property operated by the railroad company, in spite of the specific provisions of section 5429, General Code. The same principle must be observed throughout in the assessment of public utilities.

This last general observation, I am sure, the commission desires. It amounts to a supplement to a former opinion in the matter of sleeping car, pipe

line and equipment companies, and does not have proper place in this opinion, save as the principle which I have defined is suggested by the facts of this opinion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

455.

OHIO OIL COMPANY NOT A PIPE LINE COMPANY UNDER LAWS OF OHIO—PRODUCERS' AND REFINERS' OIL COMPANY, LIMITED, AND THE TIDE-WATER PIPE COMPANY, LIMITED, ARE PIPE LINE COMPANIES UNDER THE LAWS OF OHIO.

The business conducted by the Ohio Oil Company does not constitute that company a pipe line company and a public utility within any of the provisions of the act of May 31, 1910, as to making property reports to the tax commission and paying excise tax thereon upon its gross receipts.

The Producers and Refiners Oil Company, limited, and the Tide-Water Pipe Company, limited, are engaged in the business of transporting oil and are pipe line companies within the meaning of section 5416, General Code, and their plants are public utilities within the meaning of section 5415, General Code.

COLUMBUS, OHIO, May 20, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some months ago you submitted for my opinion a question respecting the liability for excise and property taxation, as "public utilities," or more accurately, as "pipe line companies," of four certain companies or organizations. The question has given me a great deal of trouble, and I must confess that I have in recent weeks, during the legislative session, laid it aside for more careful consideration. I have at length reached a conclusion in the matter and take this opportunity to apologize for the long delay. The companies in question, with their manner of doing business are as follows:

The Ohio Oil Company is a corporation of the state of Ohio, organized for the purpose of producing, transporting and refining oil. This is not the exact phraseology of its articles of incorporation as amended, but constitutes the substance thereof. The company is actually engaged in the business of producing oil, as it owns and operates a large number of oil wells in Ohio, Indiana and Illinois. For its own convenience it maintains a pipe line which extends from the Illinois field (not the Indiana or Ohio fields) to the Pennsylvania state line where, as well as in Ohio, the company owns storage tanks. It appears from the statement of facts that all of the oil which the company transports through its pipe line is designated for storage in the tanks of the company. That is to say the movement of the oil is from the company's own wells to the company's own tanks. The oil is not secured by purchase or otherwise from other producers and is not delivered directly from the transportation line to the refineries. Therefore, although the company is authorized under its charter to engage in three distinct kinds of business, viz., production, transportation and refining, it is as a matter of fact engaged principally in the sole activity of production and incidentally (to the production) in the activity or business of transportation. The company sells all of its oil to refiners or to pipe line companies which are accustomed to purchase the oil transported by them. All of the receipts of the company are derived from the sale of its products.

The Producers' and Refiners' Oil Company, limited, operates (but does not own) an interstate pipe line originating in Ohio and extending into West Virginia and Pennsylvania. The company buys the crude petroleum from producers, it not being itself engaged in the business of producing, and when the act of transportation thereof through the pipe line is complete it sells the oil to purchasers who for the purposes of the opinion may be referred to as those engaged in the business of refining the crude petroleum. The company is a limited partnership organized under the laws of the state of Pennsylvania.

It will be seen, therefore, that the business which this company does may be summarized as follows: It is engaged in transporting crude oil or petroleum in interstate commerce between points in Ohio and points in other states through a pipe line owned by another company; but all the crude oil transported by it is purchased before it enters the transportation line and sold at the end of the journey so that it is the property of the company while it is in the company's pipe line.

The Pure Oil Company is a corporation of the state of New Jersey. It is engaged in Ohio in the business of producing and selling crude petroleum and also owns a pipe line but does not operate it; this line being the one operated by the Producers' and Refiners' Oil Company.

The Tide-Water Pipe Company, limited, is a limited partnership organized under the laws of Pennsylvania. The partnership is authorized by its partnership articles to transport and refine petroleum as well as to buy and sell this commodity. It owns and operates a pipe line through Ohio extending from a point in Illinois to a point in Pennsylvania and has other lines in the states of Pennsylvania, New York and New Jersey. A lengthy statement of facts is made from which, however, it is difficult to determine whether or not the company is actually engaged in the business of refining oil. The statement is made that, "we buy oil in Illinois, we transport it to Rixford (Ill.) * * * at Rixford it is transported by the main line to Bayonne (N. J.) * * *. Our income is derived from the sale of the oil at the seaboard *to our own refinery.* * * * We have no transportation charge for the oil coming in from any of these branches or any over the main line."

It seems apparent from this statement of facts that if this partnership is engaged in the business of refining oil it keeps that business separate so that the oil which is purchased in Illinois and transported through Ohio *is sold* to the refinery in New Jersey, by whomsoever the refinery is owned and operated. I shall, therefore, consider the business of this company as being substantially similar (save with respect to the ownership of the transportation line) to that conducted by the Producers' and Refiners' Oil Company, i. e., the business of transportation of oil purchased at the point of origin and sold at the point of delivery, so that while in the transportation lines the commodity is the property of the transporting company.

None of these companies admit that they are in fact engaged in the transportation business as a common carrier, although the Producers' and Refiners' Oil Company admits a willingness to engage in business in this manner, and that it is holding itself out in a tentative way, so to speak, in this capacity. The other companies assert that the business conducted by them is purely private and deny that they can be considered as "public utilities" and as "pipe line companies" for any purpose.

The question which the commission desires to submit for my consideration, and upon which my opinion is requested is:

> "Whether these companies are 'pipe line companies' and subject to the provisions of the act of May 31, 1911, as to making property reports

to this commission and paying excise taxes thereon upon their gross receipts?"

This question involves the consideration of the following sections of the General Code, being sections of the tax commission act of 1911, 102 O. L. 224:

"Section 5415. The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers * * * herein referred to as * * * pipe line companies * * * and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations.

"Section 5416. That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated; * * *, when engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company; * * *

"Section 5417. The term 'gross receipts' shall be held to mean and include the entire receipts for business done by any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done by such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever.

"Section 5419. The property owned or operated by a public utility, required to make return to the commission of its property to be assessed for taxation by the commission, shall be deemed and held to include such utility's plant or plants and all real estate necessary to the daily operations of the public utility and all other property, moneys and credits owned or operated, or both, by it wholly or in part within this state, used in connection with or as incidental to the operation of the public utility, whether the same be held in common or by the individuals operating such public utility. In the case of incorporated companies, all the real estate, personal property, moneys and credits owned and held by such corporation within this state in the exercise of its corporate powers, or as incidental thereto, whether such property, or any portion thereof, is used in connection with such public utility business or not, shall be conclusively deemed and held to be the property of such public utility.

"Section 5420. Each public utility, as defined in this act, except express, telegraph and telephone companies, shall annually, on or before the first day of March, make and deliver to the tax commission of Ohio, in such form as the commission may prescribe, a statement with respect to such utility's plant or plants and all property owned or operated, or both, by it wholly or in part within this state.

"Section 5422. Such statement shall contain:

"1. The name of the company.

"2. The nature of the company, whether a person or persons, firm,

association or corporation, and under the laws of what state or country organized.

"3. The location of its principal office.

"4. The name and postoffice address of the president, secretary, auditor or the principal accounting officer or person, treasurer, and superintendent or general manager.

"5. The name and postoffice address of the chief officer or managing agent of the company in this state.

"6. The number of shares of the capital stock.

"7. The par value and market value, or if there is no market value, the actual value of its shares of stock on the first day of the month of January in which the statement is made; the amount of capital stock subscribed, and the amount thereof, actually paid in.

"8. A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise, if any such there be.

"9. An inventory of the personal property, including moneys, investments and credits, owned by the company, in this state, on the first day of the month of January in which the statement is made, where situated, and the value thereof, making separate statements of that part used in connection with the daily operation of the company, and that part used otherwise if any such there be.

"10. The total value of the real estate owned by the company and situated outside of this state, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

"11. The total value of the personal property owned by the company and situated outside of the state, making separate statements of that part used in connection with the daily operations of the company, and that part used otherwise if any such there be.

"12. The total amount of bonded indebtedness and of indebtedness not bonded; the gross receipts for the preceding calendar year from any and all sources and the gross expenditures for the proceeding calendar year.

* * * * * * * * * * *

"14. In case of pipe line, gas, natural gas, waterworks and heating or cooling companies, such statement shall also show:

"(a) The number of miles of pipe line owned, leased or operated within this state, the size or sizes of the pipe composing such line, and the material of which such pipe is made.

"(b) If such pipe line be partly within and partly without this state, the whole number of miles thereof within this state and the whole number of miles without this state, including all branches and connecting lines in and out of this state.

"(c) The length, size and true and actual value of such pipe line in each county of this state, including in such valuation the main line, branches and connecting lines, and stating the different values of the pipe separately.

"(d) Its pumping stations, machine and repair shops and machinery therein, tanks, storage tanks and all other buildings, structures and appendages connected or used therewith, including telegraph and telephone lines and wires, and the true and actual value of all such stations, shops,

tanks, buildings, structures, machinery and appendages and of such telegraph and telephone lines, and the true and actual value thereof in each county in this state in which it is located; and the number and value of all tank cars, tanks, barges, boats and barrels.

"Section 5423. On the second Monday of June of each year, the commission shall ascertain and assess, at its true value in money, all the property in this state of each such public utility, subject to the provisions of this act, other than express, telegraph and telephone companies.

"Section 5424. In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility.

"Section 5425. The property of such public utilities to be so assessed by the commission shall be all the property thereof, as defined in section forty-three.

"Section 5426. Before the assessment of such property each of such public utilities (and railroad or street, suburban or interurban railroad companies) shall have the right, upon written application, to appear before the commission and to be heard in the matter of the valuation of its property for taxation.

"Section 5470. Each public utility * * * doing business in this state shall annually * * * under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe.

"Section 5471. The statement provided for in the preceding section, shall contain:

"1. The name of the company.

"2. That nature of the company, whether a person or persons or association or corporation, and under the laws of what state or country organized.

"3. The location of its principal office.

"4. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.

"5. The name and postoffice address of the chief officer or managing agent of the company in this state.

"Section 5474. In case of all such public utilities except railroad, street, suburban and interurban railroad companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received, or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, but this shall not apply to receipts from interstate business, or business done for the federal government. Such statement shall also contain the total gross receipts of such company for such period in this state from business done within this state.

"Section 5475. On the first Monday of September the commission

shall ascertain and determine the entire gross receipts of each light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then next preceding the first day of May, and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government.

"Section 5487. In the month of October, the auditor of state shall charge for collection, from each pipe line company a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported to him by the commission, as the gross receipts of such company on its intrastate business for the year covered by its annual report to the commission, as required in this act, by taking four per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

The questions presented have, as I have already indicated, seemed very difficult to me. However, after careful consideration it has occurred to me that the cases of these four mentioned companies, with the exception already referred to. are not by any means identical, and it has been helpful to me to note at the outset certain distinctions which have occurred to me, and which may serve to simplify a discussion of the entire question.

I call attention to the fact that the Pure Oil Company is, in point of fact, engaged in Ohio in the sole business of producing oil. It owns a pipe line but is not operating the same. It seems to me that the fact that this company is not operating its pipe line is conclusive of the question so far as it is concerned. It is certainly not "engaged in the business of transporting oil through pipes," within the meaning of section 5416.

I, therefore, advise that the Pure Oil Company is not a public utility. This does not, however, as I shall hereafter point out, signify that the pipe line owned by this company but operated by another company is not to be valued for taxation as a "pipe line," even though by the arrangement between the parties the assessment made as a result of such valuation, may render this corporation ultimately liable for taxes levied thereon.

The case of the Ohio Oil Company should next be considered. This corporation is primarily a producing company. It transports oil but not for the purpose of conveying it to market. At least the transportation in which the company engages does not result in delivering the oil to the refinery. This company does not buy petroleum but does sell it. When the oil is sold it is delivered, not directly to the refinery but to another transportation company. The sole purpose of the transportation operations of this company, extensive as they are, is to make the petroleum available for storage in its own storage tanks. During the entire time that this company holds possession of the oil it acts primarily in the capacity of a producer. In this respect its ownership of the oil which it is engaged in transporting is perhaps of different significance from the ownership of the oil, both owned and transported by the Producers' and Refiners' Oil Co., and the Tide-Water Pipe Company, respectively, under the facts in regard to these companies as I have stated them. I think this distinction is of some importance as will hereafter more clearly appear.

The Ohio Oil Company is, then, in a word, engaged in transporting oil which it has itself produced for the purpose of collecting it together in convenient

places for storage. The storage tanks are in turn connected with other pipe lines not owned or operated by the company through which the crude petroleum is again transported and sold to the refiners.

The commission will recall that in a recent opinion respecting certain corporations incidentally engaged in furnishing electric current to consumers I held that the mere fact that such an activity is merely incidental to some other principal business, is immaterial as affecting the status of such corporation as an "electric light company" and accordingly a "public utility" under the sections above cited. This is because section 5416, General Code, in defining "electric light company" contains the following language:

> "When engaged in the business of supplying electricity for lighting, heating or power purposes to *consumers* within this state, is an electric light company."

Every element of this definition is satisfied by the case of a corporation which actually does supply electricity to consumers, regardless of whether or not it be incidental to some other paramount business. This is true, as I tried to point out in the other opinion, whether the question turns on the mere phraseology of the definition itself or upon the fundamental reason and theory of the tax.

The conclusion reached in this opinion is not of very great assistance in considering the case of the Ohio Oil Company however, because the phrase "to consumers" finds no counter-part in the definition of the "pipe line company" as above quoted, unless such a counter-part must be supplied by interpretation. This, it is alleged, must be done. It is argued with great force that an "electric light company" is not such unless it supplies "consumers;" and a gas company is not such unless it serves "consumers." So also with a "natural gas company" a waterworks company, a heating company, and a cooling company, the definitions of all of which "public utilities," as found in section 5416, contains the identical phrase "supplying * * * to consumers."

Again, in some of the definitions in this lengthy section in which this identical phraseology is found, there are similar phrases like, "supplying messengers for any purpose" in the definition of a "messenger company." The idea of *service* to others, presumably the general public, being latent here. Therefore some relation to the general public or to those who are served, or would be served by the business of transporting oil must be shown to exist before, having regard to the intent of the section as a whole, the definition of a pipe line company, or rather the spirit of that definition, could be satisfied. So that it is urged that by construction the phrase "for others than itself," or some equivalent should be understood and interpolated in that portion of section 5416 which defines a "pipe line company." Indeed, it is urged that even a more comprehensive phrase should be so understood, viz., something to the effect that the oil transported is not the property of the transporting company.

Reference to one of the former opinions of this department leads me also to mention a more recent opinion in the matter of certain freight line companies in which I held that the fact that a freight line business of a company might be carried on as incidental to some other business, and that the freight transported might belong to the company itself, were both immaterial as determining its status for taxation. This is because the phrase "whether such freight is owned by such company, or any other person or company," is found in that portion of section 5416 which defined the phrase "freight line company." So that it is difficult to draw any conclusive inference from other provisions of this section by which interpretative light may be thrown upon the exact meaning of a "pipe

line company" therein. On the one hand it might be argued that whereas phrases like "supplying to consumers" are frequently used in the section, and no similar phrase is found in the definition in question itself, the silence of the legislature is significant and must be applied upon a principle analogous to that referred to as *expressio unius est exclusio alterius.* That is to say if the legislature had intended further to qualify its definition of a "pipe line company" it would have done so inasmuch as it was careful similarly to qualify other definitions framed by it in the same section. On the other hand it is pointed out that the term "public utility" as used in the preceding section ought to be given some weight and that the obvious intent of the use of this phrase ought by itself to qualify each and every one of the definitions found in section 5416.

I have, however, in one of the previous opinions to which I have referred, shown by examination of the legislative history here involved that this phrase "public utility" must be regarded as descriptive but not as definitive. It is an artificial term and as such is not of great weight in qualifying definitions which were framed historically before it ever came into use in this connection. On the same side of the ledger, so to speak, however, there is another consideration which is the opposite of the one already discussed as tending to show an inference that the legislature did not intend further to limit its definition of the term "pipe line company;" that is, the fact that the definition of a "freight line company" found in this section contains the express qualification already referred to. From this it might be argued that if the legislature had intended that the fact that a pipe line company is transporting oil which is its own property should be regarded as immaterial, it would have said so unequivocally as it has done in defining the term "freight line company." The force of this consideration is somewhat mitigated by the historical fact that prior to the revision of the tax laws by the legislature of 1911, the definitions of sleeping car, freight line and equipment companies were found in a separate section, and indeed, were originally part of an act entirely separate and distinct from that in which the other definitions now found in the same section are incorporated.

Hence, it is true that from the standpoint of interpretation, the section itself is not a single legislative idea but is rather a conglomeration of several distinct legislative ideas. Again, the inference just referred to, even if permissible, could bear upon the argument respecting ownership only, and not upon that respecting mere relationship to the public or that portion of it to be served by the transportation of oil.

Therefore, while due weight must be given to the consideration which I have discussed as bearing upon the meaning of the definition of a "pipe line company" as found in section 5416, General Code, yet in the ultimate analysis I think that the definition must be interpreted in the light of the facts surrounding the business of transporting oil. In this same connection too, I may refer to the fact that, as I am informed, the interstate commerce commission has, under favor of an act of congress, declared all interstate pipe lines to be common carriers of interstate commerce, regardless of the ownership of the oil transported through them, and regardless also of the connection in which the transportation takes place. This order, however, was promulgated subsequently to the enactment of the statute now under consideration, and, of course, long after the original adoption of the definition which I am now discussing, which was enacted in 1896. The re-enactment of this definition from time to time without verbal-change is sufficient, it seems to me, to show that the legislature did not intend the phrase employed by it to have a meaning broader than the original meaning thereof.

So it is that I have reached the conclusion that after all the definition in question is not to be interpreted by reading into its phraseology any additional

qualifying language, but that rather the nature of the "business of transporting oil" must be ascertained by reference to undisputed facts.

Now as I have already pointed out, the Ohio Oil Company itself transports oil, but this transportation is not only incidental to the business of production in the sense that it grows out of production but is *completely* incidental to the business because the oil after receiving the transportation which is given to it by this company is still, so to speak, producer's oil. It has not yet become available for refining. Now while the facts respecting the oil business as a whole are by no means free from confusion and doubt, it seems certain that the business as a whole may and must be divided into three distinct processes, viz.: production, transportation and refining. These three processes for the purpose of this opinion may be defined as follows:

Production is the process by which the crude petroleum is brought from its natural reservoirs to the surface and there stored or otherwise made available for the second or intermediate process of the business.

Refining is the process by which the crude petroleum is made available for commercial use in various forms. It is a species of manufacturing; whereas the production of oil is a species of mining. One transforms the raw material produced by the other into articles of use and consumption.

Now it is a fact, I think, that for reasons similar to those which have located steel mills, for example, geographically remote from iron mines, the refineries are located geographically apart from the producing fields, or some of them at least. We may therefore imagine two groups of persons engaged in these different branches of the oil business, viz., the producers and refiners. In order that they may come into that contact by and through which the business may be carried on, the intervention of a third class of persons, which has been suggested by the above definition, is required. This leads to the formulation of "transportation" as applied to the oil business as follows:

Transportation in the oil business is that activity or business by which crude petroleum is taken from the producer and delivered to the refiner, who in this instance corresponds to the "consumer" who is mentioned in some of the other definitions in section 5416.

Now the *service* rendered by a transporter of crude petroleum is unlike that rendered by a "natural gas company" or a "waterworks company" and is like that rendered by a railroad company in that it is not given to or for the benefit of the class of persons to whom deliveries are made alone. It is this question which has given me the greatest difficulty, and after conducting an investigation into the customs of the oil business, I have come to the conclusion that it would not be fair to state either that transportation in the oil business is a service performed for the refiner or that it is a service performed for the producer. It is in point of fact a service performed for both the refiner and producer without which neither could do business with the other. So the business is like any other transportation business, except that it does not involve the public as such. That is to say, any person engaged in almost any business is likely to require the service of a common carrier of persons or freight, such as a railroad, interurban railroad or water transportation company; but it is only the producers and refiners of oil who can ever require the services of a transporter of oil, when the transportation is effected by means of pipe lines. That is to say, while some help might be obtained from considering that railroads and water transportation companies, for example, became such by holding themselves out to the public as common carriers for all who may require their services, yet this consideration is not very helpful as applied to the business of transporting oil, because an oil pipe line is incapable of transporting anything but oil. Therefore, a pipe line can never be a "common

carrier" in the full sense that a railroad can become one. So transporters of oil deal not with the public at large but with a very limited and restricted part of the public, viz., the producers and refiners of oil. It can take on its freight only in the producing fields and can deliver its consignment only at the refinery.

With these definitions and principles, all of which I think are practically true from the standpoint of facts at hand, I pass again to the specific case of the Ohio Oil Company. This corporation does not employ its pipe line for the purpose of transporting oil in the sense that I have defined the business of transportation, being engaged in the business of production, it devolves upon this company, as a part of that business, to collect the oil taken from the wells and to place it in storage tanks. To be sure storage tanks are also used in the transportation business if I am not mistaken. On this point, however, it seems clear that the storage of oil is not an essential part of its transportation, but is in a measure, at least, an essential part of its production, for while the crude oil remains in the storage tank it remains the property of the producer even when the storage tank belongs to the transporter, and I am informed that it is customary in the business for transporters of oil maintaining storage tanks to charge storage upon oil received by them for transportation between the time when the oil is received and when it is sold to the refiner; and that often oil is delivered by producers to transporters for storage facilities and is held in their tanks subject to storage charges for considerable lengths of time awaiting a more favorable market for the product.

Now I apprehend that no one would say that a producer of oil on a large scale, who collected the product from his numerous wells and stored it in a given place in the same oil field where a number of storage tanks were located in close proximity to a potential connection with a transportation line operated by another, was engaged in the business of transportation because of the operation of such pipe lines and the equipment necessary therefor as might be required in order to get the petroleum from the wells to his own storage tanks. This is because his intention, in operating such pipe lines, is not to start the oil on its journey to the refinery, which journey constitutes its "transportation" as I have above defined it, but rather to store the petroleum and thereby actually to withhold it from true transportation and delivery to the refinery until the most favorable time for such transportation and delivery. It would be easy to reach this conclusion were the storage tanks in close proximity to the wells and did this process involve no lengthy mileage of trunk pipe line. Yet upon careful consideration I cannot determine in my own mind that the mere length of the transit, and the mere separation of the storage tanks from the producing field, where both belong to and are controlled by the producer himself, are either of them material. Once the principle is laid down that transportation for the producer's own convenience is not the business of transportation which the statute describes, it must be applied regardless of the extent of the transportation.

Just at this point the question naturally arises as to what the holding would be on the above principle as to a pipe line owned by a refiner and operated in connection with the refinery, which none of the particular pipe lines about which you inquire are, unless it be the Tide-Water Pipe Company, in case the pipe line should connect directly with the producer's wells or with storage tanks supplied by a pipe line managed by a producer in the manner in which the Ohio Oil Companys' storage is conducted and maintained. That is to say, if the business of the Ohio Oil Company does not constitute transportation because it is conducted as a part of the business of production, then would the transportation of oil through a pipe line managed and conducted by a refiner in connection with his refinery constitute the business of transportation?

I mention this question so that no unwarranted inference may be drawn from the preceding discussion. At a matter of fact—although this point is not necessary to the determination of any of the questions presented by you in your letter—I am of the opinion that a pipe line operated in connection with a refinery would under certain circumstances constitute the transportation of oil within the meaning of section 5416. So also I am of the opinion that a pipe line operated in connection with producing wells or producers' storage tanks if the pipe line extended to and delivered the oil to the refinery would constitute a transporting agency. In other words it is the transportation which takes the crude petroleum from the producer and delivers it to the refiner which constitutes the business of "transporting oil" within the meaning of said section.

The transportation business conducted by the Ohio Oil Company is closely analogous to the incidental transportation conducted by large manufacturing plants and extensive mines. Railroads operated in such manner are not to be regarded as "railroads" within the meaning of the section under consideration. This is obviously the case.

For all of the foregoing reasons then I am of the opinion that the business conducted by the Ohio Oil company does not constitute that company a "pipe line company" and a "public utility" within any of the provisions of the act of May 31, 1911, containing the sections above quoted.

There remains to be considered yet the case of the Producers' and Refiners' Oil Company and the Tide-Water Pipe Company, which for the purpose of this opinion have already been assumed to be substantially similar. I have pointed out that the facts stated with respect to the second mentioned company are not as complete as might be desired, yet for reasons which I have already mentioned I think the conclusion which I should reach upon either of the two possible constructions which might be placed upon that statement of facts would be the same. For the present, however, I shall consider the two companies just named together.

It appears from the above statement of facts that these two companies are actually engaged in taking oil from the producer and delivering it to the refinery, so that insofar as these facts are concerned the definition of the business of transportation already framed is completely satisfied. However, the business conducted by each of these companies supplies an additional element not heretofore considered, viz., the fact that they actually purchase the oil from the producer and sell it to the refiner so that while it is in transit it is the property of the transporting company. Now it is apparent at a glance that these companies do two things, viz., they transport crude petroleum and they buy and sell the same commodity. In both capacities they constitute the go-between with respect to the producer and refiner. They are like, in one aspect of their business, a jobber or wholesale dealer in merchandise, except that jobbers and wholesale dealers might more properly be regarded as distributors than as collectors, whereas these companies in their relation to the refiners serve as collecting agents in that the volume of petroleum delivered to a single purchaser is greater than the volume received from a single producer if indeed the former does not constitute the entire volume of oil transported.

On the other hand, as already pointed out, the two companies are clearly engaged in transporting oil. A question might, therefore, be raised as to whether the purchase and sale of the commodity is "incidental" to the transportation, or, on the other hand, whether the transportation is incidental to the mercantile business. This puzzling question, however, is not necessarily determinative of the ultimate issue involved. In the first place the principles announced in the former opinion to the commission in the matter of certain

electric light companies come into play here. The mere fact that the so-called "public utility" business is merely incidental to another paramount activity does not necessarily point to the conclusion that the company is not within the intendment of the public utility taxation statute. Applying this principle to the facts respecting these two companies would result in holding that even if the transportation of oil be regarded as incidental to the mercantile business transacted by the companies, yet the transportation itself being such transportation as the statute contemplates would render each of he companies a "pipe line company" within the meaning of the section.

But I am not so sure that it can be claimed that the transportation is even incidental to other business conducted by these companies. Broadly speaking, the activity of these companies, as already pointed out, is limited to satisfying the economic needs of two classes of persons, viz., the producers and the refiners who without their intervention could not come together in such fashion as to enable the business as a whole to be carried on. The economic want which is satisfied is primarily that of transportation. That is to say, if the refineries were located in the producing fields these companies could not do business. There would be no demand for their services. They could not buy from the producers nor sell to the refiners; because in that event the two classes of persons would deal directly with each other. It is only because of the geographical separation of the two classes that these companies exist at all. I might interpolate here a remark which, of course, has no force or weight in itself but which is an interesting sidelight upon the question, the very name of one of these companies "The Producers' and Refiners' Oil Company" is suggestive of the business in which it is engaged, which is the business of bringing producers and refiners together.

Now these companies choose to secure their remuneration for the service which they render by taking title to the commodity which they transport. That is to say, they might conduct themselves as carriers, and as such make stipulated rates for certain transits at which they would transport oil, either at the cost of the producer or at that of the refiner—most likely the latter if my understanding of the business is correct. Instead of so doing, however, they make an outright purchase of the oil in the producing field and an outright sale of it at the refinery. This does not, however, in my judgment alter the essential nature of the business transacted by these companies from the standpoint from which they have been under investigation by me. In fact these companies do no more than is done by any so-called "public pipe line," if any such there be. (In point of fact I am informed that in Ohio at any rate there are not many pipe line companies which purport to be actual common carriers of crude petroleum, although there are many pipe lines in operation.) The business then is in all respects a transportation business. It is such a business also as, in a sense, constitutes a service to so much of the public as is concerned in the general oil business. These things being true I am of the opinion that the mere taking of title in the oil transported is a fact insufficient to alter the legal effect of the other facts which are presented.

It is, therefore, my opinion that the Producers' and Refiners' Oil Company, limited, and the Tide-Water Pipe Company, limited, are "engaged in the business of transporting oil through pipes" within the meaning of section 5416, and that they thereby become "pipe line companies" within the meaning of said section, and their plants become "public utilities" within the meaning of section 5415, General Code.

As to the suggested further question respecting the specific liability of these companies for taxes I refer the commission to a previous opinion in the matter of the Connecting Gas Company in which it is pointed out that business of this

kind is interstate in its character and, therefore these companies would be liable for little, if any, excise taxes on gross receipts.

So far as property taxes are concerned I note one contention made by the Tide-Water Company, limited, which deserves consideration. It is claimed by the representative of that company that the line which runs through Ohio is independent of other lines owned by the company. If this is indeed true then for purposes of property valuation the commission would be limited to the line which traverses Ohio for the purpose of apportioning on the unit basis, that is to say, even if this limited partnership be regarded as an "incorporated company" within the meaning of section 5419, General Code, above quoted, and accordingly if the commission's first inquiry by virtue of such section would be into the total value of all the property owned by the company wherever located, then if the said line in Ohio is separated from other pipe lines the value of all such other pipe lines and equipment and property used in connection with them should first be deducted from the total so ascertained before the apportionment required by section 5446, General Code, above quoted is made. But if the commission ascertains that although there are distinct and in a sense separate branch lines which are owned by this company, of which the Ohio line is one such line, together, constitute a single system used for a single purpose, then on the authority of Adams Express Co. vs. Ohio State Auditor, 165 U. S. 683, the commission may, and should, ascertain the value of the whole system and upon the equitable basis enjoined by the section just referred to apportion the ascertained value between Ohio and the rest of the world, due care being exercised to allow for any essential differences which exist among various lines which the company owns and operates.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

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THE PRODUCERS AND REFINERS OIL COMPANY IS NOT LIABLE FOR TAXES AS A FOREIGN CORPORATION, BUT IS LIABLE FOR EXCISE TAX.

The Producers and Refiners Oil Company is not liable for tax as a foreign corporation for profit. This company is liable for excise tax if it has any gross receipts for business done in Ohio, upon which to compute such excise tax. This company is not liable at all for reports and fees as a foreign corporation for profit.

COLUMBUS, OHIO, May 4, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On November 22, 1912, you submitted to this department for an opinion thereon a question which I shall presently state respecting the status of the Producers & Refiners Oil Company as a foreign corporation for franchise taxation. Previously you had submitted the facts respecting this company, together with other companies doing a somewhat similar business, for my opinion as to whether or not the business done by those companies constitutes them "public utilities" for excise and property taxation purposes.

I have come to a conclusion with regard to this request which in reality obviates the necessity for considering the latter question. Because of the

principles involved, however, I have undertaken to answer the question as it would have to be answered if the Producers & Refiners Oil Company were not a "public utility company." The question is raised by the following facts:

> "The Producers & Refiners Oil Company is a corporation organized under the laws of Pennsylvania, and on August 7, 1906, complied both with sections 148c and 148d of the Revised Statutes. Ever since that date it has annually made reports as a foreign corporation for profit and has paid the minimum fee of $10.00.
>
> "The property of the company located in Ohio is small in value as compared with that located outside of Ohio. The business transacted in Ohio is separable into two classes, viz:
>
> "1. A relatively large amount of crude petroleum was bought by the company and delivered into its lines for transportation into other states.
>
> "2. A very small amount of local business intrastate in character was also transacted.
>
> "The company buys crude petroleum in Ohio and owns a pipe line through which it transports the crude petroleum purchased by it into other states where it is sold to purchasers. In short, the company may be regarded, for the purpose of this opinion, as doing a "pipe line' business exclusively inasmuch as it neither produces nor refines petroleum."

This statement, however, must be qualified by noting the fact that the company actually becomes the owner of the petroleum which is transported in its pipe lines and thus becomes a middle-man in the purchase and sale of the product as well as a transporting agency.

The company contends that in determining the proportion of the authorized capital stock represented in this state so far as business is concerned, the commission must compare purely local business transacted in Ohio, which is small in amount, with the business transacted outside of Ohio, for the reason that the other business of the company transacted in Ohio, which is large in amount, is interstate in character, and cannot lawfully be used for the purpose of computing the annual fee as that would impose a burden upon interstate commerce in violation of the federal constitution.

The question, therefore, is as to whether the commission in determining the proportion of the authorized capital stock of the company represented in this state may ascertain the same upon the basis of the entire amount of business transacted, or is the commission limited to the relatively small amount of purely local business for this purpose?

I call attention to an opinion rendered somewhat recently to the commission in the matter of the Detroit & Cleveland Navigation Company. In that opinion I traced the legislative history of the so-called "Willis law" with a view to disclosing the meaning of the phrase "subject to compliance with all other provisions of law," found in section 5499, General Code. I came to the conclusion that the meaning of this phrase is "subject to compliance with section 183, General Code." That is to say, I was then of the opinion, and still am, that foreign corporations which are not liable to compliance with section 183, General Code, are not liable for annual reports and fees under the so-called "Willis law" provisions of the present Tax Commission law. The corporations which are not subject to section 183, General Code, are those enumerated in section 188, General Code. The following provision of this section will be sufficient for present purposes:

"The preceding five sections shall not apply to foreign * * * express, telegraph, telephone, railroad, sleeping car, transportation or other corporations engaged in Ohio in interstate commerce; * *"

The Producers & Refiners Oil Company is a foreign corporation engaged in interstate commerce in the exact sense. Indeed, it is engaged in the transportation of interstate commerce. Therefore, it is not such a corporation as is liable to compliance with section 183, General Code, which corresponds with section 148c of the Revised Statutes.

It will, therefore, be seen that if the Producers & Refiners Oil Company had not complied with section 148c of the Revised Statutes and had not paid taxes for a series of years upon the theory that it was subject to such compliance the question presented by the facts stated in your letter would be precisely the same as that involved in the case of the Detroit & Cleveland Navigation Company.

The opinion in the matter just referred to, however, is not conclusive of the question here presented because the Producers & Refiners Oil Company has actually complied with section 148c, now section 183 and has actually been paying annual fees. This suggests the question as to whether or not a foreign corporation which is not subject to compliance with "all other provisions of law" within the meaning of section 5499 but which has actually complied with all other provisions of law is subject to the provisions of the sections immediately following and including said section 5499.

It might be urged in support of an affirmative answer to the question just suggested that the original certificate of compliance, and the annual fee exacted from foreign corporations by the sections already alluded to are in return for a privilege. Neither the original nor the annual fee constitutes a tax upon the *doing* of business but is a tax upon the right to exercise certain corporate franchises. Now it might be asserted that the corporation by securing the original certificate has acquired the right which constitutes the subject of taxation, and having so acquired the right cannot be heard to deny its liability for the annual tax.

Upon careful consideration I have rejected this view and have adopted the opposite conclusion. As a matter of fact the act of the Producers & Refiners Oil Company in complying with the provisions of section 148c Revised Statutes was a mere nullity. It conferred upon the corporation no right which it, so far as its transaction of business was concerned at any rate, would not have had without any such action. That is to say, it is now the settled law of the United States, as it seems to have been the certain policy of the general assembly in enacting section 148c, Revised Statutes, that a corporation of one state may without let or hindrance on the part of another state carry on in such other state the business of transportating or conducting interstate commerce, and to that end may exercise its corporate powers in such other state and be recognized as a body corporate for that purpose. Western Union Telegraph Co. vs. Kansas, 217 U. S. p. l.; Commercial Co. vs. Glenn Mfg. Co., 55 O. S. 217, Fruit Co., vs. Armour, 74 O. S. 168.

Now while it is reasonable to argue that a tax my be levied upon a right to do, even in the absence of its exercise, and that the state has a right to tax a privilege of its own creation so that so long as the privilege exists, the liability for the tax must also continue, yet if the proposed "privilege" in fact has no real existence it is my opinion that the liability for the tax is likewise non-existant.

The case is entirely different from that of a foreign corporation which after taking out a certificate under section 183, General Code, in fact withdraws

from the state and ceases to transact business or to own or use property therein. In such a case the liability for the tax continues because the privileges —i.e. the right to transact business—still exists. That is to say, the privilege at one time existed and was real and substantial. In the case now under discussion, however, the "privilege" i.e., the supposed act of the state conferring rights upon the corporation, never existed in reality or substance.

For the foregoing reasons I am of the opinion that the Producers & Refiners Oil Company is in no event liable for taxes as a foreign corporation for profit. This is entirely aside from the question suggested by the other letter which I have already mentioned respecting the liability of this company for excise taxes as a "pipe line company." I have reached the conclusion that this company is liable for excise taxes if it has any gross receipts for business done in Ohio upon which to compute such excise tax. That liability of itself would, by virtue of section 5518, General Code, discharge any supposed liability for franchise taxes as a foreign corporation for profit. If, however, the company has no gross receipts from intrastate business done in Ohio, and, therefore, is not liable for any excise taxes, then the principles of this opinion apply, which is a sufficient reason for going into the question in the manner in which I have done.

It is my conclusion, therefore, that the Producers & Refiners Oil Company is not liable at all for reports and fees as a foreign corporation for profit, and therefore, the exact question which the commission submits cannot be answered. I am aware that my opinion was not directly asked upon the question which I have actually considered, but on another question. However, on careful consideration I became satisfied that I could not answer the commission's question because, at least so far as transportation companies are concerned, it would be impossible for reasons already stated, for a foreign corporation of this kind actually engaged in interstate commerce to be liable for any taxes whatever as a foreign corporation for profit.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

464.

PARAGON REFINING COMPANY NOT A PIPE LINE COMPANY UNDER THE LAWS OF OHIO.

The Paragon Refining Company, a corporation engaged in refining petroleum, which transfers its petroleum in a pipe line from the field to its refinery, is not a pipe line company within the meaning of section 5416, *General Code, for excise tax and general property tax under the laws of Ohio.*

COLUMBUS, OHIO, June 4, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: In conncetions with questions involving companies engaged in broadly similar business, you have submitted to me, separately, the question as to whether or not, upon the following statement of facts, the Paragon Refining Company is a "public utility," or a "pipe line company," for excise tax and general property tax purposes under the laws of this state.

The company is principally engaged in the business of refining, as defined

in the opinion respecting the other companies above referred to. In connection with its refinery, it operated transportation pipe lines from the producing field to the said refinery, through which crude petroleum, some of which is produced by the company itself and some of which is purchased from other producers, is carried from the field to the refinery. No separate charge is made for transportation, nor is the oil produced or purchased by the company sold as it passes from the transportation line into the refinery.

At first blush I was inclined to the view that the case of the Paragon Refining Company is essentially identical with that of The Tide-Water Pipe Company, one of the companies considered in the former opinion, and therein held to be a "pipe line company," for excise tax and general property tax purposes. Upon more careful consideration, however, I observe a distinction between the two cases, which, slight though it is, has in my opinion, determining effect. I refer to the fact, as stated in the statement respecting the nature of the business of The Tide-Water Pipe Company that although the old transported through its pipe lines was purchased in the field and belonged to the company while it was in the pipe line and in course of transportation, and although the refinery, in the case of that company, belonged to the company itself, yet, there was a separation of the business of refining from the business concerning which your question was asked. So that, whether or not, in the case of the Tide-Water Pipe Company, the business concerning which your question was asked could have been regarded in any sense as incidental to the business of refining, yet it was clear that it was not strictly so, having been separated therefrom in the usual course of business by the company itself.

The case of the Paragon Refining Company differs from that of The Tide-Water Pipe Company in this one particular. As in the other case, the oil transported belongs to the transporting company, and the activity of transportation is incidental to some other business. But in the case of the Paragon Refining Company the incidental relation is much closer than that which exists in the other case. There is no separation of the business of refining from that of transportation. There are no receipts from transportation—although this is not of itself a determining consideration. The important thing is that it is, on the statement of facts furnished me, impossible to distinguish and separate the transportation activity of the Paragon Refining Company from its refining and producing business.

Now, in the opinion of March 13, to the commission, in which the meaning of the word "business" as used in section 5416, General Code, was considered, I stated the following conclusion, found on page 19 of the pamphlet which has been printed:

> "That conclusion is that a person, partnership or corporation is 'engaged in the business' defined by section 5416, when it is found doing any of the acts therein enumerated, as a continuous or habitual activity, whether as a principal pursuit, or an independent, though subordinate, undertaking, or as a purely incidental undertaking.
>
> "In laying down this broad principle, however, I deem it proper to state that it may be subject to certain exceptions. I have no such exceptions specifically in mind, but realize that the nature of the subject is such that it is unsafe to state rules too rigidly."

I adhere to the conclusion thus expressed, but in the light of the facts as presented by the case of the Paragon Refining Company, I am moved to add another qualification to the definition suggested, namely:

"In order to constitute a 'business' within the meaning of section 5416, an activity must be separable, by means appropriate to the purposes of the taxes involved, from other activities to which it may be incidental. If the activity is so separable, the mere fact that it is merely incidental to another activity is immaterial. If, however, it is not so separable, then it does not constitute a 'business' within the meaning of the statute."

In reaching this conclusion I have given weight to the legislative history of the sections involved, which are quoted in other opinions, and need not be quoted here. For the purposes of this opinion, it is sufficient to state that most of the definitions in section 5416 were first adopted in the act of 1896, and have remained unchanged ever since. The act of 1896 imposed a uniform excise tax at the rate of one-half of one per cent. upon certain defined companies, among them pipe line companies. I think that it is clear that under that law, a pipe line company was not liable for excise taxes and therefore, conversely, was not "a pipe line company" in the technical sense, unless it had separate receipts from the pipe line business as such, whether those receipts were in the nature of transportation charges, or consisted of receipts from sales of petroleum bought and sold by the company for the purpose of transportation only, as in the case of The Tide-Water Pipe Company. When the receipts of the company consisted entirely of receipts from the sale of manufactured products, is in the case of the Paragon Refining Company, I do not think that it could have been contended that the company constituted a "pipe line company" for the purposes of the original act.

Now, inasmuch as the definitions found in the original act have never been changed, I am of the opinion that they do not include any subjects of legislation not included within the terms of the original definitions; and this despite the fact that by recent legislation these definitions have been used to designate the subjects of general property taxation by and under the unit rule of valuation, and have been supplemented by the comprehensive definitions of section 5417, for example, under which the gross receipts of a public utility which is a corporation are held to mean and include all of the receipts of the corporation as such, from whatever source derived, whether from the operation of the utility or not. The enactment of section 5417 did not, in other words, in my opinion, operate to enlarge the class of things comprehended within the definition of section 5416, which had been previously adopted, but simply operated to enlarge the definition of the term "gross receipts."

Therefore one test of ascertaining what constitutes a "pipe line company" within the meaning of the present laws, is afforded by considering what would have constituted such a company under the act of 1896. The Paragon Refining Company, which did not so conduct its transportation business so as to permit separation of its receipts from that source, from its receipts for merchandise sold, or even to afford any means of separating its transportation activities from the remainder of its business by any means could not, under the original act, have been regarded as a "pipe line company." Therefore, it is not a "pipe line company" under the existing law.

This conclusion is supported by the decisions of the federal courts in two cases arising under the federal revenue laws, viz.: United States vs. Northwestern Ohio Natural Gas Company, 141 Federal, 198, and United States vs. Consumers Gas Trust Company, 142 Federal 134. I confess that I cannot follow the learned judges who decided these cases through the entire course of their reasoning, particularly when they cite the case of Carothers vs. Philadelphia County, 118 Penna. State, 485, in support of the conclusions reached by them.

However, I heartily agree with the principle announced by the court which is to the effect that a tax on the receipts of a business cannot be levied upon a company which does the things that would otherwise amount to the business taxed, but whose receipts or income are exclusively derived from another activity or business to which that activity is purely incidental and into which it is so merged as to be incapable of separation therefrom.

It does not militate against the conclusion which I have reached, that there is no seeming reason for distinguishing between the Paragon Refining Company and The Tide-Water Pipe Company, for example, so far as property taxation under the unit rule of valuation is concerned. The general assembly has been content to adopt the excise tax definitions in defining the subjects of this kind of taxation; hence it has failed to comprehend within the definition for property tax purposes the companies which fall outside of the definition as applied to excise taxes.

Nor can it be urged, I think, against my conclusion, either in this opinion or in the other case involved, that the facts herein are so nearly like those respecting the Producers & Refiners Oil Company, for example. The distinction, though slight, is sufficient to charge the nature of the business transacted.

This opinion should be read in connection with the opinion respecting the four other oil transporting companies. By so doing, the application of so much of section 5416, General Code, as relates to pipe line companies, as I construe it, may be worked out, I think, in its entirety.

I am of the opinion, for the reasons above suggested, that the Paragon Refining Company is not "a pipe line company" within the meaning of section 5416 of the General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

542.

TAXPAYERS MAY WORK OUT THE ROAD TAX LEVIED AGAINST THEM AT ANY TIME PRIOR TO THE FIRST OF SEPTEMBER, 1913.

Any taxpayer may work out the road tax levied against him any time prior to September 1913, and receive a certificate for the same, or if he so desires he may pay the tax.

COLUMBUS, OHIO, October 1, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On June 16, 1913, I directed to you an opinion, in which, in answer to a question asked by you, I gave it as my view that the passage of house bill No. 389 amending section 5649, General Code, would not affect the continued operation of section 7488, General Code. This opinion was based upon three considerations, viz.:

1. Section 7488 was not repealed or amended expressly and the presumption is against an implied amendment or repeal thereof.

2. A former general assembly had enacted laws substantially the equivalent of present section 7488 and amended section 5649 as a part of the same act, seeming to indicate that it was possible for the two statutes to subsist side

by side, and leading to the conclusion therefore, that the two sections are not necessarily inconsistent.

3. Where there is a general provision which is inconsistent with a specific provision relating to a particular subject, the specific provision is construed as an exception to the general provision, even though the latter be later in point of enactment. This is a general rule of statutory construction.

In a letter just received from you, under date of June 21st, you call my attention to certain considerations which I overlooked and which, in my judgment, entirely over-ride the considerations upon which the opinion referred to was based. You point out that while section 7488, General Code, vests in the township trustees authority to levy a tax which may be worked out by taxpayers in labor performed on the roads at the rate paid for similar services. This section of itself does not provide the machinery by which it may be carried into effect. That is to say, in order that the declared right of the taxpayer to work out his road tax may be made effective and carried into execution it is necessary to provide by law for the issuance, by some duly constituted authority, of certificates showing the amount of labor performed by an individual taxpayer, which certificates would be acceptable at the county treasury in payment of taxes, or some equivalent machinery.

You point out that former section 5649 did provide such machinery, but that the section in its amended form, when the same became effective, does not provide such machinery, these provisions of the former section having been stricken out. You point out also that the working of the roads is now under the direction of the road superintendents, who have been substituted for the road supervisors who formerly exercised this duty.

An examination of the statutes, being sections 7137 to 7180, General Code, fails to disclose any authority in the road superintendent to issue any certificate receivable at the county treasury in payment of taxes. On the other hand, section 7147, General Code, clearly implies that the road superintendent shall pay for all labor performed on the roads at the rate of $1.50 per day out of funds subject to his disposition. It is true that section 7148 gives the superintendent authority to fix compensation for cutting weeds which may be credited on the road tax, but this is a special proceeding. Aside from this provision, however, there is no authority vested in the road superintendent to do the thing which would be necessary in order to enable the taxpayer to receive credit upon his road tax for work performed by him upon the roads.

You point out that the same situation existed under the act of 1906 which was referred to in the former opinion; so that although it was proper for me to impute to the legislature of that year the intention that two provisions similar to those found in the amended law of 1913 should exist at the same time, yet that intention, even under the act of 1906, was not effective for lack of appropriate machinery to carry it into effect. These considerations lead to the following conclusions:

1. Whether or not the general assembly intended to amend section 7488 or to repeal it by implication, the amendment of section 5649 so as to strike out of that section all machinery for receiving credit on road taxes renders said section 7488 *inoperative* insofar as the right to work out the road tax therein provided for is concerned.

2. Inasmuch as it is of the essence of section 7488 that the tax therein provided for shall be subject to be worked out by the taxpayers, subsequent legislation which renders the labor provision thereof inoperative, is equivalent to a repeal of the whole section. That is to say, the legislature would not originally have granted to the township trustees authority to make the levy

mentioned in section 7488 in the absence of any machinery giving to the taxpayers the right to work the said tax out on the roads.

Therefore, I am of the opinion that section 7488 will be no longer effective when the amendment of section 5649, General Code, becomes effective, which will be, as stated in the former opinion, sometime in August of this year. To this extent the former opinion must be regarded as reversed.

This conclusion makes it necessary to consider the other two questions asked in your letter of May 17th, which may be combined into a single question as follows:

> "Inasmuch as the change in the law did not take place until August, 1913, if township trustees have levied this year taxes under section 7488, may the taxpayer discharge the same by labor after the date when the repeal and amendment of section 5649, General Code, becomes effective."

This question is of considerable difficulty. Prior to the enactment of the Smith one per cent. law, so-called, the road taxes to be worked out in a given year were to be fixed earlier in the year so that the road labor in discharge thereof could be performed during the succeeding summer. The machinery for this purpose was provided by section 7485, General Code, which provides as follows:

> "The auditor of each county, after the county commissioners and township trustees at their annual sessions for that purpose, have determined the amounts to be assessed, for road purposes in their respective counties and townships, shall forthwith give notice, in a newspaper in general circulation in the county, of the per cent. on each hundred dollars of the valuation so determined to be assessed in such county and township respectively. He shall make a list of the names of taxpayers, and the amount of road tax with which each stands charged, and transmit it to the clerk of the proper township."

I think it is apparent from this section, read in connection with section 5649, in its present form, i. e. prior to its amendment, wherein the superintendent is required to make his return "on or before the 5th day of September in the year in which levied," and wherein it is further provided that "when such road tax is paid in labor, such labor shall be performed before the first day of September in the year in which levied," that the labor should be performed before the tax was technically charged for collection. The Smith law may have had some technical effect upon the operation of section 7485 after all, though the budget commission has no control over levies which may be worked out by the taxpayer. It may be (although the point is not decided) that the levies themselves do not become perfect until they have been certified through the budget commission.

However, this may be, I am of the opinion that section 5649, General Code, in its original form, as aforesaid, continued to control after the enactment of the Smith law, and that the labor to be performed must be credited upon the tax levied in the year of the performance thereof and not upon the taxes charged in the fall of the preceding year.

If, therefore, township trustees have made a levy for this year under section 7488, General Code (which they have the right to do), road labor performed, at least up to the date when the amendatory act became effective, can be credited upon the payment of such taxes through the machinery provided in the present

section 5649. This seems to be clear. Your question, however, relates to the right of the taxpayers to receive a certificate from the superintendent for labor performed after the amendment of section 5649 became effective.

It will not be necessary to quote section 5649 in full. The section is a lengthy one and its contents have already been described. I have already pointed out that it is essential to the legislative idea implied in section 7488, General Code, that the levy therein authorized to be made, may be worked out by the taxpayer. I have also shown that section 5649, General Code, in its original form, and the machinery therein provided for, is necessary in order to complete the idea of section 7488. In other words, when the levy is made under section 7488, the right of the taxpayer to work out the road tax during the succeeding summer thereupon attaches under section 5649 in its original form, and, therefore, the superintendent will continue to issue certificates, at least up to the date when the change in the law became effective.

In my opinion the case comes within the reason and spirit of section 26, General Code, which provides that:

> "Whenever a statute is repealed or amended, such repeal or amendment shall not in any manner affect pending * * * proceedings * * * unless so expressed."

I am of the opinion that the working out of the road labor under a levy made under authority of section 7488 is a proceeding and that the taxpayer has a right to pay the tax in road labor and to have issued to him a certificate, so that the amendment of section 5649 does not by virtue of section 26, General Code, operate to take away that right.

Virtually, then, the amendment to section 5649, General Code, although it technically took effect sometime early in August, 1913, did not become complete until after the first of September, 1913, and does not operate at all until the period for the collection of road taxes in the year 1914. Therefore, any taxpayer might work out, at any time, prior to the first of September, 1913, the road tax levied under section 7488, General Code, in the year 1913.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

627.

A FOREIGN CORPORATION, OTHER THAN A TRANSPORTATION COMPANY, MUST PAY FRANCHISE TAX ON ALL ITS PROPERTY AND ALL THE BUSINESS TRANSACTED IN OHIO.

Where a foreign corporation, other than a transportation company, transacts business and has property in Ohio, so as to make it subject to the annual tax on foreign corporations, all the business so transacted in Ohio, together with the property so owned and used, may be taken into consideration in determining that proportion of the authorized capital stock of the corporation on which the computation of the franchise tax may be based.

COLUMBUS, OHIO, Nov. 25, 1913.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Mr. Laylin, of this department, informs me that the Tax Commission has been confronted in various forms with a question which may be generally stated as follows:

"A foreign corporation, other than a transportation company transacts some business and has some property in Ohio, and is admittedly liable for some franchise taxes. A part of its business in Ohio, however, consists of sales of manufactured products in the original package or otherwise under such circumstances as to lend support to the contention that such business is interstate in character, and constitutes interstate business.

"In determining the amount of the authorized capital stock of the corporation represented by its property and business in Ohio should the commission take into account the business which may be regarded as interstate in character?"

Mr. Laylin informs me that a question of this type has been raised, for example, in the matter of the National Biscuit Company, and that the question has been discussed informally but that no formal request for an opinion has come to this department from you. I have determined to adopt the somewhat unusual course of advising you in advance of the receipt of a formal request for an opinion for the reason that the question has been cleared up to a considerable extent by the decision of the Supreme Court of the United States in the case of the Baltic Mining Company vs. Massachusetts, rendered on Monday, November 3, 1913, a copy of which I have received from the clerk of that court.

In that case the Supreme Court sustained the constitutionality of a law something like our own law for taxation of the franchises and privileges of foreign corporations. The most important section of the Massachusetts act is as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one-fiftieth of one per cent of the *par value of its authorized capital stock* as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

It will be observed that under the Massachusetts law every foreign corporation is obliged to pay on the entire value of its authorized capital stock, whereas under the Ohio law a foreign corporation is required to pay only on such portion of its authorized capital stock as is represented by its property and business in Ohio, as compared with its property and business outside of the state. In the abstract sense, therefore, the basis of taxation under the Massachusetts statute is more extensive, so to speak, than that under the Ohio statute.

The Baltic Mining Company which took the case to the Supreme Court of the United States had certain property and assets in Massachusetts but was engaged principally in the business of mining in the state of Michigan. Some of its product was sold for delivery in Massachusetts and transported from the Michigan smelter to the purchaser. The place of sale, as a general rule, was New York City, although in exceptional instances sales might be made out of the usual course of business in the state of Massachusetts for delivery there.

A case heard contemporaneously with that of the Baltic Mining Company was that of the S. S. White Dental Manufacturing Company vs. Massachusetts, which presents the converse of the case of the Baltic Mining Company, in that

this company, while a non-resident of the state, had a business office and sales room in Boston from which place it conducted a business in part consisting of mail orders received at, and filled from the Boston sales room, and delivered to points outside of the state by means of the instrumentalities of interstate commerce.

As stated by Mr. Justice Day, who delivered the opinion:

> "The specific objections of the plaintiffs in error to the imposition of this tax under the facts shown in the records are threefold: First, the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the Commonwealth of Massachusetts; and third, the tax denies to the plaintiffs in error the equal protection of the law."

The court dismissed all three of these objections and in so doing distinguished first, the class of cases holding that a corporation may not be excluded by a state from the privilege of conducting an interstate business within its borders; holding in substance that although the state might not prohibit the business, it, nevertheless might tax it. The court distinguished also cases like Western Union Telegraph Co. vs. Kansas, 216 U. S., 1, Pullman Co. vs. Kansas, 216 U. S., 56 and other similar cases on the ground which is perhaps best stated by quoting from the opinion itself:

> "In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the Western Union Telegraph Company case, the company had a large amount of property permanently located within the state and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the state, in state and interstate business, for many years. There was no attempt to separate the intrastate business from interstate business by the limitations of state lines in its prosecution.
>
> "An examination of the previous decisions of this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state. *In the cases at bar the business for which the companies are chartered is not of itself commerce.* True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the constitution of the United States, and it is not within the authority of a state to tax it by burdensome laws. From the statement of facts, it is apparent however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions."

And also at another point, the following language is employed:

> "It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it."

I apprehend that the distinction in the mind of the court lies in the fact that there is a difference, so far as the question made in the case was concerned, between foreign corporations engaged in *transporting* interstate commerce, i.e., furnishing the very instrumentalities by which that commerce may be carried on, and corporations engaging in such commerce as merchants or manufacturers and the like.

The second point respecting the taxation of property outside of the jurisdiction of the state was decided upon the ground that the *authorized* capital stock, as distinguished from the *actual* capital stock is a proper measure of the value of a privilege taxable in the state, and cannot be regarded as in substance a tax on *property* of a corporation. On this point Mr. Justice Day uses the following language:

> "In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but the property of the corporations, including that used in such commerce, represented by the authorized capital of the corporations, is taxed and therefore interstate commerce is unlawfully burdened by a state statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. In the Baltic Mining Company case, the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the White Dental Company case the authorized capital is $1,000,000, while the assets aggregate $5,711,718.29. Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

This decision, then, permits the use of the authorized capital stock of a foreign corporation as the sole measure of a tax upon the privilege of that corporation to do business in the state; that is to say, if a corporation is admittedly taxable at all on its privileges the tax may be based upon the whole authorized capital stock, and if upon the whole authorized capital stock then, assuredly, upon any portion thereof less than the whole whether that portion be ascertained by comparing business done in the state, which is interstate in character, with the whole business of the corporation, or otherwise.

I am, therefore, of the opinion that under the Ohio law, the commission is entitled to and should use all the business of the corporation transacted in Ohio whether technically of an interstate character or not, for the purpose of ascertaining the proportion of the authorized capital stock which shall constitute the measure of the tax.

Not desiring to be misunderstood, I call attention also to the fact that the Ohio law itself limits the measure of the tax to something less than the entire

authorized capital stock of the corporation, although under the decision cited this limitation might perhaps be regarded as unnecessary from the view points of constitutional limitations. Hence, it follows that in applying the rule of the statute care must be taken to ascertain whether or not the business in question is actually transacted "in Ohio." The mere fact, for example, that a foreign corporation might sell goods to an Ohio purchaser would not of itself make that sale Ohio business within the meaning of the "Willis law." The sale must itself be consummated in Ohio in order to be counted on that side of the ledger, so to speak. Furthermore, the commission must bear in mind that the corporation is not liable at all if it is engaged solely in interstate business or if it is one of the transporters of interstate commerce mentioned in section 188, General Code; the non-liability of the latter class of companies existing regardless of the extent of the interstate transportation as compared with intrastate business of the company.

I might state in this connection that the fact that the Massachusetts law, as interpreted by the supreme judicial court of that state, did not apply to this class of companies, may have been one of the elements inducing the Supreme Court of the United States to hold the law constitutional. At least these facts are commented upon by Justice Day in his opinion.

In short, for the present purposes, I would limit this opinion to the statement that where business is actually transacted in Ohio, as by the making of sales in the original package or by the making of sales from an Ohio warehouse for delivery outside of the state, so that the business is transacted "in Ohio" within the meaning of the "Willis law," such business so transacted while "technically interstate" in character, may lawfully be taken into consideration by the commission in ascertaining the taxable proportion of the authorized capital stock of a foreign corporation.

While the decision in the Massachusetts case above referred to called my attention to the question in such a way as to induce me to address this opinion to you, the above conclusions are supported also by the case of People ex rel Parke, Davis & Co. vs. Roberts, 171 U. S. 657. The facts in this case are strikingly similar to the above hypothetical statement.

Parke, Davis & Co., was a corporation organized under the laws of the state of Michigan for the manufacture and sale of chemical and pharmaceutical preparations. Its manufactory was situated in the city of Detroit. The corporation had a warehouse and depot in the city of New York and there kept on hand varying quantities of its manufactured products which were sold there at wholesale *in original packages.*

The resident manager of the company in New York, in addition to selling the manufactured articles of the company, also sold crude drugs *imported from foreign countries in the original packages.*

The law of the state of New York imposed upon foreign corporations, together with domestic coporations, "a tax upon its franchise or business" to be computed upon "the amount of capital stock employed within this state."

It is claimed, of course, that the corporation was not liable to any tax, for the reason that it transacted nothing but interstate and foreign business.

Mr. Justice Shiras delivering the opinion of the court, from which Mr. Justice Harlan only dissented, first made the distinction already referred to in this opinion between corporations engaged in the business of furnishing instrumentalities of interstate and foreign commerce, on the one hand, and corporations engaged in interstate commerce in the manner in which Parke, Davis & Co., was admittedly engaged therein, in the following language:

"When a corporation of one state, whose business is that of a

common carrier, transacts part of that business in other states, difficult questions have arisen, * * *. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different states and the subject has been much discussed in several recent cases. (Citing Western Union Teleg. Co. vs. Atty Gen. 125 U. S. 530; Railway Co. vs. Backus, 154 U. S. 421; Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S. 18, and Adams Express Co. vs. Ohio, 165 U. S. 194.)

"It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

"The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of Paul vs. Virginia, 8 Wall, 168, and subsequent cases affirming that one," (citing in particular Horn Silver Mining Co. vs. New York, 143 U. S. 305).

This distinction was considered by Mr. Justice Shiras and the court at that time as sufficient ground upon which to uphold the New York law and its application to corporations doing business in that state in the manner in which Parke, Davis & Co. was doing business therein, as against the objection that such application of the statute would constitute a burden upon interstate commerce. I shall perhaps have hesitated, however, to apply the doctrine of the case last discussed to the situation which now confronts your commission in the light of the many more recent decisions of the supreme court of the United States upon the general subject, and particularly in the light of what may be termed the "Kansas cases" already referred to herein, but for the fact that in the Massachusetts case already discussed, the court has re-affirmed its adherence to the doctrine of the Parke, Davis & Co. case and to the distinctions therein made between corporations actually carrying on interstate commerce on the one hand, and corporations whose mercantile operations might be regarded as technically interstate on the other hand. Then, too, the express reference to the unquestioned propriety of basing a franchise tax upon the authorized capital stock as distinguished from the actual capital of the corporation, made in the Massachusetts case, seems to me to furnish a final cumulative ground for the opinion which I have already expressed.

Subject to the qualifications which I have tried to outline, then, and with the additional remark that the statute of Ohio does not go so far apparently as, under the doctrine of these cases it might go without violating the federal constitution, I beg to advise the commission that where a foreign corporation actually transacts business in Ohio (as distinguished from what may be termed the transaction of "Ohio business," i. e. business with the citizens of Ohio), and owns property in this state, so as to make it subject to the annual tax on foreign corporations, all the business so transacted in Ohio, together with the property so owned and used, may be taken into consideration in determining that proportion of the authorized capital stock of the corporation on which the computation of the franchise tax may be based.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Public Service Commission)

4.

PASSENGER FULL CREW LAW—INTERPRETATION—CRIMINAL OFFICES—"COACHES"—EXEMPTION OF DINING CAR AND PRIVATE CAR —"CARS CARRYING PASSENGERS" INCLUDES PULLMAN CAR.

In construing the various offices defined in the passenger full crew law, 102 O. L. pages 508 and 509, under the express provisions of that act, the term day coach shall include a combination mail or baggage and passenger car.

The term "cars carrying passengers" shall include pullman cars and day coaches, but shall not include state dining cars, and private cars. The term day coaches means the ordinary day coach as used and understood in the railroad world.

COLUMBUS, OHIO, Jan. 6, 1913.

Public Service Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication in which you request my opinion as to the meaning of what is usually designated as the Passenger Full Crew Law, being House Bill No. 93, and found on pages 508 and 509 of volume 102, Ohio Laws. In reply thereto I desire to say that on September 12, 1911, I rendered an opinion to your board, in which I endeavored to construe an offense, or how many offenses said act defines; and I can do no more now than to more fully construe said law, and, therefore, render the following as supplementary to the original opinion:

Under the provisions of said act there are six offenses defined, as set forth in the opinion of September 12, 1911, as follows:

Whoever, being superintendent, trainmaster, or other employe of a railroad company, sends or causes to be sent outside of the yard limits,

1. A train of not more than five cars, any one of which carries passengers, with a crew of less than one engineer, one fireman, one conducter and one brakeman;

2. A train of five cars, four of which said cars are day coaches carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and less than one additional brakeman;

3. A train of more than five cars, three or more of which are day coaches carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman, and less than one additional brakeman;

4. A train of more than six cars, four of which carry passengers with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and less than one additional brakeman;

5. A train of more than seven cars, two or more of which carry passengers, with a crew of less than one engineer, one fireman, one conductor, one brakeman, with less than one additional brakeman;

6. A train of six or more cars carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman, and less than one additional brakeman;

Said act also defines another offense, namely:

That whoever, being superintendent, trainmaster or other employe of a railroad company, sends or causes to be sent outside of the yard limits a passenger train with more than two cars, either of which carries passengers, and requires the brakeman to perform the duties of a baggagemaster or express agent, shall be fined not less than twenty-five dollars for each offense, etc.

This act also provides that a combination mail or baggage and passenger car shall be regarded as a day coach and counted as one car, but exempts straight dining cars and private cars from being classified as such cars as are carrying passengers.

Under the first offense defined in said act a superintendent, trainmaster or other employe of a railroad company may not send out a train of not more than five cars, any one of which carries passengers, with less than a full crew, namely: one engineer, one fireman, one conductor and one brakeman, unless the car carrying passengers is a private car; in which event such train does not come within the provisions of said act, on account of the exemption of private cars. But any other cars of such train, carrying passengers, must be considered in the making up of said train for the purposes of said act.

In defining the second offense the legislature has used the term "day coaches carrying passengers," and has provided that a superintendent, trainmaster or other employe of a railroad company may not send or cause to be sent outside of the yard limits a train of five cars, four of which said cars are day coaches carrying passengers, with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman and less than one additional brakeman. The term "day coach" was intened by the legislature to mean the ordinary day coach as used and understood in the railroad world.

Under the third offense defined in said act a superintendent, trainmaster or other employe of a railroad company may not send out, or cause to be sent out of the yard limits a train of more than five cars, three or more of which are day coaches carrying passengers, with a crew of less than the full crew with one additional brakeman. In computing the number of coaches carrying passengers the same rule applies as is set forth under Offense Number Two, above defined.

The fourth offense consists in sending out a train of more than six cars, four of which carry passengers, with a crew of less than a full crew and one additional brakeman; and under this offense is included any train of more than six cars, four of which carry passengers, either day coaches or pullman coaches, or any other car carrying passengers except private cars.

The fifth offense consists of sending a train outside of the yard limits, of more than seven cars, two or more of which carry passengers, with less than a full crew and one additional brakeman; and in computing the number of cars carrying passengers any cars may be included therein except private cars.

The sixth offense consists of sending or causing to be sent outside of the yard limits a train of six or more cars, carrying passengers, with a crew of less than one engineer, one fireman, one conductor, one brakeman and one additional brakeman; and in computing the number of cars carrying passengers all cars may be included, which carry passengers, except dining cars and private cars, exempted under the provisions of said act.

The other offense described in said act consists of sending, or causing to be sent outside of the yard limits, a passenger train of more than two cars, any of which carries passengers, and requiring the brakeman to perform the duties of baggagemaster or express agent.

I think that the legislature, in enacting said act, intended to exempt pullman coaches from certain offenses, and to include them in others.

In computing the number of cars which go to make up a train, or trains, under the respective offenses defined, a combination mail or baggage and passenger car shall be regarded as a day coach, and as one car.

I come to the above conclusions for the reason that the legislature, in enacting said law, must have taken into consideration the fact that pullman coaches universally have porters thereon for the purpose of taking care of pas-

sengers traveling in said coaches; but in long trains, as those set forth in offenses four, five and six, that although composed of day coaches and pullman coaches, carrying passengers, no distinction is to be made and each class of cars should be counted in making up such trains.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

56.

PUBLIC UTILITY—POWER OF PUBLIC SERVICE COMMISSION TO COMPEL ADDITIONS AND EXTENSIONS UPON COMPLAINT OR UPON OWN INITIATIVE—CONTEMPLATED MERGER NO DEFENSE.

Under sections 2329 and 2330, of the "public utilities act," the public service commission is given ample power, either upon its own initiative or upon complaint, to compel, in accordance with the procedure required, any additions, extensions, improvements, repairs or changes which are just and reasonable, and which may be necessary to give patrons, adequate and sufficient service. The fact that the telephone company is contemplating a merger with a rival concern does not operate as a defense against the orders of the commission, on the ground that compliance therewith would compel unnecessary duplication and expense.

COLUMBUS, OHIO, December 4, 1912.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours of September 11, 1912, the pertinent part of which is as follows:

> "I am directed by the commission to lay before you for an opinion, the following state of facts:
>
> "About four months ago a resident of Dayton, Ohio, complained informally to the commission that he had made application to The Home Telephone Company, of that city, for service and was refused. The Home Telephone Company in Dayton is an independent interest, being owned by the same parties that own The Citizens' Telephone Company at Columbus. Upon receipt of informal complaint above referred to, we took up with the manager of The Home Telephone Company at Dayton and we refered it to Mr. Frank Davis, of Columbus. Mr. Davis asked for an interview and at the interview plainly stated that the ownership of the independent telephone interests in the larger cities in Ohio did not, at the present time, intend to extend their existing facilities for the reason that a general policy of merger with the Bell interests was anticipated and that a duplication of property would be an economic waste.
>
> "Subsequently we sent our telephone expert to Dayton and he reports that it would cost one hundred and seventy-five thousand dollars ($175,000.00) to equip The Home Telephone Company's plant at Dayton to take care of the business now offering, and the reasonable prospective needs of the near future.
>
> "Kindly understand that the additional equipment referred to is not all in the nature of extension. There are localities in Dayton

where the existing cables are drawn upon to their full capacity, and to serve their patrons in the same localities would require additional equipment at the central plant and additional cable extended from the central plant. Some of the $175,000.00 referred to would be expended in pure extension; that is to say, in carrying lines into territory beyond the termini of existing lines, but the greater part of it would not be so expended; but rather expended in the increase of facilities in the territory now partially covered.

"It is but fair to say that when the city of Dayton conferred upon The Home Telephone Company the franchise by which the streets and alleys were occupied and were to be occupied, the expectation undoubtedly was that the entire population within the municipal limits would be served. It is also but fair to say that the franchise in the city of Dayton was not conferred by the city itself, but was accorded by order of the probate judge after the city itself had refused."

Based on the above facts, your interrogatory to me is as follows:

"The question is, what authority, if any, lies in the public service commission of Ohio to proceed on its own initiative to compel The Home Telephone Company of Dayton to accord the citizens of Dayton the service demanded?"

You also say, at the close of your letter, "it is pretty hard to draw the line between 'extensions' as the word is used in section 53, and the word 'additions,' as used in section 30, when applied to this state of facts." I fully concur with you in your last remarks.

In the first place, it is not at all clear from your statement of facts what portion of the required constructions are "extensions," and what are "additions."

All these matters of "extension," "addition," adequate service, etc., on the part of public utilities, are provided for in the public utilities act, 102 O. L. 549.

This is a lengthy and comprehensive law; and like all acts attempting to cover too much ground, it is, in many places, ambiguous, and repeats some of its provisions in different sections.

Confusion necessarily arises by reason of the incorporation of different acts of commission and omission, together with the remedies therefor, in *one section*, and attempting to duplicate the same in *another*.

Section 23 of said act provides "upon complaint in writing, against any public utility, by any person, firm or corporation, *or upon the initiative or complaint of the commission* that * * * any service is, or will be, *inadequate or cannot be obtained*, the commission shall notify the public utility, etc." A hearing is then provided for, and the commission, according to the facts in each case, may fix and determine the just and reasonable service to be thereafter rendered.

Section 29 of said act provides as follows:

"Whenever the commission shall be of the opinion, after hearing had upon complaint, as in this act provided, *or upon its own initiative or complaint*, served as in this act provided, that the rules, regulations, measurements or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service thereof *is inadequate, inefficient, improper or insufficient, or cannot be obtained*, it shall determine the regulations, practices and service thereafter to be installed, observed, used and rendered, and

fix and prescribe the same by order to be served upon the public utility. It shall thereafter be the duty of such public utility and all of its officers, agents and official employes to obey the same and do everything necessary or proper to carry the same into effect and operation; provided, that nothing herein contained shall be so construed as to give to the commission power to make any order requiring the performance of any act or the doing of anything which is *unjust or unreasonable* or in violation of any law of the state or the United States."

Section 30 provides as follows:

"Whenever the commission shall be of the opinion, after hearing had, as in this act provided, *or upon its own initiative or complaint*, as in this act provided, that repairs or improvements to the plant or equipment of any public utility, should reasonably be made, *or that any additions thereto should reasonably be made*, in order to promote the convenience or welfare of the public, or of employes, or in order to secure adequate service or facilities, the commission may make and serve an apropriate order with respect thereto, directing that such repairs, improvements, *changes or additions be made within a reasonable time*, and in a manner to be specified therein. Every such public utility, its officers, agents and official employes *shall obey such order and make such repairs, improvements, changes and additions required of such public utility by such order.*"

Section 53 of said act provides that the council of any municipality may require of any public utility such *additions or extensions* to its distributing plant as shall be deemed reasonable, etc. So far as "additions" are provided for in this section, the remedy is cumulative to the provisions for the same word in section 30. So that, "additions" can be compelled to be made either by the council or the commission.

Section 14 provides that "every public utility shall furnish *necessary and adequate service and facilities* which shall be reasonable and just * * *."

Section 15 says "every public utility shall furnish and provide with respect to its business *such instrumentalities and facilities as shall be adequate and in all respects just and reasonable.*"

I have quoted the law extensively to show the duties of the telephone company and the powers of the commission. It makes no difference how this company acquired its franchise in Dayton, whether through the probate court or council. In return for such franchise, it is bound to furnish adequate service to the citizens; and if it requires additions to its plant or equipments, it must make the same, provided that it is *just and reasonable*, under the facts and circumstances, so to do.

Neither does it make any difference that the company claims it is about to sell out to the Bell Company, or be merged therewith. The company must render adequate service to the citizens, regardless of prospective sales or mergers, unless the costs thereof are not just and reasonable under all the circumstances; and that is a question for the commission, after a full and impartial hearing, to determine. The company cannot retain control of the territory of the city of Dayton and only supply the citizens thereof in a half-hearted and inefficient manner.

If the service is *refused*, as you say in your letter, then it "cannot be obtained," and falls within the language of sections 23 and 29. If the service is *inadequate*, as provided for in section 23, or *inadequate, inefficient, improper*

or *insufficient, or cannot be obtained,* as recited in section 29, then it clearly makes a case which you should investigate and make such orders as are just and reasonable. You need not worry much about the *name* you shall apply to the further equipment of the plant for efficient service, whether it is a *repair, improvement, addition, change* or *enlargement.* You must apply common, ordinary judgment in viewing these matters in the full light of all the circumstances and say whether these changes or additions, etc., should be made by the company for the proper service of the citizens of Dayton.

By reference to the law quoted above you are given full power, either on complaint of others, or on your own initiative and complaint, to take up this matter, and make such orders as you see proper and which are just and reasonable. You will take into consideration the investments of the company, the revenue derived, the number of patrons, the territory occupied and to be occupied, the nature and extent of the service rendered and to be rendered, and all other facts connected with the case.

Exercise your best judgment and deal fairly with the citizens and the company and then make and enforce such orders as are warranted by the facts.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

59.

PUBLIC UTILITIES—RAILROAD COMPANIES—RIGHT TO CHARGE FOR SINGLE JOURNEY IN EXCESS OF TOTAL AMOUNT CHARGED FOR INTERMEDIATE JOURNEY.

A railroad company has the right to make such reasonable rates and regulations pertaining to the charge for a single journey as its sees fit to impose. A journey in which a passenger is engaged is the whole journey from a place of departure to his destination and the fare which is due is for the whole distance. A passenger has no right to split up a single journey into several, by tendering fares at intermediate stations for intermediate distances, even though he might thus secure a passage cheaper than the regular fare made for his entire contemplated trip. The rates for intermediate trips are made in accordance with local conditions for the benefit of local persons, which a person contemplating a longer trip may not take advantage of.

A railroad company, therefore, is not exceeding its rights in charging forty cents from Youngstown to Leetonia, Ohio, although its fare from Youngstown to Columbiana, an intermediate point is only thirty cents, and its fare for the remaining distance, to wit: from Columbiana to Leetonia is five cents, and a passenger may not indirectly avoid this rule by disembarking at an intermediate point and reboarding the train at the same point.

COLUMBUS, OHIO, January 29, 1913.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of October 7, 1912, you say:

> "Please refer to attached correspondence with Mr. W. G. Wells, of Youngstown, Ohio, which involves a very abstruse legal problem. Should be pleased to have an opinion from you relative thereto."

Mr. Wells' letter to your board is as follows:

"The enclosed affidavit is self-explanatory. Will you kindly inform me, viz.:

"1st. What is the passenger fare on the Youngstown & Southern Railroad from Youngstown to Leetonia?

"2nd. If a through passenger pays the fare of 30 cents from Youngstown to Columbiana, does he have to pay 10 cents from Columbiana to Leetonia?

"3rd. Does getting off and on the car at Columbiana make any difference in the fare?"

His accompanying affidavit sets forth:

"That the passenger fare on 'The Youngstown and Southern Ry. Co's. road from Youngstown, Ohio to Columbus, Ohio, is 30 cents; and from Columbiana, Ohio, to Leetonia, Ohio, 5 cents.

"That he purchased from said company on September, 9, 1912, coupon book No. 4797, for '100 rides,' each coupon 'good for one five-cent fare' and "good between all stations for one or more persons.'

"That on September 7, 1912, he rode on said road from Leetonia to Columbiana when the conductor—McElroy—took up one of the coupons, and he rode from Columbiana to Youngstown when the conductor took up 7 coupons.

"That on September 10, 1912, he purchased from said company a regular ticket from Leetonia to Columbiana and used the same. Then went on to Youngstown when the conductor—McElroy—took up 7 coupons.

"That on September 10, 1912, he went on said road from Youngstown to Columbiana when the conductor—Bacon—took up 6 coupons; got off the car and returned to the same for Leetonia—the conductor took up 2 coupons.

"That on September 11, 1192, he purchased from said company a regular ticket from Leetonia to Columbiana and return, and used the ticket to Columbiana, then went on to Youngstown on the same car. The conductor—Flickinger—took up 7 coupons.

"That on September 11, 1912, he went on said road from Youngstown to Columbiana when the conductor—Puth—took up 6 coupons; went on to Leetonia when he gave the conductor said return ticket, the conductor demanded 5 cents more fare which was paid under protest."

The substance of your answer is:

"The question that you raise is one that involves a very uncertain legal situation. The published tariff passenger fare of The Youngstown & Southern Railway Company, Youngstown to Leetonia is 40 cents, Youngstown to Columbiana, 30 cents, and Columbiana to Leetonia 5 cents. You will observe that the combination is less than the through rate. Your contention is that if you pay from Leetonia to Columbiana, then from Columbiana to Youngstown, that the railroad has no right to demand more. As above stated, this is a very doubtful question. Your trip is through from Leetonia to Youngstown and the published fare for that trip is 40 cents. On the other hand, you have paid the

tariff fare, Leetonia to Columbiana and Columbiana to Youngstown. The court decisions, so far as there are any, seem to favor the right of the railroad to demand through fare, when they know, as a matter of actual fact, and the passenger is accorded through transportation. Just how far your debarking from a train at Leetonia and immediately re-embarking would change the situation, is problematical."

I have quoted extensively from the whole correspondence, in order that we may have all the salient points involved in the controversy before us.

The undisputed facts, as gathered from said correspondence, are substantially as follows:

(1) The published tariff passenger fare of The Youngstown & Southern Ry. Co., from Youngstown to Leetonia is 40 cents, being within the price authorized by statute to be charged for the distance between said points.

(2) The fare for local passengers from Youngstown to Columbiana (and intermediate stations), is 30 cents, and from Columbiana to Leetonia 5 cents.

(3) The conductors on said road uniformly refused to permit Wells to ride from Youngstown to Leetonia for 35 cents, in 5-cent coupons, or local tickets being the sum of the local fares between the three stations on that route.

(4) Said conductors refused to allow this passenger to split up his journey, and pay from station to station, based on the local fares between the same, but charged the full published tariff fare of 40 cents. to him and others, making the continuous journey from Youngstown to Leetonia.

The questions presented are not free from difficulty, owing to the dearth of authorities thereon.

"The journey is a single entire unit."

In section 1253, of Wyman on public service corporations, under the above title, at page 1108, the author says:

"The journey for which a passenger has a right to be received and upon which he enters when he is received, is *the whole transit from the point of departure to his destination;* the entire journey which he means at the particular time to take. This journey is a *single unit* of service; for if the carrier is entitled to make a *single charge*, and the passenger is entitled only to an *unbroken carriage. Neither party has a right to break this single unit of service into two.*"

Under the title "The journey as a single unit," this author, in section 446, repeats the same language as above quoted.

The same author, in sections 1254 and 1255, page 1109, discusses the proposition further, under the titles respectively: "*Ticket good only for through transportation,*" and "*Passengers cannot take two journeys for a single fare.*"

"*Two partial fares for a single journey.*"

Under the above title, section 1256, page 1110, the author says:

"For this reason a passenger has no right to split up a single journey into two by tendering fare from the point of departure to an *intermediate station*, and then, continuing on the train, tender fare from the intermediate station to his destination, *even though he might thus secure a cheaper passage by taking advantage of cheaper rates between two of the stations.*

"The journey in which he is engaged is the *whole journey from his place of departure to his destination;* and the fare which is due, and which alone is due, is the fare for the *whole distance.* Same section page 1111.

"Change of destination during the journey."

Section 1260, page 1113, of the same author, says:

"If a passenger takes a train intending to go to an intermediate station, but during his journey changes his mind and determines to go further, he is still proposing to take a *single journey,* and must pay the difference between the fare he has already paid and the entire fare for the whole journey he decides to take, but upon doing so he would, it seems, have a right to stay in the train and complete his journey."

Under the title, *"The journey the unit in passenger service,"* Beale and Wyman on Railroad Rate Regulations, section 671, uses the same language as above and further says:

"Furthermore it is essential that the passenger when taking the train should have determined what journey he shall take and should be ready to pay his fare for that journey."

Section 444, page 382, same author, in discussing "public service upon a unit basis," says:

"One applying to a public service company for service is not altogether free to determine what service he will have, and for what amount of service he will pay. It is for the public service company itself in the first instance to decide upon what basis it will render service, and the decision of the company as to the units in which it will provide service is conclusive *unless* their section is unreasonable. Thus one who wishes to go on a journey *cannot demand the right to pay mile by mile, but the company may insist that he pay for the whole journey as a unit whenever fare is demanded."*

Hutchinson on Carriers, 3rd edition, section 1042, page 1202, under the heading: "Through passengers cannot claim the advantage of local excursion or competitive rates between intermediate points," says:

"When the through fare from the place of departure to passenger's destination is greater than the sum of the local fare between the place of departure and an intermediate point plus the local fare between that intermediate point and the passenger's destination, owing to the existence of a competitive rate between the place of departure or destination and the intermediate point, a passenger cannot stay on the train and tender the local fare plus the remaining local fare for his through carriage, instead of the existing through rate. By remaining on the train, the passenger showed an intention to make the contract one of *through carriage,* and he must pay the through rate. And it would seem that the same rule is applicable to excursion tickets."

The leading case on this subject, and which is extensively quoted in all the text books above cited by me, is that of London & Northwestern Railway

vs. Hinchcliffe, 2 Kings Bench (1903), page 32. Referring to said leading case, section 675 of Beale and Wyman on railroad rate regulations says:

> "The facts in the case were these: the defendant, intending to travel by a particular train from Huddersfield to Manchester on plaintiff's railway, took a ticket to Stalybridge, an intermediate station, and after giving up this ticket on the arrival of the strain at Stalybridge remained in the carriage and tendered to the plaintiff's servants 7d., which was the amount of the fare from Stalybridge to Manchester, the difference between the fare from Huddersfield to Stalybridge and the through fare from Huddersfield to Manchester being 9d. The plaintiff refused the amount tendered, but allowed the defendant to travel on in the same train to Manchester, and sued him for the excess through fare; it was held that the plaintiffs were entitled to recover."

The latter part of the above section lays down the doctrine, that a through passenger, by rebooking at intermediate stations against the rules of the company, may obtain the advantage of tourist rates between such stations *which were never intended for him*, or holiday and excursion rates between inter mediate local stations by wrongfully splitting his journey.

> "If he (the passenger) had remained in the train, and informed the guard (conductor) that he wanted to go on to S., he would have had to pay the full fare from G. (his starting point) to S. (his destination)."

The above is the language of Chief Justice Darley of Australia, quoted on page 624 of Beale & Wyman on railroad rate regulations.

A railroad company has the right to make and enforce any rules as to carrying passengers, which are reasonable and not in conflict with law. This includes through rates, local rates, stop-over privileges, holiday rates, excursions, party tickets, coupon tickets, mileage books or any other arrangement which the company may see fit and proper to carry out, lawfully, as a carrier of passengers. The test of any rate, charge, or regulation in passenger service is: *"Is the same reasonable under all the circumstances, surrounding and conditions, and not in violation of law?*

Railroads, for instance, can charge more fare from A. to B. than from B. to A. Leon vs. B. & M. R. R., 9 I. C. C. Rep. (1903) 642.

A through rate is not unreasonable because it is higher than the sum of local rates fixed by state laws. 7 I. C. C. Rep. (1898) 601.

That railroads can charge a passenger higher cash fare on train, than for a ticket, over the same route, is universally upheld by the courts. For good and sufficient reasons, the company may establish regular rates between intermediate stations on its lines, or the accommodation of local passengers between said points. Labor trains to mines, or factories, or from one town to another, covering only a part of a line of road, have become a part of the industrial necessities for reduced rates; but all these arrangements are *special* in their nature, *and established for the benefit and accommodation of the local passengers for whose convenience and accommodation they were installed.* Through passengers and those not contiguous to the sections of the road included within these local arrangements, are not entitled to the benefits thereof as parts of their journeys when their units of travel are not co-extensive with points favored by these special rates. Certainly, any one, no matter where he lives, would be entitled to these *local rates*, when *making a local journey* between stations included in such provisions; but through passengers should inform conductors,

if the rules so provide, of their destination, and pay the full fare, if they provided, as in this case, with mileage coupons. Through passengers seeking to pay from station to station, either on the train, or by rushing out at each station and purchasing a ticket and rushing back on again would cause confusion and interference with others entering or leaving the coaches. In the language of Chief Justice Darley, Beale & Wyman railroad rate regulation, section 675:

> "A person might (if such rules were not enforced as above set forth) in coming from G. to S., take a ticket from G. to the next station, and then travel on the C., and take a ticket from there to S., thus traveling over a considerable portion of the journey without a ticket. To obviate this it would be necessary, to look at the tickets at every station, which would lead to inconvenience and delay, not only to the railroad department, but to the public. In the present case the respondent, by rebooking, obtained the advantage of tourist rates between M. V. and S., which were never intended for him.
>
> "Without regard to any statutory authority, a carrier of passengers has, under the common law, the right to make *reasonable rules and regulations for* the conduct of his business. Cyc. vol. 6, page 545.
>
> "The right of the carrier to exact payment in advance as a condition of the right of the passenger to transportation is unquestioned." Cyc. vol. 6, page 547."

In the light of all the facts submitted in this case, and the law applying thereto, I am of the opinion that the railroad company has the right to make and enforce a rule requiring *through passengers* from Youngstown to Leetonia to pay the full published tariff fare of 40 cents; and that such passengers are not entitled to the benefit of the *lower fare between intermediate stations, as a part of their unit of travel for the entire route aforesaid.*

Of course if the railroad consents to such arrangement, or permits it, such acts would give the passenger the right to split his journey; but the company can do as it sees fit, within reasonable bounds, in such matters. Getting off at intermediate stations would not help the passenger, in this matter, who is equipped with ticket, coupon or mileage transportation, as you have stated, if he was *on the train originally as a through passenger.*

Such passenger, if required by the company, must pay the *full legal published tariff fare* from his *start to destination*, either in money, or such other evidences of transportation as are recognized and issued by the company.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

73.

PUBLIC UTILITY—FRANCHISE BY MUNICIPALITY TO PUBLIC UTILITY IS A CONTRACT—COMMISSION HAS NO AUTHORITY OVER SAME.

It is well settled that a franchise granted by a municipal corporation to a public utility is a contract. As the public service commission is not given judicial power, it may not exercise supervision over and has no jurisdiction with respect to the enforcement of the terms of such franchise.

Section 614-8, General Code, therefore, which empowers the public service commission to examine public utilities and to keep informed as to their general conditions, their capitalization and their franchises and with respect to their compliances with franchises and charter requirements, may only be construed to permit such commission power to examine such franchises in order to inform itself as to the general conditions, capitalization, etc.

COLUMBUS, OHIO, December 10, 1912.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMAN: I beg to acknowledge receipt of your letter of October 17, 1912, in which you state:

> "Suggestions have been made to the commission at various times that the commission had the authority and was therefore charged with the duty of requiring public service corporations to comply with the terms and conditions of franchises granted to them by municipal and county authorities, and to compel obedience to the provisions and conditions of contracts entered into by such public service corporations and public authorities."

and request my advice and construction as to that part of section 10 of the Public Service Commission act, section 614-8, General Code, which authorizes the commission to exercise general supervision over all public utilities with respect to their compliance with franchise and charter requirements.

In construing said section it is necessary to read the same in connection with the whole act, particularly for the reason that certain sections of said act except the operation thereof with respect to certain utilites, to which I shall hereafter refer.

Said section 614-8, General Code, provides as follows:

> "The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted *with respect to the adequacy or accommodation afforded by their service*, and also with respect to the safety and security of the public and their employes, *and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements* * * *"

In order to properly construe said action it is necessary to look to the definition of "franchise" and apply the same to the use of the word as found in said section and act. In its legal meaning a franchise is a particular privi-

lege conferred upon individuals by grant from the government. Franchises are usually held by corporations created for the purpose of enjoying them. The charter of a corporation is in itself a franchise from the state, creating said corporation and authorizing it to do the things for which it was formed. The Public Service Commission act was enacted for the purpose of giving to your commission a general supervision, by vesting it with the power and jurisdiction to supervise and regulate public utilities and railroads, as in said act defined and provided; and to require all public utilities to furnish their product, and render all services as required by the commission or by the law, and thereby insure to the public, from corporations and public utilities amenable to said act, the service which the law enjoins upon them.

By early decisions of our supreme court, which have been followed to the present day, a franchise granted by a municipality to a corporation or public utility is a contract, and the contractual relation existing under such franchise cannot be impaired by subsequent act of the legislature. Upon this theory I am of the opinion that section 10 of the Public Utility Act being section 614-8 of the General Code, was enacted by the general assembly with that well established principle of law in mind; and that the legislature, by said section, intended that your commission should have, and granted to it, the general supervision of all public utilities within its jurisdiction, with the object in view that your commission should see that such public utilities complied with all the provisions of the laws of the state, and the orders of the commission, franchises and charter requirements, only insofar as that supervision and jurisdiction did not, in any manner, impair the obligations of a contract between any municipality and such utility or utilities, created prior to the enactment of said public utility act, or any legal contract entered into between any municipality and any utility as in said act defined thereafter.

I am of the opinion, under the public utility act and the particular section heretofore referred to, that your commission would be without jurisdiction to entertain a complaint by any municipality against a utility or utilities, enjoying a franchise contract from such complaining municipality, as to the enforcement of a contractual relation between such public utility and said municipality, because the municipality would have its legal remedy against the utility to compel it to specifically perform its contract, or have its remedy in law against said utility or corporation for failure to perform the obligation enjoined upon it by such contractual relation. The powers and jurisdiction granted to the Public Service Commission under said section are confined to the enforcement of those duties, imposed upon a public utility by its charter or franchise, to the public and individuals thereof, as to adequacy of service and obedience to rates, under the terms of any franchise. The legislature did not, in creating the said commission, and enacting the provisions of the law defining its powers and jurisdiction, delegate to its judicial powers; and, in section 49 of the act, provides that the act shall not apply to any rate, fare or regulation, now or hereafter prescribed by any municipal corporation granting a right, permission, authority or franchise, to use its streets, alleys, avenues or public places, for street railway or street railroad purposes, or to any prices, so fixed under sections 3644, 3982 and 3983 of the General Code, except as provided in sections 46, 47 and 48, General Code, sections 614-44, 614-45 and 614-46. In view of this fact I am of the opinion that the legislature intended that the power with respect to rate, price, charge, toll or rental, to be made, charged, demanded, collected or exacted, for any commodity, utility or service, by public utilities in the cases enumerated in the statute should remain and be vested in the municipality; but that the Public Service Commission should have the general supervision over such utilities in seeing that the operation of such utilities, under said fran-

chises, should be in compliance with all provisions of law, orders of the commission, franchises and charter requirements.

Said section 614-8 of the General Code provides in part as follows:

> "That the commission shall have power to *examine all utilities within its jurisdiction and also power to keep informed as to their general conditions, their capitalization, the franchises, etc.*"

and in my opinion the word "franchises," as used therein, means that your commission *may examine such franchises* in order to inform itself as to the general conditions, capitalization, etc., of said utilities, but may not entertain any complaint against any such utility wherein the contractual relation arising out of such franchises between municipalities and utilities is the basis of said complaint, for the franchise granted to a utility by a municipality is a contract between them and the enforcement of the terms thereof, as between said municipality and utility, is a judicial power and not conferred by law upon your commission.

Very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

116.

TAXES AND TAXATION—PUBLIC UTILITY—LIABILITY OF OWNER OF BUILDING FOR EXCISE TAX WHEN FURNISHING ELECTRICITY TO TENANTS UPON EXTRA CHARGE THEREFOR.

Since the Burckhardt Estate, which is the owner of a large building, furnishes electricity to its tenants for light and power, by charging each individual tenant a higher price therefore than the estate itself is charged by the company supplying such power, such estate "is engaged in the business of supplying electricity for light and power purposes to consumers" within the meaning of section 614-2, General Code, and is, therefore, a "public utility" within the sense of that statute.

COLUMBUS, OHIO, December 21, 1912.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am replying to yours of April 11, 1912, which is as follows:

> "I take the liberty of handing you herewith the correspondence with the Burckhardt Estate of Cincinnati, Ohio, and would invite your attention to the same and request your opinion as to whether or not the Burckhardt Estate is a utility?"

From the extensive correspondence submitted herewith, the facts seem to be substantially as follows:

> "The Frederick Burckhardt Estate of Cincinnati, Ohio, is the owner of a large building in that city, the several stories of which are occupied by tenants of said estate.
>
> "Said estate furnishes electricity to its tenants for light and power, in the following manner: A large meter is installed in the building,

and the estate purchases electricity for the whole structure from an electrical company. All the electricity used in the building passes, in the first instance, through this large meter, and is paid for by the estate at certain rates. Small meters are placed in every tenant's apartment, and all the electricity used by each tenant goes through his individual meter and is paid for monthly by him at rates fixed by the estate. The price received by the Burckhardt Estate from its tenants for this electricity, is higher than it pays for the same to the electrical company, although the profit is not very great.

"This estate will not permit its tenants to purchase their electricity from any other other source."

The question then is, whether the above facts constitute the Frederick Burckhardt Estate a public utility, subject to your jurisdiction, under the public utility act?

Section 614-2, General Code, (102 O. L. 550), defining the terms as used in said act says:

"Any person or persons, firm or firms, co-partnership or voluntary association, joint stock company or corporation, whenever organized or incorporated:

"When engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company."

In section 4 of said act, the term "public utility" is defined as follows:

"The term 'public utility' as used in this act shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit. * * * *"

It is clear from the reading of the above sections that the act was intended to include any person, corporation, etc., engaged in the business of supplying electricity for light, heat or power purposes to *consumers within this state;* and it only remains to apply the facts herein to the law, in order to answer your question. There can be no question but that this estate is furnishing electricity to all the tenants in said building, and they use it for light and power. This makes them "*consumers,*" and they are within *this state.*

It makes no difference whether this estate purchases this electricity from another and then distributes it, or generates it by a plant of its own, the legal status is the same. Nor does it matter whether the consumers are many or few, or whether the profits are large or small. It is the *character of the business* that fixes the standing of the parties in the eyes of the law. Each individual case, of course, is determined by the particular facts thereof.

Taking all of the facts of this case into consideration, as well as the law applicable thereto, I am of the opinion that the Burckhardt Estate is a public utility, and, therefore, subject to your supervision, and must comply with your orders.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

135.

PUBLIC SERVICE COMMISSION—MAY USE FUNDS FOR PURCHASE OF BLANKS FROM INTERSTATE COMMERCE COMMISSION.

Under section 614-48, *General Code, the public service commission is required to furnish public utilities with blank forms for its reports, and under section,* 606, *General Code, such commission is empowered to assess public utilities for the purpose of obtaining funds necessary for the operation of the department. These statutes, therefore, authorize the commission to purchase blanks for the Interstate Commerce Commission for the purpose of furnishing the same to public utilities in accordance with these statutes.*

COLUMBUS, OHIO, March 31, 1913.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated March 11, 1913, is received in which you request my opinion upon the following question:

> "Whether the commission would have authority under the law to use any of its funds for the purpose of buying blanks from the interstate commerce commission for use by the railroads of the state in making their report to the commission as required by law?

Section 606 of the General Code provides as follows:

> "For the purpose of maintaining the department of the public service commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding $75,000.00 each year shall be apportioned among and assessed upon the railroads and public utilities within the state by the commission, etc."

It is manifest, the intention of the legislature was to make the department of public service self-supporting, and that the funds raised by assessing the railroads and public utilities, should be expended by the commission in carrying on the duties and affairs of the commission and exercising public supervision of the railroads and public utilities.

Section 614-48, General Code, provides as follows:

> "Every public utility (which includes railroads) shall file with the commission, at such times and in such form as it may prescribe, an annual report * * * . The commission shall prescribe the character of the information to be embodied in such annual report, *and shall furnish to each public utility a blank form therefor, etc.*"

Section 556 of the General Code provides:

> "The commission shall cause blanks to be prepared suitable for the purposes designated in this chapter which shall conform as nearly as practicable to the forms prescribed by the interstate commerce commission, and when necessary furnish such blanks to each railroad."

The furnishing of blanks to the railroads for the purposes set forth in

the foregoing quoted sections is mandatory upon the commission, and they shall conform as nearly as practicable to those used by the interstate commerce commission.

The fact that you can get the blanks required to be so furnished to the railroads from the interstate commerce commission of itself goes without saying that by purchasing the blanks from said interstate commerce commission they will conform in toto with those forms used by it.

The funds proposed to be used in the purchase of said blanks are raised by assessing the railroads and public utilities for the purpose of properly exercising public supervision of said railroads and public utilities, and the reports referred to are one of the things which enable the commission to properly perform such supervision of said railroads and public utilities, hence the expenditure of so much of the funds so raised for blanks is legal and proper and from all reports the purchasing of the same from the interstate commerce commission will insure uniformity and economy.

The forms, such as you speak of in your communication, are not such state printing as comes under the provisions of sections 754 and 786 of the General Code.

I am, therefore, of the opinion that your commission may purchase the blanks for the purposes referred to from the interstate commerce commission and pay for the same from the funds of your commission.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

419.

PUBLIC SERVICE COMMISSION—PUBLIC UTILITY COMPANIES MUST FILE SEPARATE ANNUAL REPORTS WHEN ONE COMPANY IS CONTROLLED BY THE OTHER THROUGH STOCK.

Under the provisions of section 614-48, General Code, every public utility company is obliged to file an annual report with the public service commission Where one company is controlled by another through stock ownership, so long as they remain distinct companies, they should file separate reports.

COLUMBUS, OHIO, August 1, 1913.

Public Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your communication dated June 12, 1913, is received in which you submit copies of your file of correspondence with the officers of the Ohio Fuel Supply Company, which company controls, through stock ownership, the Federal Gas and Fuel Company, relative to the said company filing but one report, viz.: the report of the Ohio Fuel Supply Company, which includes the annual report of the Federal Gas and Fuel Company, and requesting my opinion as to whether or not the two companies' transactions can be covered in the one report of the Ohio Fuel Supply Company, which controls, through stock ownership the Federal Gas and Fuel Company, and thereby meet the requirements of the law as to reports to be made by utilities to the public service commission annually.

In reply to your inquiry I desire to say that section 614-48 of the General Code provides as follows:

> "Every public utility shall file with the commission, at such times and in such form as it may prescribe, an annual report, duly verified, covering the yearly period fixed by the commission. The commission shall prescribe the character of the information to be embodied in such annual report, and furnish to each public utility a blank form therefor. If any such report is defective or erroneous, the commission may order the same to be amended within a prescribed time. Such annual reports shall be preserved in the office of the commission. The commission may, at any time, require specific answers to questions upon which it may desire information."

Under the provisions of the above quoted section of the General Code there can be no question that so long as the Ohio Fuel Supply Company and the Federal Gas and Fuel Company exist as separate corporate entities it is the duty of each company or each utility under said section to file with the commission an annual report, duly verified as in said section provided.

The power vested in your commission to compel annual reports to be filed by each and every utility operating in this state is for the purpose of carrying into effect the provisions of law relating to said utilities under the public service commission act; and I cannot see how your commission can properly be informed as to the matters that may be embodied in such annual report and enlightened as to all things that may come into question and for which said annual reports are or may be made, such as the question of rates for the commodity furnished by the respective utilities or for the securing of such information as may enlighten the commission upon the transactions of the said separate utilities upon any issue which may be properly brought before your commission relating to the utilities referred to in your communication.

I am, therefore, of the opinion that it is a mandatory duty incumbent upon each public utility to file an annual report, and that although the Ohio Fuel Supply Company controls, through stock ownership, the Federal Gas and Fuel Company, as long as they remain separate and distinct corporate entities within this state your commission should require them to file separate reports and not take the report of one company wherein is included the transactions and proceedings of the other for the year for which the report was intended to cover.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

449.

PUBLIC SERVICE COMMISSION—MEMBERS OF PUBLIC SERVICE COMMISSION ENTITLED TO SALARY UNTIL THE MEMBERS OF THE PUBLIC UTILITIES COMMISSION ASSUME THEIR OFFICE—PUBLIC UTILITIES COMMISSION TO FINISH UP BUSINESS OF PUBLIC SERVICE COMMISSION.

"Members of the public service commission are entitled to their salary from the time the public utilities law went into effect until the members of the public utilities commission are appointed and assume their duties.

"The public utilities commission, by virtue of the fact creating this commission, has authority and power to finish up any and all unfinished business of the public service commission and to use all of the funds appropriated to that commission, the same as the public service commission would have done had it continued to exist."

COLUMBUS, OHIO, August 26, 1913.

Public Service Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—I have your letter of August 20, 1913, in which you inquire:

> "The auditor of the state has raised the question: First, as to whether, since the eighth day of August, the public service commission of Ohio has any authority to draw vouchers against the fund appropriated for its use.
>
> "Second, whether there is any fund appropriated or available for the use of the public utilities commission of Ohio against which the public utilities commission may, after its organization, draw vouchers for the money necessary to carry on the public business.
>
> "The auditor seems to be of the opinion the public service commission of Ohio has had no legal existence since the eighth day of August and that there is no fund appropriated or available for the use of the public utilities commission."

Section 606, G. C., reads:

> "For the purpose of maintaining the department of the public service commission of Ohio, and the exercise of police supervision of railroads and public utilities of the state by it, a sum not exceeding seventy-five thousand dollars each year shall be appropriated among and assessed upon the railroads and public utilities within the state, by the commission, in proportion to the intrastate gross earnings or receipts of such railroad and public utilities for the year next preceding that in which the assessments are made.
>
> "On or before the first day of August next following, the commission shall certify to the auditor of state the amount of such assessment apportioned by it to each railroad and public utility and he shall certify such amount to the treasurer of state, who shall collect and pay the same into the state treasury to the credit of a special fund for the maintenance of the department of such public service commission."

Section 20 of the act of April 18, 1913 (103 O. L., 808), reads:

"The public utilities commission shall succeed to and be possessed of the rights, authority and powers not exercised by the public service commission of Ohio and perform all the duties now imposed upon the public service commission of Ohio, and said powers and authority shall be exercised and enforced and said duties performed in the manner now provided by law for the said public service commission. Said public service commission of Ohio shall on and after the time this act shall take effect have no further legal existence, and the public utilities commission is hereby authorized and directed to assume and continue as successor of said public service commission of Ohio. Wherever in the public service the terms railroad commission or public service commission occur, the term public utilities commission shall be substituted therefor."

While it is true that after the taking effect of the said act on August 9, 1913, the public service commission had no further legal existence and its successor, the public utilities commission, was authorized and directed to assume and continue as successor of the said body with all of its rights, authority, power, and duties, yet I beg to advise that his excellency, honorable James M. Cox, consulted with this department a few days prior to August 8, 1913, advising me that he would not be prepared to appoint the members of the public utilities commission until the fifteenth day of August, and inquiring if members of the then public service commission might not continue to discharge their usual duties until August 15th. I advised him that I saw no objection to the members of the commission continuing to discharge the duties of their office until the said date so long as they made no orders, so that the state might safely have the benefit of their services for the few days intervening in the way of attending to all the other duties of the office.

About August 9th, Messrs. Sullivan and Gothlin called upon me and asked for instructions as to what they should do pending the arrival of the new public utilities commission. I advised them that it was their duty to attend to the affairs of the office until their successors arrived, refraining from making any orders.

They accordingly did perform such duties of the office as I directed them was within their power, I am of the opinion that justice requires that these men should receive their salaries. Certainly no one could claim that in paying these salaries any abuse has been committed. They rendered honest and efficient service to the state.

Moreover, the public utilities law is substantially the same as the public service commission law; the same general duties are to be performed by the same number of men, and one law may well be said to be a continuation of the other; and Judge Hughes being appointed a member of the public utilities commission rendered service during all the period, and Messrs. Sullivan and Gothlin remaining at their post in accordance with the wishes and direction of the governor, it is immaterial whether the service was rendered by virtue of the public service commission or the public utilities law—the effect would be the same, entitling all three members to their compensation.

Your second question calls for a construction of the act creating the public utilities commission, and especially the above copied section 606, G. C., and section 20 of the public utilities act.

To my mind section 20 should be given a full, fair and liberal construction, avoiding, of course, any exclusion of its language or enlargement of its provisions, and that it should be held to transfer to the utilities commission all the rights, powers, privileges and duties devolving upon the public service com-

mission, including the right to draw vouchers against any and all funds upon which the public service commission, had it continued to exist, might have drawn.

I am therefore of the opinion that the public service commission ceased to exist at the expiration of ninety days after the finding of said public utilities bill with the secretary of state, and it had no power thereafter to transact any business whatever, but that the public utilities commission took its place and succeeded to all its business, when it ceased to exist. And by virtue of section 20, above copied, it had power and authority to finish up any and all unfinished business of the public service commission and to use any of the funds appropriated to that commission, the same as such commission might have done had it continued in existence.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

461.

WHERE TWO RAILROADS MERGE AND ONE IS IN PROCESS OF BUILDING, THE PART THAT IS COMPLETED MUST CONFORM TO THE STATUTE REQUIRING A FARE OF TWO CENTS PER MILE.

The Lorain, Ashland and Southern Railway Company may not charge rates in excess of two cents per mile in excess of five miles on that part of the road now completed. The road does not come within the exemptions of section 9004, *General Code, as a completed section of the road.*

COLUMBUS, OHIO, Sept. 9, 1913.

Public Service Commission of Ohio, Columbus, Ohio.

GETLEMEN:—Your communication dated June 7, 1913, is received in which you state as follows:

> "The Ashland & Western Railroad has been in existence and operation for ten years or more. Within the past six months it was merged with, and became part of a road known as The Lorain, Ashland & Southern, a part of which road is still under construction.
>
> "The Lorain, Ashland & Southern recently submitted to this commission a proposed new passenger tariff covering the Ashland & Western portion of the new road only, and this proposed new tariff carries rates in excess of two cents per mile for distances of more than five miles. They justify these rates by section 9004."

You request my legal opinion as to whether or not the exemption specified in section 9004 of the General Code would apply under the above statement of facts.

In reply to your inquiry I desire to say that section 8977 of the General Code provides as follows:

> "A company operating a railroad in whole or in part in this state may demand and receive for the transportation of passengers on its road,

not exceeding two cents per mile, for a distance of more than five miles, but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance."

Section 9004 of the General Code provides in part as follows:

"The provisions of sections eighty-nine hundred and seventy-seven * * * shall not apply to a railroad *in course of construction*, * * * * . Such exemption shall not continue longer than five years after cars are run for the transportation of freight and passengers on such road."

Your inquiry, in brief, raises the question whether The Lorain, Ashland & Western Railroad Company may charge in excess of the rates provided in section 8977, General Code, because of its right to avail itself of the provisions of section 9004, General Code.

As you state the facts, The Ashland & Western Railroad Company has been in operation ten years or more and prior to the stated merger was not and did not claim to be a road in process of construction, but the claim is made by the Lorain, Ashland & Western Railroad Company that because it has a part of its road under construction, it may claim exemption from section 8977, General Code.

While the manner of this merger is not stated, it could only have been brought about in one of three ways: (1) the old road (Ashland & Western) buying out and securing control of the new road—the one then in process of construction; (2) By the new organization buying the old road, or (3) By a new corporation organized for that purpose buying both roads.

While it is true that section 8977, mentions a "company operating a railroad," and section 9004 merely directs that its provisions shall not apply to a railroad in course of construction," and it is also true that the corporation now owning both these roads is a legal entity indivisible, and that the railroad companies owning these roads, before the merger, have ceased to exist, yet it is not believed that your question is to be answered from a consideration of the ownership merely. While the ownership has changed, the physical condition of the roads remained the same—one completed road and one in process of construction. The change of ownership had no more effect in making one road of the two than it did to render the completed portion incapable of operation, and while this may be looking at the question from the standpoint of facts rather than law, I cannot conceive how the merger of these two roads could any more constitute one completed road than it could one road in process of construction.

One of three conclusions must follow:

1. That the merger of the completed road with the unfinished one constituted the combination a completed road.

2. That it constituted it a road "in process of construction," or

3. That it constituted the Ashland, Lorain and Western Company the owner of two roads, one constructed and completed and the other in process of construction.

The first and second of these are based on equal law, logic and facts and neither of them fulfill the measure of the law or meet the objects intended to be accomplished by this legislation.

The third and last has a solid foundation in the request made to your body for authority to fix a tariff on the old road only.

This company by making its application in this manner confessedly admits

that it has some completed road, that it is operating the same and desires to fix rates on it.

If it should be claimed that the attachment of the new road to the old one merged the new into the old and that they both constituted a completed road, greater hardship and more inconvenience would result than in holding, as I do, that the change of ownership of the old road did not change its physical condition nor alter its relation to the statutes in question.

I am, therefore of the opinion that The Lorain, Ashland and Western is not entitled to change rates in excess of two cents per mile as requested, and does not come within the exemptions of section 9004, General Code, as to the completed portion of the road.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Industrial Commission)

437

FUNDS OF THE VARIOUS STATE DEPARTMENTS THAT ARE CONSOLIDATED INTO THE INDUSTRIAL COMMISSION ARE TO GO TO THE INDUSTRIAL COMMISSON AS ONE GROSS SUM FOR THE USE OF THE COMMISSION.

The amounts appropriated for the use of the State Liability Board of Awards, State Board of Arbitration, Chief Examiner of Steam Engineers, Department of Board of Boiler Rules, Bureau of Labor Statistics, Chief Inspector of Mines and Chief Inspector of Workshops and Factories, that are unappropriated at the time these departments cease to exist on September 1, 1913, are to be converted into one gross sum for the use of the commission.

COLUMBUS, OHIO, August 8, 1913.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of August 6th in which you inquire:

> "Kindly advise us whether such portions of the amounts appropriated in detail for the state liability board of awards, state board of arbitration, chief examiner of steam engineers, department of board of boiler rules, bureau of labor statistics, chief inspector of mines and chief inspector of workshops and factories as remain unexpended on September 1, 1913 are by the provisions of sections 3 and 4 above mentioned, reduced to a lump sum and made available for the uses and purposes of the industrial commission of Ohio under the heads 'receipts and business' and 'salaries and expenses;' or, will the industrial commission in making use of such appropriations, be required to observe the detail of the same?"

The act of March 12, 1913, creating the industrial commission of Ohio, by section 11 thereof provides that after September 1, 1913, the following departments, to wit: commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories, chief examiner of steam engineers, board of boiler rules and the state board of conciliation and arbitration shall have no further legal existence, except that the heads thereof shall report to the governor for such part of the year 1913 as they were in existence; and by the same section it is provided that,

"On and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law on said departments."

By section 12 of said act, pp. 97 and 656, 103 O. L., the industrial commission supersedes and is given authority to perform all the duties of the state liability board of awards; and by section 24 of said act (163 O. L. 103) it is provided:

> "All duties, liabilities, authority, powers and privileges conferred and imposed by law upon the commissioner of labor statistics, special agents for the commissioner of labor statistics, chief inspector of mines,

district inspector of mines, chief inspector of workshops and factories, first assistant chief inspector of workshops and factories, second assistant chief inspector of workshops and factories, chief examiner of steam engineers, assistant chief examiner of steam engineers, district examiners of steam engineers, the board of boiler rules, head of the department of the board of boiler rules and chief inspector of steam boilers, assistant chief inspector of steam boilers, general inspectors of steam boilers, special inspector of steam boilers, state board of arbitration and conciliation, are hereby imposed upon the industrial commission of Ohio and its deputies on and after the first day of September, 1913. All laws relating to the commissioner of labor statistics, special agents of the commissioner of labor statistics, chief inspector of mines, district inspector of mines, chief inspector of workshops and factories, first assistant chief inspector of workshops and factories, second assistant chief inspector of workshops and factories, district inspectors of workshops and factories, chief examiner of steam engineers, assistant chief examiner of steam engineers, district examiners of steam engineers, the board of boiler rules, head of the department of the board of boiler rules and chief inspector of steam boilers, general inspectors of steam boilers, special inspectors of steam boilers, state board of arbitration and conciliation on and after the first day of September, 1913, shall apply to, relate and refer to the industrial commission of Ohio, and its deputies. Qualifications prescribed by law for said officers and their assistants and employes shall be held to apply, wherever applicable to the qualifications of the deputies of the commission assigned to the performance of the duties now cast upon such officers, assistants and employes."

The power of the legislature to abolish these departments and consolidate them, as done by this act, cannot be questioned, and inasmuch as section 3 of the sundry appropriation act provides:

"* * * That whatever sums are herein specified and appropriated for the purposes of the state liability board of awards, state board of arbitration, chief examiner of steam engineers, department of board of boiler rules, bureau of labor statistics, chief inspector of mines and chief inspector of workshops and factories; and, whatever sums have been appropriated or may be appropriated for the purpose of said departments shall on and after September 1, 1913, be available for the uses and purposes of the industrial commission of Ohio."

(103 O. L. 626)

Section 4 of the general appropriation act reads:

"Sums herein specified and appropriated for the purposes of the state liability board of awards, state board of arbitration, chief examiner of steam engineers, department of board of boiler rules, bureau of labor statistics, chief inspector of mines and chief inspector of workshops and factories; and, whatever sums have been appropriated or may be appropriated for the purpose of said departments shall, on and after September 1, 1913, be available for the uses and purposes of the industrial commission of Ohio."

(103 O. L. 647)

All doubt as to what body shall use and control these appropriations

(whether in gross or specific) is removed. They are available for the uses and purposes of the industrial commission of Ohio, and there being no requirement that the appropriations shall be used for the specific purposes named, it must necessarily follow that as the industrial commission supersedes the boards and departments, named, is given all their powers, and required to perform all their duties and thus given these appropriations for the purposes of the act of March 13, 1913, without specifying that they shall be used for the specific purposes mentioned, it is only called upon to use these appropriations for the general purposes of the *industrial commission.*

In other language, section 3 of the one bill and section 4 of the other, substantially converts these specific appropriations to one in gross, for the use of the industrial commission in carrying out the objects of the various departments whose legal existence terminates on September 1, 1913, and whose power and duties are conferred upon the industrial commission, said commission being careful if possible to keep the expenses of each department, as made by it, within the limit of the appropriations made for the same.

From this it necessarily follows that the industrial commission of Ohio has the incidental right and power to see that the expenses of these several departments, up to September 1, 1913, are within the limits of appropriations made for each.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

526.

THE PROVISION OF SECTION 6213, GENERAL CODE IN REFERENCE TO PRISON MADE GOODS IN A VALID USE OF THE POLICE POWER AND DOES NOT INTERFERE WITH INTRASTATE OR INTERSTATE COMMERCE.

Section 6213 of the General Code of Ohio requiring goods, wares and merchandise made by convict labor to be branded, labeled or marked before being exposed for sale, applies to goods, wares and merchandise made by convict labor in the state of Ohio, when such goods are imported, brought or introduced into this state, applying as well to goods of this character made within this state as well as those introduced into it.

This section is a legitimate exercise of the police power of the state, does not interfere with interstate commerce, and is violative of neither the federal nor the state constitution.

COLUMBUS, OHIO, October, 1, 1913

HON. T. J. DUFFY, *Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of September 17th, enclosing a letter received from Mr. Schreiber, city solicitor of Toledo. In his letter he refers to the fact that certain firms in Toledo are selling prison-made goods and suggests that the factory inspectors throughout the state call upon merchants in the various cities and explain to them the law prohibiting the sale of prison-made goods. You state that the sections of the General Code to which you have been referred in regard to this matter do not prohibit the sale of prison-made goods, but merely provide that such goods must be labeled

in order to indicate that they are prison made. You inquire whether this department has rendered an opinion upon this subject, and if it has, you desire to have a copy thereof.

This department has not rendered an opinion upon this question, but I shall hereby do so.

Section 6213 of the General Code, provides that:

> "Goods, wares and merchandise made by convict labor in a penitentiary, prison, reformatory or other establishment in this or any other state in which convict labor is employed and imported, brought or introduced into this state, shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed without such brand, label or mark."

Section 6214 prescribes the style and use of the brand, section 6215 designates the form of label to be used, section 6216 states where the brand, mark or label shall be placed, and section 6217 reads thus:

> "A person dealing in convict-made goods, wares or merchandise, as described in this chapter, shall not knowingly have them in possession for the purpose of sale, or offering them for sale without the brand, label or mark required by this chapter, or remove, conceal or deface the brand, mark or label thereon."

Section 6218 provides in substance that when the commissioner of labor statistics has reason to believe that the immediately foregoing section has been violated, he shall submit to the attorney general his information in support of such belief and the attorney general shall institute the proper legal proceedings to compel compliance with the foregoing statutes.

The following is section 13170:

> "Whoever, dealing in goods, wares and merchandise made by convict labor in a penitentiary, prison, reformatory or other establishment where convict labor is employed, knowingly has them in possession for the purpose of sale or offers them for sale, without the brand, label or mark of 'convict made' as required by law, or removes, conceals or defaces such brand, mark or label, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than ten days nor more than twelve months, or both."

Preliminary to a discussion of the questions here involved, I desire to say that the section last quoted was originally enacted with other sections therein before referred to, and therefore the words "as required by law" no doubt have reference to the provisions of the other sections.

The constitutionality of this law must be determined from a consideration of its validity under the constitution as it stood prior to the amendment of 1912. This is true because the constitutionality of a statute must be based on the constitution in force at the time of the passage of the law. An unconstitutional statute is absolutely void and cannot be validated by subsequent amendment which is in harmony with the said statute. 8 Cyc. 758.

In Arnold vs. Yanders, 56 O. S. 417, an act requiring any person exposing for sale convict-made goods, to obtain a license, was held to be in conflict with

that provision of the United States constitution giving congress power to regulate commerce among the several states. It must be noted, however, that this act provided that its terms should not be applicable to the products of the prisons of this state. It is a clear and distinct regulation of commerce, as its aim was to discourage the importation of convict-made goods from other states, while it did not tend to discourage the sale of such goods when they were made in Ohio. If it had been a proper police regulation, it should have been made applicable to all classes of convict-made goods. In addition to this, I think a distinction should be made between a license, such as was involved in that case and the requirement of a label as provided for in the sections here discussed. And furthermore, it must be borne in mind that the case just referred to contains no discussion of the application of the state constitution to the law thereunder consideration. At the time this decision was rendered, the statutes we are now considering applied only to convict-made goods manufactured in other states and imported into Ohio. After this decision, and probably as a result thereof, section 6213 was amended by the insertion of the words "this or" immediately after the words "establishment in." On July 5, 1901, Mr. J. H. Sheets, who was then attorney general held that the insertion of these two words rendered the statute ambiguous, with the result that the manufacturers succeeded in obtaining a decision in the circuit court of Franklin county, in the case of State ex rel. vs. Brown, etc., Company, to the effect that the provisions of this section did not apply to convict-made goods manufactured and sold in Ohio.

Vol. 5, opinions of attorney general of Ohio, 496.

If this construction be correct, then I should be inclined very seriously to doubt the constitutionality of the statute, but with the construction of Mr. Sheets, I am not entirely satisfied, notwithstanding the decision to which he refers, and think that the act can and should be so read as to apply to goods made by convicts in this state as well as to imported convict-made goods. I base this reasoning on the fact that it was the manifest intention of the legislature, by the insertion of the words above quoted, to include with its provisions goods made in this state. Clear meaning may be given the act by making the following words stand together as one separate clause, thus, "or any other state, in which convict labor is employed, and imported, brought or introduced into this state."

In other words, the act would then provide in substance—the goods, etc., made by convict labor in a penitentiary, etc., in this state or in any other state and brought into this state, should be branded, etc. After arriving at this conclusion, I found that Attorney General Richards had construed the law in the manner in which I herewith suggest.

Vol. 4, opinions of attorney general of Ohio, 581.

It is interesting to note in this connection, that in the Massachusetts case, to which I shall later refer, the justices of the court of that state treated an act like the one in question as embracing goods made within and those without the state within its terms. Of course in that case this identical question was not decided, but the assumption of the court seemed to be that which I have indicated.

Assuming that my interpretation of the law is correct, the next question is whether the act is a valid police regulation under the constitution of Ohio as it stood at the time of the enactment of the law. The New York court of appeals in People ex rel. vs. Hawkins, 42 L. R. A. 490, at least in the reasoning of the opinion of the judge who rendered the majority opinion, took the view that a law of this character was invalid under the New York constitution. The substance of the holding of the judge rendering the majority opinion was that the statute was not a valid exercise of police power, although he announced

another reason to which I shall later refer. Very able dissenting opinions were rendered by Chief Justice Parker and Judge Bartlett, and the justices who concurred in the majority opinion voted for affirmance upon the ground that the statute conflicted with the commerce clause of the federal constitution. From this it will be seen that two justices distinctly held that the act was a valid police regulation, and one took a contrary view while three of the justices by concurring in the majority opinion only upon the federal question, would indicate that they agreed with the dissenting judges upon the phase of the question which I am now discussing. Judge Haight concurred with Chief Justice Parker and Judge Bartlett. The majority opinion, however, was followed in People ex rel. vs. Rayne, 136, App. Div. 417 (Aff. 198 N. Y. 549), which last decision was not upon a statute like the one in question but upon a law similar to the law declared unconstitutional by our supreme court in the case hereinbefore referred to.

I am of the opinion, although the question is one of some doubt, that this legislation is a legitimate exercise of the police power of the state because the protection of an honest, unimprisoned laborer, from competition with convict-made goods, will promote public welfare and prosperity and such production is consonant with the spirit of the age and modern thinking; and also because it is and should be competent for this state to protect its citizens from the fraud and deception that result if prison-made goods are offered for sale without any designation of their origin. The people should be advised of the fact that such goods are convict-made so that when they buy them they will do so with their eyes open and not under a delusion that such goods are the product of the labor of him who is a free citizen rather than a criminal. Congress has fully recognized this in providing by statute that prison-made goods may not be imported into the United States.

Conceding that I am correct in my interpretation of the statute and in my opinion that it is not violative of the state constitution, we are still confronted with the claim that the law is invalid as an interference with interstate commerce. The supreme judicial court of Massachusetts in re opinion of Justices 98 N. E. 334, held that a statute like the one in question, was invalid as an interference with interstate commerce. Now if this statute is so separable that one part of it may be held valid, while another part is held invalid, the constitutional part may stand and the unconstitutional part may be rejected. Consequently if the clause regulating imported prison-made goods be independent of the clause regulating prison-made goods manufactured within the state, then, even if the former clause were held to be contrary to the provisions of the federal constitution, the latter provision may be retained. This rule of statutory construction must be limited, however, and where it is found that the whole taken together warrants the belief that the legislature would not have passed the valid portion alone, then the whole statute should be held inoperative.

There is much to be said in favor of the theory that the legislature would have made a law applying solely to convict-made goods within the state, even if it could not have regulated the sale of convict-made goods which are imported into the state and I incline to that theory, although a very strong argument to the converse may be adduced. I also think that the two parts may be treated as independent. Upon the whole, however, I have arrived at the conclusion in the face of the two decisions which I have cited, that this law, even if it be treated as so inseparable as not to permit any clause to be disregarded, is nevertheless, not violative of the federal constitution, or a direct interference with the freedom of interstate commerce. The opinion of Judge Bartlett in the New York case very clearly and lucidly maintains this position and I think it would be supported by the supreme court of the United States. I wish

to add that in the Massachusetts case, the justices were asked to pass upon the constitutionality of a proposed law, as is permitted in that state, rather than to construe one that had been passed, and this I think should have some bearing in considering their opinion.

A particularly nice question also arises upon the application of section 13170, General Code, to section 41 of article 2 of the new constitutional amendment. The statute was originally part of an act found in 90 Ohio Laws 320, but was carried into the General Code separate from the other parts of this act. The constitutional amendment provides that convict-made goods sold in this state shall be marked "prison made," while section 13170 prescribes a penalty for selling convict-made goods without the brand "required by law." Can these words last quoted be treated as referring to the said constitutional amendment? If so the difficulty of interpreting section 6213 will be obviated. I shall not here, however, enlarge upon this phase of the situation.

The foregoing considerations move me to suggest to you that your commission should conduct an investigation with a view of bringing a test case in order to determine the validity of the law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

584.

THE INDUSTRIAL COMMISSION TAKES THE PLACE OF CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES AS A MEMBER OF THE BUILDING CODE COMMISSION—MONEY APPROPRIATED FOR THE PURPOSES OF THE CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES CAN BE USED FOR THE GENERAL PURPOSES OF THE INDUSTRIAL COMMISSION.

1. *The industrial commission takes the place of and succeeds the chief inspector of workshops and factories as a member of the building code commission on and after September* 1, 1913, *and in acting as a member of the building code commission or industrial commission should act as a unit, that is, as one member of such building code commission.*

2. *Appropriations made for the chief inspector of workshops and factories are available for the expenses of the industrial commission.*

COLUMBUS, OHIO, October 21, 1913.

HON. WALLACE D. YAPLE, *Chairman, Industrial Commission, Columbus, Ohio.*

DEAR SIR:—Under date of October 11, 1913, you inquire:

"1. What, if any, duty is the industrial commission of Ohio required to perform, relative to the preparation of the building code referred to in my letter?

"2. Whether the appropriation made for the chief inspector of workshops and factories is available for the expenses of the industrial commission, and if so, in what manner shall expenditures therefrom be authorized?"

1. On May 10, 1913, an act relating to the preparation of a code of regulations to govern the erection and maintenance of public and other buildings was passed and the secretary of the state board of health, state fire marshal

and chief inspector of workshops and factories, were authorized and directed to submit to the next general assembly a copy of the regulations governing the erection, etc., of such buildings. An appropriation was made to cover the expenses of this work. This act was continued on May 31, 1911, (102 O. L., 440) and additional appropriation was made. As the work was not completed at the time the last general assembly was in session, the commission was continued and an appropriation of $3,500.00 was made, such appropriation appearing under the head of "state department workshops and factories," this being the language:

"Uses and purposes of the State Building Code Commission ..... $3,500.00"

By the creation of the industrial commission, 103 O. L., 95 the office of chief inspector of workshops and factories was abolished and his powers and duties were transferred to and merged into the industrial commission of Ohio, the act in this regard taking effect on and after September 1, 1913. The title of this act, and sections 11 and 24 thereof, make very clear the fact that the industrial commission shall have all powers and perform all duties conferred by law upon the chief inspector of workshops and factories, and that all laws relating to the last named position shall relate and refer to the industrial commission. It is true that the act continuing the building code commission was passed subsequent to the passage of the industrial commission act, which continued as a member thereof the chief inspector of workshops and factories, but, in my judgment, this is an immaterial matter, as no necessity arises for the application of the doctrine of implied repeal. The chief inspector of workshops and factories was an existing position and continued so to be until September 1, 1913, and the legislature no doubt intended that he should remain a member of the building code as long as his office existed.

In view, however, of the broad language used in conferring the power, duties and obligations of the chief inspector of workshops and factories upon the industrial commission, I am of the opinion that this commission takes the place of and succeeds the chief inspector of workshops and factories as a member of the building code commission, on and after September 1, 1913. Ordinarily, there would be no question in the average mind regarding this, if an individual had been appointed to succeed the inspector, but as it is a board which takes his place, this might at first glance confuse the mind, but a careful study will develop that there is no reason for the distinction. In acting as a member of the building code commission, the industrial commission should act as a unit—that is to say, as one member of such building commission.

2: I assume from your question, that you desire information regarding all appropriations made for the chief inspector of workshops and factories rather than the one to which I have heretofore adverted.

As your board has succeeded, in all respects, to the chief inspector of workshops and factories, I think that under the language used in the appropriation act itself, there is no question that the industrial commission has the right and has been authorized, since September 1, 1913, to use the balance of the appropriations made for the inspector, by virtue of appropriations made by the last general assembly.

Section 2 of the appropriation act, 103 O. L., 611, 626, provides:

"Whatever sums herein specified and appropriated for the purpose of the * * * * chief inspector of workshops and factories; and

whatever sums have been appropriated or may be appropriated for the purposes of said departments shall, on and after September 1, 1913, be available for the uses and purposes of the industrial commission of Ohio."

The specific appropriation of $3,500.00 for the use of the state building code commission, must be expended for the uses and purposes of this commission, and cannot be devoted to the general purposes of the industrial commission of Ohio.

Trusting that this fully answers your inquiry, I am,

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

606.

WAGES MUST BE PAID TWICE EACH MONTH.

The provisions of the General Code require the payment of wages earned during the first half of the month on or before the first of the following month, and the payment on or before the 15th day of each month all wages earned during the last half of the preceding calendar month. Any system that does not comply with these requirements is illegal.

HON. WALLACE D. YAPLE, *Chairman Industrial Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of October 15, 1913, enclosing a letter from the Goodyear Tire & Rubber Co., together with a copy of your reply to their letter. You request this department to render an opinion upon the following questions, suggested by the letter of the Goodyear Tire & Rubber Co.

"Our factory employes have been divided into two divisions, each containing about one-half of the employes, Saturday has been determined upon as pay day; one division being paid one Saturday, and the other division the following Saturday. Our pay system, therefore, involves a pay period covering two weeks, making twenty-six pay days during the year. The pay period for wages paid on any Saturday always ends with Wednesday, ten days before pay day.

"To give you a concrete example, showing wherein possibly our system does not fully comply with the law, we might take a pay period of one of the divisions starting Thursday, September 11th, and ending Wednesday, September 24th. Under our system, the men in this division would be paid on Saturday, October 4th. Thus there would be in this period four days, 11th, 12th, 13th and 15th, which falls within, the first one-half of the month, and which according to the law, would have to be paid on or before the 1st of October.

"If you can, we would be glad to have a ruling on this, and an explanation from you as to whether we are working so well within the provisions of the law as to make unnecessary a change in our present system."

Section 1 of an act to provide for the payment of wages at least twice in each calendar month, provides in substance that every individual, firm, company, partnership, association or corporation, doing business in this state, who employ five or more regular employes,

> "shall on or before the first day of each month, pay all their employes engaged in the performance of either manual or clerical labor, the wages earned by them during the first half of the preceding month, ending with the 15th day thereof, and shall on or before the 15th day of each month pay such employes the wages earned by them during the last half of the preceding calendar month."

The foregoing language clearly and unequivocally requires the payment of wages earned during the first half of the month, on or before the first day of the following month, and the payment, on or before the 15th day of each month, all the wages earned during the last half of the preceding calendar month. This being true, it necessarily follows that the Goodyear Tire & Rubber Company will not comply with this act if it continues the system illustrated in its letter, for the reason that part of the wages earned during the first half of the month will not be paid on or before the first of the following month.

While the system that they have adopted seems to be eminently fair and may possibly conform to the spirit of the act, neverthless the statute is so plain that there is no room for construction or consideration of the object of the law as a means of arriving at its intention. Hence, the company should be advised that it must discontinue its present system and adopt one in conformity with the statute.

In conclusion, I wish to call your attention to the opinion rendered by this department to the Hon. Carl D. Friebolin, on July 11, 1913, a copy of which I herewith enclose.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

642.

A STATIONARY ENGINEER'S LICENSE MAY NOT BE REVOKED EXCEPT ON THE GROUNDS PROVIDED BY STATUE.

The fact that charges have been set forth against an operating stationary engineer accusing him of neglect of duty in abandoning his boiler and leaving the building in darkness, during which time the oil cups, oil pump check valves and other parts of the machinery were interfered with in a very detrimental manner, is not grounds for revoking his license under section 1049, *General Code.*

COLUMBUS, OHIO, Dec. 9, 1913

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have at hand your communication of December 8th, with which you enclose an affidavit setting forth charges against an operating stationary steam engineer, who holds a license issued by your department. Said affidavit, in substance, sets forth that the engineer in question abandoned his

boiler, leaving the building in darkness, and that within a very short time thereafter the oil cups, oil pump, check valves and other parts of the machinery were found to be interfered with in a very detrimental manner. You ask whether or not the facts set forth afford sufficient grounds for the revocation of the engineer's license, under section 1049, General Code.

Section 1049, General Code, is as follows:

> "If upon such examination, the applicant is found proficient in such subjects, a license shall be granted him to have charge of and operate stationary steam boilers and engines of the horse power required by law, for one year from the date on which it is issued. Upon written charges after notice and hearing, the district examiner may revoke the license of a person guilty of fraud in obtaining such license, or who becomes insane, or is addicted to the liquor or drug habit to such a degree as to render him unfit to discharge the duties of a steam engineer."

The grounds for revocation of a license are set forth fully in this statute; they are specifically enumerated and distinctly stated. Whatever may be the guilt of the engineer in question, and whatever condemnation his action may merit, it is clear that the facts stated do not afford sufficient grounds for revocation of a license, as they are set forth in the statute quoted. It is clear that none of the grounds set forth in the statute have application to the facts appearing in the affidavit; since the facts stated show not the slightest evidence of fraud in obtaining the license, nor of insanity, nor of addiction to the liquor or drug habits in any degree, which circumstances alone afford ground for revocation of a license under said statute.

I am enclosing the affidavit and the communication submitted by you.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Civil Service Commission)

661

DISTRICT TAX ASSESSORS—SUBORDINATE TO TAX COMMISSION OF OHIO—NOT ENTITLED TO TWO SECRETARIES, ASSISTANTS OR CLERKS IN UNCLASSIFIED SERVICE.

The district tax assessors are responsible directly to the Tax Commission of Ohio, and are not directly responsible to the Governor. They are not heads of principal department. They are not principal executive officers, but are subordinate to the Tax Commission of Ohio, consequently they are not entitled to have two secretaries, or assistants or clerks in the unclassified service.

COLUMBUS, OHIO, Dec. 20, 1913.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN: Your favor of December 18, 1913, is received, in which you inquire:

> "The question has been submitted to us as to whether the district assessors (commonly called the county tax assessors) are to be construed as heads of principal departments, as designated in section 2 of main section 8 of the civil service act—and also whether or not each district tax assessor is entitled to appoint two persons outside the classified service, as provided in subsection 7 of main section 8. That is, are all the employes of each district assessor in the classified service or can they have two exempt persons?"

Subdivisions 2 and 7 of branch (a) of section 8, of the civil service act, section 486-8, General Code provides:

> "2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.
>
> "7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or chief clerk."

The district assessors are appointed by virtue of the act of 103 Ohio Laws, 786, and their duties are therein prescribed.

Section 1 of said act, to be known as section 5579, General Code, provides:

> "In addition to all other powers and duties vested in or imposed upon it by law, the tax commission of Ohio shall direct and supervise the assessment for taxation of all real and personal property in the state. For the purpose of such assessment, the state is hereby divided into assessment districts. Each county in the state shall constitute an assessment district. In each assessment district which contained, at the last preceding federal census, less than sixty-five thousand inhabitants, there shall be appointed in the manner provided in this act, one

deputy state tax commissioner, who shall be known as the district assessor. In all other assessment districts, there shall be appointed, in the manner provided in this act, two deputy state tax commissioners, not of the same political party, who shall constitute the district board of assessors. Wherever used in this act, the term "district assessor" shall mean and include also the district board of assessors herein provided for, or a member thereof as the case may be. *Such district assessors, shall, under the direction and supervision of the tax commission, be the assessors of real and personal property for taxation,* within and for their respective districts, except as may be otherwise provided by law. There shall also be appointed in each assessment district, in the manner provided in this act, three persons who shall constitute a board to hear complaints and review assessments of real and personal property for taxation, which shall be known as the district board of complaints.

Section 2 of said act to be known as section 5580, General Code, provides:

"Each district assessor shall be appointed by the governor on or before the first day of November, 1913 and shall hold his office until his successor is appointed and qualified, except as otherwise provided by law. He shall be an elector of the district for which he is appointed, and upon ceasing to be such, his office shall be vacant. The tax commission of Ohio may with the consent of the governor remove any district assessor.

Section 3 of said act, to be known as section 5581, General Code, provides:

"Each district assessor shall appoint such number of deputy assessors, assistants, experts, clerks and employes as may, from time to time, be prescribed for his district by the tax commission of Ohio. Such deputy assessor, assistants, experts, clerks, and employes shall hold their respective offices and employments for such times as may be prescribed by the tax commission."

Section 4 of said act, to be known as section 5582, General Code, provides, in part:

"The district assessor shall, annually, *under the direction and supervision of the tax commission,* list and value for taxation all real and personal property subject to taxation in the county constituting his assessment district, except as otherwise provided by law."

It will be observed that the district assessor is appointed by the governor. The duties of such district assessor are performed "under the direction and supervision of the tax commission" of Ohio. It is the duty of "the tax commission of Ohio" to "direct and supervise the assessment for taxation of all real and personal property in the state."

For this purpose the state is divided into districts and in each district there is one or two district assessors. These district assessors are subordinate to the state tax commission.

In the opinion recently given to your department it is held that a principal department is one the head of which is directly responsible to the chief ap-

pointing authority. The chief appointing authority in this instance is the governor.

The district assessors are responsible directly to the tax commission of Ohio and are not directly responsible to the governor. They are not, therefore, heads of principal departments as said term is used in subdivision 2 of branch (a) of section 8 of the civil service law.

They are not "principal executive officers" within the meaning of subdivision 7 of said section 8. They are subordinate executive officers, as they are subordinate to the tax commission of Ohio.

The district assessors do not therefore come within the terms of either subdivision 2 or subdivision 7, of branch (a) of section 8 of the civil service law, and they are not entitled to have two secretaries, or assistants or clerks in the unclassified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

662.

HEAD OF SUBDEPARTMENT UNDER CLASSIFIED CIVIL SERVICE MAY NOT HAVE ASSISTANTS IN UNCLASSIFIED SERVICE.

There is no head of a subdepartment that can be classed as a "principal executive officer" under subdivision 7 of the civil service act, nor any other position, the incumbent of which is in the classified service that can have two assistants or secretaries or clerks in the unclassified service.

COLUMBUS, OHIO, December 23, 1913.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of December 22, 1913, you inquire:

> "Could an appointee, either of the governor or the mayor of the city, who is himself under the classified service, have two secretaries, assistants, or clerks exempt from the classified service as provided in section 7, i. e., are there any persons with appointing power who are in the classified service and at the same time entitled to have secretaries, assistants and clerks, who are not in the classified service?"

You attach a letter from Mr. C. B. Wilby, chairman of the civil service commission of Cincinnati, in which he states:

> "What officers are entitled to two secretaries or assistant clerks, under subdivision 7 of section 8 of the civil service law. Does that apply to appointees of the heads of principal departments, boards and commissions named in subdivision 2 of that section? In other words, are any principal executive officers who themselves are not exempt, but are in the classified service, entitled to two secretaries, assistants, or clerks, who are not in the classified service?"

Subdivisions 2 and 7 of branch (a) of section 8 of the civil service law, provide:

"2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.

"7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to apoint such a secretary, assistant or chief clerk."

By virtue of subdivision 2 "heads of principal departments, boards and commissions," who may be termed "principal executive officers, boards and commissions" are in the unclassified service.

By virtue of subdivision 7, "principal executive officers, boards or commissions," are entitled to two secretaries, or clerks or assistants in the unclassified service.

An appointee appointed by the governor or mayor, and who is in the classified service cannot be termed a "principal executive officer." If he should be so classed he would come under the terms of subdivision 2 and himself be placed in the unclassified service.

The word "principal has the same meaning in subdivision 2 that it has in subdivision 7. It does not necessarily follow that if an officer comes within the terms of subdivision 2 he must thereby come also within the provisions of subdivision 7, or vice versa.

I know of no head of a subdepartment that can be classed as a "principal executive officer" under subdivision 7. Nor do I know of any position, the incumbent of which is in the classified service, that can have two assistants, or secretaries, or clerks in the unclassified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

663.

CIVIL SERVICE—SECRET SERVICE OFFICERS NOT UNDER CIVIL SERVICE—CLERK OF COUNCIL IN CLASSIFIED CIVIL SERVICE—CITY ENGINEERS, STREET COMMISSIONERS AND CITY CEMETARY SUPERINTENDENTS IN CLASSIFIED CIVIL SERVICE.

The clerk of council is placed in the classified civil service of the city by the new civil service law. A secret service officer appointed by the prosecuting attorney is not in the classified service under the civil service law. A street commissioner, as provided for in section 4363, General Code, is an officer of a village and not of a city and the new civil service law does not apply to villages. The city engineer is not at the head of a principal department as provided for in subdivision 2 of branch a of section 8 of the civil service law, and is, therefore in the classified service. A court bailiff is not in the classified service under provisions of section 9 of the civil service law.

COLUMBUS, OHIO, December 27, 1913.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—This department has received several inquiries asking for an interpretation of the new civil service law. As you have general supervision of the civil service law it is deemed advisable to address all opinions pertaining

to said law to your commission. This opinion is therefore addressed to you upon the several inquiries as now presented.

Under date of July 15, 1913, Hon. D. F. Dunlavy, prosecuting attorney of Ashtabula county, inquires:

> "Kindly inform me whether or not in your opinion the secret service officer, appointed by the prosecuting attorney, comes within the Friebolin act and is a civil service man."

Hon. David G. Jenkins, city solicitor of Youngstown, Ohio, submits this inquiry under date of September 8, 1913:

> "Please render me your opinion as to whether under section 486-8, General Code, 103 Ohio Laws, 701, the clerk of council is in the unclassified service or not."

Under date of September 15, 1913, Hon. T. A. Bonnell, member of the house of representatives from Guernsey county, inquires:

> "Do city engineers, street commissioners, and city cemetery superintendents come within the provisions of the new civil service law?
> "Do these hold under civil service or by direct appointment?"

Also under date of October 13, 1913, Senator Carl D. Friebolin inquires:

> "Will you please give me your opinion on section 8, subdivision 9 of the civil service law, passed April 28, 1913, found on page 702, volume 103, Ohio Laws? Section 8 enumerates the positions not to be included in the classified service, among others subdivision 9 provides 'bailiffs of courts of record.'
> "Would you say that the term 'bailiffs of courts of record' would include persons appointed by virtue of section 1692, General Code?"

Each of these inquiries call for a construction of section 8 of the act of 103 Ohio Laws, 698. This section, to be known as section 486-8, General Code, divides the civil service of the state, counties, cities and city school districts thereof, into classified and unclassified service.

Said section 8, reads:

> "Service—Unclassified. The civil service of the state of Ohio and the counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.
> "(a) The unclassified service shall comprise the following positions which shall not be included in the classified service, except as otherwise provided in section 19 hereof:
> "1. All officers elected by popular vote.
> "2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.
> "3. All officers elected by either or both branches of the general assembly.
> "4. All election officers.

"5. All commissioned, noncommissioned officers and enlisted men in the military service of the state.

"6. All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities, the library staff of any library in the state supported wholly or in part at public expense.

"7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.

"8. The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals.

"9. Bailiffs of courts of record.

"10. Employes and clerks of boards of deputy state supervisors and inspectors of elections.

"(b) The classified service shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class.

"1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction, as provided in sections 15, 16 and 17 of this act and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of section 13 of this act."

Section 19 referred to in the first part of section 8 above quoted, applies to the appointment and duties of the members of the municipal civil service commission, and to the suspension of the chief of police, or the chief of the fire department. It does not affect any of the positions now under consideration.

Section 8, supra, places certain described positions in the unclassified service and all others in the classified service. The office of county detective or county secret service officer is not placed in the unclassified service by this section.

Section 2915-1, General Code, as amended in 103 Ohio Laws, provides:

"The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made, or if there be more than one judge, by the judges of such court in such county in joint session, and shall not be less than one hundred and twenty-five dollars per month of the time actually occupied in such service nor more than one-half of the official salary of the prosecuting attorney for a year, payable monthly, out of the county fund, upon the warrant of the county auditor."

Said section 2915-1, General Code, as passed in 102 Ohio Laws, 73, did not contain a provision that such "appointment shall be made for such terms as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney." Such a provision, however, was contained in section 6184, General Code, as enacted in 100 Ohio Laws, 91. The constitutionality of original section 2915-1, General Code, need not be considered in determining the present question.

The same legislature which passed the civil service law also passed the amendatory act of section 2915-1, General Code, supra. The civil service act and section 2915-1, General Code, apply to the same subject-matter and they should be construed, if possible, so as to permit both acts to stand.

The provision in section 2915-1, General Code, to be considered in this:

> "Such appointment shall be made for such term as the prosecuting attorney may deem advisable, and subject to termination at any time by such prosecuting attorney."

This provision would tend to show that the position of secret service office is temporary. The prosecuting attorney "may appoint" such an officer and he may terminate it at any time. That is he may terminate the position. In other words it is discretionary with the prosecuting attorney as to whether he shall appoint a secret service officer. This is further shown by the provision as to payment of salary. That is, he shall be paid "for the time actually occupied in such service."

The temporary character of the position would not indicate that the appointment to such position should not be made from an eligible list after examination.

Section 8 of the civil service act does not place this officer in the unclassified service.

Is it practicable to hold examinations for this position? The determination of this question is left, in the first instance to the civil service commission, subject to review by the courts, as is held in the opinion as to assistant city solicitors and assistant prosecuting attorneys.

The duties of the secret service officer are prescribed by section 2915-1, General Code, and they are such that it can be determined as a matter of law that it is impracticable to hold examinations as to this position. The duties of the position are to assist the prosecuting attorney "in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature."

These duties are so intimately connected with the duties of the prosecuting attorney that it would be impracticable to determine the merit and fitness of applicants by examination.

"It is held to be impracticable to hold examination for a county detective in People vs. Webb, 54 N. Y. App. Div. 588, and for a subpoena server in People vs. Gardner, 157 N. Y. 520.

The county secret service officer is therefor in the unclassified service.

The next position to consider is that of clerk of council.

Section 4210, General Code, provides:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem., a clerk and such other employes of council as may be necessary, and fix their duties, bonds

and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

This section was enacted in 96 Ohio Laws, 59, and then carried into the General Code as section 4210. It was enacted prior to the adoption of the constitutional amendment pertaining to civil service.

The general rule is that a later general law does not repeal an earlier special or local law. But there are many exceptions to the general rule.

In discussing this rule it is stated at page 1087 of volume 36 of Cyc.:

"While the rule undoubtedly is that a general affirmative act, without express words of repeal, will not repeal a previous special or local act on the same subject, even though the provisions of the two be inconsistent, and although the terms of the general law are broad enough to include the cases embraced in the special act, yet it is not a rule of positive law, but of construction only. In accordance with this rule, the presumption is that a general act does not repeal a local or special statute, although it contains a general repealer of acts inconsistent with it. *But, equally in accordance with the purpose and limitations of the rule, such presumption must give way to a plain manifestation of a different legislative intent.* The question is always one of intention and the purpose to abrogate the particular enactment by a later general one is sufficiently manifested when the two acts are so irreconcilably inconsistent or repugnant that both cannot stand together. Such intention may also be made to appear by the words of the general act, by the subject-matter with which the general act is concerned, by other legislation on the same matter, by the surrounding circumstances, by the purpose to be accomplished, or by anything else to which reference may properly be had for the purpose of discovering the legislative intent. *Thus where the clear general intent of the legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed. So also where an act is passed to carry into effect a general amendatory provision of the constitution, all acts inconsistent therewith, although local, are repealed.*"

Section 4210, General Code, was passed before the constitutional amendment requiring the application of the merit system was adopted, and also prior to enactment of the civil service law.

The civil service act was passed in compliance with the provisions of section 10 of article 15 of the constitution and the act was intended to establish a uniform system throughout the state as to all offices and positions which are in the civil service as defined by the act itself.

Such a purpose shows a general intent to repeal prior inconsistent acts which may be special, particular or local.

In view of this rule the provisions of section 4210, General Code, which fix a term of office for the clerk of council and which grants the right to council to remove the clerk of council for cause are limited and qualified by the provisions of the civil service act, and to the extent that the two acts are inconsistent, the civil service act is controlling.

This is further shown by the general repealing clause of the civil service act, wherein it is provided in part:

"Repeal. Sections 4381, * * * of the General Code, and all other acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed."

The status of the clerk of council must, therefore, be determined by the provisions of the civil service act.

It is necessary to determine first, if the clerk of council as an officer or employe of a legislative body, is in the civil service of the city.

The term "civil service" is defined in section 1 of the civil service act, section 486-1, General Code, as follows:

"Definitions. 1. The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof."

This section places all positions in the civil service. The purpose to include officers or employes of a legislative body in the civil service is further carried out by section 8 of the act when it is provided therein that

"3. All officers elected by either or both branches of the general assembly"

shall be in the unclassified service.

It is evident, therefore, that the clerk of council is in the civil service of the city as contemplated by the civil service law.

It will be observed that by the terms used in section 4210, General Code, the clerk of council is spoken of as being "elected."

In section 2 of the civil service law, section 486-2, General Code, the election of officers in the civil service is referred to as an "appointment."

Said section 2 reads in part:

"On and after January 1, 1914, appointments to and promotions in the civil service of this state shall be made * * *."

The terms "election" and "appointment" are distinguished in 15 Cyc. at page 279, as follows:

"The term 'election' carries with it the idea of a choice in which all who are to be affected with the choice participate; whereas from the word "appointment" we understand that the duties of the appointee are for others than those by whom he is appointed."

In the note to the above citation it is said:

"As distinguished from an election an appointment is generally made by one person or by a limited number acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made."

A number of cases are cited. Among these is the case of State vs. McCallister 11 Ohio 46.

In that case Hitchcock, J., says, at page 52:

"The constitution of the state contemplates two different modes of conferring office. One is by appointment, the other by election. And a careful examination will show, that whenever the office is to be conferred by the people, or by any considerable body of the people, it is spoken of as an *election*. Whenever it is to be conferred by an individual, as by the governor, or by a select number of individuals, as by a judicial court, *or by the general assembly*, it is spoken of as an *appointment*."

Also on page 53 he further says:

"It is true that in a certain, and perhaps in the most general sense of the term, every person upon whom an office is conferred may be said to hold that office by appointment, whether the appointment be made by an individual or individuals having power to make, or by the election of a more numerous body. And it is equally true that the same person may be said to have been elected to the office, as he fills it in pursuance of choice whether that choice has been made by one or more."

The clerk of council, while an employe of council is in fact in the service of the city, and his compensation is paid by the city. His selection is made by council. Although section 4210, General Code, provides that he shall be "elected" by council, the selection of a clerk of council is in effect an "appointment," in view of the foregoing distinctions between an election and an appointment.

If the clerk of council comes in the unclassified service it must be by virtue of subdivision 7 of branch (a) of section 8, which provides:

"Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.

This branch of section 8 covers "elective and principal executive officers, boards and commissions." The council is an elective body, but it is not an executive body. By virtue of this branch of section 8 the officers, boards and commissions, must be "executive officers, boards or commissions."

This branch of section 8 does not, therefore, include the clerk of council.

It might be contended that council is not a continuous body, and that each newly elected council has the inherent power to select its officers and employes. The same contention can be made as to the general assembly. Yet the legislature has seen fit to specifically place the officers selected by the general assembly in the unclassified service.

A specific mention of one of a similar class in a statute means the exclusion of all others of that class.

I am of opinion, therefore, that the clerk of council is placed in the classified service of the city by the new civil service law. This is true as to the other employes of council.

As to street commissioner:

Section 4363, General Code, provides for the appointment of the street commissioner as follows:

"The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his suc-

cessor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner."

The street commissioner as herein provided for is an officer of a village and the civil service act does not apply to villages. The office of street commissioner is not fixed by statute for a city. If the office is created by ordinance the duties of the office and manner of appointment should be given in order to determine its status under civil service law.

As to the city engineer:

Section 4250, General Code, provides:

"The mayor shall be the chief conservator of the peace within the corporation. *He shall appoint and* have the power to remove the director of public service, the director of public safety and *the heads of the subdepartments of the departments of public service* and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

This section authorizes the mayor to appoint the heads of the subdepartments of the department of public service. The city engineer is at the head of the subdepartment of engineering, and as such is appointed by the mayor.

Subdivision 2 of branch (a) of section 8 of the civil service law, places all heads of principal departments appointed by the mayor in the unclassified service.

The department of engineering is a "subdepartment" of the department of public service. The principal department is that of public service. The city engineer is not at the head of a principal department, and is therefore in the classified service.

The next position to be considered is that of court constable or as commonly called, the court bailiff.

Subdivision 9 of branch (a) of section 8, supra, places "bailiffs of courts of record" in the unclassified service.

Section 1692, General Code, as amended in 103 Ohio Laws, 417, provides:

"When, in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, superior court, insolvency court, in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more *constables to* preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases."

Section 1541, General Code, applies to the appointment of criminal bailiffs. This section was amended in 103 Ohio Laws, 415, which act was approved May 6, 1913, and also by act in 103 Ohio Laws, 564, which also was approved May 6, 1913.

The parts herein quoted from said section are the same in each of the acts.

Said section 1541, General Code, as amended provides in part:

"The judge of the court of common pleas of a county, or the judges of such court in a county in joint session, if they deem it advisable, may appoint either or all of the following:

"Second. A criminal bailiff, who shall be a deputy sheriff and hold his position during the pleasure of the judge or judges of such court. He shall receive compensation to be fixed by such judge or judges at the time of his appointment not to exceed the amount permitted by law to be allowed court constables in the same court, which shall be paid monthly from the county treasury upon the warrant of the county auditor."

In the act creating and governing the Cleveland municipal court, bailiffs are authorized to be appointed.

Section 1579-46, General Code, as amended in 103 Ohio Laws, 694, provides in part:

"A bailiff and deputy bailiffs, shall be designated as hereinafter provided for in this act. They shall perform for the municipal court services similar to those usually performed by the sheriff for courts of common pleas and by the constable for courts of justice of the peace. * * *"

But section 1579-47, General Code, as amended in 103 Ohio Laws 694, places such officers in the classified service as follows:

"Excepting the clerk and the chief deputy clerk, the bailiff and all deputy clerks and deputy bailiffs, of the municipal court shall be in the classified civil service of the city of Cleveland, subject to the provisions of the laws of the state applying to said classified service. * * *"

The statutes do not provide for bailiffs in police courts.

The foregoing are all the provisions of the statutes wherein officers of a court are called "bailiffs."

If subdivision 9, supra, applies only to such positions as are called "bailiffs" in the statutes, then it can only apply to the criminal bailiff authorized to be appointed by virtue of section 1541, General Code, supra. The bailiffs of the Cleveland municipal court are specifically placed in the classified service and were in said classified service prior to the amendment of the Cleveland municipal court act in 103 Ohio Laws 694, supra.

Court constables as provided for in section 1692, General Code, are commonly known as court bailiffs and are not generally known as constables, as called by statute.

A bailiff is defined at page 156 of volume 5 of Cyc.:

"Bailiff. An officer concerned in the administration of justice of a certain province; an under or deputy sheriff; a tipstaff; * * *."

Also at page 1524 of volume 35 of Cyc. under the subject of "sheriffs and constables" bailiffs are defined:

"Bailiffs. It is the duty of the sheriff, when he cannot attend to such duties in person, to appoint deputies to attend upon the terms of court, and when such deputies are put in charge of juries the term 'bailiff' is applied to them. * * *"

There is no statutory officer, other than the criminal bailiff, that is called by statute a "bailiff," to which subdivision 9 of section 8, of the civil service law can apply. The officer who performs the duties of a court bailiff is the court constable and this officer is generally known as the court bailiff. He is in fact the bailiff of such courts and as such is a bailiff of a court of record.

The legislature in specifying the officers in the unclassified service used general terms and did not call or designate each office by its specific title.

By subdivision 9, supra, the legislature evidently intended that such officers who performed the duties of "bailiffs" to courts of record should be placed in the unclassified service. The court constable provided for in section 1692, General Code, performs such duties and is therefore in the unclassified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

664.

CIVIL SERVICE—COURT STENOGRAPHERS IN CLASSIFIED SERVICE UNLESS CIVIL SERVCE COMMISSION DETERMINES OTHERWISE.

The question whether or not court stenographers are to be in the classified civil service is an administrative question and should be settled by the civil service commissioners. Court stenographers are in the classified civil service unless the civil service commissioners decide that it is not practicable to determine their merits and fitness by a competitive examination.

COLUMBUS, OHIO, December 9, 1913.

State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—A question relating to the civil service laws has been submitted to this department by Mr. Frank L. Hogan, Secretary of the Ohio Reporters' Association, which will, no doubt, be of interest throughout the state, and with which your commission will be concerned, consequently, pursuant to our understanding that all questions of this nature should be answered as if coming from the civil service commission, I am taking the liberty of herewith submitting my opinion upon the matter involved.

Mr. Hogan's inquiry is as follows:

> "Does the position of official court stenographer come within the purview of the new state civil service law?"

Section 10 of article 15 of the constitution, was adopted by the people of this state at an election held on September 3, 1912, and provides as follows:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

This mandate to the general assembly was complied with by the passage, on April 28, 1913, of an act to regulate the civil service of the state of Ohio, the several counties, cities and school districts thereof, and to repeal certain sections of the General Code. This act was approved by the governor on May

5, 1913. It provides, among other things, that on and after Jan. 1, 1914, appointments to and promotions in the civil service of the state and the counties, cities and city school districts thereof, shall be made only according to merit and fitness, to be ascertained as far as practicable, by examination which, if practicable, shall be competitive. On and after that date, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state or the foregoing subdivisions thereof, except as prescribed in said act. Your commission is authorized to prescribe, amend and enforce rules for carrying into effect that section of the constitution just quoted, and the provisions of said act, which rules are to have the force and effect of law.

Section 8 of the act divides the civil service into unclassified and classified service. Those coming within the unclassified service are expressly designated, they being officers elected by public vote, heads of principal departments, boards and commissions, appointed by the governor or with his consent, or by the mayor or similar chief appointing authorities of any city or village school district, officers elected by either or both branches of the general assembly all election officers, all commissioned, non-commissioned officers and enlisted men in the military service of the state, presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library, supported wholly or in part at public expense, two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, excepting the civil service commissions, authorized by law to appoint such employes, deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals, and holding a fiduciary relation to such principal; bailiffs of courts of record, and employes and clerks of boards of deputy state supervisors and inspectors of elections.

The salient provisions relating to classified service read thus:

> "The classified service shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class. 1. The competitive class shall include all positions and employments *now existing or hereafter created in the state*, the counties cities and city school districts thereof, *for which it is practicable, to determine the merit and fitness of applicants by competitive examinations.* Appointments shall be made to or employment shall be given in all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction as provided in sections 15, 16 and 17 of this act, and the rules of the commission by appointment from those certified to the appointing officer, in accordance with the provisions of section 13 of this act."

By virtue of section 9 of this act, your commission is required to put into effect rules for the classification of offices positions and employment in the classified service of the state and the counties, and for appointments promotions, transfers, etc., which rules are to be given to appointing officers affected thereby, as well as printed for public distribution.

The nature of the examinations to be given and the manner in which they shall be conducted, are defined under section 10. Incumbents of positions in the competitive classified service, except those holding positions under the existing civil service laws, shall be subject to a non-competitive examination as a condition of continuing in the service. From the returns of these examinations the

commission shall prepare an eligible list of persons whose general average is not less than the minimum fixed by your rules, provided such persons are otherwise eligible. The persons on the eligible list shall take rank in the order of their relative excellence, as determined by the examination and in case this develops equality priority of time of application shall determine the order in which the names shall be placed upon the list.

Under section 13, the heads of the departments, offices or institutions in which a position in the competitive classified list is to be filled, shall notify the commission of such fact and it shall then certify to him the names of the three candidates standing highest on the list, for the class or grade to which the position belongs. The appointing officer shall fill such position by appointment of one of the three persons certified to him by the commission, as aforesaid. This appointment shall be for a probationary period of not to exceed three months, to be fixed by the rules and no appointment or promotion shall finally be made until the probationary period has been served. At the end of this time the appointing officer shall transmit to the civil service commission a record of the employe's service, and if it is unsatisfactory the employe may, with the approval of the commission, be removed or reduced without restriction; but dismissal or reduction may be made during such period as provided in section 17 of the act, to which I shall hereafter refer.

Positions in the competitive class may be filled without competition; (a) when there are urgent reasons for filling a vacncy and the commission is unable to certify to the appointing officer a list of eligible persons, when the appointing officer may nominate a person to the commission for a non-competitive examination and if certified by the commission as qualified, such person may be appointed provisionally to fill a vacancy until appointment can be made after competitive examination. (b) In case of vacancy in a position where peculiar and exceptional qualifications of a scientific, managerial, professional or educational character are required and competition is impracticable and the position can best be filled by the selection of some designated person of high and recognized attainments, in which event the commission may suspend the provision of statute relating to competition. (c) When the services to be rendered are for a temporary period not to exceed one month and the need of such service is important and urgent, then any person on the eligible list may be selected without regard to his standing.

The following language is taken from section 16:

"Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department."

Section 17, heretofore referred to, reads as follows:

"No persons shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction, or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced or suspended, with a copy of the order of discharge, lay off, reduction or suspension, and

his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any of the subordinate shall be filed with the commission.

"Nothing in this act shall limit the power of an officer to suspend without pay, for purposes of discipline a subordinate for a reasonable period, not exceeding thirty days; provided however, that successive suspensions shall not be allowed."

I have discussed at some length the provisions of this act in order that a clear understanding as to its purport and scope may be had, as this is an essential element to be taken into consideration in construing the law.

I do not believe that court stenographers can be treated as coming within the unclassified service, as they are not either directly or indirectly included within any of the classes therein designated consequently I have here to determine whether they are comprised within the classified service.

The question is one of much difficulty and it may be well to quote the provisions of law relating to their appointment. Section 1546 of the General Code, as it appeared prior to the amendment thereto which will be hereafter quoted, authorized the court of common pleas to appoint a stenographer who should hold the appointment for a term of three years and until a successor was appointed and qualified unless removed by the court, after good cause shown for neglect of duty, misconduct in office or incompetency.

On April 17, 1913, and eleven days prior to the passage of the civil service act, this section was amended, authorizing the court to appoint for a term *not exceeding* three years. The statute now reads as follows:

"When in its opinion the business requires it, the court of common pleas of a county may appoint a stenographic reporter as official stenographer of such court who shall hold the appointment for a term not exceeding three years from the date thereof, and until a successor is appointed and qualified, unless removed by the court, after a good cause shown, for neglect of duty, misconduct in office, or incompetency. Such official stenographer shall take an oath to faithfully and impartially discharge the duties of such position."

This act was approved on May 6, 1913 and one day after the civil service act.

It would seem to be fundamental that this authority vested in the court, would constitute within the meaning of the civil service act, an employment created in the state, as it is by virtue of the state law that a stenographer may be hired, and the court is an arm of the state rather than a county official.

A peculiar situation arises by reason of the fact that the civil service law, although passed after this act nevertheless was approved first, the difficulty being in determining what rule of statutory construction should obtain, there being a conflict to some extent at least between that provision of the civil service law which prohibits removal for religious or political reasons, and the express designation of an official term by court, under authority of the courts stenographer statute. A doubt also would arise in case the court stenographer act is to be read as an exception to the civil service law, as to whether a stenographer should be appointed from the eligible list, although such doubt is not a very serious one, in that two acts might be reconcilable in this regard upon the hypothesis that while the court should appoint his choice should be confined to those persons certified to him by the civil service commission.

In principle, the case of People vs. Gaffney, 142 App. Dec. 122 (N. Y.) seems to maintain this view. The decision has been affirmed without report by the New York court of appeals. In addition to this, under the civil service act the court would be compelled to furnish a stenographer, whom he had discharged, with reasons for such dismissal, the subordinate being given a reasonable time in which to file an explanation. In this regard the two laws might be read together and reconciled. The real conflict will arise when the term of the stenographer has expired, as it seems to be the aim and purpose of the civil service law merely to provide for civil service in so far as appointments are concerned, and not with reference to tenure in office.

Returning, however, to the subject of the construction of statutes, it is a fundamental principle that, in construing laws, the intent of the legislature is the polar star by which one is to be guided and it is a general rule that this legislative intent may be ascertained from the time at which the laws were enacted—that is to say, where there is conflict between an earlier and later statute, the last shall govern. Whether this priority is to be determined from the date of the approval by the governor or from the time of the enactment of the laws by the general assembly, is a serious question. Authority may be found to support both views, and in view of the fact that I think that the civil service act is to be construed as an exception to ordinary legislative enactments, as I shall hereafter show, I do not care to enter upon a discussion of the question as to whether the date of the approval of the governor or the date of the passage of the laws should be the guiding light to lead us out of the maze in which those laws are involved, but it would seem that the mere inadvertent act of the governor in signing last the law first passed, ought not to operate to defeat the manifest purpose of the law enacting body of the state.

State vs. Henson, 106 Pac. 362.

Of course if the principle last referred to obtains, there would be no question that the civil service act superseded section 1546, insofar as there exists any repugnancy between them, but in view of the other rules of statutory construction, which will enable us to arrive at the same result in regard to this law, I shall not further refer to that phase of the situation. Furthermore, if that view should be taken it would result in the placing of the common pleas court stenographer under civil service, while the stenographer of the court of appeals would not be within such service. This is true because on the day succeeding the passage of the civil service act, the legislature revised certain sections of the General Code relative to the organization, jurisdiction and procedure of the court of appeals, which revision was approved by the governor on May 6, 1913, one day after he approved the civil service law, thus unquestionably rendering the court of appeals law the later enactment.

Section 1520 of this act, 103 O. L., 412 provides as follows:

> "Each court of appeals may appoint one or more official stenographers. They shall take an oath of office, serve at the pleasure of the court, perform such duties as the court directs, and have such powers as are vested in official stenographers of the common pleas court.

What has already been said with reference to the reconcilement of the common pleas stenographer statute, obtains in regard to the section now under discussion, excepting that these latter stenographers "serve at the pleasure of the court," which, if the civil service act does not apply, would enable them to remove a stenographer for religious or political reasons.

It is a sound and salutary doctrine of statutory construction that all laws

in pari materia should be construed together, and this applies with peculiar force to the statutes passed at the same session of the legislature. The presumption is that such laws are imbued with the same spirit and actuated by the same policy and consequently should be construed together as if parts of the same act; and statutes which are not even *in pari materia* may be referred to in ascertaining the legislative intent.

36 Cyc., 1151.

26 Am. En. Enc. of Law, 2d. Ed. 623, 624,

Now statutes are in *pari materia* when they relate to the same class of persons or things. They have the same general purpose.

26 Am. Eng. Enc. of Law, 2d edition, 621.

38 Cyc., 1147.

These three statutes have express reference to the appointment and tenure of state employes. The civil service act expressly refers to all positions and employments *now existing or hereafter created in the state*, while the other statutes quoted apply to particular employments. At this point I desire to say, that I cannot bring myself to believe that this is a case calling for the application of another rule of statutory construction, to the effect that a particular statute is to be read as an exception to a general statute for the reason that the civil service act relates to a primary interest of public policy, which was recognized by the people of the state in adopting the constitution. It clearly and cogently lays down the theory that it is the public policy of the state that civil service should obtain, and the other statutes to which we are here confining ourselves, are of a secondary consideration and therefore that which is greater in principle should obtain. Consequently, it must follow that the doctrine of special statutes, overriding general ones, does not here obtain.

Having established the fact that these three laws should be construed together as if they were parts of the same act,

Blackwell vs. Bank, 63 Pac., 43,

County vs. Gordon, 145 S. W., 1160,

Mays vs. Bassett, 125 Pac., 609,

we bring the matter in hand within the purview of state ex. rel. vs. Mulhern, 74 O. S., 363, which provides that in giving construction to a legislative act, the position in the order of precedence of the several provisions will be given due consideration, but there is not arbitrary rule requiring that a provision found in the latter part of the act shall be given an effect to repeal conflicting provisions in the earlier part of the act. Where conflicting provisions are irreconcilable, the court, in seeking to make the act enforcible, will be governed by the purpose, policy and intent of the general assembly, as gathered from the whole act, even though it results in a disregard of the later provision. This rule should here obtain, even though the statutes were not in *pari materia* or were not parts of the same statute. The civil service law was passed on one day and the court of appeals stenographer act on the following. They are so close in point of time that the obvious policy and intent of the legislature should be ascertained from an examination of the two laws rather than by any arbitrary rule to the effect that the later provisions or statute should repeal the prior one.

The rule last referred to is not based upon reasoning but rather upon necessity, and therefore should not be applied when that necessity does not exist. Here the intent of the legislature may be ascertained by a construction of the two acts. When the general assembly stated that the competitive class should include all positions and employments hereafter created, it meant just what it said, and when it created a position on the folowing day, it intended that position to be read as coming within the purview of the former act. Had there been any other intent or desire on the part of the legislature, such intent

or desire could easily have been made clear by the insertion of the proper language. While it is true that one legislature cannot pass a law which another legislature may not repeal, nevertheless, it has been held that it may bind such subsequent legislature by providing in the law that it shall only be expressly repealed.

American Society vs. Cloversville, 78 Hun., 40. In so doing it merely lays down a rule for the construction of a certain statute and it is not an attempt by one legislature to restrict a future legislature, as the latter can frame enactments so as to bring them without the purview of the first law. This rule should obtain *a fortiori* in this case because all these laws were passed by the same general assembly. The foregoing doctrine has received the support of a supreme court of the United States in Lau Ow Bew vs. United States, 144 U. S., 47. Section 6 of the court of appeals act provided that these courts should have appellate jurisdiction to review final decisions of the circuit court in certain cases "unless otherwise provided by law." Chief Justice Fuller, for the court, says, that the quoted words were inserted out of abundant caution in order that any qualification of the jurisdiction, by contemporaneous or subsequent acts, should not be construed as taking it away, except when expressly so provided. "Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause." If words of the character referred to by Mr. Chief Justice Fuller provide against implied r peals, it cannot fairly be contended that the words "hereafter created in this state" do not, just as effectually remove the possibility of impliedly repealing the civil service law, by acts such as the one here being considered.

Another important and decisive consideration to be borne in mind is, that the civil service act was passed in pursuance of a constitutional mandate. It is a law providing for the enforcement of section 10 of article 15, to be found quoted in this opinion, and under the decision of the supreme court of this state, in State vs. Harris, 77 O. S., 481, should be interpreted as if part of the amendment. In that case an amendment to the constitution relating to elections was before the court, such amendment providing that the general assembly should have power to extend existing terms of office to effect the purpose of section 1 of said amendment. This language was not as positive as is the language used in the present instance. It was contended that the law enacted in conformity with this amendment was unconstitutional, as in violation with another provision of the constitution to the effect that no person should be eligible to certain offices for more than four years in any period of six years. The court in deciding the case held that cases interpreting constitutional restrictions respecting ordinary legislation are distinguishable from those pertaining to acts especially authorized by constitution. In other words, the application of a constitutional limitation to an act passed under a general grant of legislative power, is not involved. The court holds that a law, such as the one here in question, enacted to make a constitutional amendment operator, *is to be interpreted as a part of the constitutional amendment.* Adopting this construction, we are confronted with the proposition to repeal by implication part of the constitutional amendment, merely because the general assembly had subsequently enacted a law, which in some respects is not in complete harmony with an act passed for the purpose of carrying into effect the constitution, which latter act must be read as part of the constitutional amendment. To permit this would be violative of sound public policy and the spirit, if not the exact letter of the decision just cited. By this I do not mean to say that the legislature could not alter a law carrying into effect a constitutional provision, but I do wish to be understood as holding that this cannot be done by implication, nor by the

passage of laws in some respect conflicting with an act vitalizing the constitution. In order that the legislature may alter the civil service act, it is necessary that it do so by directly amending the provisions of that act, thereby clearly indicating an intention to carry out the provisions of the constitution in some way other than that originally designed. That has not been done in this case and consequently, I am of the opinion that the civil service act applies to stenographers of the common pleas court and the court of appeals, unless they are taken out of the classified service by the commission, under circumstances hereinafter referred to. I may add that the reasoning adopted in this branch of the opinion receives added force from the fact that all the laws here involved were passed by the same session of the legislature at approximately the same time.

The possibility just suggested that court stenographers might not be under civil service, arises by virtue of the language following the figure 1, where it appears in that provision of section 8 relating to classified service. The competitive class includes positions and employments for which it is practicable to determine the merit and fitness of the applicants by competitive examination. This determination of the practicability of an examination for the ascertainment of the fitness and merit of applicants, is in the first instance for your commission, and its decision is final in the absence of an arbitrary, unfair or improper action by it in including in or excluding from the competitive class, certain employments. Should it exceed the bounds of propriety and reasonableness, the courts will review its action. It appears, however, as a matter of law, that a court stenographer does not occupy a position for which it is not practicable to determine the merits and fitness of applicants by competitive examinations. The case of People vs. Weatherly, 130 N. Y. Supp. 1, expressly holds that a stenographer comes within civil service, and the reasoning of this case will be applicable to the whole law.

In connection with the foregoing discussion, I desire to remark that in People vs. McWilliams, 185, N. Y., 92, is to be found what is probably the latest expression of the New York court of appeals upon the question of the extent to which the courts will go in reviewing the question of the practicability of competitive examinations. The holding is to the effect that the determination of the commissioners in classifying positions is not a judicial act, although it involves in a high degree the exercise of judgment, which judgment is that of the legislative or executive officers rather than that of a judge. Decisions of matters of this kind involve considerations which cannot well be the subject of judicial inquiry, but, nevertheless, the action of the commissioners is subject to control. The proper classification depends, in no small degree, on the practical operation of such classification, but if it clearly violates the constitution or the law, mandamus will issue to correct the error. The court will not intervene unless the action of the commission is palpably illegal. In other words, if the position is clearly one that is subject to a competitive examination, the commissioners may be compelled so to classify it, while on the other hand, if the position be by law or from its nature, exempt from examination, and the action of the commission be unlawful, it may be compelled to strike the position from the competitive class. If there be fair and reasonable ground for difference of opinion among intelligent and conscientious officials, the action of the commission should stand, even though the courts might differ from the commission as to the wisdom of the classification.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

665.

WHEN STATE CIVIL SERVICE COMMISSION MAY APPOINT CIVIL SERVICE COMMISSION FOR CITY—LENGTH OF TERM OF SUCH COMMISSION, ETC.

Where the mayor of a city fails, for more than sixty days after the taking effect of the civil service law, to appoint a civil service commission for such city, it becomes the duty of the state civil service commission to appoint a civil service commission for the said city, the appointment to take effect immediately and to continue in force until the expiration of the term of such mayor.

COLUMBUS, OHIO, December 26, 1913.

Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your inquiry in which you set forth that the mayor of the city of Washington C. H. has failed, for more than 60 days after the taking effect of the civil service law, to appoint a civil service commission for that city, and that lately, and after the expiration of said 60 days, he named three persons to act as a civil service commission for that city; and you inquire as to whether the 60 day limit in section 19 of the civil service law is directory or mandatory, and whether it is your duty, under that section, to make an appointment of the civil service commission of that city.

I have given the matter careful consideration and have concluded that the failure of the mayor to appoint within the 60 days, rendered it impossible for him to legally make the appointment thereafter, and that his naming of said parties at the time he did, had no force nor effect in law, and was nugatory. I am of the opinion that it is the duty of your board to appoint a civil service commission for Washington C. H., the appointment to take effect immediately, and the tenure of the appointees to be until the expiration of the term of the present mayor of that city, which, I am advised, is January 1, 1914.

I believe this fully and clearly answers your question and will set the matter at rest in so far as said city is concerned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

667.

MUNICIPAL CIVIL SERVICE COMMISSION—POWER OF MAYOR TO APPOINT—POWER OF STATE CIVIL SERVICE COMMISSION TO APPOINT WHERE MAYOR NEGLECTS TO APPOINT.

When the mayor of a city, or the chief appointing authority thereof, fails to appoint a member of the municipal civil service commission within sixty days after that right existed in him, the state civil service commission is the only authority which can exercise the right of appointment of such member.

COLUMBUS, OHIO, December 20, 1913.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of December 16, 1913, you inquire:

"In many municipalities of the state the mayors have not yet appointed civil service commissions, and in some of the municipalities of the state the existing mayors have appointed civil service commissioners since the expiration of sixty days from the taking effect of the civil service act.

"To illustrate our question we desire to say, that in one city in Ohio there never was a municipal civil service commission appointed until December 12, 1913, when the mayor of that city appointed three persons to serve for two, four and six years, respectively. There has come to our commission requests that we act under section 19 of the civil service act and proceed to appoint a commission for that city.

"We desire your opinion to this commission as to whether or not the power of a mayor of a city to appoint a municipal civil service commission continues until the power has been exercised by the state commission, or does the authority of the mayor to appoint a commission cease after sixty days have elapsed from the time the law became effective?

"The two questions we desire to have answered specifically are:

"First. When does the right and authority of a mayor to appoint a civil service commission for his city cease where the authority has never been exercised, or where a vacancy exists?

"Second. Does the authority of this commission to appoint municipal civil service commission begin at the expiration of sixty days from the time the law became effective, and is the authority of our commission thereafter the only appointing power, or does that power continue to be lodged both in the mayor and in our commission until one or the other has exercised its prerogative?"

A similar inquiry has been received from Hon. S. M. Johnson, solicitor of Athens, under date of November 19, 1913.

Your inquiry is governed by the provisions of section 19 of the civil service act to be known as section 486-19, General Code.

Said section provides in part:

"The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall constitute the municipal civil service commission of such city and of the city school district in which such city is located; provided, however, that members of existing municipal civil service commissions shall continue in office for the terms for which they have been appointed and that their successors, the first appointees of the mayor or other chief appointing authority of such city, shall be appointed to serve respectively for four years, five years and six years and until their successors are appointed and have qualified.

"If the appointing authority of any such city fails to appoint a civil service commission or commissioner as provided by law within sixty days after he has the power to so appoint, or after a vacancy exists, the state civil service commission shall make the appointment, and such appointee shall hold office until the expiration of the term of the appointing authority of such city and until the successor of such appointee is appointed and qualified."

By virtue of this section the mayor is given the power to appoint the members of the municipal service commission.

Formerly the municipal civil service commission was appointed by virtue of section 4478, General Code. This section was specifically repealed by the repealing clause of the civil service act. This repeal became effective ninety days after the approval of the civil service act by the governor on May 5th, 1913.

Section 19 of the civil service act became effective ninety days after its approval on May 5, 1913, and from that time the power of appointing a municipal civil service commission vested in the mayor.

It is further provided that if the appointing authority of such city fails to make such appointment "within sixty days after he has the power to so appoint, or after a vacancy exists, the state civil service commission shall make the appointment."

Is this provision directory or mandatory? This is a matter of construction and the intention of the legislature as expressed must govern.

Provisions as to the time of performance of a duty by an officer are generally directory, but there are exceptions.

The rule is stated at section 612 of Sutherland on Statutory Construction:

> "Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, *unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered as a limitation of the power of the officer.*"

The nature of the provision under consideration and the phraseology of the statute is such that the designation of the time "must be considered as a limitation of the power of the officer," the chief appointing authority, to make the appointment.

Also at section 617 Sutherland further says:

> "A statute required that, within fifteen days after a vote to organize a new school district, directors of the new district should be elected. The provision was held mandatory as to time, and a failure to elect directors within the time specified was held to nullify the prior proceedings to organize the district."

By section 19 of the civil service act, after the expiration of sixty days the power of appointment is vested in the state civil service commission. This time of sixty days does not begin to run in all cases from the time when the civil service law became effective. The power to appoint is active when an appointment is to be made, and the time of sixty days begins to run when the appointing authority has an appointment to make.

It is evident that the legislature did not intend that the power of appointment should exist in two different authorities at the same time. It has fixed the time within which the mayor may act, and during that time his power is exclusive. This is a limitation upon his power of appointment and if he fails to act within that time, his right terminates. In that event the exclusive right of appointment is vested in the state civil service commission. At no time has the mayor and the state civil service commission a concurrent power of appointment.

Answering your specific questions:

Where no municipal civil service commission has ever been appointed the right of the mayor to appoint vested in him ninety days after May 5, 1913, and that power ceased sixty days after it vested.

The power of a mayor to fill a vacancy vests when such vacancy occurs and ceases sixty days thereafter.

The authority of the state civil service commission to appoint members of a municipal civil service commission begins at the expiration of sixty days from the time the state civil service law became effective, where no civil service commission has ever been appointed for a city.

When the mayor of a city, or the chief appointing authority thereof, fails to appoint a member of the municipal civil service commission within sixty days after that right existed in him, the state civil service commission is the only authority which can exercise the right of appointment of such member.

In this connection your attention is called to this provision of section 19, as to the appointee of the state civil service commission:

> "and such appointee shall hold office until the expiration of the term of the appointing authority of such city and until the successor of such appointee is appointed and qualified."

The state civil service commission does not appoint for the full term or for the unexpired term in case of a vacancy.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

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CIVIL SERVICE ACT—MUNICIPAL CIVIL SERVICE—CLASSIFIED SERVICE—INCUMBENTS—COMPETITIVE EXAMINATION — NON-COMPETITIVE EXAMINATION.

1. *The civil service act does not repeal section* 4505 *of the General Code, specifically. This section would be repealed by the civil service act insofar as it is inconsistent with the provisions of this act.*

2. *Under the provisions of section* 10 *of the civil service law incumbents who were not in the classified civil service under the former civil service law, and are placed in the classified service, retain their positions subject to a non-competitive examination. This provision applies to municipal, county and state positions.*

3. *The word "incumbents" includes all persons legally holding positions prior to January* 1, 1914, *and who legally occupy their positions on January* 1, 1914.

4. *Incumbents holding positions on Jan.* 1, 1914, *are not compelled to take a competitive examination. They are required to take a non-competitive examination in order to hold their position.*

COLUMBUS, OHIO, Dec. 27, 1913.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Your favor of December 3, 1913, is received, in which you inquire:

"First: Does the civil service act known as amended Senate Bill No. 7, repeal section 4505 of the General Code?

"Second: Would persons in the municipal service now holding office by appointment without examination because they were not in the classified service under the old law, but who are now taken from the exempt class and put in the classified service by the new law, be included among those persons who shall not be removed on and after January 1, 1914, as provided in section 2 of the civil service act?

"That is, will those persons who are holding positions of this class on the first day of January, 1914, be from that time on in the classified service until after they have taken the non-competitive examination provided for in the last paragraph of section 10 of the civil service law?

"Third: What is the meaning of the word "incumbents" as used in the last paragraph of section 10 of the civil service law in its application to those who are in the service of the municipalities and who have not heretofore been in the classified service, and will these incumbents who may never have passed an examination be construed as in the classified service from January 1, up to the time they take their non-competitive examination?

Fourth: Does section 10 of the civil service act require a non-competitive examination for such "incumbents," or may the municipal commissions require these "incumbents" to submit to a competitive examination?"

The title to the civil service act, 103, Ohio Laws, 698, et seq., reads in part:

"To regulate the civil service of the state of Ohio, the several counties, cities and city school districts thereof, and to repeal sections 4412, * * * 4504, 4505, 7690-1, * * * of the General Code.

The repealing part of said act, section 32 thereof, reads:

"Repeal. Sections 4381, 4412, 4477, * * * 4503, 4504, 7690-1, * * * of the General Code, and all other acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed."

Section 4505, General Code, is mentioned in the title, but is omitted in the repealing section.

Section 31 of said act provides in part:

"* * * Municipal civil service commissions now in office shall continue to perform their duties under the provisions of sections 4412, 4477, 4505, 7690-1, 7690-6, 12895 and 12896 of the General Code and the rules prescribed thereunder until rules are provided in compliance with the the provisions of this act.

The fact that section 4505, General Code, is used in this section in connection with other sections which have been repealed would not be sufficient of itself to show that section 4505, General Code, was in fact repealed.

The title of an act is not a substantive part thereof. It may be looked to in case of doubt to ascertain the intention and purpose of the legislature.

The rule is stated by Hitchcock, J., at page 10, of state of Ohio vs. Granville Alexandrian Society, 11 Ohio 1, where he says:

"True, the title to an act does not constitute any part of the act, but it may be referred to, in order to explain what is doubtful in the act, itself.

The same judge says in case of Steamboat Monarch vs. Finley, 10 Ohio 384, at page 387:

"Although the title to a statute constitutes no part of the law, yet it may well be considered in its construcion as furnishing an index by which doubtful matters in the body of a statute may be settled. Especially is this proper where, as in this state, the title is prefixed by a solemn vote of the legislature passing the law."

It will be observed that the title is referred to in order to construe doubtful provisions of the act.

The title in this case evidently shows that at one time the act proposed to repeal section 4505, General Code, but the completed act does not show such a repeal. The omission of section 4505, General Code, in the repealing section is not doubtful. It is an actual fact.

Therefore section 4505, General Code, is not specifically repealed by act of 103 Ohio Laws 698, known as the civil service act. In so far as the provisions of section 4505, General Code, are inconsistent with the provisions of the civil service act it would be repealed by implication. The section has not been examined to determine this.

Your second inquiry is as to persons in the municipal civil service, who were not in the classified service under the former civil service law but who are placed in the classified service by the provisions of the new act.

Section 2 of the civil service act, section 486-2, General Code, provides:

"Method of appointment. On and after January 1, 1914, appointments to and promotions in the civil service of this state and the counties, cities and city school districts thereof shall be made only according to merit and fitness to be ascertained as far as practicable by examination which, as far as practicable, shall be competitive; and on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employee in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

This section applies to all persons and positions in the civil service of the state, the counties, cities and city school districts thereof. It includes positions in municipal civil service, which under the former municipal civil service law were in the unclassified service but which will be in the classified service under the act of 103 Ohio Laws, 698, et seq.

Section 10 of the civil service act, section 486-10, General Code, provides in part:

"The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. Reasonable notice of all such non-competitive exam-

inations shall be given in such manner as the commission may require and all such non-competitive examinations shall conform in character to those of the competitive service."

The provisions of section 10 apply to persons in the municipal civil service as well as to those in the state. This is shown by the exception in the part of this section above quoted:

"except those holding their positions under existing civil service laws."

This exception can only apply to cities and city school districts. Municipalities are specifically mentioned in other parts of section 10, supra.

By virtue of the above provisions of section 10, incumbents who were not in the classified service under the former civil service law, and who are placed in the classified service by the act of 103, Ohio Laws, 698, retain their positions subject to a non-competitive examination. This provision applies to positions in the municipal civil service as well as to those in the service of the state and of the counties thereof.

Under the former municipal service law, incumbents at the time the act became effective passed into the classified service without examination of any kind. The new law provides for a non-competitive examination as a condition of their, the incumbents, continuance in the service.

In your third inquiry you ask the meaning of the word "incumbents" as used in section 10, supra, and whether such incumbents are in the classified service from and after January 1, 1914, up to the time they take the non-competitive examination.

By virtue of section 2 of the civil service act on and after January 1, 1914, all appointments and promotions are to be made by virtue of the provisions of the new civil service law.

The word "incumbents" as used in section 10, supra, applies to all persons who have been legally appointed to an office or position prior to January 1, 1914, and who on January 1, 1914, legally occupy such offices or positions.

In other words the "incumbents" must have been appointed in conformity to the law in existence at the time of their appointment.

The word "incumbents" will include persons in the municipal civil service who were in the unclassified service prior to January 1, 1914, and who were legally appointed to such positions. Such "incumbents" if placed in the classified service by the act of 103, Ohio Laws, 698, will be subject to the provisions of section 10, supra, and will pass into the classified service subject to a non-competitive examination.

On and after January 1, 1914, all positions are either in the classified service or in the unclassified service. The civil service is divided into these two classes. On January 1, 1914, incumbents of positions in the classified service under the new law pass into the classified service, but their continuance therein is subject to a non-competitive examination. This applies to the civil service of the state, the counties, cities and city school districts.

Answering your fourth inquiry:

Municipal civil service commissions cannot compel "incumbents" on January 1, 1914, to take a competitive examination. Such incumbents are required to take a "non-competitive" examination as a condition of their continuance in the classified service.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

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ASSISTANT PROSECUTING ATTORNEYS IN UNCLASSIFIED SERVICE—ASSISTANT CITY SOLICITORS IN UNCLASSIFIED SERVICE—UNCLASSIFIED CIVIL SERVICE.

Assistant prosecuting attorneys are deputies within the meaning of the civil service law, and are in the unclassified service of the county. Assistant city solicitors are deputies within the meaning of the civil service law, and are in the unclassified service of the county.

COLUMBUS, OHIO, Dec. 30, 1912.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—You have made inquiry of this department as to whether or not assistant prosecuting attorneys are in the classified or unclassified service under the civil service law, 103, O. L., 698, et seq.

Section 2915, General Code, provides:

> "The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

This section authorizes the prosecuting attorney to appoint assistants. The duties of such assistants are not prescribed in this section.

Section 8 of the civil service act places certain positions in the unclassified service. By virtue of subdivision 8 of branch (a) of said section, "deputies" are placed in the unclassified service. Said subdivision 8 reads:

> "The deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals."

Are assistant prosecuting attorneys "deputies" within the meaning of the above subdivision?

Authorities have been submitted which tend to hold that these assistants are in fact deputies. Cases have been cited which hold that assistant district attorneys are deputies of their principals. These cases do not arise under civil service regulations and are no doubt decided upon the particular wording of the statute then under consideration.

The legislature of Ohio has left no doubt as to the meaning of the word "deputy" as used in subdivision 8 of section 8, supra.

Two things are necessary to bring a position under the term "deputy."

First. Deputies must be authorized by law to act "generally for and in place of their principals."

Second. They must hold a fiduciary relation to their principal.

Now it seems that even in the absence of statute the court had the inherent power to appoint an assistant to the prosecuting attorney, but this matter has been set at rest in this state by the enactment of section 13560 which reads as follows:

"The prosecuting attorney or assistant prosecuting attorney shall be allowed at all times to appear before the grand jury for the purpose of giving information relative to a matter cognizable by it or advice upon a legal matter when required. Such attorney may interrogate witnesses before such jury when it or he deems it necessary, but no other person shall be permitted to remain in the room with the jury while the jurors are expressing their views or giving their votes on a matter before them. In a matter or case which the attorney general is required to investigate or prosecute by the governor or general assembly, he shall have all the rights, privileges and powers conferred by this section and the next succeeding section, upon prosecuting attorneys."

This section does not in any way limit the powers of an assistant prosecuting attorney but, on the contrary, places him on a parity with the prosecutor himself. The legislature evidently doubted the right of the prosecutor to appear before the grand jury and be present at the deliberations of the grand jurors, and consequently conferred this right upon him in express terms. Recognizing the fact that the assistant had the right to act for his principal it included him in the statute, thus vesting him with the same authority as the prosecutor in this regard. In other words, this section conferred an additional right upon the office and enlarged its authority. It was not intended to nor did it restrict, in any way, the powers of assistants. It is fundamental that such assistant may do whatever the prosecutor is authorized to do, and his acts have the same validity as though done by the principal in person; or as expressed in 32 Cyc., 724:

"An assistant duly appointed or permitted to prosecute is clothed with all the powers and privileges of the prosecuting attorney, and *all* acts done by him in that capacity must be regarded as if done by the prosecuting attorney himself."

See also 23 Am. & Eng. Ency. of Law, 2d Ed. 278.

If the assistant possess such extensive authority in that gravest of all public duties—that of prosecuting persons charged with crime, it must necessarily follow that he may act for and on behalf of his principal in other matters pertaining to the office, and by such acts binds his superior.

Subdivision 8, under consideration, requires deputies to act "generally" for and in place of their principals.

Does the word "generally" mean universally?"

The word "generally" is defined in the New Standard Dictionary as follows:

"For the most part; in general; in most but not all cases; commonly; ordinarily."

It is in the foregoing sense that the word "generally" is used in subdivision 8 of section 8 of the civil service act. That is, the deputy must be authorized to act "in general, in most but not all cases," for and in place of his principal.

By virtue of section 13560, General Code, the assistant prosecuting attorney is authorized to act generally for his principal in the grand jury room.

A deputy must also occupy a fiduciary relation to his principal. An assistant prosecuting attorney who is authorized to appear before the grand jury and examine witnesses would certainly occupy a fiduciary relation to his principal, whose duty it is to present the evidence to the grand jury.

The assistant prosecuting attorney is authorized by law to act generally for and in place of his principal and he holds a fiduciary relation to his principal, the prosecuting attorney.

Assistant prosecuting attorneys are, therefore, "deputies" within the meaning of subdivision 8 of section 8 of the civil service law and are in the unclassified service of the county.

ASSISTANT CITY SOLICITORS.

You also enquire as to whether or not the assistant or assistants to the city solicitor are within the classified or unclassified list. Very much of what has been said in reference to assistant prosecuting attorney applies with refernce to city solicitors. Of course the duties to be performed by the assistant prosecuting attorney in relation to the grand jury are ones that do not fall within the scope of the duties of an assistant city solicitor. Neverthless section 4306 of the General Code serves as a parallel so far as the reason of the question is concerned, said section being as follows:

> "The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

The very fact that force and effect are to be given to the provisions whereby the assistant or assistants who are designated to appear before the mayor's court are to be affirmed by the council would seem to suggest that the subject is not within the domain of the classified service. So far as I know, speaking rather off-hand, one whose merit is determined by the civil service would hardly be subject to the test of approval by the city council. The city solicitor is, under the statutes, counsel for the board of education in cities. He may appear as well through one of his assistants as personally; likewise may the city solicitor through one of his assistants perform the duties mentioned in section 4305 in relation to the preparation of contracts, bonds and other instruments in writing in which the city is concerned, and in serving the several directors and officers referred to in the title relating to city solicitors, he is, in my judgment a deputy in the ordinary acceptation of the term. The real gist of the question is that the assistant shall act generally for and on behalf of his principal, and sustain toward the principal a fiduciary relation; and the reasoning which brought me to the conclusion I arrived at in relation to the assistant prosecuting attorney applies with special force in relation to the solution of the present question.

The civil service act is one designed for practical purposes and to embrace all those offices of such character as that in fact it ought not matter what may be the political or general notions of the appointee or employe. The act is not designed to bring impracticable and unworkable relations into the administration of public affairs. My own experience in the office of the attorney general has satisfied me beyond doubt that it is humanly impossible for the head of a legal department either in the state or in any of the great cities of the state to keep in personal touch with all of the important matters requiring professional attention. It is necessary for the head of a legal department to repose the greatest trust and confidence not only in the ability of each of his assistants but in their feeling of responsibility they should know that their tenure of office depends upon that feeling of personal responsibility for results and that fidelity to the policy pursued by the head of the department.

Courts are inclined to take the practical view of questions of this character and to keep well in mind the object to be attained by any act. It will, if necessary, disregard the strict letter of the act to carry out the design and purpose thereof. This is especially true when they have precedents before them disclosing that the word "assistant" in many situations is a real substitute of the word "deputy" although apparently the latter might have a technical or even statutory meaning.

Moreover, the number of assistants in a legal department is usually more or less fluctuating, depending upon the extent of litigation. There are times when the head of a legal department in a state or city is almost wholly dependent upon his assistants for the daily operation of his office, especially is this true when the head of a department is engaged personally in the conduct of a suit. The head of a department is at times required to select the things which will engage his personal attention, leaving to his assistants to act not only generally but exclusively in his stead, and your commission, in the conduct of your office, will find it necessary to conduct examinations through others.

Very respectfully yours,

TIMOTHY S. HOGAN,
Attorney General.

(To the Liquor License Commission)

446.

UNDER PROVISIONS OF 103 O. L. 216-243, A PERSON WHO IS A STOCKHOLDER IN A BREWERY CANNOT OBTAIN A LICENSE TO SELL LIQUOR.

Under the provision of the liquor license act of April 18, 1913, no person who is a stockholder in a brewery can be permitted to have a license authorizing the sale of intoxicating liquors.

COLUMBUS, OHIO, August 15, 1913.

State Liquor License Commission, Columbus, Ohio.

DEAR SIR:—The question whether a saloon license can be issued to a person who is a stockholder in a brewery is one at once interesting, intricate and important.

The amendment to the constitution (in part) reads:

> "License shall not be granted to any applicant, who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are *the only persons* in any way pecuniarily interested in the business for which the license is sought, and no other person shall be interested therein during the continuance of the license; if such interest of such person shall appear the license shall be deemed revoked."

Section 19 of the act of April 18, 1913, 103 O. L. 216-243, in part, reads:

> "License shall not be granted to any applicant, who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the *only persons* in any way pecuniarily interested in the business for which the license is sought, and no other person shall be interested therein during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked."

In the application for a license, it must be stated:

> "The fact that the applicant is not in any way interested either as owner or part owner in a business, or a stockholder of a corporation engaged in the business, conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage."

The evident object of the amendment and these provisions of the law is to prevent the control of more than one saloon by any one individual. And inasmuch as these provisions are clear, contain no exception, nor reservation, and there are two and only two classes of licenses— wholesale, and retail or saloon licenses—it is plain that no person interested in a saloon license can take out a wholesale license and vice versa.

The question to be solved, however, is not to be disposed of so easily as

that, and we must look to all of the provisions of the amendment and the act bearing upon the subject.

The last sentence of the amendment defines a saloon in the following language:

> "The word 'saloon' as used in this section is defined to be a place where intoxicating liquors are sold or kept for sale, *as a beverage*, in quantities less than one gallon."

As stated, the legislature grants two classes of licenses, (1), wholesale, where sales must not be made in a smaller quantity than two gallons at one time, and (2), saloon, where the sales may be made in any quantity and consumed on or off the premises. (Sec. 22.)

Of course, intoxicants are not always sold as a beverage, nor are they manufactured for that purpose exclusively in any instance, but when sold either to a wholesale dealer or to a saloon, such sales, unless made for some mechanical, pharmaceutical or medicinal uses, must be conclusively held to have been sold for beverage purposes. In fact, it will be seen that the local option and other laws restricting the sale of intoxicants are directed at their sale for beverage purposes, and an examination of this amendment and the law under consideration will develop the fact that they deal with the sale of intoxicants as a beverage only. The amount of sales cuts no figure, whatever, especially as to beer, which is neither manufactured nor sold for any other purpose, having no use from a commercial or practical view for either mechanical, pharmaceutical or medicinal purposes.

Such being the situation, it would seem unnecessary to look further to ascertain whether a stockholder in a brewery was a person interested in any way as owner or part owner in a business, or a stockholder in a corporation engaged in the business, conducted at any other place where intoxicating liquors are sold, or kept for sale as a beverage, but I prefer going back and taking into consideration one of the objects of this amendment to see if I can, whether, in adopting it there was any specific object in view, which might aid in solving the question.

No fact was nor is better known in Ohio, than that a very large number of saloons in the state were formerly owned and managed by some brewery. The object of the brewery was to increase its trade, business and profits, and by doing so they became wholesalers of beer, retailers of intoxicants, and saloon keepers in the municipalities or counties where the brewery was located and elsewhere. Neither care nor wisdom was exercised in all instances in selecting managers, bartenders and person in charge, or in whose names the business was conducted, and the result was a deterioration of the breweries and a loud insistence from the best citizens of the state that the practice should be stopped, and that saloons and breweries should be divorced.

To my mind, this end is sought to be accomplished by this amendment and act, and the question arises as to whether it can be done without doing violence to the language used. To my mind, it is no stretch of meaning to hold that all beer is sold as a beverage, whether in a saloon, by a wholesale dealer or at the brewery, and, instead of construction of the language used being necessary to bring about the result, it is only necessary to apply the primary meaning of the words employed to the subject matter at which they are directed and we find that stockholders in breweries are not eligible under the law to secure a license authorizing the sale of intoxicants.

This may not be broad enough in statement to cover a person who is a stockholder in a distillery, for the reason that distilled intoxicants may have

more uses than the product of a brewery, but the answer would have to be the same unless it was made to appear clearly to the commission that the distillery in which the applicant held stock was not, and would not be engaged in selling its products or keeping the same for sale as a beverage.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

457.

THERE IS NO LIMIT UPON NUMBER OF WHOLESALE LICENSES WHICH MAY BE ISSUED IN ANY MUNICIPALITY— WHOLESALE LICENSES SHALL NOT BE COUNTED WITHIN THE LIMIT OF FROM ONE TO FIVE HUNDRED POPULATION—WHOLESALE BUSINESS CAN BE DONE UNDER A SALOON LICENSE.

Since the constitution has made no provision for the limiting of licenses in intoxicating liquors, except to those who sell in quantities of less than one gallon, and since under a wholesale licenses, a person may not sell in quantities of less than two gallons at one time, there is no limitation upon the number of wholesale licenses that may be granted.

A wholesale license is not counted a saloon license, and is not counted among saloon licenses, which may be issued within the limit of from one to five hundred population.

Under section 22, of the liquor license act, under a saloon license intoxicating liquors may be sold in any quantity, and it follows that under such a license one can conduct both a wholesale and retail business if he so desires.

COLUMBUS, OHIO, September 10, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 5th asking for a ruling upon the following questions:

> "1. Is there any limit upon the number of wholesale licenses which may be granted in any municipality?
>
> "2. Shall wholesale licenses be counted among the saloon licenses which may be issued within the limit of one to five hundred population?
>
> "3. Can a wholesale business be done under a saloon license?"

As the questions are inter-related I will discuss them all together. Section 9 of article 15 of the constitution, as approved September 3, 1912, reads as follows:

> "License to traffic in intoxicating liquors shall be granted in this state, and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law, and municipal corporations shall be authorized by general laws to provide for the limitation of the number of saloons. Laws shall not be passed authorizing more than one saloon in each township or municipality of less than five hundred population, or more than one saloon for each five hundred population in other townships and municipalities. * * *

The word 'saloon' as used in this section is defined to be a place where intoxicating liquors are sold, or kept for sale, as a beverage in quantities less than one gallon."

Under authority of this section of the constitution the legislature passed the so-called liquor licensing law, passed April 18, 1913, approved May 3, 1913, filed in the office of the secretary of state May 3, 1913, and found in 103 O. L. 216. Section 19 of this act reads as follows:

"License shall not be granted to a person who is not a citizen of the United States or who is not of good moral character. Where a corporation or other association of persons is an applicant for license, such corporation or association shall designate a manager or managers of the place of business belonging to said corporation or association, who must be a citizen or citizens of the United States, residing in Ohio, and of good moral character.

"If at any time a corporation or association shall come to be without a designated manager as provided for herein, the license of said corporation or association shall be suspended unless within ten days a new manager or managers are appointed; and if in such case no new manager is designated within thirty days after the original manager ceases to occupy the position, unless the time is extended by the county board, and if said manager has not all the qualifications provided by law in the case of an individual applicant, the license may be revoked.

"License shall not be issued to a minor or to a person of unsound mind.

"License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked.

"No saloon license as hereinafter provided for shall be issued to any person who has not been a resident of Ohio for more than one year preceding the date of his application.

"No license shall be granted after August 1, 1915, to operate a saloon within three hundred feet of any permanent public or parochial school building, measuring the distance in a straight line following the street from the nearest point of the premises on which such school building is located, nor two hundred feet in a straight line following the street from the nearest point of the premises. This provision shall not apply to a bona fide reputable hotel or club; or to a saloon located within three hundred feet of a school house in the central or main business section of the city."

Section 22 of this act reads as follows:

"Licenses shall be either wholesale licenses or saloon licenses. Under a wholesale license, intoxicating liquors may be sold in smaller quantities than two gallons at one time of the same kind of liquor, and not to be consumed upon the premises. Under a saloon license intoxicating liquors may be sold in any quantity and consumed on or off the premises."

Section 24 of this act reads as follows:

> "Not more than one saloon shall be licensed in any township or municipality of less than five hundred population, nor more than one saloon for each five hundred population in other townships and municipalities. * * *
>
> "(Then follows the provision where, in municipal corporations, thirty-five per cent. of the electors may petition for a further limitation on the number of saloons in such municipality, with provisions for the holding of elections, etc.)"

I believe from a consideration of the questions submitted I have above quoted all of the sections of the law and constitution directly applicable.

The people in approving the license amendment to the constitution changed the policy on the liquor question that had obtained since the adpotion of the constitution, and expressly provided that "license to traffic in intoxicating liquors *shall* be granted in this state."

Further authority was granted to the legislature to enact license laws with such restrictions and regulations as might be provided by law, and power was also given to the legislature to authorize, by general law, each municipality to provide for limitation of the number of saloons. In addition to this a general limitation was provided for in regard to "saloons." Saloons were to be limited in each township or municipality to one saloon for each five hundred population.

Attention is called to the fact that while authority was given to license the traffic in intoxicating liquors in general, the only limitation made was on the number of places where a traffic of a certain kind was carried on, to wit, saloons; and "saloon" *as used in section* 9, was defined "to be a place where intoxicating liquors are sold or kept for sale as a beverage in quantities less than one gallon." The constitutional convention in formulating, and the people in approving this amendment, had in mind a restriction in the number of places where intoxicating liquors are sold at retail, usually by the drink or dram, and where men resorted to for the purpose of consuming the liquor where purchased. The object and aim of most of the liquor legislation has been against the dram-shop. It was the regulation of sales in small quantities to be drunk on the spot that was primarily aimed at in the early legislation against the evils resulting from the sale of intoxicating liquors, and in the adoption of section 9 of the constitution, the same idea was in mind and limitations on the number of licenses to be granted was specifically provided for, as to those licenses as would permit places where intoxicating liquors were sold in quantities of less than one gallon.

The legislature in the adoption of the so-called liquor licensing law has attempted to carry out the spirit, intention and letter of the constitutional amendment, and divided the kinds of licenses to be issued into two classes, denominating one "wholesale license" and the other a "saloon license." Under section 22 of the act making this classification, under a "wholesale license," liquors may not be sold in smaller quantities than two gallons at one time of the same kind, and not to be consumed upon the premises. Under a "saloon license," liquors may be sold in any quantity and consumed on or off the premises. It is apparent that under a saloon license, since the sale may be in any quantity, there is a permission to sell in quantities of less than one gallon, and since there is such permission, the holder of such a license comes within the class which, under the constitution and the law, is limited in number. On the other hand, since under a wholesale license, liquor may not be sold in smaller quantities than two gallons at one time of the same kind of liquor, the holder of

such a license does not come within that class which is limited in number in a particular locality. It is to be noted that the provision for a saloon license is in no wise inconsistent with the constitutional provision defining "saloon," for the definition is limited to the section in which it is used. So long as the person to whom a license to traffic in intoxicating liquors has been granted, is authorized to make sales in quantities less than one gallon he is authorized to conduct that character of place which is specifically limited in number in particular localities.

The constitution does not make any classification of licenses. It gives general power to grant licenses. It merely provides that in the event that licenses are granted which would permit sales in smaller quantities, to wit, less than one gallon, that licenses permitting such place, shall be limited in number in each particular locality.

The case of Strauss vs. Galesburg, 67 North Eastern Rep., 835 (203 Ill. 234), might be interesting to refer to in this matter. In that case the validity of an ordinance, by the provisions of which the holder of a dram-shop license might be permitted to keep a dram-shop and sell liquor in any quantity, was challenged upon the ground that it was in conflict with what was known as the "dram-shop act," and particularly that section thereof which defines a dram-shop as "a place where spirituous, vinous or malt liquors are retailed in less quantity than one gallon." It was argued that the statute having defined a dram-shop, that the statutory definition was exclusive, and when the city of Galesburg, by ordinance, conferred upon the holder of a license to keep a dram-shop, the authority and power to sell liquors in any quantity other than the quantities specified by the definition, viz., by less quantity than one gallon, that it had exceeded its power. The Illinois supreme court in that case held that the definition of a dram-shop as a place where liquors are retailed by less quantity than a gallon, is not exclusive and does not prohibit the authorities of a city from authorizing dram-shop keepers to sell liquors in any quantity. The case, of course, is not exactly similar to the case under discussion, since in the one instance the legislature had defined the term "dram-shop," and a municipality in dealing with the same subject had granted further powers than were expressed in the legislative definition, while in our case the constitution defines the word "saloon" as used in part of the section, and the legislature, by the authority granted to it, apparently broadens the definition in defining what a license for a saloon shall be; still the reasoning of the decision of the supreme court of Illinois, and its conclusion fully supports the position taken here. Coming then to your questions I would say:

First. That since the constitution made no provision for the limiting of licenses to traffic in intoxicating liquors other than those licenses which grant to a person the right to sell in quantities of less than one gallon; and that since under a wholesale license a person may not sell in smaller quantities than two gallons at one time, there is no limitation upon the number of wholesale licenses which may be granted in any municipality.

Second. Since the only limitation on the number of licenses is as to a license permitting the sale of intoxicating liquors in less than one gallon quantities, and since under a wholesale license one is not permitted to make sales in such quantities, that a wholesale license is not counted as a saloon license, and I answer your second question in the negative.

Third. It appearing that under section 22 of the act that under a saloon license intoxicating liquors may be sold in any quantity, it follows that under such a license one can conduct both a wholesale and retail business if he so desires. The mere fact that a person holding a saloon license sells in greater quantities than one gallon does not militate against the fact that he is author-

ized to make sales of less than one gallon. It is this right to make such sales of less than one gallon that constitutes his place a saloon. The fact that he also sells, and is authorized to sell in greater quantities does not make him any more or less the keeper of a saloon. I might remark that neither the law nor the constitution made any classification into wholesale and retail business. The classification that the legislature made is into wholesale and saloon licenses. What constitutes a wholesale business or a retail business has not been defined. Just where the line is to be drawn between a wholesaler and retailer, so far as this act is concerned, cannot be determined, but I am of the opinion that the legislature had a perfect right to make the provision that it has seen fit in section 22 of the act, and under this section, by authority of the license a person holds, liquors may be sold in any quantity and consumed on or off the premises. Consequently I would answer your third question affirmatively.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

488.

HOTEL COMPANY PARTLY OWNED BY A BREWERY MAY NOT RECEIVE A SALOON LICENSE.

Where an incorporated brewery owns a minority of the stock in a hotel company, such hotel company may not receive a saloon license.

COLUMBUS, OHIO, September 18, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—I have your favor of the 17th wherein you advise:

> "We herewith transmit a copy of a letter received from the Hamilton county liquor licensing board, and request your opinion in writing on the question therein contained."

The copy of the letter from the Hamilton county liquor licensing board to which you refer is as follows:

> "The following question is submitted to you at the special request of an applicant for a retail license; the same query occurs in several other cases.
> "Where an incorporated brewery owns a minority of the stock in a hotel company, would that fact have any bearing upon the consideration of the application for license of said hotel company?"

Section 9 of article 15 of the constitution of Ohio, among other things provides:

> "License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is

sought and no other person shall be in any way interested therein during the continuance of the license."

This same language is carried in the Greenlund act.

A hotel company, part of whose stock is owned by an incorporated brewery, could not comply with the following conditions:

> " * * * nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought * * *"

because the brewing company clearly would be a person pecuniarily interested in the license within the contemplation of the statutes.

While the word "person" in all situations in reference to the Greenlund liquor act and the constitutional amendment upon which it is founded would not embrace corporations, undoubtedly the term "person" embraces as well as a corporation in the particular provision of the constitution quoted from.

Other reasons may be given why the applicant or applicants referred to in the communication are not eligible, but in our judgment sufficient has been said to disclose their ineligibility.

Very respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

491.

APPLICANTS FOR SALOON LICENSES THAT ARE REFUSED, ENTITLED TO HEARING—SAME KIND OF LIQUOR MEANS THE SAME CLASSES OF LIQUOR.

Where applicants for saloon licenses have been refused, the applicants are entitled to a hearing; but in most cases no extended hearing should be necessarily granted, especially when the reason or refusing the license was because of the necessity of reducing the number of saloons.

The same kind of liquor means the same class of liquor, namely, distilled, vinous and malt, or some other kind of liquor having a well known distinction in the trade, and does not mean different varieties of the same class.

COLUMBUS, OHIO, September 18, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—In your communication under date of August 30th, you ask an opinion upon the following questions:

> "1. Do the provisions of section 29 of said law apply for the year 1913, to those applicants who may be rejected by the various county liquor licensing boards for the reasons that it is necessary so to do to reduce the number of saloon licenses to the number authorized by law?
>
> "2. We respectfully direct your attention to the phrase found in section 22, namely, 'same kind of liquor,' and ask to legally define or construe the same.
>
> "Section 29 of the liquor licensing law reads:

"In all cases where an application is rejected, the applicant shall be given a hearing upon the announcement of said rejection of the county board * * *."

The rest of this long section provides the procedure, etc., attendant upon such hearing. It is my view that since there is a slight ambiguity in the language used by the legislature, the provision for a hearing is a right granted to all applicants whose application for license have been rejected. The rejected applicant is entitled to his notice from the secretary of the board of the fact of the rejection of his application and shall be given a list of the complaints, if any, made against him, with the names and addresses of the complainants. Further, the applicant has the right to be present at said hearing, either in person or by counsel.

Attention is called to the fact that this section authorizes the liquor licensing board to adopt certain rules and regulations concerning the hearing and I am of the opinion that owing to the necessity for expediting the work of the boards that in cases where applications are rejected solely for the reason that there exists the necessity to reduce the number of saloon licenses to the number allowed by the constitutional provisions, that formal compliance is all that is required. It is my opinion that the board might formulate a rule that in such cases, on a day certain and within the time prescribed by this section, hearings would be had upon such rejected applications but that no extended hearing would necessarily be granted to any applicant so rejected unless sufficient evidence would first be filed with the board by said rejected applicant, against some applicant who had been tentatively granted a license and whose place was claimed by said rejected applicant, by reason of the evidence thus furnished. While every right granted by the licensing act should be afforded to one whose application is rejected, still from the very necessity of the case, owing to the brief time allotted between the time that the applications are filed and the time when the list of granted applications are finally made up, the board is justified in making such reasonable rules as will permit the expeditious performance of its duties. As in many localities a far greater number of applications will be filed for saloon license than that locality will be entitled to under the constitutional limitations, I can well understand that many applicants will be rejected solely because of this limitation. It would avail nothing to have any extended hearings showing the qualifications for license of the rejected applicants unless the board was advised where and whose place it would be possible for these rejected applicants to take.

Hence it is my view that in such cases the burden of showing that there might be made a place for them, rests upon the rejected applicant and in the absence of the furnishing by said rejected applicant of evidence that would disqualify some applicant who had been tentatively given a license, there exists no necessity for an extended hearing in the case of a rejected applicant.

Section 22 provides that licenses shall be either wholesale licenses or saloon licenses. Under a wholesale license, intoxicating liquors may not be sold in smaller quantities than two gallon at one time of the same kind of liquor. You ask what is meant by the phrase "the same kind of liquor." The license law was enacted to provide not only for a license to traffic in intoxicating liquors but also to further regulate the traffic therein and it is to be assumed that the legislature had in mind the whole scheme of Ohio law for regulating such traffic. The phrase "intoxicating liquor" had already been defined by statute.

Section 6064 reads:

"The phrase 'intoxicating liquor,' as used in this chapter and in the penal statutes relating thereto, means any distilled, malt, vinous or any intoxicating liquor except in subdivisions 2 and 6 of this chapter, entitled 'taxation' and 'local option in municipal corporations' respectively, and the penal statutes relating thereto, in which cases such phrase means any distilled, malt, vinous or any other intoxicating liquor."

While that definition specifically refers to the phrase as used in chapter 15 of title 2 and in the penal statutes relating thereto, in Woolen & Thornton's "The law of intoxicating liquors" in section 1, the author says:

"In its most comprehensive significance, the term 'liquor' implies a fluid substance such as water, milk, blood, sap, juice, but in its more limited sense it means spirituous fluids, whether fermented or distilled."

In a note on page 3 will be found the following language:

"The meaning of the word 'liquor' must always be ascertained by considering the sense in which it is used and that sense is ascertained by considering its connection with the words in which it is connected."

Many of the states have defined intoxicating liquors in the same manner as defined by our statute in section 6064 and the general classification of intoxicating liquors are "distilled, malt, vinous or any other intoxicating liquors." In my opinion, the legislature in speaking of the sale of liquor under the wholesale license, meant intoxicating liquor as used in our statute. It may be noted that they did not speak of a sale in smaller quantities than two gallon at one time of the *same liquor*. They said "of the *same kind of liquor*," recognizing the well known subdivision of intoxicating liquors into distilled, malt and vinous liquors. Cyc. treats the term "kind" as synonymous with "sort;" "grade;" "class." The term "class" has been defined as a crowd of persons or things taken collectively, having qualities in common and constituting a unit for certain purposes. It is my opinion that "same kind" of liquor means the same class of liquor and that so long as the holder of a wholesale license does not sell in smaller quantities than two gallon at one time of the same sort of or class of liquors, that is, of distilled, vinous, or malt liquor or of some other intoxicating liquor, having a well known designation in the trade, that he would be within his rights under his license. The mere fact that the liquors thus sold would be of different varieties of the same class, would not in my opinion make any difference.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

521.

BREWING COMPANY MAY NOT OBTAIN LICENSES IN ITS NAME FOR THE SEVERAL PLACES IN THE STATE WHERE IT CONDUCTS SELLING AGENCIES.

Under the provisions of the General Code, a brewing company cannot obtain license in its name for selling liquor in the several places in the state where selling agencies are located.

All persons and corporations seeking licenses may obtain but a single license within the state.

COLUMBUS, OHIO.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 10th, enclosing a letter from the Huebner-Toledo Breweries Company, in which it is stated:

> "We are engaged in the brewing business in this city. We have also a number of selling agencies throughout the state at which places we have been paying the Aiken tax in the past and selling and disposing of our beer in any quantity wholesale and retail. Inasmuch as the new license code provides that a person or corporation may be interested in only one place where intoxicating liquors are sold the question arises as to how we are to make applications for our selling agencies where the beer is sold at both wholesale and retail in our name.
>
> "We understand very well that under a retail license we may sell in any quantity providing we pay the internal revenue tax. The question I desire answered is whether we may apply and obtain in our name retail licenses for the several counties or places in the state of Ohio where our selling agencies are located."

Section 19 of the so-called liquor license law provides among other things, that:

> "License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked."

Under the above provision I do not think there can be the slightest question but that is would be impossible for the brewing company to obtain licenses in its name for the several counties or places in the state of Ohio where its selling agencies are located, as the statute says that an applicant cannot in any way be interested in the business conducted at any other place where intoxicating liquors are sold. This limits all persons and corporations seeking licenses to obtain but a single license within the state.

There is no way, so far as I know, for this company to make application for more than one liquor license.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

534.

UNDER THE PROVISIONS OF THE LIQUOR LICENSE LAW LIQUOR MAY NOT BE SOLD ON TRAINS.

The liquor license law does not make any provision for the sale of liquor on trains. The legislature did not see fit to attempt to make any law covering this matter, and the various boards are limited in the granting of liquor licenses to the laws enacted by the legislature regarding such subjects.

COLUMBUS, OHIO, October 3, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of September 19th, enclosing copy of a letter from Messrs. Dolle, Taylor and O'Donnell, of Cincinnati, Ohio, which reads as follows:

> "We have been asked for an opinion as to whether under the liquor licensing law intoxicating liquors can be sold in Ohio on trains while moving through wet territories, as is now being done, and if so can such traffic be carried on under a license issued to the person in charge of the commissary of such railroad company, and which designates one of the companys' depots as the place of traffic.
>
> "Before giving a definite answer to said inquiry we would be pleased to have you advise us if you have made any ruling upon the subject, and if so to favor us with a copy thereof. If your conclusion is that sales will be permitted upon moving trains then we shall be pleased to have you also advise us of the place which should be designated by the applicant for its place of business, if one of the depots of the company is not the proper place."

Under the Dow-Aiken law, as found in section 6075, provision was made for a tax on a railway corporation which maintained or conducted dining or buffet cars upon a train, in which spiritous, vinous, malt or other intoxicating liquors are dispensed within the state. While the constitutionality of this section was doubted by some, still, no question was ever raised upon the same. The framers of the license law were fully cognizant of this provision, made for a tax upon a particular class engaged in the business of trafficking in intoxicating liquors; but, under the provisions of section 9 of article 15 of the constitution, providing for the licensing to traffic in intoxicating liquors, laws could not be passed authorizing more than one saloon in each township or municipality of less than five hundred population nor more than one saloon for each five hundred population in other townships and municipalities. The definition of the word "saloon," as used in this section, to wit: "a place where intoxicating liquors are sold or kept for sale as a beverage, in quantities of less than one gallon," would include the buffet and dining cars of railway corporations as heretofore conducted.

The further provision of this section of the constitution as to a denial of a license to any applicant in any way interested in the business conducted at any other place where intoxicating liquors are sold, or kept for sale as a beverage, would likewise limit the use of a license granted to one particular place and locality.

The committee having the preparation of this license law in charge had in mind the question as to whether or not licenses could be granted for the sale of intoxicating liquors on dining or buffet cars, and, I am reliably informed,

concluded that under the constitution it would be very doubtful if any law could be so framed as to permit the sale of intoxicating liquors on such cars, under a license authorized by this section. At least, they did not put into the act any provisions covering the granting of licenses to persons operating or conducting dining or buffet cars, permitting the dispensing of intoxicating liquors thereon.

You can well see that since the limitation of the number of saloons is to each particular municipality and township, the question would arise as to which locality a saloon license should be charged, that would be granted to a corporation conducting such business. Then, again, since such corporations would have more than one car, the license could not cover the different buffet or dining cars in which it was sought to dispense the liquor. Since, too, the intent and spirit of the constitutional provision and the law, as indicated by the language, was to prevent a person from being interested in more than one saloon, it can readily be seen that the ordinary license could not cover a number of moving places in different localities in the state, dependent upon where the railroad ran.

The suggestion in the letter of Messrs. Dolle, Taylor and O'Donnell as to whether or not one of the depots of the company would be the proper place to designate as a place where the license might be used, in the event that sales would be permitted upon moving trains, practically answers the question. If the depot in one of the principal municipalities of the state were designated as the place of business, then each of the dining or buffet cars of the railway company would be charged against that particular municipality, and still each of the movable places in which the sales were allowed under the license might be scattered throughout the various townships and municipalities of the state, only at rare intervals being within the particular municipality designated as the place of the location of the business.

I am constrained to hold that since each municipality and township is limited by the constitution and law to a designated number of places, according to the respective population of a particular municipality, there cannot be such a thing as a "movable place," where intoxicating liquors are sold, and which, under the liquor license law could be permitted to operate under a license.

Directly answering the question propounded, I am of the opinion that the liquor license law does not make any provision for the licensing of the sale of intoxicating liquor on trains, while moving through wet territory. The legislature did not see fit to attempt to make any such provision, and the various boards are limited in the granting of such licenses to the laws enacted by the general assembly on the subject.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

546.

A VILLAGE OF 700 POPULATION MAY HAVE BUT ONE SALOON.

The liquor license law permits one saloon for each 500 population. Under this provision a village of 700 population may have but one saloon.

COLUMBUS, OHIO, October 3, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from Hon. Henry Hart, prosecuting attorney of Erie County, under date of September 25th, which reads as follows:

> "Under the constitutional provision authorizing the licensing of saloons, it is provided,
>
> " 'Laws shall not be passed authorizing more than one saloon in each township or municipality of less than five hundred population or more than one saloon for each five hundred population in other townships and municipalities.'
>
> "Under this provision, can a saloon license be issued for a fractional part of five hundred population, after one license is issued for the first five hundred?
>
> "Reduced to a concrete form it is this: The village of ———— has seven hundred population. Can two saloon licenses be issued to traffic in intoxicating liquors in that village?"

I am answering this letter to you, and will furnish Mr. Hart with a copy of the opinion.

I beg leave to say that the language of section 9, article 15 of the constitution, quoted above, is not susceptible of any construction other than that the full population of five hundred is required for each saloon license. The language used in section 24 of the liquor license act follows the wording of the constitutional provision, and reads as follows:

> "Not more than one saloon shall be licensed in any township or municipality of less than five hundred population, nor more than one saloon for each five hundred population in other townships and municipalities. * * *"

I am informed that the question of providing for a license for a fraction over and above one-half of five hundred population was discussed by the committee drafting the liquor license law, but that the opinion was practically unanimous that any such legislation would contravene the constitutional provision.

I am of the opinion, therefore, in answer to your concrete question, that in a village of seven hundred population there can be granted but one saloon license.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

570.

A PERSON HOLDING A SALOON LICENSE MAY SELL INTOXICATING LIQUORS IN ANY QUANTITY AND TO BE CONSUMED IN ANY QUANTITY ON OR OFF THE PREMISES, SO LONG AS THE SALES TAKE PLACE ON THE PREMISES OF THE SALOONIST HOLDING THE LICENSE AND MAKING THE SALE.

A person holding a saloon license may sell intoxicating liquors in any quantity and to be consumed in any quantity on or off the premises. There is nothing in the law to prevent one saloonist from selling beer in quantities to other saloons so long as the sales take place on the premises of the saloonist holding the license and making the sale. The question of drug companies complying with the liquor license is a question of fact to be determined from the circumstances of each case.

COLUMBUS, OHIO, October 10, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—In your communication of October 7th you ask my opinion upon the following questions:

> "*First.* The firm of C. & S., applicants for a saloon license, have in the past few years established a trade in their city for a certain beer manufactured in another city. There is no interest between the brewery and saloonist whatsoever. The firm buys a carload of beer at a time and places it in a rented cold storage apartment, and have been in the habit of selling said beer to two or three other saloonists in the city, and to one saloonist outside of the county.
>
> "They would like to know if they can continue to sell said beer?"

In an opinion to your honorable board under date of September 10, 1913, this department held that the holder of a saloon license was permitted to sell intoxicating liquors in any quantity and to be consumed on or off the premises.

As I understand your inquiry, this firm has been a dealer in a certain brand of beer, buying the same at one price and selling it at an advanced price like a dealer in any other commodity. I assume there was no question of agency, since the question states that there was "no interest between the brewery and saloonist." The fact that sales are made to certain saloons in the city has no bearing on the question whatever, and if the sale made to the saloon located outside of the county is legally made and referable to the place for which the license is held, then the fact that the purchaser happens to live outside of the county would have no bearing on the case. As I take it, the inquiry resolves itself into the simple question of whether or not the holder of a saloon license can make sales in any quantity; and as I stated before, this question was answered in the affirmative in the opinion spoken of. In answering the above I assume that all sales are made on the licensed premises.

> "*Second.* The B. Drug Co., a wholesale drug concern, and the F. P. B. Drug Co., a wholesale and retail drug concern, have made application for saloon licenses. The two companies are wholly separate. The B. Drug Co., has been conducting a wholesale business while the F. P. B. Drug Co., has been conducting both a wholesale and retail business.
>
> "The inquiry is made as to whether in the event that the F. P. B. Drug Co., was granted a saloon license it would have to conform to the laws governing saloons.

"You further ask if the company would not have to conform to the laws governing saloons whether or not the two saloon licenses would be included in the elimination?"

I confess that I am somewhat at a loss as to how to answer this inquiry. In the first place I take it that the question before the county board is whether or not they will grant the application for saloon licenses made by these two companies. The reason why one or the other desires a saloon license, rather than a wholesale license, to my mind, is no concern of the board as far as the mere granting of the licenses is concerned. So too, it strikes me, that what laws will be applicable to the saloon acting under the license that it obtains is an entirely after consideration. I hardly think it is fair to anticipate that if either one of these companies, acting under a saloon license, conduct a saloon business that they will seek to protect themselves under the exemption of section 13050, General Code, as being a regular drug store. Whether or not they are conducting a regular drug store, and are within the exception of the section above cited would be a question of fact to be decided at the time. So with any other of the laws on the statute books affecting places where intoxicating liquors are sold as a beverage, decision as to what laws would apply would depend solely upon the state of facts presented at the time.

Then again, it is my opinion that it does not make any difference whether or not the companies must conform to the laws governing saloons when it comes to granting the number of saloon licenses that are permissible in a given municipality. Only the number of saloon licenses allowed by law can be granted and if each of these companies receive a saloon license that fact alone places them in the list of places that are limited by the constitution and the law.

Trusting this answers your inquiries, I am,

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

573.

BREWING COMPANIES MAY SELL BEER IN QUANTITIES OF ONE GALLON OR MORE IF IT IS DELIVERED IN THEIR WAGONS FROM THEIR BREWERY, BUT THEY ARE NOT PERMITTED TO SELL FROM STORAGE HOUSES.

Brewing companies making sales of their product in this state under the liquor license law are permitted to make sales in quantities of one gallon or more at the factory or from the wagon of said brewer to the holder of a liquor license, or in the same quantities to individual consumers when the liquor is delivered to the homes of said individual consumers in territory where the sale of intoxicating liquor is not prohibited. But they are not permitted to sell from storage houses. Orders may be taken and sales made from the manufactory, and orders may be taken and sales made from the wagons of the manufactory, but a sale that is referable to any other place would be a violation of the license law.

COLUMBUS, OHIO, October 29, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—In your communication of September 10th you submit a number of inquiries coming to you from numerous brewing companies within the state, all involving practically the same question, to wit, the status and

rights of brewing companies in making sales of their product in this state under the new liquor license law. In this opinion I will confine myself to a discussion of the position of manufacturers within this state of intoxicating liquors from raw material.

Section 9 of article 15 of the constitution, as adopted September 3, 1912, provides amongst other things that license shall be granted to traffic in intoxicating liquors in this state, and authorizes the legislature to pass license laws, with such restrictions and regulations as might be deemed proper. The same amendment also provides that licenses to traffic in intoxicating liquors shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought and no other person shall be in any way interested therein during the continuance of the license.

Under authority of this amendment the legislature passed what is known as amended senate bill 203, providing a scheme for the licensing of the traffic in intoxicating liquors. Twice before the voters of Ohio had voted down a proposition to license the sale of intoxicants. The liquor question had been before the people in many phases, for many years. It was desired to place the liquor business on a higher and better plane, and by the means of a license system raise the standard of those engaged in this business, and at the same time reduce the number of places where intoxicating liquors are sold in small quantities. A feeling also was prevalent that there should be a separation of the interests of the wholesaler and the retailer in their respective business, and further that no one should be interested in any way in more than one place where intoxicating liquors are sold as a beverage. Concessions were made by the adherents of either side of this great moral question of temperance, and with due regard for the acute condition of the public mind the so-called Greenlund act was enacted.

I think it is well to keep in mind the purpose aimed at in this law in the discussion of the questions involved here, and for the purpose of reaching a conclusion that is fully justified by both the letter and the spirit of the law.

It may be well to call attention at this point to the fact that for many years a tax had been assessed upon the *business* of trafficking in intoxicating liquors. The Dow law, passed in 1886, 83 O. L. 157, with its various amendments, is now found in the General Code as sections 6071, et seq. Section 6071 reads as follows:

> "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed yearly and paid into the county treasury, as provided by sections 6072, and following, of the General Code, by each person, corporation or co-partnership engaged therein the sum of one thousand dollars. (103 Ohio Laws, page 241.)"

This section, prior to the amendment by the last legislature, provided that this tax should be paid "for *each place* where such business is carried on;" but since, under the license law, but one license may be issued to any one person, and that license only for a designated place, it can readily be seen that it would be necessary only to place a tax upon the business at the one place permitted under the license. The Dow law, as it stood prior to the last amendment, exempted certain classes of persons from its provisions, and specifically provided that the phrase "trafficking in intoxicating liquors" did not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory by the manufacturer thereof in quantities of one gallon or more at one time. Origi-

nally, the exemption was to all sales by the manufacturer. It was subsequently limited to sales at the manufactory; and the last legislature (103 Ohio Laws, 241) amended that portion of section 6065 so that it now reads as follows:

> "* * * Such phrases do not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer thereof in quantities of one gallon or more at one time at the manufactory *or the sale thereof in said quantities from the wagon or other vehicle of the manufacturer to the holder of a liquor license or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law.*"

I call attention to the provisions of this liquor tax law because, while under the license a permit is issued to a person to sell intoxicating liquors at designated place, the Dow-Aiken tax law assesses a yearly tax upon the business for which it is necessary under the law to secure a license. While the one is a tax, and the other is a license, and they are therefore separate and distinct, they are nearly related, and the Ohio decisions upon the tax law will be very helpful, if not controlling, in deciding similar questions under the license law.

Attention is further called to the fact that the legislature, in excepting certain classes from the provisions of the license law, followed practically the same language as the general assembly used in designating the exceptions to the Dow-Aiken tax.

Section 48 of the license act, which provides a penalty for "liquor for drinking."

As stated by Mr. Black, in his estimable work on interpretation of law, page 204:

> "In the course of the entire legislative dealing with the subject, we are to discover the progress and development of a uniform and consistent design, or else the continued modification and adoption of the orignal design to apply it to changing conditions or circumstances. In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject, and to have shaped its new enactment with reference thereto. Hence the same principle which requires us to study the context for the meaning of a particular phrase or provision, and which directs us to compare all of the several parts of the same statute, only takes us on a broader scope when it bids us read together, and with reference to each other, all statutes in pari materia."

Originally the brewer was exempted from the provisions of the so-called Dow tax law, for certain sales made no matter where. Subsequently legislation limited these sales to the particular sales made at or referable to the place of manufacture. The last legislation on the subject extended the exemption from the tax, so that manufacturer could make sales from his wagon or other vehicle, providing such sales were to either one of the two well defined classes, to wit, license holders and individual consumers, made in "wet" territory, at their homes.

While it might have been a disputed question as to whether all sales by the manufacturer were sales of intoxicating liquors to be used as a beverage, it is no longer an open question in this state, where it is a well-known fact that the brewer fills practically all orders for his product providing the same is not below the quantity limited by law.

To my mind the reasoning of the supreme court of Tenessee, in the case of Kelly & Co. vs. State, as reported in 132 S. W., at page 193, fully justifies the conclusion that the sale by a brewer is a sale as a beverage, and that a brewery is a place where intoxicating liquors are sold or kept for sale as a beverage. The court in said case says, at page 199:

> "But counsel say the words 'as a beverage' restrict the word 'sale' so that it means a sale for consumption 'for the pleasure of drinking.' It should be borne in mind that it is 'to sell as a beverage' that is prohibited, and not to drink as a beverage. It is the seller's purpose that is referred to and not the purchaser's. The quantity so sold is not limited by the statute, and there is nothing in the language employed that necessarily restricts the prohibition to immediate consumption sales. The plaintiff in error sold 10 barrels of whiskey knowing that it would be resold in 'small and large quantities' in the ordinary course of trade. Its ultimate destination was the consumer, the purchaser being merely a distributor, and there is no suggestion in the evidence that it was not intended by all parties that, even the whiskey finally reached the consumer, it would be sold as a beverage. Plaintiff in error sold as a manufacturer in wholesale quantities, and thereby became the initial distributor of the whiskey to the general trade, and its purpose with respect to the final sale to the consumer must have been general and promiscuous. This would include beverage sales, as well as all other kinds of sales, and would clearly fall within the prohibition conceded by its learned counsel. When a sale is proven, the burden shifts to the defendant to show that it was lawfully made for a lawful purpose, and it would be straining too far to say that a sale in quantities to be distributed to the public generally for all purposes negatives a purpose upon the part of such seller that it was sold as a beverage."

Our own supreme court, in the case of Senior vs. Ratterman, 44 Ohio State, 661, while not deciding this question, did hold that wholesale dealers in intoxicating liquors were not manufacturers, nor within the terms of the act of the general assembly passed May 14, 1886; and it is readily apparent, from a reading of Judge Spear's decision in that case, that the sole reason for the exemption of the manufacturer was because he was specifically exempted by the statute. As the learned judge says, at page 673:

> "The word 'traffic' has always had a well-understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who trafficks—a trader, a merchant. No limit as to amount is fixed in the section, and it is plainly as much traffic to deal in a given commodity by the wholesale as at retail."

While, of course, the statutory definition, as found in section 6065, General Code, is controlling, it is apparent that it is only the exception to the manufacturer that saves him from liability to the Dow-Aiken tax; and it cannot be contended that the brewer of today does not keep a place where intoxicating liquors are sold or kept to be sold as a beverage.

Section 19 of the so-called Greenlund license act provides amongst other things:

> "License shall not be granted to any applicant who is in any way

interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked."

Section 21 of the same act provides:

"Each applicant shall state:

* * * * * * * * * * * *

"(c) The fact that the applicant is not in any way interested either as owner or part owner in a business, or a stockholder of a corporation engaged in the business, conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage."

Now, since under the express provisions of section 48 of the liquor licensing act, which imposes a penalty upon any person who sells intoxicating liquors without having obtained the license prescribed by law, the manufacturer is exempted, under the circumstances hereinbefore stated, it must be conceded that he is entirely without the law and does not have to obtain any license to make the sales that he is authorized to make under the statute; but he is limited strictly to the character of sales and in the quantities that are permitted. So, it is my opinion that the brewers in the question submitted are permitted to make sales in quantities of one gallon or more at one time at the factory, or in quantities of one gallon or more from the wagon or other vehicle of said manufacturer to the holder of a liquor license, or in quantities of one gallon or more at one time to individual consumers, where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law.

Since this right and privilege is an exception to a certain class, for a certain character of sales, every sale must comply with and conform strictly to the sale so permitted.

In the past, so I am informed, brewers have had, in one or more counties of the state, other than the county where the brewery was located, a storehouse or depot for the distribution of its keg and bottled beer. Following the decisions of our courts, where sales were referable to such storehouses, the practice has been, by virtue of section 6071, to pay the tax assessed upon each place where intoxicating liquors were so sold. Questions frequently arose as to where the sale was actually made, but in the recent case of Diehl Brewing Company vs. Beck, 10 C. C. R. n. s. 361, affirmed without report in 81 O. S. 512, the court held that:

"A brewing company manufacturing and selling beer at wholesale, which maintains a cold storage house in a location separate from its manufactory, and from which cold storage house daily deliveries of beer are made to customers on order previously taken by a soliciting agent, thereby becomes a trafficker in intoxicating liquors within the meaning of Revised Statutes, 4364-9 (and section 6071, General Code,) and is subject to the Dow tax provided for by that act."

In that case the agent of the brewery took orders from saloon keepers for the amount of beer which they would need during the next period of thirty days

or until he would next make his round. These order were sent to the main office of the brewing company at Defiance for approval. From its brewery the company would then ship in carload lots to Holgate and Deshler an amount of beer sufficient for the demand in those places. The beer so shipped was consigned to itself, and was received by its agents in Holgate and Deshler and stored in its cold storage houses in those towns and none of it was in any way designated or set apart for any particular customer. Each morning and evening the agent of the brewing company at Holgate and at Deshler would take the round of the saloons in his town; inquire of each saloon keeper how much beer he would need for the day or part of a day; enter that amount with the price thereof on a book which he carried with him; make a duplicate entry on the books kept by the saloon keeper; and afterwards would deliver by wagon to the saloon keeper the amount and kind of beer so ascertained to be needed, taking such amount of beer from the general stock on hand in the cold storage house, and continue so to do until the amount previously ordered by any customer had been delivered to him. Occasionally the local agent would make collections; ordinarily, however, the soliciting agent would do so.

Judge Hurin, at page 363, after stating the facts, says:

> "It is evident that the whole question involved in this case depends on the one word 'sale' and its definition.
>
> "When and where under the facts agreed upon in this case, did the sale take place?
>
> "Was the sale completed by the soliciting agent when he took the order for the supply of beer to each saloon for the coming month; or was it completed when the order for beer was accepted and confirmed by the home office in Defiance; or was it completed when the beer for all the Holgate and Deshler customers was shipped in bulk to the cold storage houses in those towns; or was it completed when the beer was delivered by the agent of the brewing company from the cold storage houses to the saloons; or was it only completed when, after delivery, the soliciting agent again called, collected the money for the beer previously delivered, and solicited a new order?"

The judge distinguishes the cases of Hanson vs. Luce, treasurer, and Monaghan vs. Luce, treasurer, reported together in 50 O. S. 440, because in those cases it was conceded that there was no traffic or sale at the cold storage houses; and calls attention to the case of Jung Brewing Company vs. Talbot, 59 O. S. 511, saying:

> "In that case it appeared that the brewing company, located in Cincinnati, maintained a cold storage house in Urbana, Champaign county, 'where beer, shipped from the brewery, was received and kept on hand ready for sale and delivery to customers in the latter city, from time to time as they might order. The sales were not made directly at the storage rooms, but were made by agents and employes of the plaintiff *who drove wagons for that purpose* which were supplied with beer in the keg from the storage room.' The court held that the business conducted in that manner was taxable and on page 516 of the opinion the court says:
>
> "'If customers had made their purchase or received the property at the building (meaning the cold storage building) it would undoubtedly have been a place of traffic. Instead of conducting the business in that way the agents who had charge of the building and contents obtained

orders from the customers which they filled by hauling the beer from the building to the customers. That was merely a matter of convenience to the purchaser or inducement to buy. The building where the property sold was situated and from which it was delivered was, for every practical purpose, the place where the business was carried on. The substantial distinction between this case and the cases of Hanson vs. Luce, and Monaghan vs. Luce, 50 O. S. 440, is that in the latter case the storage room was used in connection with, and as part of the wholesale and retail traffic carried on by the proprietor at his saloon where all the business was done, and for which he had paid the tax. In such a case, it was held he was not subject to a separate tax on account of the use made of the storage room.'

"Here we find a close similarity to the case at bar and the court holds that though 'agents who have charge of the building and contents obtained orders from the customers which they filled by hauling the beer from the building to the customers, that was merely a matter of convenience to the customers or inducement to buy; the building where the property sold was situated and from which it was delivered was, for every practical purpose, the place where the business was carried on.'

"But plaintiff in the case at bar insists that the manner of sale in this case, the fact that a blanket order had previously been taken and that the daily orders delivered from the cold storage houses were merely designations of what was immediately needed, takes it out of the rule thus laid down.

"A case perhaps still more nearly identical with this case is that of village of Bellefontaine vs. Vassaux, 55 O. S. 323. There a brewery company at Sidney owned a cold storage house at Bellefontaine. There was evidence tending to show that customers in Bellefontaine ordered beer of the brewing company at Sidney, which thereupon shipped it to the purchaser at Bellefontaine, but in care of its own agent, who stored the beer in the cold storage house and delivered it to the purchaser only when paid for. In that case there was an attempt to show that the beer for each purchaser was set apart by itself in the storage house in a rack labeled with the initial of the purchaser's name but there was no attempt to show a separation between the beer ordered by two men with names of the same initial letter. The court held that such evidence justified a conviction of the charge of selling intoxicating liquor in violation of law.

" * * * What then is a sale and when is it complete?

"Blackstone (ed. Com. page 446) says it is 'transmutation of property from one man to another in consideration of some price.'

"Kent calls it 'a contract for the transfer of property from one person to another for a valuable consideration.' 2 Kent's Com. 468.

"Benjamin on Sales, section 1, declares that, 'It may be defined to be a transfer of the absolute or general property in a thing for a price in money.'

"Mecham on Sales defines it as, 'The transfer, in pursuance of a valid agreement, from one party called the seller to another called the buyer, of the general or absolute title to a specific chattel, for a price, or a consideration estimated in money,' and says further that the sale takes place only when the title passes.

"In all these definitions except that of Kent a transfer of title or

property is held to be a necessary element of a sale; and in Kent's definition it is the contract for the transfer which constitutes a sale.

* * * * * * * * *

"But when the agent of the brewing company took that beer from this cold storage house, setting apart some of it for one customer and some for another and, from the cold storage house, began the delivery of their portions to the respective purchasers, then the brewing company lost its title and the purchaser gained it whether payment had been made or not. Then the sale was complete.

* * * * * * * * *

"True, the order had previously been given, but the execution of it, the completion of the actual sale, was carried out only from the cold storage house and by the agent in charge thereof. Until such delivery, there was no completed sale; no setting apart of any particular beer; no transfer of any title to any particular kegs or barrels of beer. The business was conducted from the cold storage house and only completed by the agent in charge of that house. * * *

"It may not be amiss to consider in conclusion the effect of a contrary view. Under that holding the brewing company—merely because it is a manufacturer—might establish in each county in the state and in each town in each county, a depot of supplies. Its agents might there conduct what is in all essential respects a wholesale business and without taxation—a privilege denied to all other wholesalers of beer.

* * * * * * * * *

"The brewing company might thus by a simple subterfuge get around the law and conduct a limitless number of subsidiary wholesale houses without taxation—just what the law prohibits in all others.

"We do not think that such an interpretation of the law is consistent either with the decisions of our supreme court or with the spirit of the law or even with its letter."

In Jung Brewing Company vs. Talbot, 59 O. S. 512, Judge Williams said:

"The business of trafficking in intoxicating liquors upon which the tax may be assessed, as defined by the statute, means the buying or procuring and selling of such liquors, and does not, it is claimed, include sales by the manufacturer of them, because he neither buys nor procures, but produces them. It seems clear, however, the word 'procure' was not used in the statute in that restricted sense. After defining the phrase 'trafficking in intoxicating liquors' to mean the 'buying or procuring and selling,' etc., the statute, in express terms, excludes manufacturers in certain cases from the definition, which is sufficiently indicative of the legislative understanding that such express exclusion was necessary to relieve manufacturers of the tax; for if they were not within the definition, the excepting clause was unnecessary. And, moreover, the excepting clause does not exclude manufacturers in all instances, but only in cases where their sales are made at the manufactory, etc. * * * In general use the word 'procure' means to obtain in any way, and that it was employed in that sense in this statute, seems clear from all of its provisions."

Continuing, Judge Williams, at page 516, says:

"The selling of intoxicating liquors from a wagon equipped as a

saloon, drawn from place to place, is as certainly within the purview of the statute, as is the traffic carried on in elegantly fitted rooms; and so is the selling from any vehicle when it is not done as a part of a business on which the proprietor pays the required tax. But, was not the traffic carried on by the plaintiff at a place in the city of Urbana? The beer was shipped there and placed in the storage room, where it was kept on hand for sale by local agents. If customers had made their purchases or received the property at the building, it would undoubtedly have been a place of traffic. Instead of conducting the business in that way the agents who had charge of the building and contents obtained orders from the customers which they filled by hauling the beer from the building to the customers. That was merely a matter of convenience to the purchaser, or inducement to buy. The building where the property sold was situated, and from which it was delivered, was, for every practical purpose, the place where the business was carried on."

Keeping in mind the principles laid down by the cases discussed above, it is plainly to be seen that every case must be decided upon its own peculiar evidence, and that at all times the brewer must see to it that every sale is made in the manner and at the place permitted in the exception in the law. I believe that the cases decided by our court of last resort, and referred to above, point out the kind of sales that are permitted, and those that are not. It is perfectly apparent that all sales in the proper quantities, made at the manufactory, are within the exemption. Also, the language is so plain as to not need interpretation that the manufacturer is permitted to make sales in the prescribed quantities from his "wagon" or other vehicle to the permitted classes mentioned in the exception.

A more serious question arises when the inquiry is made as to the right of the brewer to have a warehouse or depot for the distribution of his keg or bottled beer, away from his manufactory. If this warehouses is a mere matter of convenience to the manufacturer, and no sale is made or can be legally referred to the warehouse, I can see no valid reason for preventing the stoppage at the warehouse of the goods of the manufacturer; and it is my opinion, under the authority of the Dow tax cases in our supreme court, which are so analogous to those that might arise under the license act, that a manufacturer could load up his wagon as well from his warehouse as from his manufactory, and start out to make his sales from his wagon or other vehicle. Such sales, under such circumstances, would be at the peril of the manufacturer; and if at any time the sale could be properly referred to the storehouse; and if, in the words of Judge Williams, 59 O. S. 512, the manufacturer "obtained orders from customers which he filled by hauling the beer from the building to the customers," then, since that was merely a matter of convenience to the purchaser, the building or storehouse where the property sold was situated, and from which it was delivered, would be for every practical purpose the place where the business was carried on, and the sales made, and so would be in violation of law.

A manufacturer could not solicit and receive orders and then take his wagon to the storehouse, obtain therefrom his product, and deliver the product as per the orders theretofore received. This would constitute a sale at the storehouse. He would have to have his goods on his wagon and then proceed to consummate every element that went to make up the sale of his product therefrom, in order to be within the excepting clause of the statute.

A manufacturer, by reason of the exception, is without the scope of the

license act; neither he nor anyone for him can obtain a license. In the first place, one is not necessary to him for making the sales that he is allowed to make; and then, again, he could not comply with the requisites to obtain a license for another and a different place, for he would already be interested in the business conducted at another place where intoxicating liquors were sold or kept for sale.

It must be understood that the exemption is to the manufacturer, and that the practice can no longer obtain of establishing agencies in the various counties and making sales from the offices of the agencies, or from the storehouses themselves. The manufacturer, by himself and his agent, is bound to the strict letter of the law, and can make only such sales as are fully and legally completed at the excepted places, to wit: the manufactory or the wagon or other vehicle. The sales at the manufactory must be limited to the very place of manufacture; the sales from the wagon or other vehicle are limited to the wagons or other vehicles, but not to any particular locality, so long as the sales are made in the prescribed quantities and to the prescribed persons.

In discussing this entire question I am assuming that the brewery or place of manufacture is situated in so-called "wet" territory.

I hope I have made myself plain. The question is somewhat involved; yet, to me, the language of the exception in the statute can mean nothing else than the literal meaning of the words. The rule laid down by the circuit court in Brewing Co. vs. Beck, which was later affirmed in the supreme court, must be borne in mind, as well as that of the other cases cited above. The breweries may have storehouses or warehouses, but they cannot make sales at or therefrom. They must strictly comply with the letter of the law, according to all rules of statutory construction regarding exceptions.

As I view it, the manufacturer may ship a carload of beer to another point than the factory, consigned to himself, and place the same in his storage house. He may load from the storage house, into his wagon or other vehicle, and proceed to make sales from said wagon or other vehicle; but he may not take an order for some of his goods and proceed then to the storehouse, and deliver the same in fulfillment of the order therefore given. Under the cases above referred to this would be a sale at the storehouse, which is not permitted. Orders may be taken and sales made from the manufactory, and orders may be taken and sales made from the wagon or other vehicle; but any sale that is referable, under the law, to another place would be outside of the exception, and a violation of the license act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

576.

THE LIQUOR LICENSE COMMISSION SHOULD EXERCISE GREAT CARE IN GRANTING SALOON LICENSES IN ORDER THAT THE WELFARE OF ORPHANS' HOMES AND ORPHAN ASYLUMS MAY BE GUARDED.

While section 13206, General Code, in reference to locating saloons in the vicinity of state institutions does not apply to private institutions, yet the liquor license commission should exercise great care to the end that the welfare of orphans' homes and asylums, whether public or private, should be guarded. This is within the power of the liquor commission and it should not hesitate to exercise its power.

COLUMBUS, OHIO, October 31, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—You inquire whether, on account of section 13206, General Code, county license commissioners may lawfully issue a license to an applicant for a saloon license, whose saloon is located within twelve hundred yards of an orphan asylum, as distinct from an orphans' home which is conducted either by the state or state agencies.

The orphan asylums to which you refer are those conducted by individuals or private charitable associations or corporations, other than those in charge of the state or the agents of the state, or political subdivisions of the state.

Section 13206, General Code, is as follows:

> "Whoever sells intoxicating liquors or keeps a house of ill-fame at or within twelve hundred yards of the administration or main central building of the Columbus state hospital, Dayton state hospital, Athens state hospital, Toledo state hospital, soldiers' and sailors' orphans' home, or an other orphans' home in this state, or within two miles of the boundary line of the boys' industrial school, south of Lancaster, Fairfield county, or within two miles of the place where an agricultural fair is being held, or within one mile of a county children's home of a county of the state situated within one mile of an incorporated village or city in which the sale of intoxicating liquors is prohibited by an ordinance of such village or city, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned not more than thirty days, or both. The place wherein such intoxicating liquors are sold shall be shut up and abated as a nuisance by order of the court upon conviction of the owner or keeper thereof."

It is clear that every other institution named in this section, than orphans' homes, is conducted by the state or state agencies, or political subdivisions. In other words, they are conducted by governmental agencies. This alone tends strongly to the notion that it was not intended to embrace orphan asylums in charge of individuals, charitable associations or eleemosynary corporations. This conclusion would reasonably follow were it not for the history of the legislation on this subject.

It is not necessary to go farther back than year book 88, page 603, laws of 1891, for light on the subject. Section 6946, Revised Statutes, as found in said volume, prohibited the sale within twelve hundred yards of "the Ohio soldiers' and sailors' orphans' home." No other orphans' home was referred to.

The next act is to be found in 99 Ohio Laws, page 435 (laws of 1896), where the provision in respect to orphans' homes is as follows:

> "Soldiers' and sailors' orphans' home, or any other orphans' home in this state, except in cities of the first class."

The exception "or any other orphans' home in this state, except in cities of the first class" would leave the inference that sales were prohibited within the prescribed distance from orphans' homes other than those conducted by governmental agencies. However, the legislative intent appeared to be to except cities of the first class from the operation of the act.

The same language is used when the legislature acted again. See year book 93, page 342, section 6946.

To the same effect we find the section in the Revised Statutes, section 6946, Bates' Annotated Code, 1908.

When the General Code was adopted section 6946, Revised Statutes, passed into what is now section 13206, General Code, with the following words left out, so far as the question at hand is concerned, to wit, "except in cities of the first class."

It is easily to be seen that the exception was omitted because of the decision of the supreme court holding that classification of cities is unconstitutional.

Nothwithstanding the exception, and the changes made in reference to it, it does not conclusively follow that other than governmental homes are still embraced. Without finding it necessary to go deep into the statutes with reference to orphans' homes and orphan asylums, it is sufficient to say that an examination of the General Code, sections 3070, et seq., discloses that the statutory idea of "home" and "asylum" is not the same. It will be kept in mind that the statute under interpretation is a penal one. A home, in legal contemplation, is a permanent fixed place of abode, and presupposes that those at the home are under the entire control of the management in charge, subject to governmental authority; while this does not always obtain as to an asylum. Orphan asylums frequently do receive children for given and limited periods; and in fact do receive destitute children who may not be orphans. Too, usually there are well-defined rules and regulations as to admission to homes, as well as to departure therefrom. In my judgment a court in a criminal case would hesitate to enter into an inquiry as to the shades of difference that in some circumstances would constitute an orphan asylum a home, and in others not.

In advising you as to a constitutional provision I wish to leave the idea that great care should be taken to avoid too liberal a construction, to the end that the spirit of the constitution might be carefully complied with. Section 9 of article 15 of the constitution provides as follows:

> "Laws shall not be passed authorizing more than one saloon in each township or municipality of less than five hundred population or more than one saloon for each five hundred population in other townships and municipalities. Where the traffic is or may be prohibited under laws applying to counties, municipalities, townships, residence districts, or other districts now prescribed by law, the traffic shall not be licensed in any such local subdivision while any prohibitory law is operative therein, and nothing herein contained shall be so construed as to modify or suspend any such prohibitory laws, or any regulatory laws now in force or hereafter enacted, or to prevent the future enactment, modification or repeal of any prohibitory or regulatory law."

The maxim, *expressio unius exclusio est alterius*, may apply to the matter at hand, especially since the Greenlund act is directly applicable and controlling with reference to the issuance of licenses; and the legislature may have had

in mind the likelihood of the existence of some part of clause of statute to which its attention might not be directed, and to leave no doubt upon the subject may have intended to describe all of the prohibited places. Sufficient at least appears from this to more than raise a question of doubt as to the right of the license commission to withhold a license to a saloon keeper, who is of good moral character, and whose place of business has been conducted within twelve hundred yards of an orphans' home or asylum other than one conducted by governmental agency.

Importance, too, is to be attached to the last paragraph of section 19 of the Greenlund act, to the effect that "*no license shall be granted after August* 1, 1915, *to operate a saloon within three hundred feet of any permanent public or parochial school building, measuring the distance in a straight line following the street from the nearest point of the premises on which such school building is located, nor two hundred feet in a straight line following the street from the nearest point of the premises. This provision shall not apply to a bona fide reputable hotel or club; or to a saloon located within three hundred feet of a school house in the central or a main business section of the city.*"

Section 28 of the Greenlund act, among other things provides:

> "Where the number of applications is greater than the number of licenses allowed by law, the applicants who were engaged in the sale of intoxicating liquors prior to the fourth Monday of May, 1912 (or their bona fide successors in title), as evidenced by the payment of the assessment for the preceding period under section 6071 of the General Code, shall be preferred, provided they are otherwise qualified by law."

The legislative intent, as well as the spirit of the constitution, indicates the purpose of the legislature and the people to place the license traffic in proper hands. The criminal sections in existence before the licenses were intended to prevent abuses, largely because there was no other method provided for reaching the end to be attained and regulating the liquor traffic.

Inasmuch as the section of the constitution before quoted, prohibiting the sale in certain places, does not deny to the license commission the authority to issue licenses to persons who are to conduct the business within twelve hundred yards of privately conducted orphan asylums or homes, in my judgment, the mind rather inclines to the belief that the license commission has authority to issue the licenses, rather than that they have not. In view of the fact that the statute, section 13206, General Code, is a penal one; that its own interpretation is not free from doubt; that if its interpretation were free from doubt, it is not altogether clear that it is applicable as against the provisions of the constitution in respect to license and the Greenlund act, passed in conformity thereto; and in view of the further fact that the commission, in my judgment, in a case of this kind, has the power to protect any institution, whether private or public, from danger of proximity to the liquor traffic, I think you should be clearly of the opinion that the commission is without authority to issue a license before withholding it.

If your commission and this department should be wrong in this interpretation, the general assembly may easily remove the doubt.

My advice to you, therefore, is that the commission would hardly be warranted in construing the statute to apply to homes other than those in charge of governmental agencies; but that, in view of the doubt, great care should be taken to the end that the welfare of the orphans' homes and orphans' asylums, of whatever kind and character, public or private, should be guarded. This is

within the power of the local commission, and it should not hesitate to exercise that power, to the end that no abuse might possibly be permitted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

577.

THE OWNERS OF A DISTILLERY THAT IS BEING OPERATED IN DRY TERRITORY MAY RECEIVE EITHER A WHOLESALE OR A SALOON LICENSE, PROVIDING THE ENTIRE OUTPUT OF THE DISTILLERY IS DISPOSED OF AT THE LICENSED PLACE, AND THEY DO NOT INTEND TO TAKE ADVANTAGE OF THE EXEMPTION UNDER THE LICENSE ACT.

Where a distillery is owned and operated in dry territory the proprietors of this distillery are eligible to a license either saloon or wholesale, provided they do not intend to take advantage of the exemption remaining to them under the license act, and provided further the entire output of the factory is disposed of at the licensed place.

COLUMBUS, OHIO, October 31, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—I have yours of October 9th enclosing a request from the Montgomery county liquor licensing board wherein an opinion is desired upon the following:

> "An application is made for a license by a partnership doing business under the firm name of D. Distilling Company, the partnership consisting of J. F. D. and B. E. D., both giving the same address at Tippecanoe City, Ohio. The place where the business is to be carried on is at a certain address in Dayton, Ohio. Both partners say in their application that they are in no way interested, either as owners or part owners in the business or stockholders of the corporation, nor engaged in a business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage.
>
> "One of the partners stated verbally that the partnership owns and operates a distillery at Tippecanoe City. Tippecanoe City is located in a county which is "dry" under the county local option. It is not disclosed whether or not this distillery sells liquors to other concerns or whether its product is marketed through their Dayton store.
>
> "Inquiry is made whether or not this distillery is such a place as debars the proprietors thereof from obtaining a saloon license in another place?"

The Rose law passed in 1908, 99 O. L., 35, makes it unlawful for any person, personally or by agent within the limits of such county to sell, furnish or give away intoxicating liquors to be used as a beverage or keep a place where such liquors are kept for sale, given away or furnished for beverage purposes. (Section 6112, General Code.)

Section 6103, General Code, which was section 3 of the Rose law excepted from the operations of the law,

> "The sale of intoxicating liquor at retail by a regular druggist for exclusively known medicinal, mechanical, pharmaceutical, scientific

or sacramental purposes; nor in addition thereto shall it prevent such sale for exclusively known art purposes by a regular druggist in the limits of a township without the limits of a municipal corporation, as provided in sub-division 5 of this chapter."

Section 13225, General Code, which was section 2 of the Rose law provides a penalty against selling, furnishing, giving away or otherwise dealing in intoxicating liquors as a beverage in any manner, directly or indirectly, and also for the keeping or using of a place of any kind where the same is done.

In the case of Scheu vs. State, 12 circuit court, N. S. 118, the syllabus reads:

"Inasmuch as the Rose local option law provides its own exceptions, it is not permissible to read into it the exceptions found in the Dow law as to sales of intoxicating liquor at the manufactory and by the manufacturer in quantities of one gallon or more at any one time; but such sales are prohibited within a county where the Rose law has become operative."

Judge Donahue says at page 119:

"Looking to the law itself we find no exceptions made in favor of manufacturers or brewing companies any more than any other individual."

At page 121 the same eminent jurist says:

"Construing similar legislation, the supreme court in the 61st Ohio St., at page 597 says:

" 'The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a township where the people have availed themselves of the provisions of the local option law.'

"Let us change that language by substituting the word 'county' for 'township.' 'The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a *county* where the people have availed themselves of the provisions of the local option law.' It is clear to us that the supreme court has passed upon substantially the same statute as the one in question and has held against the contention of the plaintiff in error."

Later the supreme court in the same case, found reported in 83 O. S. 146, affirmed the judgment of the circuit court, and Judge Price, at the bottom of page 153 says:

"We see no exception of the brewer or manufacturer, and no privilege defined if sold, furnished or given away in quantities of one gallon or more. There is no intimation of such exemption in favor of anyone."

So it is settled beyond cavil in this state that there is no exception to the manufacturer in a "dry" county to sell, furnish or give away intoxicating liquors as a beverage or to keep a place where the same is done. The only right that would be left to the manufacturer is to transport his product, consigned to himself, in so-called "wet" territory, and to make his sales there. I am inclined to the view that while his business at this last point is the selling of his product,

that he is none the less a manufacturer because the manufacturer does not lose his class as a manufacturer when he acts in the same manner as a merchant in the selling of his product.

Then the question arises, what is the status of the manufacturer who is unable to dispose of his product at his plant by reason of local option laws when it comes to his making sales of his own product at a place where the sale of intoxicating liquor is not prohibited by law.

Section 48 of the Greenlund license law grants an exemption to the manufacturer in the making of sales at two places, to wit: at the manufactory in the prescribed quantities, and from the wagon or other vehicle of the manufacturer to the two mentioned classes of consumers.

Now, in the case under discussion, the manufacturer is prevented by an intervening vis major, to wit: the county local option law, from taking advantage of the exemption to sell at the manufactory; yet, as above stated, he is none the less a manufacturer when he still holds his product at a point away from his manufactory where a sale of intoxicating liquor as a beverage is permitted by law. He would be entitled to the other exemption, to wit: the right to make a sale in the prescribed quantities "from the wagon or other vehicle of said manufacturer to the holder of a liquor license, or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law."

A manufacturer is specifically exempted, and is entirely without the license law, so long as he sells at the places, in the quantity, and to the persons prescribed by the exemption.

So, if this manufacturing firm, whose plant is in "dry" territory, under the "Rose law," still desires to sell from its wagon, it may do so in "wet" territory without a license, so long as the sales are at and from the wagon of the manufactory, and to the persons prescribed by law. There is nothing in either the constitution, nor in the license laws passed by authority of the constitutional amendment, that prohibits the issuance of licenses to sell intoxicating liquor to manufacturers. There is provision against granting a license to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold, or kept for sale as a beverage; and if the manufacturer does make sales of intoxicating liquors, as a beverage, from his manufactory or other place, he, of course, would be precluded from having a license to sell at an additional place. Now, since it is presumed that this manufacturing firm will not violate the law prohibiting the sale in the county in which its plant is situated, if it should choose not to avail itself of the other privilege granted in the exemption to manufacturers, to wit: to make sales from the wagon, as provided in said exemption, then, so far as the manufactory was concerned, and so far as the wagon was concerned, since no sales were to be made therefrom, the said firm would stand in the position of any other applicant. The mere fact of its being a manufacturer of intoxicating liquors, of itself, would not disqualify said firm from eligibility to receive a license.

In other words, it is my opinion that a proper construction of the provisions of the liquor licensing law does not prohibit a manufacturer from being eligible to receive a license, either wholesale or saloon; and that, as far as his application is concerned, he stands in the same position as any other applicant, as long as he does not avail himself of the privileges granted in the exemption clause of section 48 of the license act.

This would permit the manufacturer to obtain a license, and from the place so licensed to make sales of his manufactured products, as well as those of other manufacturers. Of course, it is to be understood that like any other holder of a li-

cense under this law, if at any time he desires to avail himself of the exemption to manufacturers, and made a sale at a place other than at the place licensed; or if, at any time, it should appear that he was or should become in any way interested, either as owner or part owner, in the business, or a stockholder of a corporation engaged in the business conducted at any other place where intoxicating liquors were sold, or kept for sale as a beverage; or that any other persons were in any way pecuniarily interested in the business for which the license was held, then his license would under the law be deemed revoked.

I am, therefore, of the opinion that the proprietors of the distillery in question are eligible to a license, either saloon or wholesale, provided they do not intend to take advantage of the exemption remaining to them under the license act, and provided further that the entire output of the manufactory is disposed of at the licensed place.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

578.

A FOREIGN BREWERY MAY HAVE A LICENSE TO DO BUSINESS AT ONE PLACE WITHIN THIS STATE AND CANNOT BE DIRECTLY, OR INDIRECTLY, INTERESTED IN ANY OTHER PLACE WHERE INTOXICATING LIQUORS ARE SOLD AS A BEVERAGE.

The managing agent of and for a foreign brewery cannot deliver beer from its storehouse in this state on orders previously solicited by said agent from customers within this state, without said brewery having a license authorizing such sale of intoxicating liquors in the particular county in which, and at the place the business is conducted. Such a foreign brewery can have a license to do business at only one place in the state and cannot be interested directly, or indirectly, in any other place where intoxicating liquors are sold as a beverage.

COLUMBUS, OHIO, October 31, 1913.

State Liquor License Commission, Columbus, Ohio.

GENTLEMEN:—Your honorable board has inquired as to the status of a foreign brewery, which has resident managers conducting branch agencies in the different counties of the state. As I understand the practice that has obtained in these branch agencies, a local manager, under salary, is in charge of and manages the local branch. The product of the foreign brewery is shipped to the local manager, and sales are made by the local manager at the branch agency; and the several branch agencies have been paying the Aiken tax for each place so conducted.

In this opinion I am assuming that the sales are actually made by and at the local agencies; and do not consider the question of sales made directly from the office of the foreign brewery.

Section 48 of the Greenlund liquor licensing act, 103 Ohio Laws, 237, provides:

> "Whoever sells intoxicating liquors without having been duly licensed as provided herein shall be guilty of a misdemeanor, and shall be fined not less than two hundred dollars nor more than five hundred

dollars for the first offense and for a second or subsequent offense not less than five hundred dollars nor more than one thousand dollars, or imprisoned in the county jail for a period of not less than one month nor more than three months, or both.

"Sales of intoxicating liquor by other than dealers therein, in quantities of forty gallons or more, where said liquors are taken by way of payment of a debt or by way of collateral security on a loan, or are acquired for investment solely and sold en bloc, and sales under provisions of law requiring an executor, administrator, guardian, receiver or other officer of the court to sell, where such sales are made of a stock of liquors en bloc, or a sale by a person, firm or corporation previously licensed but whose license is not renewed, or is revoked, forfeited, surrendered or otherwise lost, where such sales are made of a stock of liquors en bloc, are not included within the meaning of this section. Nor shall this section include the manufacturer of native wine, cider or other intoxicating liquors from the raw material and the sale thereof by the manufacturer in quantities of one gallon or more at one time at the factory or the sale thereof in said quantities by the manufacturer from the wagon or other vehicle of said manufacturer to the holder of a liquor license, or in said quantities to individual consumer where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law. Nor shall this section include the sales made by a registered pharmacist upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes."

The first question that might arise is whether these branch agencies come within that part of the exemption in section 48, supra, which provides that:

"Nor shall this section include the manufacturer of native wine, cider or other intoxicating liquors from the raw material and the sale thereof by the manufacturer in quantities of one gallon or more at one time at the factory or the sale thereof in said quantities by the manufacturer from the wagon or other vehicle of said manufacturer to the holder of a liquor license, or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law."

Attention is called to the fact that this language is identical with the provision found in section 6065, as amended by the last legislature. Section 6065, prior to the amendment, excepted the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory by the manufacturer thereof, in quantities of one gallon or more at one time. This phrase has been judicially construed, and while it is found in a section which imposes a tax upon the business of trafficking in intoxicating liquors, this tax is so similar to a license and the two laws are so intimately related, I am of the opinion that the interpretation given by the courts to the same, or similar words in the tax law, would be controlling as to the same words used in the same manner in the license law.

Our courts have held that if intoxicating liquors are shipped to a warehouse,and kept on hand for sale by local agents, the manufacturer is liable to the tax, and that the sale is not completed while anything remains to be done,

such as setting apart and identifying specific goods which are the subject of the sale, from other goods belonging to the seller.

Brewing Company vs. Talbot, 59 O. S. 516.

Village of Bellefontaine vs. Vassaux, 55 O. S. 323.

So, too, it has been held that a brewing company that maintains storehouses, separate and apart from the manufactory, from which daily deliveries are made to customers on orders taken by the seller, would be liable to payment of the tax and would be a trafficker under the meaning of the tax law. True, these decisions were on a state of facts arising where the manufactory was situated in this state, and the sales were made from storage houses at other points than at the factory, but I think it must be conceded that the practice that has obtained in the conduct of branch agencies of foreign breweries is similar to the manner in which the business of the local manufacturers was sought to be done in places removed from the manufactory.

Now, it appears at a glance that the exception in the Dow-Aiken tax law was to the manufacturer selling in quantities of one gallon or more at the manufactory, and it could only have applied to those manufacturers who were manufacturing in this state. I speak now of the law prior to the last amendment. This amendment extended the exception, granted further privilege to the manufacturer, and gave him a right to make certain sales from his wagon or other vehicle to certain classes of consumers. To my mind, this further exception applies to the *same class* to which the exception in the prior law applied, to wit: to the domestic manufacturer; and it is he, and he alone, who is so specially favored and granted exemption in the tax law from the payment of the assessment on trafficking in intoxicating liquors; and he is likewise, by similar language, exempted from the penal provisions of the liquor license law. All who are not engaged in the business of *manufacturing in this state* are without the exception, as far as this particular exception is concerned. So, then, the managing agents stand in the place of the foreign breweries; and the foreign breweries come to the licensing board as any other applicant of a similar kind, i. e. whether corporation, firm or individual.

I do not believe the fact that one is a foreign manufacturer of intoxicating liquors would necessarily disqualify him from receiving a license to sell intoxicating liquors within this state. The license act only acts intrastate. It has no extra territorial effect. The provision against one being interested in the business conducted in *another place* where intoxicating liquors are sold or kept for sale as a beverage means any other place *within this state*, and it is my view that a foreign brewer is eligible to make application for either a saloon or wholesale license, under the new license act. So, then, the foreign brewer, standing on the same footing as any other applicant, may receive one license, and that either a saloon or a wholesale license. When he has obtained that, he is through. He cannot have more than *one place* within this state, for then he would offend against the provision of being interested in another place where the business of trafficking in intoxicating liquors is carried on. Surely, a foreign brewing company could not be in any better position than a domestic brewing company in maintaining a cold storage house, from which its products were delivered on orders previously taken by a soliciting agent.

In the case of Diehl Brewing Company vs. Beck, found reported in the 10th circuit court reports, page 361, which case was subsequently affirmed without report by the supreme court in 81 O. S. 512, the court held:

> "A brewing company manufacturing and selling beer at wholesale, which maintains a cold storage house in a location separate from its manufactory, and from which cold storage house daily deliveries of beer

are made to customers on orders previously taken by a soliciting agent, thereby becomes a trafficker in intoxicating liquors within the meaning of Revised Statutes, 4364-9, and is subject to the Dow tax provided for by that act."

In this case, as well as the cases of Brewing Co. vs. Talbot, 59 O. S. 516, and Village of Bellefontaine vs. Vassaux, 53 O. S. 323, it was contended, on behalf of the brewers, that the sales were referable to the manufactory, and hence were exempt from the Dow tax, but the court uniformly held that some element of the sale was completed at the storehouse, so constituting the storehouse the place of sale, and rendering it amenable to the tax.

You understand, of course, that I am not passing on the question where the sale in law and in fact was completed at the manufactory of the foreign brewer in another state. I am assuming that the managing agent seeks to conduct the business as branch establishments of foreign brewers have been conducting business in this state in recent years.

It is my opinion, therefore, that a managing agent of and for a foreign brewery could not deliver beer from its storehouse in this state on orders previously solicited by said agent from customers within this state, without said brewery having a license authorizing such sale of intoxicating liquors in the particular county in which, and at the place the business was being conducted. Further, it is my opinion that such foreign brewery could only have a license to do business at one place within the state, and could not be interested, directly or indirectly in any other place where intoxicating liquors were sold as a beverage.

Of course, such foreign brewer, whether individual, firm or corporation, would have to comply with all the provisions of the license and other laws of this state; and if a corporation the license act specifies what qualification it must possess, as also the qualifications of its managers.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Secretary of the Building Commission)

622.

THE CONTRACT ENTERED INTO BETWEEN THE VILLAGE COUNCIL OF MARYSVILLE, OHIO, AND THE OHIO REFORMATORY FOR WOMEN FOR THE CONSTRUCTION OF A SEWER, SHOULD PROVIDE THAT IT SHALL CONTINUE IN FORCE SO LONG AS MAY BE AUTHORIZED BY LEGISLATIVE APPROPRIATIONS FOR THAT PURPOSE.

Article 4 of the ordinance adopted by the village council of Marysville in regard to a sewer contract between the building commission for the Ohio reformatory for women and the village of Marysville, Ohio, which provides that the contract shall be continued in force until 1935 *is invalid, and should be changed so as to provide that the contract shall be in force for the full term for which appropriations are now made for said reformatory, and for such further period or periods as may be authorized by legislative appropriations for that purpose.*

COLUMBUS, OHIO, November 25, 1913.

HON. H. H. SHIBER, *Secretary of Building Commission, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 15th with copies of sewerage contract between the building commission for the Ohio reformatory for women and the village of Marysville, together with copy of the ordinance of said village in regard to the same, and you inquire as to whether any changes should be made in said contract so as to make it conform to decisions of the supreme court.

The authority of the village council to make a contract of this character is found in the act of May 18, 1911, which reads:

> "Section 10160-1. The council of any city or village may permit the owners or association of owners of lots and lands abutting on roads or other highways entering such city or village to connect with and use the sewers of such city or village for carrying off sewage and drainage from such outside lots or lands upon such terms as may be agreed upon between such council and the owners or association of owners of such outside lots or lands. (102 O. L., 192.)"

The authority for your board to make such contract is found in the act of April 18, 1913, which reads:

> "Section 1. Any commission or board vested with authority to erect or manage a state institution, located outside of the corporate limits of a municipality and the council of such municipality may enter into a contract upon such terms and conditions as may be agreed upon, to connect the sewer system of such institution with that of such municipality. Such contract may include payment for the increased cost to such municipality occasioned by such connection and service rendered, provided that such contract shall be made for a period of not less than ten years, and is approved by the governor and the attorney general. (103 O. L., 658.)"

No criticism can be made of the act of 1911, and the power of the council to make the contract must be conceded. However, on March 6, 1845, the legis-

lature passed an act to abolish the board of canal commissioners and revive the board of public works, the fifth section of which act provided:

> "That whenever, in the opinion of said board, it will be for the public interest to let by contract the keeping in repair, all or any portion of the public works, except the national road, said board may divide any portion of the same into suitable and convenient sections; and thereupon said board shall give due notice of the time and place of letting, for said repairs, with the plans and specifications for said repairs, and the manner of doing the same; and said board shall let the same by sections, to the lowest responsible bidders, for any term of years not exceeding five, upon condition that the bidder shall make, execute, and deliver to said board a bond, with security to be approved by the board, in any sum not less than double the amount of the contract price, payable to the state of Ohio, conditioned for the faithful performance of said contract, and upon such other terms and conditions as said board may determine. * * *"

The constitutionality of this act was assailed in State vs. Medbery et al., 7 O. S. 522, and the court held inter alia:

> "That no officers of the state can enter into any contract, except in cases specified in the constitution, whereby the general assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount—the power and the discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.
>
> "The contracts of the board of public works, creating a present obligation to pay the defendants and others, for the period of five years, a certain amount, do not come within said constitutional exceptions, and are in contravention of the provisions of article 8, section 3 and article 2, section 2."

and the court in course of the opinion by Judge Swan says:

> "These contracts, then, so far as the inhibition of the constitution relating to debts is involved, stand precisely upon the same ground as any other contracts for expenditure, which the general assembly have authorized, but provided no revenue and made no appropriations to meet the amount specified to be paid by the state when it becomes due. It is a contingent debt ripening into an absolute one, without money being set apart to meet and pay it. The contracts, indeed, can stand nowhere else than among inhibited debts, inasmuch as they are, in our opinion, and for the reasons which we shall now state, in addition to those already given, inconsistent with the provisions of the constitution relating to expenditures and appropriations."

The opinion of Swan J. was concurred in by Brinkerhoff, Scott, and Sutliff, J. J., and Bartley, C. J., filed concurring opinion in which he stated:

> "I concur in the decision just announced, solely on the ground of a want of authority in the agents of the state to make such a contract as that set out in the agreed case submitted to us. I am wholly unable to reconcile the exercise of such authority by the board of public works with the provisions of the present constitution of the state."

The constitutional provisions considered in the Medbery case being still in force, the analogy between that case and the one we have is very close.

If the legislature, under the constitution, had no power to authorize the board of public works to make a contract for keeping public works in repair "for any term of years not exceeding five," it certainly has no power to authorize the building commission for the Ohio reformatory for women to make a contract for connection of a sewer system with that of a municipality for a "period not less than ten years" where such contract involves annual payments by the state during the period covered by the contract.

Such being my conclusion, it follows that article 4 of this contract, when it provides that this contract shall be continued in force until the first of January, 1935, is invalid, and my suggestion is that this article of the contract should be changed so as to read (in substance):

> "This contract shall continue and remain in force for the full term for which appropriations are now made for said Ohio reformatory for women, and for such further period or periods as may be authorized by legislative appropriations for that purpose."

This, of course, will necessitate an amendment to the village ordinance:

The question whether this amendment is subject to a referendum is exceedingly doubtful, but can be easily cared for by declaring the amendment to be an emergency measure.

The following is suggested as a guide to the framing of such section of said ordinance:

Section ..... The terms, conditions and provisions of the contract by which the village of Marysville shall take care of the sewage from the Ohio reformatory for women having been heretofore agreed upon, and the compliance with said agreement, necessitating a change in the plans, specifications and character of said system and materially affecting the time of the completion thereof, and this amendment being made solely for the purpose of making the ordinance passed ....., ..., 1913, conform to the decisions of the supreme court of Ohio, this amendment is declared to be an emergency measure affecting the health, peace and safety of the village of Marysville and therefore shall take effect upon passage and publication as provided by law.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Superintendent of Banks)

43.

SUPERINTENDENT OF BANKS MAY COMBINE TWO OR MORE LIQUIDATIONS UNDER ONE HEAD.

Under the statutes, the superintendent of banks, is empowered, if he so desires, to establish a liquidation bureau in which to combine two or more liquidations under one head, when they reach a point where the services of special deputies and other help can be dispensed with.

COLUMBUS, OHIO, January 24, 1913.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 23rd in which you make the following requests for my opinion:

> "I have been considering the advisability of establishing in this office a liquidation bureau in which to combine two or more liquidations under one head, as fast as they reach a point where the services of a special deputy and other help can be dispensed with. Please render to me an opinion as to whether or not this action would be consistent with the law. I might add that this proposed action is contemplated for the purpose of reducing the cost of liquidation to a minimum figure as well as to develop a corps of expert assistants in that feature of our work."

I take it from your letter that it is your plan to have all liquidations administered from your office after said liquidations have passed the active stage, that is, the stage when a special deputy is necessarily required to be at the situs of the corporation in process of liquidation. After this active stage is passed and it is unnecessary to have a special deputy or other assistants actually at the place where the business of the corporation was transacted, I can see no reason why the remaining business of the liquidation should not be transacted at your department in Columbus, and, if one liquidation is carried on here there is no reason why all liquidations in your charge should not be so carried on. It seems to me that such an arrangement would lessen the cost of liquidation, and also, by having the various liquidations in progress under one head, would add to the efficiency of the same.

I have carefully examined the laws governing your department and find no provision that is inconsistent with your carrying into effect the idea expressed in your letter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

55.

SAVINGS BANKS—MAY NOT MAKE DIRECT LOAN ON SECURITY OF A MORTGAGE UPON A LEASEHOLD ESTATE—MAY INDIRECTLY LOAN ON SUCH SECURITY.

Under paragraph (a), of section 9765, *General Code, referring to paragraph (f) of section* 9758, *General Code, which concludes all nature of real estate securities upon which a savings bank may loan its funds, such bank is not empowered to invest its funds in a mortgage of a leasehold estate, for any term of years which does not contain a clause providing for the renewal thereof, forever.*

Under paragraph (c), of section 9765, *General Code, however, a corporation may invest its funds in promissory notes given to other individuals, firms or corporations, when such notes were secured by a mortgage on such leasehold estate, if the directors approve thereof, subject to the provisions of sections* 9754 *and* 9755, *General Code; the reason being that paragraph (f) of the section aforesaid, authorizes only real estate security, whilst paragraph (e) of the other section authorizes collateral security.*

COLUMBUS, OHIO, December 19, 1912.

HON. F. E. BAXTER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—In your letter of November 16, 1912, you asked for a clarification of the conclusion of my opinion rendered to you on January 19, 1912, stating that a certain bank had written you that it did not entirely understand my holding, and wished to know whether if a mortgage were executed on a leasehold estate (said leasehold not being permanent) securing notes a savings bank could purchase said notes. The conclusion of my opinion of January 19, 1912, is as follows:

> "My opinion, therefore, is that a savings bank cannot legally invest its funds in a mortgage or a leasehold estate, for any term of years, which does not contain a clause providing for the renewal thereof forever under paragraph 'f' of section 9758 of the General Code of Ohio.
>
> "This disposes of your third question, as such a loan, if made, cannot be regarded as a real estate loan.
>
> "Your second question, I take it, should be: 'Can a mortgage upon a leasehold estate be taken by a savings bank as security for a loan in any event?' I think that it can, under paragraph 'c' of section 9765; that is, such a mortgage if given to a third person, securing notes to such person, could be taken with said notes as collateral security for promissory notes of an individual, firm or corporation to the bank; but a savings bank, in my opinion, is not authorized to make a loan secured directly by a mortgage upon a leasehold estate which is not renewable forever."

I shall try to make my meaning a little clearer. Section 9765 of the General Code specifies the manner in which the funds of savings banks shall be invested, and is as follows:

> "A savings bank may invest the residue of its funds in, or loan money on, discount, buy, sell or assign promissory notes, drafts, bills of

exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following:

"(a) The securities mentioned in section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may loan not more than seventy-five per cent. of the amount of the paid-in capital, surplus and deposits on notes secured by mortgage on real estate. But all loans made upon personal security shall be upon notes with two or more signers or one or more indorsers, payable and to be paid at a time not exceeding six months from the date thereof. In the aggregate, not exceeding thirty per cent. of the capital, surplus and deposits of a savings bank shall be so invested.

"(b) Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds and promissory notes of corporations, when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months.

"(c) Promissory notes of individuals, firms or corporations, when secured by a sufficient pledge of collateral approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

Under paragraph (a) of said section it will be noted that the first class of securities in which said funds may be invested are the securities mentioned in section 9758. This section 9758 is as follows:

"Subject to the provisions of the preceding section commercial banks may invest their capital, surplus and deposits in, or loan them upon:

"(a) Personal or collateral securities.

"(b) Bonds or other interest-bearing obligations of the United States, or those for which the faith of the United States is pledged to provide payment of the interest and principal, including bonds of the District of Columbia; also in bonds or other interest-bearing obligations of any foreign government.

"(c) Bonds of interest-bearing obligations of this or any other state of the United States.

"(d) The legally issued bonds or interest-bearing obligations of any city, village, county, township, school district or other district or political subdivision of this or any other state or territory of the United States and of Canada.

"(e) Mortgage bonds or collateral trust bonds of any regularly incorporated company, which has paid for at least four years, dividends at the rate of at least four per cent., on their capital stock. Such loan shall not exceed eighty per cent. of the market or actual value of such bonds, the purchase of which first has been authorized by the directors. All such securities having a fixed maturity shall be charged and entered upon the books of the bank at their cost to the bank, or at par, when a premium is paid, and the superintendent of banks shall have the power to require any security to be charged down to such sum as in his judgment represents its value. The superintendent of banks may order

that any such securities which he deems undesirable be sold within six months.

"(f) Notes secured by mortgage on real estate, where the amount loaned thereon inclusive of prior incumbrances does not exceed forty per cent. of the value of the real estate if unimproved, and if improved sixty per cent. of its value, including improvements, which shall be kept adequately insured. Not more than fifty per cent. of the amount of the paid-in capital, surplus and deposits of such bank at any time shall be invested in such real estate securities."

Therefore, the only authority in law for a savings bank to invest its funds in notes secured by mortgage on real estate is paragraph (f) of section 9758. It has been held that leasehold estates, except permanent leasehold estates, are not real estate, and therefore a savings bank cannot directly invest its funds in any leasehold estate, except those that are permanent.

But I meant by the conclusion of my opinion to refer especially to paragraph (c) of section 9765, and I again quote this section, which is as follows:

"(c) Promissory notes of individuals, firms or corporations, when secured by a sufficient pledge of collateral approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

And it seems to me that if a note is given by an individual or a corporation to a bank, and in order to secure said note said individual or corporation deposits as collateral therefor a note or notes given to him or it secured by a mortgage upon a leasehold estate, whether permanent or not, the transaction would fall under said paragraph (c). In other words, a bank cannot loan its money directly upon said leasehold estates, but under paragraph (c) of section 9765, it can indirectly do so.

Answering the question referred to in your communication, the bank cannot buy the notes which are secured by the mortgage on a leasehold estate, but it can accept such notes as collateral.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

130.

SUPERINTENDENT OF BANKS HAS NO AUTHORITY TO MAINTAIN A BRANCH OFFICE IN CLEVELAND.

COLUMBUS, OHIO, March 27, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 14th, in which you make the following request for my opinion:

"Please render to this office an opinion as to whether or not it has any authority under the law to maintain a branch office in Cleveland, and to pay the salary of a stenographer for services rendered there?"

Section 719 of the General Code provides as follows:

> "The superintendent of banks shall be furnished by the state suitable rooms at the seat of government for conducting the business of his office."

I find no other section which is supplementary to this provision, and therefore in the absence of any statutory authority for you to maintain offices elsewhere than at the seat of government, my opinion is that you have no authority to maintain a branch office in Cleveland.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

215.

BANKS AND BANKING—BOARD OF DIRECTORS—FILLING OF VACANCY—NUMBER OF DIRECTORS.

Under section 9733, General Code, the board of directors may fill a vacancy in the board, but under such section it is not mandatory to make the appointment at once.

When the stockholders provide at their meeting for a board of directors, consisting of twelve members, under section 9727, General Code, it is necessary at each subsequent stockholders' meeting to elect twelve directors until the stockholders provide for a different number.

COLUMBUS, OHIO, April 26, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On January 29, 1913, you asked for my opinion upon the following request received from a representative of one of the incorporated banks of Ohio:

> "The constitution of our bank provides for a flexible board of directors, the number being from 7 to 15 inclusive, and says a vacancy in the board caused by death, resignation or otherwise, *may* be filled for the unexpired term by appointment by a vote of a majority of the board. At our first stockholders' meeting a motion was made to elect twelve directors to direct the affairs of our bank, which number has been elected every year since. Are we required at every stockholders' meeting to pass a resolution to elect twelve men or does the first resolution make it compulsory to elect that many, until another resolution is passed to change the number? Since my last letter to you we have a vacancy in our board, so that with our constitution providing for a flexible board, and section 9733 says a vacancy in the board *may* be filled, can we legally do business the rest of this year with 11 men (12 men elected were elected at our last stockholders' meeting) or must the vacancy be filled?"

Ohio banking corporations are governed by the general corporation laws of Ohio except where special provisions are made by the banking act.

Section 9733, General Code, is as follows:

"Any vacancy in the board of directors may be filled by the board for the unexpired term."

Under this section it is not mandatory that a vacancy in the board of directors be filled at once.

Section 9727 of the General Code provides for the number of the board of directors as follows:

"The corporate powers, business and property of corporations formed under this chapter, shall be exercised, conducted and controlled by the board of directors, which shall meet at least once each month. Such board shall consist of not less than five nor more than thirty directors, to be chosen by the stockholders, and hold office for one year and until their successors are elected and qualified."

When the stockholders, in the manner provided by law, provide for a board of directors to consist of twelve persons, such action would be final and valid, and it would be necessary at each subsequent stockholders' meeting to elect twelve directors, until the stockholders provide for a different number.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

217.

OFFICES COMPATIBLE—CASHIER AND TREASURER OF BANK.

Under the laws of Ohio a cashier is not prohibited from acting as treasurer of a bank.

COLUMBUS, OHIO, April 26, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 27th you sent me a communication from a representative of a certain bank asking whether the bank could make its cashier also treasurer of the bank, the cashier being a stockholder but not a director, and you ask for my opinion as to whether this action could be taken.

The laws of Ohio governing incorporated banks provide that all directors and executive officers of a banking corporation must be stockholders. The laws also provide that the president must be chosen from the directors, but there is no provision that the treasurer must also be a director, and I know of nothing that would prevent the election or appointment of any stockholder of the corporation as treasurer.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

P. S. I return herewith letter which you forwarded to this department.

227.

PARTNERSHIP RECEIVING DEPOSITS OF MONEYS AND PAYING INTEREST THEREON NOT VIOLATING ANY LAW.

COLUMBUS, OHIO, April 30, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On February 7, 1913, your predecessor made the following statement of facts to me, upon which my opinion was requested:

> "A partnership, existing in the city of Cleveland, and engaged in a purely mercantile business, received from its employes deposits of money, on which it pays the employes, at the rate of six per cent. per annum, allowing them to withdraw the funds at any time. The partnership does not invest the deposits, but banks them with its own funds, the loss in interest being charged to operating expenses. The partnership is absolutely solvent, and no question has ever arisen between the partnership and its employes, who regard the arrangement as a distinct benefit to them, and earnestly desire its continuance."

While this partnership might be said to exercise one of the functions of banking, that is the receiving of deposits, still, while the receipts of deposits was originally the sole feature of the banking business, today it only constitutes one branch of the same; and the firm to which you refer, as I take it, does not hold itself out as receiving deposits generally, but only receives those made by its employes. At the present time there is nothing in our laws which would prevent this being done.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

228.

BANK NOT PROHIBITED FROM DEPOSITING MORTGAGES AND OTHER SECURITIES TO INDEMNIFY A SURETY GOING ON ITS BOND.

COLUMBUS, OHIO, April 30, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of April 18th enclosing a communication received by you from a certain banking company, which communication is as follows:

> "We put in a bid for state funds and was awarded twenty thousand dollars. We promised to give them a bond with the Maryland Casualty Company. Now as we are just a new bank they have asked us to put up some of our mortgages with them as collateral. We are anxious to get this money and want your advice. Would this be all right? Please reply as soon as possible?"

I am not clear, in reading the letter of this bank, whether this bank wishes to put up their mortgages with the casualty company or with the treasurer of state,

but I presume, taking the letter as a whole, that they refer to a deposit required by the casualty company to secure the casualty company in going on their bond to the state.

I know of nothing that would prevent this transaction as the bank would have the right to use its securities in any legitimate manner to promote its business so long as it did not violate any of the banking regulations, and there is no regulation prohibiting a bank from depositing mortgages and other securities in order to indemnify a surety in going on its bond.

I return you herewith letter from the bank referred to.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

244.

CHANGE OF BANK NAME DOES NOT NECESSITATE CHANGE OF NAME OF PAYEE ON NOTES TAKEN BY BANK PRIOR TO CHANGE.

Under section 8719, General Code, empowering corporations generally to make a change of name, since there are no special conflicting bank regulations, a bank may change its name in accordance with section 9714, General Code. Such change of name does not effect the identity of the bank and therefore, the name of the payee on notes taken by the bank prior to such change of name need not be altered.

COLUMBUS, OHIO, April 26, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 7, 1913, your department made the following request for my opinion:

> "In the event a state bank of Ohio changes its name by amendment to its charter, is it necessary that any action be taken looking to the change of name of payee on the notes taken by the bank in its own name prior to the authorized change."

Section 9714 of the General Code provides that the provisions of the General Code applicable to other corporations shall apply to banking corporations except where special provisions are made by the banking act.

Section 8719 of the General Code provides that a corporation organized under the general laws may amend its articles of incorporation so as to change its corporate name, and, therefore, banks would have this power.

If the name of the bank is so changed it would not be necessary for any action to be taken changing the name of the payee on notes taken by the bank prior to the change of name, for the change would be simply in the name of the corporation, and the corporate entity would be at all times the same. In all cases of renewals, however, the renewals, of course, should be taken in the new name of the bank.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

253.

RESTRICTIONS UPON BANK IN PURCHASING IT'S OWN STOCK.

Ordinarily where through a charter or a statute, or a constitutional provision the imposition of double liability on stockholders does not exist, a corporation may purchase its own stock.

Under section 9761, *General Code, however, a commercial bank, savings bank, safe deposit company or trust company may not loan money upon nor purchase its own stock, except where such purchase is absolutely necessary to prevent loss upon a debt previously contracted in good faith, in which case the stock must be sold within six months from the time of its purchase.*

COLUMBUS, OHIO, April 28, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 11th you sent to me a communication received by you from a certain bank in Ohio, asking for an opinion upon two questions. The first as to the competency for the attorney for a bank to act as notary public in matters in which the bank was interested. This inquiry I have answered in another opinion to you.

The second inquiry is as follows:

> "I would ask if our bank would be allowed to purchase any of our own bank stock, in the event that one of our stockholders desired to sell his stock, and resell the stock to another party whom we felt would give us a part of his banking business, thus enabling us to make a few dollars on the transfer of the stock and perhaps increase our banking business by gaining a new depositor."

In the case of Siders vs. Gem City Concrete Co., 13 circuit court, n. s., 481, it was held that where a corporation was not prohibited by its charter or by a statute or constitutional prohibition, it may purchase its own stock, and that there is no statute or constitutional provision in Ohio preventing such purchase. This decision was rendered in 1910, and the question involved was that of the right of a corporation, other than a banking corporation, to purchase its own stock.

As above stated, the court held it had such right in the absence of constitutional or statutory prohibition. Though attention is called to the fact that the court's decision is based largely on the ground that double liability of stockholders did not exist in this state at the time this decision was rendered, and the decision seems to indicate clearly that if double liability existed, then that it would be compelled to hold that such right did not exist.

By the constitutional amendment adopted September 5, 1912, which became effective January 1, 1913, stockholders in banking corporations are now subject to double liability, and the holding by analogy, from the language of the circuit court in the above case, would be that since the effective date of such constitutional amendment banking corporations have not the power to purchase their own stock. There is, however, a statute upon this subject which relates to commercial banks, savings banks and safe deposit and trust companies. This statute is as follows:

> "Section 9761. No commercial bank, savings bank, safe deposit company or trust company shall loan money on the security or pledge of

the shares of its capital stock; nor be the purchaser or holder of any such shares, unless such security or purchase be necessary to prevent loss upon a debt previously contracted in good faith. Stock so acquired, shall within six months from the time of its purchase, be sold or disposed of at public sale on thirty days' notice from the superintendent of banks, and in default thereof the superintendent of banks may forthwith take possession of the property and business of such corporation until its affairs be finally liquidated, as herein provided."

Upon the authority of this section my holding is that such banks cannot purchase their own stock, unless such purchase is absolutely necessary to prevent loss upon a debt previously contracted in good faith, and that stock so acquired must be sold within six months from the time of its purchase; and that otherwise than as provided by this statute, a purchase by a bank of its own stock is illegal.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

P. S. I herewith return letter addressed to you.

259.

INCORPORATED BANK NOT ORGANIZED AS A TRUST COMPANY MAY NOT ACT IN CAPACITY OF A TRUSTEE FOR HOLDERS OF BONDS ISSUED BY INDIVIDUALS.

COLUMBUS, OHIO, May 16, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 6, 1913, your department asked my opinion upon the following question submitted to you by one of the incorporated banks of this state:

"A state bank has received a proposition as follows: An individual, owner of improved real estate worth from $70,000 to $80,000, wishes to issue bonds to the amount of $25,000 or $30,000 to be secured by a mortgage on his said real estate, given to this bank in trust for the bond holders. The bonds to be negotiable, and to be given in place of promissory notes. The bank is not organized as a trust company. And the query is whether, under the provisions of sections 9765 and 9758, it may act in this capacity as a trustee for the bond holders, the bonds to be cancelled as they are paid and the mortgage released on the payment of all the so-called bonds. The bonds being, in fact, nothing more than so many promissory notes."

I find no authority in law for a savings bank or commercial bank to act as trustee in the manner indicated in the above statement; and as the bank referred to is not a trust company it must, therefore, be held that it cannot have the power to act in this capacity.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

263.

RULE OF CORPORATION REQUIRES PROXIES TO BE IN HANDS OF SECRETARY ONE DAY BEFORE MEETING DAY, VALID.

It is clearly within the power of a corporation in its code of regulations to describe the manner of voting by proxy, so long as the statutory right of the stockholder to vote is not curtailed or limited, and within this rule the regulation requiring a proxy to be in the hands of the secretary at least one day before the date set for the annual meeting, is not invalid.

COLUMBUS, OHIO, May 17, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On January 14, 1913, your department requested my opinion upon the following question:

> "At a meeting of the stockholders of a certain bank one of the stockholders was present in person, and also represented a number of other stockholders, by proxies duly authorized in writing. The proxies held by this stockholder were refused recognition on the ground that the notice of the meeting of the stockholders of the company contained also a notice that all proxies must be in the hands of the secretary at least one day before the date set for the annual meeting.
>
> "Was the action in refusing recognition of these proxies on this ground proper?"

Section 9730, General Code, is as follows:

> "In elections of directors, and in deciding questions at meetings of stockholders, each stockholder shall be entitled to one vote for each share of stock held by him. Any stockholder also may vote by proxy duly authorized in writing."

Thompson on corporations, section 878, under the head of "right to vote by proxy—regulation by by-laws" says:

> "It is very clearly within the power of the corporation to regulate by a by-law the method of voting by proxy. But the corporation may not in any manner curtail or limit any statutory right of the stockholder. The corporation may prescribe the manner in which the proxy shall be executed; it may require acknowledgment, or that it shall be filed with a particular officer, or within a stated time preceding the election."

This citation from Thompson on corporations seems to dispose of the matter. The regulation is not at all one curtailing or limiting the statutory right of the stockholder. The statute seems to go only to the question of the number of votes to which a stockholder is entitled for each share of stock held by him and authorizing the voting by proxy. It does not pretend to restrain a corporation from fixing reasonable regulations as to how the voting shall be done. A reasonable regulation like this is necessary to prevent mistake or fraud and to give those interested an opportunity to inspect the proxies to the end that they may be satisfied of their genuineness.

In your inquiry you state that the proxies held by the stockholder in

question were refused recognition on the ground that the notice of the meeting of the stockholders of the company contained also a notice that all proxies must be in the hands of the secretary at least one day before the date set for the annual meeting. It does not appear in your inquiry whether or not there was a provision to that effect in the code of regulations of the corporation. It would be lawful, as above stated, for the corporation to regulate by a provision in its code of regulations the method of voting by proxy and if there was a provision in the code of regulations of the corporation that all proxies must be in the hands of the secretary at least one day before the date set for the annual meeting such provision would be binding upon the stockholders, but if there was not such a regulation the secretary had no power to make such a provision in issuing the notices of the meeting. Whether or not there was such a valid provision in the code of regulations is a matter of fact which should be determined in order to ascertain whether the action in refusing recognition of proxies on the ground that they must be in the hands of the secretary at least one day before the date set for the annual meeting was proper.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

P. S. I herewith return letter which you forwarded to this office.

280.

REPORTS OF BANK—LIABILITY OF OFFICIALS FOR CHARGING OVERDRAFT AS A LOAN—DISTINCTION BETWEEN FALSE ITEM AND REPORT TO INSPECTOR ON FALSE ITEM IN PUBLICATION.

An officer in the bank, who in making a report, carries an overdraft on an individual account into the column on loans, is guilty of making a false entry, under section 13183, *General Code, and is subject to the penalty therein prescribed.*

Should the report be made properly, but the publication of the report contain this falsity, the person responsible for such report would be liable for the penalty provided, under section 741, *General Code, for failing to furnish to the superintendents of banks a copy of the publication as provided by section* 739, *General Code.*

COLUMBUS, OHIO, May 16, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 28th you made the following request for my opinion:

> "Section 737, 738, 739 and 741 provide for the manner of publication of the reports of banks as called for on certain dates. A certain bank having a large overdraft of one party, as shown by their own books, in making up the list for the printer, which is supposed to be an exact copy of their statement and their own books, carried this overdraft into the loan column in order, presumably, to show a small overdraft. What is our remedy in this instance, aside from compelling them to publish their report again?"

The sections to which you refer are as follows:

"Section 737. Not less than four times during each calendar year each banking company, savings bank, savings and trust company, safe deposit and trust company, society for savings, or savings society, chartered or incorporated under any law of this state, and every person or co-partnership doing a banking business, shall make a report to the superintendent of banks. Such report shall be made at such times as required by the superintendent on forms prescribed and furnished by him, and, so far as possible, they shall be made on the same day on which reports are required from national banking associations by the comptroller of the currency.

"Section 738. Such report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary or treasurer thereof, and shall exhibit in detail, and under appropriate heads, a true statement of the resources, assets and liabilities of such banking company, savings bank, society or association, at the close of business of any past day by him specified, which day shall be the same for all corporations required to make such reports.

"Section 739. Such reports shall be transmitted to the superintendent within ten days after the receipt of the request, therefor from him, and shall be published in a newspaper in the city, town or county where the company is located, and, if there is none, then in a newspaper of general circulation in an adjoining county. A copy of such publication shall be furnished to the superintendent of banks.

"Section 741. Every company, corporation, society or association failing to make and transmit to the superintendent of banks any of the reports required by law shall forthwith be notified by the superintendent, and, if such failure continues for ten days after receipt of such notice, such delinquent company, society or association shall be subject to a penalty of one hundred dollars for each day after the time required for making such report. In case of delay or refusal to pay the penalty herein imposed for failure to make and transmit a report, the superintendent shall maintain an action against the delinquent company, society or association, for the recovery of such penalty, and all sums collected by such action or paid as such penalty shall be paid into the state treasury to the credit of the banking fund."

I take it that the report transmitted to you was a correct report and showed the overdraft of which you speak, if not, then the officer who made the report would be guilty of making a false entry in a report or statement of such bank under section 13183 of the General Code which is as follows:

"Whoever, being an officer, employe, agent or director of a corporation incorporated and doing business as a commercial bank, savings bank, savings society, society for savings, savings and loan association, savings and trust company, safe deposit or trust company or other corporation or association, except building and loan association, having power to receive and receiving money on deposit, wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment or decree or makes a false entry in a book, report or statement of such corporation, shall be fined not more than two thousand dollars or imprisoned in the penitentiary not more than thirty years, or both."

If the report sent you was correct, but the report published in the newspaper was not identical with the report sent to you, then said bank has failed to comply with section 739 which provides that the report transmitted to you is the report which shall be published, and the publication required by law has not been made. In this case section 741 would apply, and if upon notice the bank failed to publish the lawful report, then it would be liable to the penalty provided in said section.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

281.

TRAVELING EXPENSES OF SUPERINTENDENTS OF BANKS AND DEPUTIES MAY NOT BE ALLOWED WHILST ENGAGED IN WORK IN HOME CITY.

COLUMBUS, OHIO, May 16, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 18, 1913, you made the following request for my opinion:

> "The matter of allowing lunch and car fare for examiners in this department who reside in Cincinnati and Cleveland and who examine the banks in these cities, is one of dispute. The examiners claim that they should be permitted lunch and car fare while they are working in their own city, as in actual cases now in existence they would lose considerable time if they were to go home, whereas a lunch down town would materially advance their work."

Section 714 of the General Code is as follows:

> "The actual and necessary traveling expenses of the superintendent of banks and of the deputies, assistants, clerks and examiners incurred in the discharge of their official duty shall be paid monthly by the treasurer of state upon the warrant of the auditor of state. Vouchers therefor shall be fully itemized, approved by the superintendent and countersigned by the auditor of state."

It has been the uniform holding of this department that state officers and employes are not entitled to what are ordinarily classed as traveling expenses in the cities where they reside. There is no more reason for allowing examiners the expense of lunches and car fare while at work in the cities where they reside than there would be for allowing state officers in Columbus their expenses of car fare and that of lunch which the majority of them incur daily in performing the necessary duties of their respective offices.

For a more extended opinion on this question I refer you to my opinion to the inspector of building and loan associations, found in volume 1, report of attorney general for the year 1911, at page —.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

282.

POWER OF SAVINGS AND COMMERCIAL BANKS TO INVEST OR LOAN FUNDS ON MORTGAGE AND BONDS OF CORPORATION.

The only limitation upon the power of savings banks to loan money on bonds of private corporation, is that contained in section 9765, General Code, which requires the vote of a majority of the board of directors or the executive committee of the bank, and the power therein contained of the superintendent of banks to order such security which he deems undesirable to be sold within six months.

Bonds issued by a building company which are secured by the real estate of the company are within this rule.

Such bonds with reference to a commercial bank, however, under the terms of sections 9756 and 9758, General Code, being a form of real estate security, shall not exceed forty per cent. of the value of the real estate if unimproved, and if improved sixty per cent. of its value; and loans on the same may not be made except upon two-thirds vote by resolution of the board of directors and may not exceed fifty per cent. of the capital, surplus and deposits of such corporation; except that when a bank combines the business of commercial and savings banks, it may loan up to sixty per cent. of its capital stock.

COLUMBUS, OHIO, May 16, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On May 15, 1913, you made the following request for my opinion;

"Referring to section 9765 with reference to investments, we are confronted with this situation in the northern part of the state around Cleveland, viz.:

"A building company issues bonds on their building, which are virtually nothing more than mortgages but are called bonds and issued in small amounts, but in a large aggregate. They are purchased by the banks. Now if they are bonds, we contend that they come under *paragraph b* and hence ought to have been in existence at least five years. If they are mortgages, then they are in excess of the sixty per cent. limit of the value of the property. In other words, these companies are simply organized for the purpose of floating the bonds. The value of the mortgage, or bond, whichever you may call it, is in excess, so my examiners say, of sixty per cent. of the value of the property, and hence could not be classed as a mortgage; on the other hand if they are classed as a bond they do not fulfill the five year requirement."

Section 9765 of the General Code is as follows:

"A savings bank may invest the residue of its funds in, or loan money on, discount, buy sell or assign promissory notes, drafts, bills of exchange and other evidences of debt and also invest its capital, surplus and deposits in, and buy and sell the following:

"a. The securities mentioned in section ninety-seven hundred and fifty-eight, subject to the limitations and restrictions therein contained, except that savings banks may loan not more than seventy-five per cent. of the amount of the paid-in capital, surplus and deposits on notes secured by mortgage on real estate. But all loans made upon personal

security shall be upon notes with two or more signers or one or more indorsers, payable and to be paid at a time not exceeding six months from the date thereof. In the aggregate, not exceeding thirty per cent. of the capital, surplus and deposits of a savings bank shall be so invested.

"b. Stocks, which have paid dividends for five consecutive years next prior to the investment, bonds, and promissory notes of corporations, when this is authorized by an affirmative vote of a majority of the board of directors or by the executive committee of such savings bank. No purchase or investment shall be made in the stock of any other corporation organized or doing business under the provisions of this chapter. The superintendent of banks may order any such securities which he deems undesirable to be sold within six months.

"c. Promissory notes of individuals, firms or corporations, when secured by a sufficient pledge of collateral approved by the directors, subject to the provisions of sections ninety-seven hundred and fifty-four and ninety-seven hundred and fifty-five."

Under paragraph "b" of said section loans on stocks must be on stocks which have paid dividends for five consecutive years next preceding the investment, but this qualification does not apply to bonds and promissory notes of corporations upon which savings banks are also authorized to loan money. The only restriction as to loans on bonds and promissory notes of corporations is that such loans must be authorized by an affirmative vote of a majority of the board of directors or by the executive committee of a savings bank; and further that you, as superintendent of banks, may order any such securities which you consider undesirable to be sold within six months. This section as to bonds and promissory notes is very indefinite, and though there is every reason for contending that it does not apply to bonds of a corporation secured by mortgage on real estate, which is nothing more nor less than a loan upon real estate, still this is not expressed by the section, and I have been compelled to hold that the only limitation upon investments by savings banks under paragraph "b" of section 9765 of bonds and promissory notes of corporations are those embraced in this paragraph, viz., the authorization by the board of directors or executive committee, and the power of the superintendent of banks to order such securities to be sold within six months.

In the case of commercial banks the matter is different. Section 9756 of the General Code is as follows:

"Loans by a commercial bank upon mortgage or other forms of real estate security, shall not be made until after the adoption of a general resolution by a two-thirds vote of the board of directors, stating to what extent its officers may loan on real estate. The aggregate amount of such loans shall not exceed fifty per cent. of the capital, surplus and deposits of such corporation; except that, if a bank combines the business of a commercial and savings bank, it may lend up to sixty per cent. of its capital stock, surplus and deposits upon real estate security, after the adoption of a general resolution authorizing it by a two-thirds vote of the board of directors. Such loans shall be upon real estate, situated in this state, or in states immediately adjacent thereto, and inclusive of prior incumbrances shall not exceed forty per cent. of the value of such real estate, if unimproved, and if it is improved, sixty per cent. of its value. The improvements shall be kept adequately insured."

The language in this section is clear, "loans by a commercial bank upon mortgage or other forms of real estate security undoubtedly covers bonds secured by a mortgage on real estate, and would be governed by sections 9756 and 9758, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

294.

ATTORNEY WHO IS OFFICER OF BANK MAY NOT ADMINISTER OATH OF OFFICE TO BOARD OF DIRECTORS.

Under section 181, *General Code, an attorney who is held out as an officer of a bank may not act in the capacity of notary public in any matter in which such bank is interested.*

COLUMBUS, OHIO, May 19, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On February 14, 1913, your department made the following request for an opinion:

> "Could our attorney, who is a notary public and one of our stockholders, administer the oath of office to our board of directors?"

Section 9732 of the General Code provides for the oath to be taken by the directors of a bank and is as follows:

> "Every director shall take and subscribe an oath that he will diligently and honestly perform his duties in such office, not knowingly violate, or permit to be violated, any provisions of this chapter, and that he is the owner in good faith of the number of shares of stock of the company required to qualify him for such office, standing in his own name, on its books."

Section 181 of the General Code specifies who are not competent to act as notaries in certain matters, and is as follows:

> "No banker, broker, cashier, director, teller, clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker or broker, shall be competent to act as a notary public in any matter in which such bank, banker or broker is interested."

Section 126 of the General Code specifies the powers of notaries public, and is as follows:

> "A notary public shall have power, within the county or counties for which he is appointed, to administer oaths required or authorized by law, to take and certify depositions to take and certify to acknowledgments of deeds, mortgages, liens, powers of attorney and other instruments of writing, and to receive, make and record notarial protests. In

taking depositions he shall have the power which is by law vested in justices of the peace to compel the attendance of witnesses and punish them for refusing to testify. Sheriffs and constables are required to serve and return all processes issued by notaries in the taking of depositions. If the postoffice which is recorded in the governor's office as the address of a notary public is in a city or village, situated in two or more counties, such notary public may receive, make and record notarial protests within the established limits of such city or village."

I think it is clear from section 121, General Code, that a stockholder of a bank is not ineligible to act as notary public. If this had been intended the word "stockholder" would have been included in the catalogue of those who are ineligible and it has been held in the case of Read, Assignee vs. The Toledo Loan Co., 68 O. S., 280, that a stockholder in a corporation may, when acting in good faith, act as notary public in taking the acknowledgment of a mortgage to the corporation, but so far as I know, no judicial interpretation has been made of the provision "or other person holding an official relation to a bank, banker or broker." I think this provision, as such wide powers are given notaries public generally, in the matter of taking acknowledgments, should be strictly construed on account of the evident intention of the legislature to declare that no one connected with the active management or business of a bank should act as a notary in matters in which the bank is interested.

My opinion, therefore, is that when the attorney for a bank is regularly employed and designated as such by the directors of the bank, and is included in the list of officers of the bank, then that such attorney is not competent to act as a notary public in any matter in which such bank is interested, no matter whether the attorney is a stockholder of the bank or not; but I do not consider that this inhibition would apply to an attorney for a bank who is not regularly employed and designated as such by the directors nor held out as an officer of the bank. That is, many banks employ the same attorney in all matters where the employment of an attorney is necessary, but this attorney is not included in the list of officers of the bank, and is not chosen or elected as attorney by the directors, but it is understood or agreed that he is to represent the bank whenever the necessity arises. In such a case I do not think the inhibition would apply. The distinction is rather hard to draw, but I think the safe course to follow would be that when the attorney for the bank is included in the list of its officers, and advertised publicly as the attorney for the bank then such attorney should not act as notary in any matter in which the bank which he represents is interested.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

295.

APPRECIATED VALUE OF BANK REAL ESTATE MAY BE ADDED.

When the value of real estate owned by a bank increases, such increase may be shown in the book value of the bank's property.

COLUMBUS, OHIO, May 16, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 29, 1913, you made the following request for my opinion:

"Is there anything in the statutes that would prevent a bank, operating under the state laws of Ohio, from adding to the value of its real estate by reason of an apparent appreciation, when it can be clearly shown that the earning capacity, as a renting proposition, would be such as to justify the carrying of the property at the increased valuation?"

There is nothing in the General Code in the provisions relating to banks and banking which govern the manner in which real estate belonging to a banking corporation shall be carried on its books. In the absence of any express requirement real estate owned by the bank should be carried in the first instance at its actual cost. In case the value of the real estate increases, then I know of nothing to prevent a conservative increase in the book value of the property. In other words, it is not only legitimate but proper to show the actual fact in regard to the value of the assets of a corporation at all times.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

322.

BANKS MAY NOT ESTABLISH BRANCH OFFICES WITHIN OR OUTSIDE OF CITY OF PLACE OF BUSINESS.

Inasmuch as under section 9703, General Code, articles of incorporation of a banking company must state the place where its business is to be transacted, designating the particular city, village or township, and also inasmuch as under section 2724, General Code, the superintendent of banks in his examination is required to ascertain whether the bank is conducting its business at the place designated in its articles of incorporation, banking companies may not be deemed under the present state of the statutes to be empowered to establish branch banks.

COLUMBUS, OHIO, May 13, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 18, 1913, you made the following request for my opinion thereon:

"Please render this office an opinion as to whether or not there is any authority of law which would enable any of our state banks to establish branch offices either within or outside the corporate limits of the city or village (or town) named in the bank's charter as its principal place of business."

Section 2 of the Thomas act, 99 O. L. 269, provides for the form of articles of incorporation to be subscribed and acknowledged by persons desiring to form an incorporated banking company, and provides that such articles must contain, among other things, the following statement:

"b. The city, village, or township where its principal office is to be located, or where its principal business is to be transacted."

By an act of the general assembly found in 102 O. L., 171 this section was amended so that said paragraph now reads, (see section 9703, General Code):

> "b. The place where its business is to be transacted, designating the particular city, village or township."

This amendment must be regarded as significant for the reason that it leaves out the word "principal," which might, under the former section, have given rise to an inference that branch places of business might be authorized in other localities than where the principal office was to be located.

Section 724 of the General Code, which provides for examinations by the superintendent of banks of banking corporations, among other requirements, contains the following:

> "He shall also ascertain if any such corporation, company, society or association is conducting its business in the manner prescribed by law and *at the place designated in its articles of incorporation.*"

The provisions of law governing banking corporations are to be strictly construed. The business of banking corporations is different in almost every respect from the business of other corporations, and the laws and rules applicable to corporations generally only apply to banks when there is no provision whatever in the banking laws on the subject, and the general provision is applicable. There is nothing in our laws, at the present time which gives authority for the establishment of branch banks. The only authority, if any ever existed, was by way of an inference which might possibly have been drawn from old paragraph "b" of section 2 of the Thomas act above quoted, but this inference is certainly annihilated by the amendment which I have quoted above.

It also seems to me that this amendment to paragraph "b" of section 9703 certainly implies that only one place of business is contemplated. The whole banking act treats of banks as separate and distinct entities. Nowhere is any authority given for the establishment of branch banks at any place, and none of the sections relating to the examination, regulation and supervision of banks refer expressly or by implication to branch banks. In fact to make the examination, supervision and regulation effective it is necessary that all the data relating to the business of a bank be at one place.

On account of the amendment to paragraph "b" of section 9703, and the reasons above stated I am constrained to hold that branch banks may not be established either within or without the corporate limits of the city, village or township where the bank is located.

I may add that my predecessors, Hon. U. G. Denman, came to the same conclusion upon consideration of the laws as they stood prior to the last amendment. His opinion will be found in the report of the attorney general for the year 1910-1911 at page 565, and I consider it sound in every respect. In this opinion he calls attention to the fact that while the federal laws do not expressly prohibit branch banks, yet the United States government has always construed the national banking act as not authorizing the establishment of the same.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

ADDENDUM:

I have confined the above opinion simply to the right of the establishment of branch banks in the future.

325.

BANK HOLDING REAL ESTATE AT THE TIME PROVISION OF THOMAS ACT BECAME EFFECTIVE MAY HOLD THE SAME FOR FIVE YEARS SUBSEQUENT THERETO.

Under sections 9753, 9762 *and* 9774, *General Code, all real estate purchases leased or held by banking companies must be sold by such corporation within five years after investing therein, unless the time is extended by the superintendent of banks.*

Under sections 9741, 9742, 9793 *and* 9794, *General Code, all banking corporations must come under the provisions of the Thomas act, on or before April* 1, 1910, *except as therein provided. Banks so coming within the act and owning real estate at the time said act became effective may hold such real estate for five years subsequent to such date.*

COLUMBUS, OHIO, June 6, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On April 28, 1913, you made the following request for my opinion:

> "Under sections 9753, 9762 and 9774 it is defined when a bank may purchase real estate and how long they may hold the same. In the case of a bank which came into possession of real estate prior to the enactment of the Thomas act, does the five years in which they can hold it mean five years from the original time it was required, or five years from the enactment of said law?"

I wish to call your attention to the following sections of the General Code which were original sections of the Thomas act, 99 O. L. 272:

> "Section 9741. Banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, and combination of any two or more of such corporations, heretofore incorporated in this state which have paid in the amount of capital stock required by this chapter to enable them to commence business, if they so elect, may avail themselves of the privileges and powers herein conferred, by signifying such election and declaration under their seal, attested by the signature of the president and secretary to the secretary of state and the superintendent of banks, which such secretary shall record, and his certificate be evidence thereof. When such election and declaration is so recorded, it shall confer all privileges and powers conferred by this chapter, and from that time such association or corporation shall be governed by its provisions.
>
> "Section 9742. Such election and declaration shall be made only when authorized by a vote of at least two-thirds of the capital stock at a meeting of stockholders, thirty days' notice of which meeting, and of the business to come before it, has been given by a majority of the directors in a newspaper published and of general circulation in the county where such association or corporation has its principal place of business. But after April 1, 1910, every such corporation, association in all respects must conform its business and transactions to the provisions of this chapter."

These two sections were originally part of section 36 of the Thomas act.

Section 9793 of the General Code, originally a part of section 91 of the Thomas act, is as follows:

"Every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society and every other corporation or association, except building and loan associations empowered to receive, and receiving money on deposit, now existing and chartered or incorporated, or which hereafter become incorporated shall be subject to the provisions of this chapter, except that no such corporation or association having a less capital stock than the minimum amount provided in section ninety-seven hundred and four, shall be required to increase its capital stock in order to conform to the provisions of such section."

Section 9794 of the General Code, originally part of section 91 of the Thomas act, is as follows:

"No such association or corporation, may avail itself of any of the privileges or powers conferred by this chapter until it has complied with the provisions of sections ninety-seven hundred and forty-one and ninety-seven hundred and forty-two. No corporation, or. association, shall be required to comply with the provisions of this chapter before April 1, 1910, but every such corporation and association, shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided by law."

Sections 9753, 9762 and 9774 of the General Code are as follows:

"Section 9753. A commercial bank may purchase, lease, hold and convey real estate only as follows:

"a. Real estate whereon is erected or may be erected a building or buildings useful for the convenient transaction of its business, and from portions of which, not required for its use, a revenue may be derived; but the cost of such building or buildings and the real estate whereon they are erected, in no case shall exceed sixty per cent. of its paid-in capital, and surplus.

"b. Such as is mortgaged and conveyed to it in good faith by way of security for loans made by or money due to such corporation.

"c. Such as has been purchased by it at sales upon the foreclosure of mortgages owned by it, or on judgments or decrees obtained or rendered for debts due to it, or in settlements effected to secure such debts. All real property referred to in this paragraph shall be sold by such corporation within five years after it vested therein, unless upon application by the board of directors, the superintendent of banks extends the time within which such sales shall be made.

"d. Such corporation also shall have power by lease to acquire a suitable building for the convenient transaction of its business, and from portions of which, not needed for its own use, a revenue may be derived.

"Section 9762. A savings bank may purchase, lease, hold and convey real estate for the purposes and in the manner hereinbefore provides as to commercial banks, and subject to like restrictions and limitations.

"Section 9774. A trust company may purchase, lease, hold and convey real estate, exclusive of trust property, for the purpose and in the manner provided by this chapter as to commercial banks, and subject to like restrictions and limitations."

Under these sections, which are part of the Thomas act, all real property referred to in paragraph "c" of section 9753, General Code, purchased, leased or held by commercial banks, savings banks and trust companies must "be sold by such corporations within five years after invested therein, unless upon application of the board of directors, the superintendent of banks extends the time within which such sales shall be made."

Under the sections which I have quoted above, all Ohio banking corporations must come under the provisions of the Thomas act from and after April 1, 1910, except that no such corporation having a less capital stock than the minimum amount required by the Thomas act can be required to increase its capital stock in order to conform with the provisions of the act, but in all other respects such corporations must comply with the regulations prescribed by the Thomas act. As the date fixed for compliance is April 1, 1910, it seems that in the matter of real estate purchased by banks prior to April 1, 1910, it should be considered as if said real estate had been purchased on that date, that is, they would have five years after April 1, 1910, within which to dispose of said real estate. To fix any shorter term would be in effect to apply the regulation of the Thomas act to such banks prior to the time of compliance as fixed by the act itself.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

347.

SUPERINTENDENT OF BANKS ALLOWED PAY DURING LEAVE OF ABSENCE GRANTED PRIOR TO RESIGNATION.

Under the constitution, the compensation of state officers must be fixed for the term during which they are in office, and as there is no provision for suspension of salary during such time, the state superintendent of banks must be allowed his salary up to date of his resignation, notwithstanding a leave of absence was granted that official, immediately prior to his resignation.

COLUMBUS, OHIO, June 12, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 17th you made the following request for my opinion:

"Upon February 15th, F. E. Baxter, was, upon his request, granted a leave of absence by the governor. Upon March 10th Mr. Baxter's resignation as superintendent of banks was received and accepted by the governor.

"Please render to me an opinion as to whether or not Mr. Baxter is entitled to any salary covering that period."

Section 710 of the General Code provides for the appointment of the superintendent of banks and is as follows:

"The governor, with the advise and consent of the senate, shall appoint a superintendent of banks, who shall hold his office for the term of four years and until his successor is appointed and qualified. The superintendent may be removed by the governor at any time."

Section 20 of article 2 of the constitution is as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall effect the salary of any officer during his existing term, unless the office be abolished."

Under the authority of this section of the constitution, by section 2250, General Code, it is provided as follows:

"The annual salaries of the appointive state officers and employes herein enumerated shall be as follows: * * * superintendent of banks, five thousand dollars. * * *"

Under section 710, above quoted, the governor is given the power to remove the superintendent of banks, and by sections 13 and 14 of the General Code the governor is given power generally to remove and suspend appointive state officers; but in the present case Mr. Baxter was neither removed nor suspended but upon his own request on February 15th was granted a leave of absence, which leave extended until March 10, 1913, when he resigned.

I find no authority whatever in our Code for the granting to an officer of a leave of absence nor any provisions of our General Code, nor any decisions which govern the matter of the salary of an officer during his leave of absence. Therefore, the question can only be considered from the standpoint of an officer who, while holding his office, does not perform all the duties of the office. This non-performance might result from sickness or from wilfulness, but the rule seems to be that unless suspended an officer is entitled to the salary fixed by law until he resigns or is removed or until his term expires. In England it has been held that even in case of suspension an officer is entitled to his salary; but the rule is otherwise in America, and our Code, sections 13 and 14, which are as follows:

"Section 13. When not otherwise provided by law, an officer who holds his office by appointment of the governor with the advice and consent of the senate. may be removed from office by the governor with the advise and consent of the senate, if it be found that such officer is inefficient or derelict in the discharge of his duties or that he has used his office corruptly. If, in the recess of the senate, the governor is satisfied that such officer is inefficient or derelict or corrupt, he may suspend such officer from his office and report the facts to the senate at its next session. If in such report the senate so advise and consent, such officer shall be removed, but otherwise he shall be restored to his office.

"Section 14. In case of such suspension of an officer, the governor shall designate a person to perform the duties of the office during the period of such suspension. The person so designated shall give bond and take the oath of office, and during the time he performs the duties of the office he shall receive the full emoluments thereof, no part of which

shall, for such time, go to such suspended officer. If the suspended officer be removed or his term expires before the action of the senate, a new appointment shall be made."

provide that in case of suspension the governor shall designate a person to perform the duties of such officer during the period of suspension, and that the person so appointed shall receive all the emoluments of the office during such period. It would seem, as our statutes give the power of removal and the power of suspension as to state officers, that unless an officer is actually suspended he should be entitled to the salary fixed by law for his office.

Sections 499 and 500 of Throop on public officers are as follows:

"Section 499. Some cases, where this question was involved, have been cited in a former chapter. Cases, where it was held that an officer, wrongfully kept out of his office, was entitled to his full compensation, without any deductions for what he might have earned, or actually did earn, while thus kept out, will be cited in subsequent portions of this chapter. The principal question, to be considered here, is whether an officer's compensation can lawfully be made subject to deduction, by reason of his failure to discharge the duties of his office.

"Section 500. The general rule, applicable to this class of cases, is well stated in a case in the common pleas of the city and county of New York, in the following language: 'The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, such rights are in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensation for official services are not fixed upon any mere principle of a quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. These may in some cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office 'for better or for worse;' and whether oppressed with constant and overburdening cares, or enabled, from absence of claims upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation, constitutes what he can claim therefor, and is yet to be accorded although he performs no substantial service, or neglects his duties * * *. The fees or salary of office are *'quicquid honorarium,'* and accrue from mere possession of the office."

My opinion, therefore, is that Mr. Baxter is entitled to the salary of superintendent of banks for the period beginning with February 15th and ending with the date of his resignation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

373.

CAPITAL STOCK OF BANK IS NOT NECESSARILY THE AUTHORIZED CAPITAL STOCK.

In section 8705, General Code, which provides that a corporation may borrow money in any sum not exceeding the amount of its capital stock, issue its notes, or coupons or registered bonds therefor, bearing any legal rate of interest and secure their payment by a mortgage of its property, real, personal or both, the words "capital stock" must be held to mean the actual capital stock paid in and not merely its authorized capital stock.

COLUMBUS, OHIO, July 14, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your predecessor, on December 20, 1912, made the following request for an opinion:

> "Referring to your opinion of June 1, 1911, regarding the right of state banks to borrow money, I beg to make the further inquiry as to whether or not the language of section 8705 is understood by you to mean *authorized* capital stock or *paid in* capital stock."

Section 8705 of the General Code is as follows:

> "A corporation may borrow money in any sum not exceeding the amount of its capital stock, issue its notes, or coupon or registered bonds therefor, bearing any legal rate of interest, and secure their payment by a mortgage of its property, real or personal, or both."

I have previously held, under the authority given by this section, as well as the general authority given to banks to contract and be contracted with, that banks have the power to borrow money, but the question which has arisen as to whether the words "amount of its capital stock" mean the *authorized* capital stock or the capital stock which is actually *paid in*, is quite difficult and seems never to have been expressly decided in this state, or in any other state that has a statute in all respects similar to ours.

Section 8705 of the General Code was formerly section 3256 of the Revised Statutes. A brief consideration of the history of this section is instructive and tends strongly to the view that the intent of the legislature was to make the paid-in capital the basis for the limitation and not the authorized capital.

This section was originally enacted March 23, 1875, as a supplement to an act passed May 1, 1852 (Curwen chap. 1196) entitled "an act to provide for the creation and regulation of incorporated companies in the state of Ohio," and may be found in Sayler's Statutes of Ohio, chapter 2974, page 3433 and is as follows:

> "1. That any company heretofore or hereafter incorporated under the laws of this state for the purpose of manufacturing or mining, or any corporation organized for religious purposes, shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at any rate of interest not exceeding that for which natural persons are or may be allowed to stipulate under the laws of

this state, and may execute bonds or promissory notes therefor in sums of not less than one hundred dollars, and to secure the payment thereof may pledge the property and income of such company."

It will be noted that in passing this section the words "not exceeding its *authorized* capital stock" were used and of course this language was free from any doubt, and the corporations named in the section under the authority given by it could borrow money to an amount not exceeding their authorized capital stock. This section seems to have stood in the form in which it was passed until the codification of the statutes made in 1879 when, by section 7437 of the codification act passed June 20, 1879, the act above quoted was repealed. (See subsection 1002 of section 7437, Revised Statutes of 1880, page 1795) and such act was then enacted as section 3256 of said Revised Statutes of 1880, and as re-enacted, read as follows:

"Section 3256. A corporation may borrow money, not exceeding the amount of its capital stock, and issue its notes or coupon or registered bonds therefor, bearing any rate of interest authorized by law, and may secure the payment of the same by a mortgage of its real or personal property, or both."

It will be noted that in this re-enactment the word "authorized" was omitted. In 1902 this section was amended by two different acts. The first amendment is found on page 151, 95 O. L. and is as follows:

"A corporation may borrow money, not to exceed the amount of its capital stock, authorized by its articles of incorporation, and issue its notes or coupons or registered bonds therefor, bearing any rate of interest authorized by law, and may secure the payment of the same by a mortgage upon its real or personal property, or both."

The second amendment is found on page 390 of the same volume and is as follows:

"A corporation may borrow money, not exceeding the amount of its capital stock, and issue its notes or coupon or registered bonds therefor, bearing any rate of interest authorized by law, and may secure the payment of the same by a mortgage of its real or personal property, or both; and a private corporation may purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition."

By both of these amendments the language as to the capital stock used in the revision of 1880 is retained.

From the above, in the absence of any judicial interpretation, it would seem that as the original act gave express authority to corporations to borrow to the extent of their authorized capital stock, and as the amendment or re-enactment of the section omitted the word "authorized" that such elimination should be regarded as significant, and that it was the intention of the legislature to limit the amount to the capital stock of the corporation, that is the actual capital stock, not potential. A corporation may have an authorized capital stock of a very large amount, and yet may be without actual capital stock at all, for the reason that none of its capital stock may be subscribed and paid for.

Our supreme court, while never having passed expressly upon the meaning of this section, has at different times given a definition of the meaning of the capital stock of a corporation. These definitions are generally found in cases involving taxation but nevertheless a definition seems to me to apply to the question now being discussed. In the case of Jones, Auditor vs. Davis, 35 O. S., 474, the court at page 476, said:

> "The capital stock of a corporation consists of the money and property subscribed and paid in for the purposes of carrying on its business operations. It constitutes a corporate fund, belonging to a corporate body."

And further on the court quotes the language of Justice Nelson in the case of Farrigton vs. Tenn. 95 U. S., 686 as follows:

> "The capital (referring to the capital stock of a national bank) is not an idle, fictitious, arbitrary sum of money, set down in the articles of association, but in theory and practical operation of the system, is composed of substantial property, which gives value and solidity to the stock of the institution."

In the case of Lee, Treas. vs. Sturgess, 46 O. S. 153, Judge Spear says, in delivering the opinion of the court, page 160:

> "It may be assumed that 'capital stock' and 'capital and property' mean practically the same thing. Primarily the 'capital stock' is the money paid in by the stockholders in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate, or personal property, or both, including machinery, buildings, credits, rights in action etc."

There is as great a reason for holding that the words "capital stock" when prescribed as the basis for loans to be made by a corporation, should refer to what is actual and tangible, as there is to give those words such meaning in matters of taxation.

The case of Lehigh Ave. Railway's appeal, being a case decided by the supreme court of Pennsylvania in 5 L. R. A., page 367, is one very much in point. The act of the legislature of Pennsylvania authorizing the incorporation of the Lehigh Ave. Railway Company provided:

> "The said company shall have the power and authority to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock."

The main question raised in this case was as to the meaning of the words "par value of the capital stock." The authorized value of the capital stock of the company was one million dollars, and the amount of the capital stock actually paid in was one hundred thousand dollars. The attorney general of Pennsylvania maintained that the company could only borrow to the extent of one-half of the amount actually paid in, viz., fifty thousand dollars. The company contended that the language meant the authorized stock of the company, viz., one million dollars, and that it could borrow fifty per cent. of that amount. The syllabus of the case is as follows:

> "The par value of the stock of a corporation within the meaning

of its charter authorizing it to borrow money 'not exceeding one-half of the par value of the capital stock' means the actual amount of capital paid in, and not the nominal or authorized capital, where subscriptions for the full amount of stock have been made, but only part of the face value of each share actually paid in."

Of course the language of the act is different from ours in that the Pennsylvania act contains the words "par value" while ours simply limits it to the capital stock, but the discussion by the court is interesting and the reasoning seems to apply as well to our statute as it would to the Pennsylvania statute.

As stated above I am unable to find any decision of our courts, or of any court, directly in point. Our statute, section 3256, has been before the courts a number of times. In the case of Central Trust Co., of New York vs. Columbus H. V. & T. Ry. Co., et al, the United States circuit court, southern district of Ohio, 87 Fed. 815, the fourth paragraph of the syllabus is as follows:

"Rev. Stat. Ohio, section 3256, provides that a corporation may borrow money not exceeding the amount of its capital stock, issue its notes or bonds therefor and secure them by mortgage of its real or personal property, but does not declare indebtedness in excess of capital void. *Held*, that the mortgage of a corporation in excess of its capital stock is not void as to a subsequent mortgage with notice, if upheld by the corporation and its stockholders."

The court says at page 827:

"2. It next objected that this mortgage is void because the amount of the bonds secured exceeds the amount of the stock of the Coal & Railroad Company. The Revised Statutes of Ohio, affecting corporations of the class to which the Coal & Railroad Company belongs, provided that a corporation may borrow money not exceeding the amount of its capital stock, and issue its note or coupon and registered bonds therefor, bearing any rate of interest authorized by law, and may secure payment of the same by a mortgage of its real or personal property, or both. Rev. St. Ohio, section 3256. This limitation as to third persons must be regarded as applying to the authorized, and not the subscribed stock. Farmers' Loan & Trust Co. vs. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49; Water Co. vs. De Kay, 36 N. J. Eq. 548."

It will be seen from the syllabus and the above quotation that the court in this case had before it the interest of the third party to the transaction and not the naked question as to the meaning of the words "capital stock." The language seems, in a way, to indicate the view of the court that the words meant that a corporation had a right to borrow money to the extent of its authorized capital stock, but this view is taken as to the rights of the third party to the transaction and in effect holds that a loan made, even in excess of the amount authorized by statute, is not void but can be enforced against the corporation.

After very careful consideration of the question, and on account of the change made in the statute itself, the definitions given by our supreme court of the meaning of the words "capital stock" and the analogy of the Pennsylvania case above quoted, my conclusion is that the words "capital stock" as

used in section 8705, must be held to mean the actual capital stock of the corporation and not its authorized capital.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

404.

BANK STOCK—BONA FIDE HOLDER—TRANSFER OF TO A BONA FIDE HOLDER.

Where bank stock is fully paid for and the certificate bears no endorsement or statement that a lien is reserved by the bank against the holder of the stock for debts due to the bank from him, and such stock is transferred by the holder to a bona fide vendee or transferee, then the bank issuing the stock would be without authority to refuse to transfer the same.

COLUMBUS, OHIO, July 18, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On May 7, 1913, I received a letter from you enclosing a letter addressed to you by the secretary and treasurer of a certain banking company upon which you desired my opinion. The request contained in this letter is as follows:

> "If the stockholder of a bank should place his stock as collateral to another bank could the bank, issuing this stock, legally refuse to transfer the stock to another party if the original owner of the stock was indebted to the said bank?
>
> "Or, if there was a resolution on the records setting forth the right to hold stock of stockholders for any indebtedness they might owe the bank, would said resolution have to be embodied in the certificate of stock?"

The question as to whether or not a banking corporation has a lien upon the stock held by its members, for debts due by such members to the corporation, unless such a lien is authorized by a statute of the state, seems to be somewhat unsettled. It has been held in other states, in which the banking laws and statutes are not in all respects similar to ours, that such a lien does not exist unless a statute exists which expressly authorizes the lien, but in Ohio, even prior to the enactment of section 8673-15, hereinafter quoted, the rule seems to be different.

In the case of Stafford vs. The Produce Exchange Banking Co., 61 O. S. 160, the court held that a savings and loan company could reserve such a lien by an express stipulation in the certificate of stock issued by it. The syllabus of this case is as follows:

> "A corporation organized to do business of a savings and loan company may, by an express stipulation in the certificate of stock by it issued, reserve a valid lien upon the stock to secure the debts of the holder of it; and such lien may be asserted against a transferee who

receives the stock before, but does not present it for transfer on the stock book of the company until after, the original holder becomes indebted to the corporation."

The opinion, written by Judge Shauck, in this case seems to imply that corporations have the right to reserve such a lien unless there is statutory authority forbidding such a lien. This case, I take it, is determinative of the question that a corporation has the right to reserve such a lien by an express stipulation on the certificates of stock. In addition, such a lien is now recognized by statutory authority in this state.

Section 8673-15 of the General Code is as follows:

"There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

This was original section 15 of the act found in 102 O. L. page 500, passed May 31, 1911, entitled "an act to make uniform the law of transfer of shares in stock in corporations."

As section 9714 of the banking act provides that in the matters not covered by the provisions of the chapter relating to banks and banking such corporations shall be created, organized, governed and conducted in the manner provided by law for other corporations insofar as not inconsistent with the banking laws, section 8673-15 would undoubtedly apply to banking corporations, and expressly recognizes the authority of such corporations to reserve a lien upon its stock by a proper statement upon the certificate.

Undoubtedly, unless the stock certificate itself has indorsed on it the restrictions that it is subject to the lien of the bank against the person to whom the stock was issued for the debts of such person to the bank, the lien would not attach, and it has been held that corporations providing for such a lien by appropriate by-laws, and issuing certificates of stock which do not show upon their face that such a lien has been reserved, cannot assert such lien against a transferee of the stock. See Bank vs. Bank, 97 Iowa, 204 and Stafford vs. Produce Exchange Banking Co., 61 O. S. 160.

A banking corporation in Ohio, also has a lien against shares of its capital stock held by its members to the extent of the amount remaining unpaid on account of the subscription for such stock. This lien is given by section 9717 of the General Code which is as follows:

"When a stockholder or his assigns fail to pay an installment on his stock, as required by the preceding section to be paid, or for thirty days thereafter, the directors for such company may sell his stock at public sale for not less than the amount due thereon, including costs incurred, to the person who will pay the highest price therefor, having first given the delinquent stockholder twenty days' notice of such sale personally or if no personal notification can be given, then by mail at his last known address as appears from the corporate record, and having advertised the sale for a like period in a paper of general circulation within the county in which the corporation is located. If no bidder can be found who will pay for such stock the amount due thereon, with costs incurred, such stock shall be sold as the directors order, within six months for not less than the amount then due thereon with all costs of sale."

The answer to your question, therefore, depends upon the facts. If the stock referred to is fully paid for, and the certificate bears no indorsement or statement that a lien is reserved by the bank against the holder of the stock for debts due to the bank from him, and such stock is transferred by the holder to a bona fide vendee or transferee, then the banks issuing the stock would be without authority to refuse to transfer the same, and even though the bank had passed a resolution that the stock of stockholders should be held for any indebtedness due from such stockholders to the bank. But if the stock certificates bore an appropriate statement, setting forth the lien then such lien would be valid, and the bank holding the same would have authority to refuse to transfer until the lien is satisfied.

I herewith return the letter which you send to this department.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

414.

PRIVATE BANKS—THE WORD "STATIONERY" AS USED IN SECTION 6, 103 O. L., 381, DEFINED—THE WORD "UNINCORPORATED MUST FOLLOW THE NAME PRIVATE BANK.

The word "stationery as referred to in section 6, 103 Ohio Laws, 381, and as used in private banks, refers to the business paper used in the bank and includes all the paper used in transacting the business of the bank, including letter heads, checks, notes, deposit slips, notices and all other kinds of paper used in transacting the business of the bank in which the name of the bank appears.

COLUMBUS, OHIO, July 30, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—In your letter of July 17th you make the following request for my opinion:

> "Under the private bank act, section 6 (103 O. L. 381) says:
> "That all persons, partnerships or associations that shall engage in business under the purview of this act, shall have printed on all their advertising matter and business stationery, the word "unincorporated" immediately following the name of the firm or business title.
> "The question has been raised whether this word 'unincorporated' should be on every legal paper used in the bank, or whether it pertains purely to advertisements and stationery such as is used in correspondence which goes to the public. Would it apply to notes and deposit slips, which I take it are in no sense an advertisement?"

The statute which you quote is the first paragraph of section 6 of the act entitled "an act to provide for the examination, regulation, supervision and dissolution of certain banking concerns," 103 O. L. page 379. Your request calls for a definition of the word "stationery" as used in this act, for it is clear that any advertising matter, of any kind issued by the bank, upon which the name of the bank appears, must also bear the word "unincorporated" immediately following the name of the bank.

In the case of Commissioners of Trumbull County vs. John Hutchins, 11 Ohio, 369, the court gives a definition of the word "stationery" at page 371 which is as follows:

> "The word 'stationery' embraces all things necessarily employed by the clerk for the purpose of writing and authenticating every species of writing which the law requires the clerk to write and authenticate; especially all such things as are necessarily connected with the office for such purpose."

This definition is extremely broad and would, of course, cover such articles as pens, ink, pencils, as well as the paper and blank forms necessarily used by the clerk in discharging the duties of his office.

I take it that the words as used in the above statute, viz., "business stationery" refer simply to the business paper used in the bank, and that as so used they include all the papers used in transacting the business of the bank including letter heads, checks, notes, deposit slips, notices and in fact every species of paper used in the transaction of the business of the bank upon which the name of the bank appears.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

415.

LIQUIDATION OF BANK—DEPOSITOR NOT BARRED BY NOT ASSERTING HIS CLAIM WITHIN TIME SPECIFIED—FINAL DISPOSITION OF FUNDS TO BE MADE BY LEGISLATURE WHEN DEPOSITS REMAIN UNCALLED FOR.

Depositors who fail to file and prove their claim before the expiration of the date fixed for filing such claim, are not barred from afterwards asserting it.

In liquidating a bank, notice must be taken of all deposits in the bank whether the same are approved or not. Deposits that are not called for should be held by the superintendent of banks until the legislature makes some enactment for the final disposition of the same.

COLUMBUS, OHIO, July 18, 1913.

HON. EMERY LATTANNER, *Deputy Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On March 21, 1913, you gave the following request for an opinion:

> "Please render this office an opinion as to what further dissolution proceedings are necessary in the liquidation of a bank, after each depositor has been paid in full, and after all other moneys coming into our hands have been paid pro rata to the stockholders."

If all the depositors have been paid in full and all other moneys coming into the hands of the liquidating agents have been paid pro rata to the stockholders then nothing remains except to dissolve the corporation. The statutes are silent at to the exact method of dissolution of a banking corporation in

the hands of the superintendent of banks for purposes of liquidation, and, therefore, that would have to be worked out under the sections of the General Code providing for the dissolution of corporations.

From a conversation with you I understand that it was intended to include in this inquiry the question as to what disposition should be made by you in liquidating banks of unclaimed deposits.

Section 742-16, General Code, is as follows:

> "Dividends and unclaimed deposits remaining in the hands of the superintendent of banks for six months after the order for final distribution shall be by him deposited in one or more state banks or trust companies to the credit of the superintendent of banks in his name of office, in trust for the several depositors or creditors entitled thereto. The superintendent of banks may pay over the moneys so held by him to the persons respectively entitled thereto upon being furnished satisfactory evidence of their right to the same. In cases of doubt or conflicting claims he may apply to the common pleas court of the county in which the office of such corporation, company, society or association was located for an order authorizing and directing the payment thereof. He may apply the interest earned by the money so held by him towards defraying the expenses of the payment and distribution of such unclaimed deposits or dividends to the depositors and creditors entitled to receive the same, and he shall include in his annual report to the governor a statement of the amount of interest earned by such unclaimed dividends."

It is plain from this section that depositors who fail to file and prove their claims before the expiration of the date fixed for filing claims are not barred from afterward asserting the same, and therefore, in liquidating a bank you are bound to take notice of all deposits in the bank whether the same are proved or not, and it is your duty to hold the deposit of such funds as provided in said section until the same are paid and distributed to the depositors and creditors entitled to receive the same. The law does not specify how long such moneys should be held and, therefore, they should be held on deposit by you, as provided in said section, until the legislature makes some enactment as to the final disposition of the same.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

435.

UNDER PROVISIONS OF HOUSE BILL No. 46, 103 O. L. 384, THE SUPERINTENDENT OF BANKS OR ANY OF HIS EXAMINERS SHALL NOT ENGAGE IN OR BE INTERESTED IN THE BANKING BUSINESS.

House Bill No. 46 (103 O. L. 384) which provides that neither the superintendent of banks nor the examiner appointed by him shall be interested in any bank or other institution under the supervision of the superintendent of banks, or be engaged in the business of banking, does not apply to existing obligations at the time the law passed but would prevent the renewal of these obligations after the act becomes effective.

COLUMBUS, OHIO, July 30, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—On July 17th you made the following request for my opinion:

> "Referring to section 717 of the private bank act, known as House Bill No. 46 (103 O. L., 384), beg to inquire whether an examiner owing a state bank prior to the enactment of this law would be liable under this act, providing the note was not renewed, but was an existing obligation? This question has been raised and I would thank you for an early reply."

Sections 712 and 717 of the General Code, as amended by the act passed April 17, 1913, found in 103 O. L., 384, are as follows:

> "Section 712. With the approval of the governor, the superintendent of banks may employ from time to time necessary clerks and examiners to assist in the discharge of the duties imposed upon him by law. With such approval he may remove any such clerks or examiners. He shall summarily remove the deputy superintendent of banks, and any examiner, clerk or deputy connected with the department of the superintendent of banks upon the violation by any such officer, examiner or clerk of any of the provisions of section 717 of the General Code."
>
> "Section 717. Neither the superintendent of banks not the examiners appointed by him shall be interested directly or indirectly in any banking association, or in any bank or other corporation or association under their supervision, or be engaged in the business of banking. Neither the superintendent of banks, the deputy superintendent of banks or any examiner, deputy or clerk connected with the department of the superintendent of banks shall directly or indirectly borrow money from any corporation, person or association under the supervision of the superintendent of banks."

I think that clearly the prohibition found in section 717 against the officials named therein borrowing money from any corporation, person or association under the supervision of the superintendent of banks is operative only as to transactions occurring after the date when the act becomes effective. It does not apply to existing obligations. It would, however, apply to the renewal of an existing obligation, if by such renewal a new obligation was created.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

482.

VOUCHERS FOR TRAVELING EXPENSES WHEN PROPERLY APPROVED BY THE DEPARTMENT HEAD SHOULD BE HONORED.

Where the legislature makes an appropriation to cover the actual and necessary traveling expenses of the head of a department and his deputies and assistants, and the voucher drawn on this fund is for legal and proper expenses and is properly approved by the head of the department, the auditor of state should honor it.

COLUMBUS, OHIO, August 11, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have asked me to give you my opinion more fully upon your request of April 18, 1913, which was as follows:

> "The matter of allowing lunch and car fare for examiners in this department, who reside in Cincinnati and Cleveland, and who examine the banks in these cities, is one of dispute. The examiners claim that they should be permitted lunch and car fare while they are working in their own city, as in actual cases now in existence they would lose considerable time if they were to go home, whereas a lunch down town would materially advance their work."

In response to the above request, on May 27, 1913, I gave you the following opinion:

> "Section 714 of the General Code is as follows:
>
> "The actual and necessary traveling expenses of the superintendent of banks and of the deputies, assistants, clerks and examiners, incurred in the discharge of their official duty shall be paid monthly by the treasurer of state upon the warrant of the auditor of state. Vouchers, therefor, shall be fully itemized, approved by the superintendent and countersigned by the auditor of state.
>
> "It has been the uniform holding of this department that state officers and employes are not entitled to what are ordinarily classed as traveling expenses in the cities where they reside. There is no more reason for allowing examiners the expense of lunches and car fare while at work in the cities where they reside than there would be for allowing state officers in Columbus their expenses of car fare and that of lunch which the majority of them incur daily in performing the necessary duties of their respective offices.
>
> "For a more extended opinion on this question I refer you to my opinion to the inspector of building and loan associations, found in volume 1, report of attorney general for the year 1911 at page 815."

You state that there seems to be a conflict between the above quoted opinion and the one referred to. As I view it there is no conflict in the two opinions, but the latter one to you, in view of the fact that the question had never before been raised in your department, should have gone into the matter more fully.

I now refer you to the following opinions rendered by me upon the question of the allowance of "traveling expenses" to employes or subordinates in state departments.

(a) Opinion to the auditor of state dated May 8, 1911, (opinions of attorney general 1911, volume 1, page 140).

(b) Opinion to dairy and food commissioner, dated September 26, 1911 (opinions of attorney general 1911, volume 1, page 503).

(c) Opinion to the public service commission dated September 12, 1911, (opinions of attorney general 1911, volume 1, page 722).

(d) Opinion to inspector of building and loan associations dated November 3, 1913, (opinions of attorney general, 1911, volume 1, page 815).

There can be no question as to the correctness of my holding in my opinion to you of May 27, 1913, above quoted, namely, that state officers and employes are not entitled to what are ordinarily classed as "traveling expenses" in the cities where they reside. If the general rule were otherwise then all officers and employes here at the seat of government could charge and collect from the state their living expenses. This would be manifestly improper. But, like all general rules, this rule is subject to exceptions; and it was for this purpose that I referred you to my opinion of November 3, 1911; and I now wish to refer you especially to my opinion of September 26, 1911, to the dairy and food commissioner (above referred to), and I repeat the language used in that opinion as applicable to all cases of character:

> "The question of 'traveling expenses' must be determined by the application of common sense rules. No hard and fast regulation can be laid down; close fine spun distinctions need not be drawn, either for the purpose of defeating a claim for reimbursement or for charging to the state an expense not contemplated by the term 'traveling expenses.'
>
> "The commissioner, in the exercise of his judgment, can soon determine from an inspection of an itemized expense account what would or would not be a proper charge of such an item as 'traveling expense.' The interest of the state should be closely safeguarded, yet, it should be remembered that since the laborer is worthy of his hire he is entitled to all that would reasonably come under the term 'traveling expenses.'"

As I have stated, this question is one that essentially involves the application of the rule of common sense rather than a technical and inflexible rule of law. The legislature makes an appropriation to cover the "actual and necessary traveling expenses" of the head of a department, his deputies and assistants, and the vouchers for items charged as necessary and actual expenses must be countersigned by the head of the department. He is the judge and upon him must rest the responsibility. He should be quick to reject padded, improper or unnecessary expense accounts. When the items charged are for expenses actually incurred, by a public servant, in the discharge of his duty, and the head of the department approves the voucher and thereby certifies that in his opinion the charge is proper, the voucher should be honored.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

541.

WHEN THE 12TH DAY OF OCTOBER, KNOWN AS "COLUMBUS DAY," FALLS ON SUNDAY THE HOLIDAY IS NOT TRANSFERRED TO THE NEXT SUCCEEDING BUSINESS DAY.

When the 12th day of October, known as "Columbus Day," falls on Sunday the holiday is not transferred to the next succeeding business day, as it is not one of the holidays to be transferred to the next business day as provided in section 8301, General Code.

COLUMBUS, OHIO, October 8, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I received a request from Hon. John L. Vance, Jr., of the Citizens Trust & Savings Bank, asking whether or not, since the 12th of October, known as "Columbus discovery day," falls this year on the first day of the week, known as Sunday, the holiday is transferred to the next succeeding secular or business day?

As this inquiry has come to my department from many other sources, and I deem it to be of public interest, in order that I may give an official ruling on the question, I am addressing my reply to you.

Section 8301, General Code, prior to the amendment passed March 23, 1910 reads as follows:

> "The following days, viz.
> "1. The first day of January, known as new year's day;
> "2. The twenty-second day of February, known as Washington's birthday;
> "3. The thirtieth day of May, known as decoration or memorial day;
> "4 The fourth day of July, known as independence day;
> "5. The first Monday of September, known as labor day;
> "6. The twenty-fifth day of December, known as Christmas day;
> "7. Any day appointed and recommended by the governor of this state or the president of the United States as a day of fast or thanksgiving; and
> "8. Any day which may hereafter be made a legal holiday, shall, for the purpose of this division, be holidays. But if such days firstly, secondly, thirdly, fourthly, sixthly and eighthly, herein, be the first of the week, known as Sunday, the next succeeding secular or business day shall be a holiday."

When the legislature, in response to the petitions of a great number of earnest admirers of the discoverer of America, concluded to fix a day that should be a holiday in his honor, section 8301 was amended to read as follows:

> "The following days, viz:
> "1. The first day of January, known as new year's day;
> "2. The twenty-second day of February, known as Washington's birthday;
> "3. The thirtieth day of May, known as decoration or memorial day;
> "4. The fourth day of July, known as independence day;
> "5. The first Monday of September, known as labor day;
> "6. The twelfth day of October, known as Columbus discovery day;
> "7. The twenty-fifth day of December, known as Christmas day;
> "8. Any day appointed and recommended by the governor of this state or the president of the United States as a day of fast or thanksgiving; and

"9. Any day which may hereafter be made a legal holiday, shall for the purpose of this division, be holidays. But if the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the twenty-fifth day of December be the first day of the week, known as Sunday, the next succeeding secular or business day shall be a holiday."

It is to be noted that in sub-section 9 of the amended section, provision is made that certain of the holidays therein named would be transferred to the succeeding secular or business day if the holiday fell on a Sunday. Attention is further called to the fact that in the last amendment the wording of this special provision as to the holiday falling on Sunday is changed, and the twelfth of October is omitted from the list of holidays which shall be transferred if the date fall on Sunday.

I am, therefore, of the opinion that since the twelfth day of October, known as "Columbus discovery day," falls on Sunday this year, that the holiday is not transferred to the next succeeding secular or business day.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

636.

THE USE OF THE WORDS "BANK," "BANKER" OR "BANKING" AS A DESIGNATION OR NAME UNDER WHICH BUSINESS IS CONDUCTED IN THIS STATE IS CONTRARY TO LAW, UNLESS THE PERSON, PARTNERSHIP, ASSOCIATION OR CORPORATION USING SUCH NAME IS EXAMINED AND REGULATED BY THE STATE BANKING DEPARTMENT.

The use of the words "Bank," "banker" or "banking," or words of a similar meaning in any foreign language, as a designation under which business is conducted in this state, is contrary to law, unless the person, partnership, association or corporation using such word or words submit to inspection, examination and regulation by the state banking department as provided by law, and also pay annually to that department the fees provided by law.

COLUMBUS, OHIO, December 6, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have asked my opinion as to whether persons, associations, partnerships or corporations, not engaged in the banking business, have the right to use the words "bank," "banker" or "banking," as a designation or name under which such business may be conducted in this state.

The last paragraph of section 3, article 13, of the constitution, is as follows:

"* * * No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank,' 'banker' or 'banking,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

Section 744-1 of the General Code, is as follows:

"That no corporation not organized under the laws of this state, or of the United States, or person, partnership or association, shall use the word 'bank,' 'banker' or 'banking' or 'trust' or 'trust company,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation, as provided in this act. The superintendent of banks shall execute all laws in relation to corporations, organized under the laws of this state or of the United States, persons, partnerships and associations using the word 'bank,' 'banker' or 'banking,' or 'trust' or 'trust company,' or words of similar meaning in any foreign language as a designation or name under which business is conducted in this state."

It is clear from the constitutional provision above quoted, and from section 744-1, enacted under the authority of the constitutional provision, that the words "bank," "banker" or "banking," or words of similar meaning in any foreign language, can only be used by corporations, persons, partnerships or associations which submit to inspection, examination and regulation, as provided by law. This inspection, examination and regulation is now fully provided for by law and upon you, as superintendent of banks, is cast the duty to execute all the laws relating to persons, partnerships, associations or corporations using any of said words. In addition, under section 736 of the General Code, every company, firm, corporation, person or association, which is subject to inspection and examination by you, as superintendent of banks, must pay annually the fees provided by such section.

My opinion, therefore, is that the use of the words "bank," "banker" or "banking," or words of similar meaning in any foreign language, as a designation or name under which business is conducted in this state, is contrary to law unless the person, partnership, association or corporation, using such word or words, submit to inspection, examination and regulation by your department, as provided by law, and also pay annually to your department the fees provided by law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

653.

THE WORDS "THE ISSUE" AS USED IN PARAGRAPH "F" OF SECTION 2 REFER TO A PARTICULAR BOND ISSUE WHICH THE COMPANY MAY DESIRE TO DISPOSE OF UNDER FAVOR OF THIS PARAGRAPH, AND NOT TO THE ENTIRE BOND, STOCK, OR SECURITY, ISSUED BY THE CORPORATION APPLYING.

The words "the issue" used in line six of subdivision "f" of section 2 of the act entitled "An act to regulate the sale of bonds, stocks and securities and of real estate not located in Ohio, and to prevent fraud in such sales" found in 103 O. L. 743, refer to the particular issue which a company may desire to dispose of under favor of this paragraph, and not to the entire bond, stock or security, as the case may be, issued by the corporation applying.

COLUMBUS, OHIO, November 25, 1913.

HON. EMERY LATTANER, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of September 4, 1913, I have letter from you asking opinion as follows:

"Do the words 'the issue,' used in the line six of subdivision 'f' of section 2 of the act entitled 'An act to regulate the sale of bonds, stocks and securities and of real estate not located in Ohio, and to prevent fraud in such sales,' passed April 28, 1913, refer to the particular issue of bonds, stocks or securities, of which the 'securities' under consideration are a part, or do said words 'the issue' refer to the entire bond, stock or security, as the case may be, issued by the corporation applying?"

Section 1 of the act in question (103 O. L., 743) provides as follows:

"Except as otherwise provided in this act, no dealer shall from and after the first day of August, A. D., 1913, within the state, dispose or offer to dispose of any stocks, bonds, mortgages or other instruments evidencing title to or interest in property or other securities of any kind or character (all hereinafter termed 'securities'), issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit, organized under the laws of this state), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

Section 2 of the act states what shall not be deemed and considered "securities," within the meaning of the term as used in the act, and, further, defines the word "dealer" as therein used as follows:

"The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing or offering to dispose of any such security through agents or otherwise, and any company engaged in the marketing or floatation of its own securities, either directly or through agents or underwriters, or any stock promotion scheme whatsoever."

The same section by separate paragraphs thereof, from "a" to "f," inclusive, conditionally except certain persons, both natural and artificial, from the meaning of the term "dealer" as above defined. The question submitted arises out of the exception stated in subdivision "f" of the section, which subdivision or paragraph reads as follows:

"An issuer organized under the laws of this state, where the disposal in good faith and not for the purpose of avoiding the provisions of this act, is made directly to its stockholders or by its own officers, without any commission, and at a total expense of not more than two per centum of the proceeds realized therefrom, and where no part of the issue is issued, directly or indirectly, in payment for patents, services, good will, or for property not located in this state; provided that the president and secretary of the issuer, shall prior to such disposal, file with the 'commissioner' a written statement setting forth the existence of all such facts."

One purpose of this act, as disclosed by the paragraph just noted, is to inhibit the issue by a company of its stock or other "securities" by exchange or payment for patents, services, good will or property not located in this state—considerations often taken over at gross over-valuation—unless the same be disposed of by a licensed "dealer" under the supervision of the superintendent of banks, secured by the provisions of other sections of the act. This consideration, as well as the general rule applicable in the construction of statutes, leads to the view that the provisions of the paragraph in question were intended to be prospective only in their operation and effect.

"It is laid down as a rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively."

Bernier vs. Becker, 37 O. S., 72, 74.
Allen vs. Russell, 39 O. S., 336, 339.

It is manifest that if the words "the issue," as used in this paragraph, are to be construed as including more than the particular issue a company may desire to dispose of, and to include the entire bond, stock or other security, issue or issues of such company, such construction might impose a disability on the company arising out of transactions which took place before the enactment of the act under consideration; which construction is contrary to the plain intent that provisions of this paragraph are to be prospective in their effect only.

Again, a sale or other disposition of its stock or other "securities" without license under the provisions of this paragraph, is one of several exceptions to sales of "securities" which otherwise, under the provision of the act, must be made by a licensed "dealer." By section 9 of the act it is provided that before a licensee (licensed "dealer") shall dispose or offer to dispose of securities within this state, he shall file with the "commissioner" certain information including the following: "A pertinent discription of such securities, and the purpose of said issue." It is evident that the word "issue" as used in this connection, is, by legislative intent, in the singular, and referable only to the particular issue that the licensee may then desire to dispose of. The meaning of the word "issue" being clear in this connection it is to be presumed that the legislature used the word with the same meaning in the paragraph out of which the question made by you arises.

"Where the same word or phrase is used more than once in the same act in relation to the same subject-matter, and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction."

Rhodes vs. Weldy, 46 O. S., 234.

For the reasons above stated, and on a consideration of the whole of the act in question, I am of the opinion that the words "the issue," as used in paragraph "f" of section 2, refer to the particular issue which a company may desire to dispose of under favor of this paragraph, and not "to the entire bond, stock or security, as the case may be, issued by the corporation applying."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

675.

LIQUIDATION OF BANKS—CROWN CITY BANK—DRAFTS ON CROWN CITY BANK.

Where checks drawn on the Crown City bank are deposited with other banks and forwarded by these banks to the Crown City bank where drafts are drawn on the Huntington National bank of Huntington, W. Va., in payment of these checks and forwarded, and the drafts are presented for payment at the Huntington National bank the day of the failure of the Crown City bank, such claims cannot be allowed as preferred claims against the Crown City bank.

COLUMBUS, OHIO, December 31, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

MY DEAR SIR:—You have referred to me the claim of the Fifth-Third national bank of Cincinnati, Ohio, against the Crown City bank. The facts upon which this claim is based are as follows:

On October 16, 1913, the Fifth-Third national bank of Cincinnati, Ohio, forwarded by mail to the Crown City bank of Crown City, Ohio, certain checks drawn by different depositors on the Crown City bank, and deposited with the Fifth-Third national bank. These checks so forwarded by the Fifth-Third national bank reached the Crown City bank in due course; on October 16th the Crown City bank issued its draft in favor of the Fifth-Third national bank and drawn on the Huntington national bank of Huntington, West Virginia, for the sum of one hundred forty-four and sixty one-hundredths ($144.60) dollars, in payment of the checks so forwarded by the Fifth-Third national bank.

This draft was received by the Fifth-Third national bank on October 20, 1913, and was by it presented for payment to the Huntington national bank of Huntington, West Virginia, on October 21, 1913. On said day, October 21, 1913, you, as superintendent of banks, took charge of the said Crown City bank for the purpose of liquidation, and immediately notified the said Huntington national bank of that fact, and ordered it not to pay any checks or drafts issued by the Crown City bank upon it. This notice was received prior to the presentation of said draft by the Fifth-Third national bank, and the said draft was therefore rejected by the said Huntington national bank, and duly protested.

The Fifth-Third national bank now presents its claim for the amount of one hundred forty-five and seventy-two one-hundredths ($145.72) dollars, being the amount of said draft plus protest fees, and asks that the same be allowed as a preferred claim against the assets of the Crown City bank, now in your hands for the purposes of liquidation.

After consulting the authorities upon this question, I am of the opinion that this claim cannot be so allowed; it seems that no cash has actually passed in this transaction that the funds in your hands as assets of the Crown City bank have not been augmented by the amount of this draft, nor has the money represented by this draft been set aside in any way so that it can be looked to as a trust fund or special deposit. The only theory upon which it can be treated as a special fund or deposit would be that when the Crown City bank issued its draft upon the Huntington national bank, it thereby made the assignment pro tanto of a sufficient amount of funds then belonging to it in the said Huntington national bank to pay said draft.

However, the statute provides, section 8294 of the General Code, as follows:

> "A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable

to the holder unless and until it accepts or certifies the check. (R. D. section 3177z.)

Our supreme court has also held to the same effect as this statute, i. e.,

> "That a bank check or draft for a part of the sum due the drawer, does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn." Covert vs. Rhodes, 48-O. S., page 66.

See also Blake vs. The Hamilton Dime Savings Bank, 79 O. S., 189, p. 196, et seq. In Morse on Banks and Banking, fourth edition, section 511-K, it is stated:

> "In case the bank on which a check is drawn becomes insolvent before the check is paid, of course the check holder could not expect a preference to the other creditors of the bank; in no reasonable view can the holder acquire more rights than the depositor would have himself."

In the present case, if one of the depositors in the Crown City bank residing at Cincinnati had sent his check to Crown City and received for the same a draft upon the Huntington national bank, and had presented said draft for payment at the Huntington national bank subsequent to the notice of the superintendent of banks, under the above authorities, he could not have compelled payment by the Huntington national bank, and his right against the Crown City bank would be only that of a depositor or general creditor; it seems to me that undoubtedly the Fifth-Third national bank by the tranaction obtained no greater rights than the depositors in the Crown City bank who issued said checks against their respective accounts.

A case almost exactly in point is that of Clark vs. Toronto Bank, et al., being the decision of the supreme court of Kansas, reported in 82 Pac. 582, and in 2, L. R. A., new series, page 83. The syllabus of this case is as follows:

> "1. Draft as assignment of fund.
>
> "Ordinarily the issuance of a bank draft does not, prior to its acceptance, operate as an assignment of a part of the fund against which it is drawn.
>
> "2. Same—insolvency of drawer.
>
> "Where a bank fails and passes into the hands of a receiver after it has issued a draft upon a correspondent bank in which it has funds on deposit, and the drawee has notice of the receivership before the draft is presented for payment, the title to such deposit passes to the receiver, and the holder of the draft, in the absence of any special circumstances, is entitled to no priority over other creditors of the failed bank."

I am, therefore, constrained to hold that this claim cannot be allowed as a preferred claim against the Crown City bank. The claim may be allowed as a general claim against the Crown City bank in favor of the Fifth-Third national bank, and it can then adjust matters between itself and the persons who deposited the original checks with it; or the original checks sent by the Fifth-Third national bank to the Crown City bank on October 16, 1913, can be returned to the Fifth-Third bank so that the individual drawers or holders of said checks may present their claims individually, which claims, when presented, can only be treated as general claims.

Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

676.

LIQUIDATION OF BANKS—CROWN CITY BANK—CERTIFICATE OF DEPOSIT—LIQUIDATION BY STATE BANKING DEPARTMENT.

Where the holder of a certificate of deposit on the Crown City bank deposits the certificate of deposit with another bank, and the certificate is finally presented to the Crown City bank, and the Crown City bank returns to the bank in payment therefor its draft on the Huntington National bank of Huntington, W. Va., but before its presentation to the Huntington National bank the Crown City bank fails, the holder of said draft will not have a preferred claim, but the claim may be allowed as a general claim.

COLUMBUS, OHIO, December 31, 1913.

HON. EMERY LATTANNER, *Superintendent of Banks, Columbus, Ohio.*

MY DEAR SIR:—You have submitted to me various correspondence with reference to the claim of the Commercial & Savings Bank of Gallipolis, Ohio, against the Crown City Bank. The facts with reference to this claim, as I understand them, are as follows:

A Mrs. Wood became in some way the owner of a certificate of deposit for the sum of nine hundred ($900.00) dollars, issued by the Crown City Bank. This certificate of deposit she either sold to or deposited with the Commercial & Savings Bank of Gallipolis; the Commercial & Savings Bank of Gallipolis sent the said certificate of deposit to its Cincinnati correspondent, the Fourth National Bank; the Fourth National Bank sent the said certificate direct to the Crown City Bank; the Crown City Bank returned to the Fourth National Bank in payment therefor its draft on the Huntington National Bank of Huntington, W. Va.; after the issuance of said draft by the Crown City Bank to the Fourth National Bank, but before its presentation to the Huntington National Bank, the Crown City Bank was taken over by you for the purpose of liquidation, and said draft was rejected and protested upon presentation. The draft was then returned by the Fourth National Bank to the Crown City Bank of Crown City, Ohio, and the said Commercial & Savings Bank now asks that this claim for the amount of said draft be allowed as a preferred claim against the assets of the Crown City Bank, in your hands, for the purposes of liquidation.

A case quite similar to this is that of Clark vs. Toronto Bank, being the decision of the supreme court of Kansas, reported in 2 L. R. A., page 83. The syllabus of this case is as follows:

> "1. Draft as assignment of fund.
>
> "Ordinarily the issuance of a bank draft does not, prior to its acceptance, operate as an assignment of a part of the fund against which it is drawn.
>
> "2. Same—Insolvency of drawer.
>
> "Where a bank fails and passes into the hands of a receiver after it has issued a draft upon a correspondent bank in which it has funds on deposit, and the drawee has notice of the receivership before the draft is presented for payment, the title to such deposit passes to the receiver, and the holder of the draft, in the absence of any special circumstances, is entitled to no priority over other creditors of the failed bank."

This case seems to be in accord with the Ohio decisions and statutes.

I am, therefore, compelled to hold that this claim on the part of the Commercial & Savings Bank of Gallipolis cannot be allowed as preferred claim against the assets of the Crown City Bank, in your possession, for the purpose of liquidation; it can however, be allowed as a general claim.

The question as between the Commercial & Savings Bank of Gallipolis and Mrs. Wood, who sold to or deposited with said bank the original certificate of deposit, will depend entirely upon that transaction and whether the said bank purchased said certificate of deposit, or only received the same for collection.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Superintendent of Insurance)

12.

SUPERINTENDENT OF INSURANCE—ANNUAL FEE OF $25.00 FOR COLLECTING INTEREST UPON SECURITY DEPOSITS, COMPREHENDS CALENDAR YEAR.

The history of 657, General Code, providing for a charge by the superintendent of insurance of $25.00 each year for the collecting and forwarding of interest checks and coupons upon bonds and securities deposited, discloses that it is the intention to apply such $25.00 fee on each $100,000.00 so deposited to each calendar year, regardless of the fact that such deposit may not have been held for the entire year.

COLUMBUS, OHIO, December 14, 1912.

HON. D. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On December 10, 1912, you made the following request for my opinion:

> "Please advise this department what construction you place upon section 657, General Code, paragraph as follows:
>
> "For making and forwarding annually, semi-annually and quarterly the interest checks and coupons accruing upon bonds and securities deposited, twenty-five dollars each year on each one hundred thousand dollars so deposited. (R. S. Secs. 269, 282).
>
> "We refer you to this specific case:
>
> "The Svea Fire & Life Insurance Co., Gothenberg, Sweden, was admitted September 7, 1912.
>
> "This department collected interest on its bonds deposited October 1, 1912.
>
> "Should this department charge the company the full amount of $25.00 for this collection or pro rate the fee according to the amount collected on October 1st only?"

It seems to me that it is the intent of this statute to provide for one annual payment by insurance companies to your department for services rendered in making and forwarding the interest checks and coupons accruing upon bonds and securities deposited. Whether said interest checks are made and forwarded annually, semi-annually or quarterly, it would seem, makes no difference, the fee is twenty-five dollars to be paid each year; and there is nothing expressed in the statute, nor anything that would give rise to the inference that this annual fee of twenty-five dollars is to be prorated in any event.

The meaning is perhaps clearer from this paragraph as it appeared in the revised statutes, section 269. It there appeared as follows:

> "Foreign insurance companies shall pay annually, as fees, for making out and forwarding annually, semi-annually and quarterly, the interest checks and coupons accruing upon bonds and securities deposited, the sum of twenty-five dollars on each one hundred thousand dollars so deposited which fees shall be turned over to the state treasurer on warrant of the state auditor."

I think it is clear from this that one annual payment was intended, and when checks are made out and forwarded to the company, your department should charge the fee specified, and it makes no difference, in my opinion, whether such checks are

made out and forwarded annually, semi-annually or quarterly, the fee is the same; and, therefore, your department should charge the company referred to the full annual fee specified in this section.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

28.

INSURANCE EXAMINERS—EXPENSES, TRAVELING—WHILE ENGAGED IN PERMANENT WORK IN THE OFFICE AT COLUMBUS, NOT ALLOWED—SAME ALLOWED WHEN TEMPORARILY EMPLOYED EXAMINING COMPANIES IN SAID CITY.

Examiners employed by the superintendent of insurance, who do not reside in Columbus may be allowed their necessary traveling expenses whilst temporarily engaged in said city in the examination of insurance companies therein.

When such examiners are permanently employed, however, in the office work of the department of the superintendent of insurance, they may not be allowed their expenses.

COLUMBUS, OHIO, January 11, 1913.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—In your letter of October 30th you request my opinion upon the following questions:

> "1. Shall the examiners employed by this department be allowed their necessary expenses while examining insurance companies located in the city of Columbus?
>
> "2. Shall such examiners be allowed their necessary expenses while employed in the work of the department in the office of the superintendent of insurance?"

I respectfully refer you to my opinion of May 8, 1911, to the Honorable E. M. Fullington, auditor of state, relative to the expenses of inspectors of building and loan associations. The direct question asked by the auditor of state at that time was whether an inspector who resided in another city being assigned to inspect an association in Columbus should be entitled to living expenses while engaged in that work. My holding, in brief, was that when an inspector is inspecting an association in a city other than that of his residence, whether that city be the capital of the state or not, all expenses incurred by him while absent from his home are really "traveling expenses." This opinion, I think, is applicable to the insurance department proper as well as to the building and loan department, and the sections providing for the inspection of insurance companies, while not identical with the provisions for the inspection of building and loan associations, are, so far as this particular inquiry is concerned, for all practical purposes the same.

An appropriation is made each year by the legislature for traveling and other expenses of the insurance department superintendent and employes on official business. The mere fact that a company happens to be located in Columbus does not seem to me to preclude an examiner who does not live in Columbus from being allowed traveling expenses while in this city and engaged in such an examination. The basis of my holding in regard to officials and employes in Columbus is that while permanently employed here, or located here, they cannot charge living expenses while in this city, and can charge only such expenses when absent on official business from Columbus.

My opinion further is that this rule applies inversely in the case of examiners who do not live in Columbus and are not permanently employed here, and that when they are here upon orders from you and engaged in examining a company or companies located in this city, such traveling expenses should be allowed; but when such examiners are brought into this city by you and employed in work in your department, not in the examination of associations, and when such period of employment in Columbus is of any length, then they would not be entitled to expenses.

Answering your questions, therefore, I would say:

1. Examiners employed by your department should be allowed their necessary expenses while examining insurance companies when located in Columbus if they do not live in this city.

2. Such examiners should not be allowed their necessary expenses while employed in the office of the superintendent of insurance in necessary office work for your department.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

287.

RIGHT OF INSURANCE COMPANIES TO RECEIVE BANK DEPOSITS PLACED WITH SUPERINTENDENT OF INSURANCE, IN ACCORDANCE WITH SECTION 3641, REVISED STATUTES, NOW REPEALED, WHEN CONTRACTS WHICH DEPOSIT WAS INTENDED TO SECURE HAVE BEEN EXECUTED.

The deposit with the state superintendent of insurance required under section 3641 Revised Statutes, now repealed, should be returned to such companies, as a matter of policy, when the contracts which such deposit was intended to secure have been proven to have been executed.

There being no statutory provision therefor, however, the proper method would be for such companies to file a friendly suit against the superintendent and in such suit proof to be given of the execution of all obligations pertaining to such contract.

COLUMBUS, OHIO, May 16, 1913.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On January 2, 1913, you made the following request for an opinion:

> "Where a deposit of $30,000.00 in securities required to be made by companies of other states, under section 3641 of the Revised Statutes of Ohio, as the same stood prior to the amendatory act of April 1, 1902, has been made by an insurance company, and all obligations upon contracts executed prior to said last named date have been fully extinguished, is it the duty of the superintendent of insurance to return to such company such deposit, upon appropriate proof being made of that fact?"

If the obligations of all contracts made prior to April 1, 1902, by such companies had been fully extinguished then there is no further reason for holding the deposit of $30,000 made by such companies to secure such contracts and such deposit should be returned to said company. The difficulty about the matter is that there is no provision of law now existing which provides for the return of such deposits, nor is there any

method prescribed by law which you are to follow in satisfying yourself that the reason for such deposit no longer exists. It seems to me, therefore, that the only way out of the difficulty is to have such company bring suit against you, setting forth all of the facts in regard to this matter and praying for a return of such deposit. To a petition of this character an answer can be filed, admitting all the facts except the allegation that the obligation of all contracts for the security of which such deposit was originally made had been extinguished. This should be denied and the company put upon proof, and I have no doubt that upon satisfactory proof being produced the court could order the return of such deposits. This would protect you and is in fact the only method which can be safely followed to accomplish the desired result.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

301.

LAW OF THE IMPROVED ORDER OF RED MEN REQUIRING ALL OFFICERS TO FURNISH BOND AND PERMITTING CERTAIN GOVERNING OFFICERS OF THE ORDER TO SELECT THEIR SURETY COMPANIES, NOT INVALID.

There is nothing in the statutes of Ohio which prohibits a fraternal order, such as the Improved Order of Red Men, from having in its general law a requirement that all officers furnish bond with a surety company, to be selected by certain governing officers of the order.

COLUMBUS, OHIO, May 16, 1913.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On April 29, 1913, you referred to me correspondence of your department with Mr. J. A. O'Donnell, great sachem, Troy, Ohio, relative to the issuance of security bonds by the American Surety Company of New York City, to local tribes of the Improved Order of Red Men of Ohio.

It seems that on May 14, 1912, the great council of Ohio of the Improved Order of Red Men, amended section 226, chapter 30 of the general laws of the Improved Order of Red Men, as follows:

> "Section 226. The chief or records, collector of wampum, keeper of wampum and trustees, before entering into the duties of their chieftaincies, shall be bonded with some approved surety company for the faithful performance of their duties, and the board of great chiefs shall enter into a contract with some approved surety company for a blanket bond to cover all the tribal chiefs above named.
>
> "Section 226a. The expenses of said bond to be contracted for by the great sachem, great chief of records and keeper of wampum shall be apportioned among the tribes, and said amounts shall be transmitted to the great chief of records together with six moons per capita tax."

It further appears that in pursuance of the authority given by said law or resolution, the board of great chiefs of said order unanimously selected the American Surety Company of New York as the surety company to execute such bonds, and that the order now requires that the officers named in said resolution give surety bonds with the American Surety Company of New York as surety, the cost of said bonds to

be apportioned and paid as provided in said section 226a. It does not appear from the correspondence before me that any one connected with the order solicits these bonds or that any one connected with the order is paid a commission on the same, and it must, therefore, be presumed that the bonds are written through the duly authorized agents of the company.

I have not the constitution and by-laws of the Improved Order of Red Men before me, and, from the data in my possession, unless there is something in said constitution and by-laws which would prohibit a transaction of this kind, I do not find that there is anything illegal in this transaction. The law or resolution primarily provides that the officers named in it shall be bonded by a bond given by some approved surety company. I think that this requirement is valid. The law then delegates to certain officers of the order the power and duty to select and approve a surety company. This, I think, can also be done. The method may perhaps be open to some criticism on the ground that it gives an opportunity for favoritism in the matter of choosing a surety company, and also it may be coercive in making all local tribes pay for bonds in a company selected by the governing body, but I take it from what is before me that this order has a representative form of government, and if the rank and file are dissatisfied with the manner in which those in authority exercise their powers, that, though this order may not have adopted the recall, still all obnoxious officers can be readily supplanted in due course of time.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

304.

POWER OF SUPERINTENDENT OF INSURANCE TO MAKE ASSESSMENT UPON MUTUAL INSURANCE COMPANY TO RESTORE IMPAIRMENT OF CAPITAL, OPERATES ONLY AS TO GOING CONCERNS—INSOLVENT COMPANY.

The power of the superintendent of insurance conferred by sections 630, and following of the General Code, to compel an assessment to restore impairment of capital of a mutual insurance company is permitted to be exercised only against going concerns.

When a company is undergoing voluntary liquidation, the superintendent of insurance has no further authority in the matter and recourse must be had under section of the General Code relating to insolvent corporations.

COLUMBUS, OHIO, June 6, 1913.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

MY DEAR SIR:—I am in receipt of your letter of January 16, 1913, as to the Akron Mutual Fire Insurance Company, together with the various enclosures attached to your letter.

It appears from your letter and the correspondence that several years ago the Akron Mutual Fire Insurance Company became insolvent, and that the superintendent of insurance revoked its license and ordered it to make an assessment of one and one-half per cent. in order to restore the impairment of its capital. I am informed that this assessment was made and was sufficient to pay off all claims that were known at that time; that subsequently the company cancelled all out-standing policies and went into voluntary liquidation, and subsequent to this, one or more

judgments were obtained against the said company, and the question has arisen as to whether your department, under section 630 of the General Code, can again levy an assessment in order to satisfy these judgments.

Section 630 of the General Code is as follows:

> "If it appears to the superintendent of insurance upon satisfactory evidence that the funds and assets, other than contingent liability, of any company organized on the plan of mutual insurance, after deducting therefrom a reinsurance reserve fund, computed in accordance with law, are less than its liabilities, such company shall be deemed to have impaired its capital. If such impairment exceeds twenty-five per cent. of such reinsurance reserve fund, the superintendent shall require such company to make an assessment as provided by law in case of impairment of its capital by a mutual company, for the amount needed to pay its incurred losses and expenses and to make good the reinsurance reserve fund required by law. The assessment shall be paid within such period as the superintendent names in the requisition."

It appears from this that this section only applies to companies that may be called going-concerns. Under it, when the superintendent of insurance ascertains that the capital of any such company is impaired, he may require an assessment to be made, and to be paid within such period as he may prescribe.

Section 633, General Code, is as follows:

> "Upon default of a company to comply with the requisition of the superintendent of insurance, the superintendent shall communicate the fact to the attorney general, who shall apply to the court of common pleas of the county in which the principal office of the company is located for an order requiring such company to show cause why its business should not be closed. The attorney general shall give the company such notice of the pendency of the application as the court directs, and thereupon the court shall hear the allegations and proof of the respective parties, or refer the application of the attorney general to a referee."

Section 634, General Code, is as follows:

> "If it appears to the satisfaction of the court that the assets of such company are reduced below the amount so required by law, or that the interest of the public so require, the court shall decree a dissolution of the company and distribution of its assets. A transfer of stock of a company made during the pendency of such investigation shall not release the party making the transfer from his liability for losses which have occurred previous to the transfer."

As stated above, I gather that this company went into voluntary liquidation after the first assessment was ordered and paid by the superintendent of insurance, and, therefore, it would seem that the superintendent of insurance has now no further authority in the matter, and that the proper course to follow would be under the sections of the General Code relating to insolvent corporations.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

316.

RIGHT OF INSURANCE COMPANY ORGANIZED IN DISTRICT OF COLUMBIA TO DO BUSINESS IN OHIO UPON DEPOSIT OF SECURITIES TO THE SUPERINTENDENT OF INSURANCE OF THE DISTRICT IN ACCORDANCE WITH RULES PRESCRIBED BY SAID SUPERINTENDENT AND APPROVED BY THE COMMISSIONERS OF SAID DISTRICT.

Under section 9367, General Code, an insurance company organized in the District of Columbia may do business in this state upon depositing the security required by said section with the superintendent of insurance of the District of Columbia, in accordance with the provisions of this statute, and in the manner prescribed by rules adopted by the superintendent of insurance of the district and approved by the commissioners of said district.

For this purpose the District of Columbia may properly de deemed a state and the rule adopted by the commissioners and approved as authorized by act of congress may be considered a law of the state within the comprehension of said section 9367, General Code.

Inasmuch as this statute requires a certificate from the superintendent of insurance or other officer of another state to the effect that he holds in trust and on deposit the prescribed securities, a certificate from such officer to the effect that such securities have been deposited with a bank would not be a compliance with the law.

COLUMBUS, OHIO, June 6, 1913.

HON. EDMOND H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—In your letter to me, dated January 17, 1913, you make the following request for my opinion:

> "The Equitable Life Insurance Co., of Washington, D. C., has made application for admission to this state. Section 9367, General Code, provides for the deposit to be made by life insurance companies as transacting such business within this state, where the securities are not deposited with this state, they are to be deposited 'with the officer of the state in which such company was organized, designated by the laws of such state to receive them.'
>
> "The company in question is organized under the laws of the United States No person or officer within the district is designated by law to receive such securities.
>
> "It is not practical to make the deposit with this state for the reason that the company desires to do business also within the state of Maryland, and, perhaps, elsewhere, in which event, a deposit with this state would be of no avail, as the laws of other states are similar to our own and provide that the deposit must be made with the respective state in which admission is sought or with the state where the company is organized.
>
> "The commissioners of the district are authorized to make regulations for the government of the insurance department in matters where the law was made no provision.
>
> "With the approval of the district commissioners, the company seeks to deposit the securities with the Commercial National Bank, under an agreement (a copy of which is filed with this department) that such securities shall be deposited and remain in trust for the benefit and security of all the policy holders of the company, and that they shall not be released except upon a certificate signed by the superintendent of insurance of this state, and the superintendent of insurance of the District of Columbia, declaring that the said deposit is no longer required.

"I write to inquire if, in your opinion, such deposit can be taken as a substantial compliance with the law sufficient to authorize the admission of said company to this state.

"The company otherwise appears to me to be a clean and conservatively managed company, and I have found no further objection to its admission save only the matter of deposit referred to."

There has also been forwarded to me the following certificates made by the Commercial National Bank of Washington, D. C., and by George W. Ingham, superintendent of insurance of the District of Columbia, respectively.

"DISTRICT OF COLUMBIA.
WASHINGTON, February 24, 1913.

"THE COMMERCIAL NATIONAL BANK, a corporation duly incorporated under the laws of the United States and located in said District of Columbia, hereby certifies that attached hereto is the certificate of the superintendent of insurance of the District of Columbia, dated February 21, 1913, reciting the rule and regulation of said superintendent requiring $100,000.00 of the assets of the Equitable Life Insurance Company to be invested in the notes and mortgages described (in items) in the schedule attached to said certificate and deposited with the said The Commercial National Bank, in trust for the benefit of the policy holders of said company; that in pursuance of said rule and regulation, said Equitable Life Insurance Company did on December 10, 1912, duly deposit with said The Commercial National Bank the notes and mortgages referred to and described in said certificate and the schedule attached thereto, for the benefit of the policy holders of said company; that said securities consist of said promissory notes and mortgages, and said mortgages are on unincumbered real estate in said District of Columbia, of at least double value of the respective amounts loaned thereon, and said securities are worth at least one hundred thousand dollars. That said deposit cannot be withdrawn without the consent of the superintendent of insurance of the District of Columbia, and the consent of the superintendent of insurance of the state of Ohio; and that said deposit ever since has been and is now so maintained.

"IN WITNESS WHEREOF, the said The Commercial National Bank has hereunto set its name, by R. E. Clapham its president, and T. K. Sands, its cashier, and caused its official seal to be affixed hereto, the day and year first above mentioned.

"The Commercial National Bank,
By R. E. Clapham, *President.*
T. K. Sands, *Cashier.*"

(Attached to the same is a list of said notes and mortgages.)

"DEPARTMENT OF INSURANCE OF THE DISTRICT OF COLUMBIA."

"WASHINGTON, February 21, 1913.

"I, GEORGE W. INGHAM, do hereby certify that I am the superintendent of insurance of the District of Columbia, and that The Equitable Life Insurance Company is a corporation duly organized under the laws of the congress relating to the District of Columbia, and is duly authorized to transact business of life insurance; that under the authority conferred upon me

as such superintendent of insurance by said laws of the congress I duly made and promulgated a rule and regulation requiring said company to invest one hundred thousand dollars of its assets in promissory notes secured by mortgages on unincumbered real estate in said District of Columbia, of at least double the value of the amount loaned thereon, and deposit the same with The Commercial National Bank of Washington, D. C., in trust for the benefit of the policyholders of said company, said deposit to be so maintained and not withdrawn for substitution of other securities or otherwise without the consent of the superintendent of insurance of the District of Columbia; that said rule and regulation was duly approved by the commissioners of the district of Columbia; that in pursuance of said rule and regulation, said the Equitable Life Insurance Company duly so invested one hundred thousand dollars of its assets in said described securities, and a schedule of the notes and mortgages in which said investments were so made is hereto attached, showing respective dates of notes and mortgages, amounts of loans, location of real estate mortgages, values thereof, maturity of loan and rates of interest payable on the loans; that I am satisfied said notes and mortgages are worth at least one hundred thousand dollars; that in pursuance of said rule and regulation said company on December 10, 1912, duly deposited said notes and mortgages with said The Commercial National Bank of Washington, D. C., in trust for the benefit of the policyholders of said company, and under a stipulation that the same cannot be withdrawn without the consent of the superintendent of insurance of the District of Columbia and the consent of the superintendent of insurance of the state of Ohio; that said deposit has been ever since and is now so maintained.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused my official seal to be affixed, the day and year first above written.

"GEO. W. INGHAM,
"Superintendent of Insurance of the District of Columbia."

(Attached to the same is a list of said notes and mortgages.)

Section 9367 of the General Code of Ohio is determinative of this question, and is as follows:

"No such company shall transact any business of insurance in this state unless one hundred thousand dollars of its assets are invested in the interest paying bonds or stocks of the United States, or of this state, or of any municipality or county thereof, or in the interest paying state bonds or stock of some other state of the United States, of the market value of one hundred thousand dollars in the city of New York or in bonds and mortgages on unincumbered real estate in this state, or in the state under the laws of which it was organized, of at least double the value of the amount loaned thereon, and such bonds and mortgages are deposited with the superintendent of insurance of this state or the chief financial or other officer of the state in which such company was organized, designated by the laws of such state to receive them. If such bonds and mortgages are deposited with the superintendent of insurance or other officer of another state, the superintendent of insurance of this state shall be furnished with the certificates of such state officer, under his hand and official seal, that he as such officer, holds in trust and on deposit, for the benefit of the policy holders of such company, the securities above mentioned, giving the items thereof, and stating that he is satisfied such securities are worth at least one hundred thousand dollars."

I have been furnished a most able and comprehensive brief on this question by Hon. A. I. Vorys, and without going into the question fully, I may say that I agree with his view, that if power has been delegated to the superintendent of insurance of the District of Columbia to make a rule requring deposits by insurance companies in practically the same manner as such requirement is made by section 9367 of the General Code of Ohio, such rule could be held to satisfy the requirement to the extent that it would have the same effect as a law; also that the District of Columbia can be considered, for the purposes of this question, as a state; but it seems to me that the deposit, as made in this instance, does not meet the mandatory requirements of our act. You will take notice that section 9367 makes it mandatory that such bonds and mortgages must be *"deposited with the superintendent of insurance of this state or the chief financial or other officer of the state in which such company was organized, designated by the laws of such state to receive them."* The requirement is further that, "If such bonds and mortgages are deposited with the superintendent of insurance or other officer of another state, the superintendent of insurance of this state shall be furnished with the certificate of such state officer, under his hand and official seal, *that he, as such officer, holds in trust and on deposit, for the benefit of the policy holders of such company, the securities above mentioned."*

This requirement seems to be mandatory and plain, it specifies directly that such deposit *must* be made with the *chief* financial or other officer of the state * * * designated by law to receive them, and further it specifies and requires that you, as superintendent of insurance of this state, must be furnished with the certificate of such state officer that he, *as such officer holds in trust and on deposit said securities.*

It will be seen from the certificate made by The Commercial National Bank and by the superintendent of insurance of the District of Columbia that these securities *are not held by any officer of the District of Columbia,* but that they are held by the Commercial National Bank of the city of Washington D. C. Therefore, it would be impossible for the superintendent of insurance of the District of Columbia (granting for the purpose of the argument that the District of Columbia can be treated as a state, and the rule of the superintendent of insurance as a law) to furnish you the certificate required by section 9367.

I have reached this conclusion with great reluctance, for I understand from you, and other sources, that this is a most excellent company, and one which your department would be glad to have do business in this state; but I am convinced that the legislature intended, in making this requirement as to the trustee for such deposits by insurance companies, to protect the policy holders to the greatest possible extent by requiring such deposit to be made in all cases with the superintendent of insurance of this state, or with the chief financial officer or some other officer of the state in which the company was organized, designated by the laws of such state to receive and hold such deposits. This requirement being made so plain and explicit it seems to me it would be not only improper, but contrary to the fundamental rules of statutory construction to read an exception into this statute upon this important particular.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

Addendum:

Since writing the above opinion the superintendent of insurance of the District of Columbia has made a rule requiring deposits made by legal reserve life insurance companies to be made with him for the benefit of the policy holders of such companies. This rule has been approved by the commissioners of the District of Columbia, and a certified copy of the same has been filed with you, and in pursuance of said rule the Equitable Life Insurance Company of the District of Columbia has made a deposit of

$100,000 in securities with the superintendent of insurance of the District of Columbia, and such fact has been certified to you. The certificate evidencing this deposit is as follows:

"UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA,
DEPARTMENT OF INSURANCE.

May 13, 1913.

"I, GEORGE W. INGHAM, do hereby certify that I am superintendent of insurance of the District of Columbia; that the Equitable Life Insurance Company is a corporation duly organized under the laws of the congress relating to the District of Columbia, and is duly authorized to transact the business of life insurance; that under the authority conferred upon me as such superintendent of insurance by said laws of the congress, I duly made and promulgated a rule and regulation requiring that when a legal reserve, life insurance company, authorized under the laws of, and located in the District of Columbia, shall make a deposit of securities in the District of Columbia for the benefit of its policy holders, such deposit shall be made with the superintendent of insurance, in trust for the benefit of the policy holders of the company, and such deposit shall be held by said superintendent of insurance of the District of Columbia in trust for the benefit of policy holders of the company until all the obligations of the company, for the protection of which the deposit is made, are paid or extinguished; subject, however, to the right of the company to substitute other acceptable securities and to receive the interest, dividends and income on said securities so long as the same are not required to discharge the liabilities for the protection of which said deposit was so made, a copy of which said rule and regulation is hereto attached, together with the certificate of approval of the same by the commissioners of the District of Columbia:

"That by a further rule and regulation I duly required said The Equitable Life Insurance Company to invest one hundred thousand dollars ($100,000.00) of its assets in promissory notes secured by mortgages on unincumbered real estate in said District of Columbia, of at least double the value of the amount loaned thereon, and to deposit said securities with me as said superintendent of insurance in trust, in pursuance of said rule and regulation.

"I hereby further certify that said The Equitable Life Insurance Company duly so invested one hundred thousand dollars ($100,000.00) of its assets in said described securities, and a schedule of the notes and mortgages, in which said investments were so made, is hereto attached, showing respective dates of notes and mortgages, amounts of loans, location of real estate mortgaged, values thereof, maturity of loan and rates of interest payable on the loans;

"That I am satisfied said notes and mortgages are worth at least one hundred thousand dollars, and that said The Equitable Life Insurance Company, in pursuance of said rule and regulation, did on the 13th day of May, 1913, duly deposit all of said notes and mortgages with me as said superintendent of insurance and trustee, and I certify that said deposit ever since has been and is now so maintained.

"And I certify that as said superintendent of insurance of the District of Columbia, I hold said securities in trust for the benefit of all the policy holders of said company, and that said deposit cannot be withdrawn until all the obligations of the company, for the protection of which said deposit was made, are paid or extinguished; subject, however, to the right of the company to substi-

tute other acceptable securities and to receive the interest dividends and income on said securities so long as the same are not required to discharge the liabilities for the protection of which said deposit was so made.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused my official seal to be affixed, the day and year first above written.

"GEO. W. INGHAM,
"Superintendent of Insurance of the District of Columbia."

The certificate of the commissioners of the District of Columbia showing the rule made by the superintendent of insurance and the approval of the same by said commissioners is as follows:

WASHINGTON, May 10, 1913.

"Ordered:

"That the following rule and regulation of the superintendent of insurance of the District of Columbia is hereby approved by the commissioners of the District of Columbia, viz:

"UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA,
DEPARTMENT OF INSURANCE.

"May 10, 1913.

"Under the provisions of section 646 of the laws of congress relating to insurance, providing:

"Said superintendent shall have power to make such rules and regulations subject to the general supervision of the commissioners, not inconsistent with law, etc."

"and section 645, providing:

"Said superintendent shall have supervision of all matters pertaining to insurance, insurance companies and beneficial orders and associations, subject only to the general supervision of the commissioners.

"The superintendent of insurance of the District of Columbia, subject to the approval of the District commissioners, hereby make and establishes the following rule and regulation, to wit:

"When a legal reserve, life insurance company, organized under the laws of and located in the District of Columbia, shall make a deposit of securities in the District of Columbia for the benefit of its policy holders, such deposit shall be made with the superintendent of insurance, in trust for the benefit of the policy holders of the company, and such deposit shall be so held by said superintendent of insurance of the District of Columbia in trust for the benefit of policy holders of the company, until all the obligations of the company, for the protection of which the deposit is made, are paid or extinguished; subject, however, to the right of the company to substitute other acceptable securities and to receive the interest, dividends and income on said securities so long as the same are not required to discharge the liabilities for the protection of which said deposit was so made.

"GEO. W. INGHAM,
"Superintendent of Insurance of the District of Columbia."

The laws of the District of Columbia relative to insurance are very brief, make simply general provisions and give very broad discretionary power to the superintendent of insurance to prescribe rules for the conduct of insurance companies and their business.

Sections 645 and 646 are as follows:

"Section 645. * * * Said superintendent shall have super-

vision of all matters pertaining to insurance, insurance companies and beneficial orders and associations, subject only to the general supervision of the commissioners."

"Section 646. * * * Said superintendent shall have power to make such rules and regulations, subject to the general supervision of the commissioners, not inconsistent with law, as to make the conduct of each company in the same line of insurance conform in doing business in the district."

Under the authority of section 646 the superintendent of insurance made the rule which is above set out. Under this same authority the superintendent of insurance of the District of Columbia has made regulations as to the basis for calculating reserves for fire and life insurance companies, a rule prescribing the table which shall be used in computing the reserves of life insurance companies, also rules prescribing the class of investments for the capital of life insurance companies, and in fact rules on practically all the important branches of the insurance business which in our state are covered by specific laws.

Quoting again section 9367, General Code, which is as follows:

"No such company shall transact any business of insurance in this state unless at least one hundred thousand dollars of its assets are invested in the interest paying bonds or stocks of the United States, or of this state, or of any municipality or county thereof, or in the interest paying state bonds or stocks of some other state of the United States, of the market value of one hundred thousand dollars in the city of New York, or in bonds and mortgages on unincumbered real estate in this state, or in the state under the laws of which it was organized, of at least double the value of the amount loaned thereon, and such bonds and mortgages are deposited with the superintendent of insurance of this state or the chief financial or other officer of the state in which such company was organized, designated by the laws of such state to receive them. If such bonds and mortgages are deposited with the superintendent of insurance or other officer of another state, the superintendent of insurance of this state shall be furnished with the certificate of such state officer, under his hand and official seal, that he as such officer, holds in trust and on deposit, for the benefit of the policy holders of such company, the securities above mentioned, giving the items thereof, and stating that he is satisfied such securities are worth at least one hundred thousand dollars."

The companies particularly referred to are specified by section 9365 which provides:

"No company organized by act of congress, or under the laws of any other state of the United States, shall transact any business, etc."

Strictly speaking this company would be a company in no way subject to or recognized by the laws of this state for it is not organized by an act of congress nor is it organized under the laws of any other state of the United States, but it is organized under the laws of the District of Columbia.

I take it that it was not meant by the enactment of our insurance code relative to foreign insurance companies, to exclude companies which might be organized in any district or territory of the United States from doing business in this state. If such had been the intention it would have been expressed; nor do I take it that it was the intention to allow such companies to do business in this state without complying with our statutes. On the contrary, I think that the only reasonable construction to be placed upon our laws is that these laws are made for the protection of the policy holders in insurance companies, they are not made to discriminate against any company on account of its location. In brief, these statutes make requirements for the protection

of policy holders and if insurance companies comply with these requirements then I think hey could, under our laws, no matter where they are located, and should be allow to do business.

Section 9367, I take it, should not be construed from a territorial view point nor from the standpoint of the insurance companies. Its purpose, it seems to me, is to provide that no foreign life insurance company shall transact business in this state until at least $100,000 of its assets, invested as required by the section, are deposited with the superintendent of insurance in this state or with the chief financial or other officer of the state in which the company was organized, designated by the laws of such state to receive such deposits. The purpose of the statute is to secure the deposit of the securities with some official of the state. It seems to me that it is not essential that the territory in which the company is located shall be a state. There would be no reason whatever for such a holding because it would only result in excluding companies organized in the District of Columbia or in some territory of the United States no matter how sound such companies might be, and for the additional reason that if such was the holding then we would have no laws that could be applied to such companies, and they consequently would be allowed to do business in this state without coming under such requirements. In addition, for the purpose of this question, as well as for practically all purposes relating to comity and intercourse between the states, the District of Columbia can be treated as a state.

In fact it seems to me that upon the question of insurance and the transaction of insurance business, as between the District of Columbia and the state of Ohio, the District of Columbia is for all practical purposes a state.

It is also my opinion that the rule promulgated by the superintendent of insurance of the District of Columbia under the authority given him by the code of that state, for all practical purposes, answers the requirements of section 9367, that the deposit shall be with the "chief financial or other officer * * * designated by the laws of such state to receive them." If it is within the authority of the commissioner to make this rule, then such rule must be considered as a law of the state, just as the rules or orders made by our public utilities commission, when reasonable and within their powers, have the force and effect of laws in this state. (56 Fed. 746, and many other cases which could be cited.)

But again, the question as to whether or not this rule is a law, is immaterial so far as this inquiry is concerned. Whether it is a rule or a law, its purpose is to require the insurance companies to make the deposit with the superintendent of insurance, and the insurance company has complied with this requirement and made the deposit. If any objection should be made, it would have to be made by the insurance company, and as stated, it has complied with the order, and in so doing has met the requirement made by our statute.

My opinion, therefore, is that this company has done everything which is required by section 9367; that the only possible ground upon which it could now be excluded would be that the District of Columbia is not a state, and this holding would result in construing section 9367 as a prohibitive statute in regard to insurance companies, that is prohibitive on account of location, and not of qualification, and I can find nothing in this section or in any of the sections of our insurance code which indicate the intention of the legislature to exclude a company organized anywhere in the United States, which complies with all the requirements of our laws, from doing business in this state simply on account of its location.

I am, therefore, of the opinion that the deposit made by this company with the superintendent of insurance of the District of Columbia is a substantial requirement with our laws and is sufficient to authorize the admission of this company to do business in this state.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

429.

ASSIGNMENT OF WAGES FOR PURPOSE OF PAYING INSURANCE PREMIUMS IS INVALID.

Insurance premiums are not necessaries within the purview of section 12946-1 and section 12946-2, General Code, and the assignment of future or unearned wages for the purpose of making provision for the payment of insurance premiums is invalid.

COLUMBUS, OHIO, August 11, 1913.

HON. E. H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your favor of June 28, 1913, requesting opinion from me in which you say:

> "I enclose you a letter from the Standard Accident Insurance Company which is self explanatory.
>
> "The matter concerning which a ruling of this department is asked is one not relating primarily to insurance, but is of considerable moment and general interest, for all of which reasons I respectfully request your opinion as to the construction to be placed upon section 2 of senate bill No. 132, being an act to provide for the payment of wages at least twice in each calendar month. Such request resolves itself into two queries:
>
> 1. "Does the act in question forbid any assignment of wages except to the extent of 10 per centum thereof, and then only for necessaries?
>
> 2. "Are insurance premiums 'necessaries' within the purview of the act?"

The act referred to by you (103 O. L. 154) has been carried into the General Code as sections 12946-1 and 12946-2, and the same provide as follows:

> "Section 12946-1. That every individual, firm, company, copartnership, association or corporation doing business in the state of Ohio, who employ five or more regular employes, shall on or before the first day of each month, pay all their employes engaged in the performance of either manual or clerical labor, the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof and shall on or before the fifteenth day of each month pay such employes the wages earned by them during the last half of the preceding calendar month; provided however, that if at any time of payment an employe shall be absent from his or her regular place of labor and shall not receive his or her wages through a duly authorized representative, such person shall be entitled to said payment at any time thereafter upon demand upon the proper paymaster at the place where such wages are usually paid and where such pay is due. Provided nothing herein contained shall be construed to interfere with the daily or weekly payment of wages."
>
> "Section 12946-2 No such corporation, contractor, person or partnership shall by a special contract with an employe or by any other means exempt himself or itself from the provisions of this act, and no assignment of future wages, payable semi-monthly, under these provisions shall be valid, but nothing in this act shall prohibit the assignment by an employe of ten per centum of his personal earnings, earned or unearned, to apply on a debt for necessaries. Whoever violates the provisions of this act shall be punished by a fine of not less than twenty-five nor more than one hundred dollars."

The questions submitted by your inquiry depend for their solution upon a construction of the last section of the General Code above set out. I am of the opinion that the words "payable semi-monthly" found therein, limit and are descriptive of the words "future wages" immediately preceding, and not the word "assignments." This is evident from the whole context of the act, and especially from the words under "these provisions," immediately following the descriptive words in question. It follows, therefore, that no assignment of future wages by an employe who is within the provisions of this act is valid unless the same shall be to apply on a debt for necessaries, and then only to the extent of ten per centum of such future or unearned wages.

Your inquiry however, is whether the act in question forbids *any* assignment of wages except for necessaries to the extent of ten per cent. thereof. Prior to the enactment in question it was the decided law in this state that an assignment of wages whether earned, or to be earned in the future, under an existing employment was valid.

Rodijkeit vs. Andrews, 74 O. S., 104.
Porter vs. Dunlap, 17 O. S., 591.

The language of the enacting clause "no assignment of future wages payable semi-monthly under these provisions shall be valid" read separate and apart from the proviso or saving clause following is affective to invalidate all assignments of future wages by an employe within the provisions of this act. The express reference in the language quoted to future wages excludes by implication wages that have been earned from the meaning of the language quoted and leaves wholly unaffected and unchanged the prior law permitting the assignment by an employe of wages that have been earned. (73 O. S. 64, 80.)

The proviso or saving clause immediately following the enacting clause of section 12946-2, is as follows:

> "But nothing in this act shall prohibit the assignment by an employe of ten per centum of his personal earnings, earned or unearned, to apply on a debt for necessaries."

The question suggested by this language of the statute is, whether or not the language quoted having expressly provided that an assignment by an employe of ten cent. of his personal earnings, *earned* or unearned to apply on a debt for necessaries shall not be prohibited, prohibits by implication, an assignment by him of earned wages other than for necessaries. The language quoted, though not formally so stated, is in substance and effect but a proviso or saving clause, in that its only manifest purpose is to limit or restrain the operation of the general terms contained in the enacting clause of this section immediately preceding, and is not, therefore, to be considered as an enactment in addition to what precedes.

Allen vs. Parish, 3 Ohio, 187, 193.
Zumstein vs. Mullen, 67 O. S., 382, 409.

> 'It is the matter of the succeeding words and not the form, which determines whether it is or not a technical proviso."

Carroll vs. State, 58 Ala., 401.

The language of the section making provision as to assignments of wages for necessaries was not in the bill as introduced, but was inserted afterwards, and before enactment. As before noted, the terms of the section, apart from the saving clause, was to make invalid assignments of future wages for any purpose; and it is reasonable

to believe that the legislature, by incorporating in the act the particular language noted as to assignments of wages for necessaries, were actuated therein by a purpose only to withdraw such assignments of future wages from the inhibition of the enacting clause which in itself made invalid *all* assignment of future wages. I conclude, therefore, that the provisions of this section as to assignment of personal earnings for necessaries, is not an independent enactment, but is in substance a proviso or exception, and as such, effective in its operation only as a limitation on the terms of the enacting clause immediately preceding.

Buckman vs. State, 81 O. S., 171, 180.

On the considerations above noted as pertinent to the construction of this section, I am of the opinion that assignments by employes who are within the act, of wages that have been earned is not inhibited, and the prior law as to such assignments remain unaffected and unchanged. Moreover, the consideration that statutory provision which attempt to abrogate or modify a well established rule of the common law should not be extended beyond the plain import of the words used, leads to the same conclusion that the prior law respecting the assignment of wages that have been earned is unaffected by anything in this section.

Felix vs. Griffith, 56 O. S., 39.
State, ex rel., vs. Fronizer, 77 O. S., 7, 16.

It may be added, that where possible, a legislative enactment should not be so construed as to inject any unnecessary question as to its constitutional validity in whole or in part.

Burt vs. Rattle, 31 O. S., 116
Bobilya vs. Priddy, 68 O. S., 373, 387.

It is to be concluded, therefore, that the effect and only effect of this section is to inhibit and invalidate all assignments by employes within the act, of future or unearned wages excepting assigments thereof to apply on debts for necessaries, which by its terms are valid to the extent of ten per cent. of such future or unearned wages.

The second question made in your inquiry is: Are insurance premiums necessaries within the purview of the act? It is evident that the word "necessaries" as used in section 12946-2 is used primarily in the same sense as that properly ascribable to the word as used in our exemption laws with respect to executions or attachments. (Sections 10253, 11725, 11738, 11819, General Code.)

In none of the sections of the exemption laws above noted is there any attempt to define the word "necessaries" as used therein. The term is one whose meaning is often important in other connections and is applied to other legal relations; such as that of infants and persons mentally incompetent with respect to commodities, services or other things of value furnished to them; likewise that of the husband or parent with respect to goods or services furnished the wife or child. There are still other relations in which the signification of the term may become important in the particular case.

Though the immediate context indicates that the legislature in the use of the term "necessaries," in section 12946-2, used the same primarily in the sense in which the term is used in the exemption laws, yet, in the construction of this section it may become important to determine the signification of the term as applied to other legal

relations. This would be true, for instance, with respect to a minor employed under the provisions of the act whose circumstances might not be such as to bring him within the protection of the exemption laws.

It has been suggested that some decisions limit the definition of necessaries for an infant may contract to a narrower class than do the exemption statutes. (9 N. P. N. S., 582.)

I am of the opinion however, that whatever difference there may be in the attitude of the courts with regard to the rights of creditors as against an infant on the one hand, and against persons setting up exemption laws on the other, has respect rather to the circumstances under which the goods or services claimed to be necessaries are furnished than to any difference in the definition or meaning of the term itself in the two relations. For example, though one furnishing supplies to an infant as necessaries is bound to know whether he is already supplied, such is not the case under our exemption laws with respect to attachment on a claim for necessaries furnished an adult person.

Smith vs. Getz, 9 C. C. N. S., 321, 323.

In no relation in which the proper definition and meaning of the term may become important, do I understand that the term is ever one of absolute or fixed signification. In every instance the question in so far as it may depend on the signification of the term is largely a relative one depending on the facts and circumstances of the particular case.

Bouvier as quoted in the case of Watkins vs. Schlecter, 7 N. P., 42, defines the term as follows:

> "Such things as are proper and requisite for the sustenance of man, including food, clothing, medicine and habitation, the term 'necessaries' is not confined simply to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term which must be applied to the circumstances and conditions of the party."
>
> "The word 'necessaries' is not used in the Ohio statutes in the narrow of articles which are indispensable, but it includes all articles which will enable them to live conveniently and decently according to the custom of those among whom they reside."

Pittsburg Water Heating Co. vs. Meckel, 9 N. P. N. S., 581.

However, before the law will permit an inquiry into the facts of a particular case to determine whether articles or services are "necessaries" they must be of such nature or character that the law can say concerning them that under some circumstance or character that the law can say concerning them that under some circumstance they may be considered as such. In other words, though the term itself is a relative one, there are some things which as a matter of law may be said not to be "necessaries."

Tupper vs. Cadwell, 12 Met. 559.
Simpson vs. Pru. Ins. Co., 184 Mass. 349.

In this state, it has never been suggested that insurance contracts may be classed as necessaries or that premiums thereof are binding and collectable obligations as such. On the contrary, it has been assumed that as against an infant, insurance premiums are non-enforcible and voidable at his option.

Life Ins. Co. vs. Hilliard, 63 O. S., 478, 491.

Since the decision in the above case infants have been made competent by statute to contract for life insurance within certain limitations (section 9392-I, G. C.). This legislation is without significance here, other than as legislative recognition of the fact that, aside from the provisions of the statutute, insurance contracts of an infant are not on any consideration enforcible against him.

In other jurisdictions the decisions have been to the point that insurance contracts are not within the class of necessaries in the legal sense of that term as here used.

Simpson vs. Pru. Ins. Co., 184 Mass. 349.
N. H. Met. Ins. Co. vs. Noyes, 32 N. H., 345.
Johnson vs. N. W. Mut. Life Ins. Co., 46 Minn., 365, 370.

I am therefore of the opinion that insurance premiums are not "necessaries" within the purview of the act in question, and that assignments by employes who are within the provisions of the act of future or unearned wages for the purpose of making provision for the payment of insurance premiums are not authorized, but are invalid.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

485.

BLUE SKY LAW APPLIES TO CONTRACTS ENTERED INTO IN ANTICIPATION OF ITS PASSAGE, PROVIDING FOR THE SALE OF STOCK AT MORE THAN FIFTEEN PER CENT—CONTRACTS OF THIS NATURE ENTERED INTO AFTER THE PASSAGE OF THE BLUE SKY LAW AND BEFORE ITS GOING INTO EFFECT ARE CONTROLLED BY THE BLUE SKY LAW.

Where an insurance company prior to the passage of the Blue Sky law, had entered into a contract with some underwriting concern for the sale of its stock at a larger commission than fifteen per cent, such concern may not take subscriptions from the public for such stock without being bound by the provisions of such act.

The Blue Sky law is a statute passed under the police power of the state and the right of the legislature to regulate sales of this kind cannot be questioned.

Where a contract was entered into subsequently to the passage of the act, but before it went into effect, the provisions of the Blue Sky law apply.

COLUMBUS, OHIO, August 6, 1913.

HON. EDMOND H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On July 21, 1913, you made the following request for my opinion:

"I enclose you a letter from Halfhill, Quail & Kirk with reference to the construction to be placed on section 12 of the Blue Sky law.

"A like question will arise in reference to several other insurance companies, which, in anticipation of the law, have made contracts for the sale of their stock at commission so abnormal as to amount to a fraud upon the public, and which seek now to avoid the operation of the law, as regards the sale of their stock, by the claim that the limitation imposed by section 12 of

the Blue Sky law would impair the obligation of the contracts which such companies have respectfully entered into with various agents, underwriting concerns and companies.

"I respectfully request the opinion of your department upon the following:

1. "Where an insurance company, prior to the passage of house bill No. 357, commonly known as the Blue Sky law had entered into a contract with some underwriting concern for the sale of its stock at a larger commission than fifteen per cent, may such underwriting concern take subscriptions from the public for such stock without being bound by the provisions of section 12 of the act, and contrary to the provisions thereof?

2. "May this be done where the contract was entered into subsequent to the passage of the act, but before it went into effect?

"An early reply to these questions will be appreciated."

You also enclose me with your request a letter from Mr. Max E. Meisel, of Clevelabd, Ohio, in re The Ohio Commonwealth Fire Insurance company. I have carefully considered both letters and especially the arguments contained in the letter of Mr. Meisel and the questions raised by the two letters are embraced in your request for my opinion.

Section 12 of what is commonly known as the Blue Sky law, 103 Ohio Laws, 743, found on page 749, is as follows:

"No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or ofler to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:

'No such sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of_____ per cent. of the amount actually paid upon separate subscriptions (or, in lieu thereof there may be inserted, '$_____per share from every fully paid subscription,') and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriper, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority.'

"The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent. of the amount actually paid upon the subscription.

"Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid."

Section 23 of said act found on page 753 is as follows:

"Nothing herein contained shall be so construed as to impair the obligation of prior contracts."

The question in brief is, does section 23 allow persons or companies, for the purpose of organizing or promoting any insurance company, to dispose or offer to dispose, within this state, of any stock in any such insurance company unless the contract of

subscription or disposal of such stock shall be in writing and contain the provision provided in section 12? In other words, if such persons or companies have entered into contracts with other persons or companies to sell their stock at a larger commission than the amount prescribed by the statute are such contracts excepted from the operation of the law and said companies allowed to sell stock without the restrictions imposed by the law?

Section 23 of the Blue Sky law above quoted is certainly no stronger and can be given no broader effect than the provisions of our constitution, section 23 of article II, which is as follows:

> "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers by curing omissions, defects and errors in instruments and proceedings arising out of their want of conformity with the laws of this state."

Indeed, it can be regarded as a reiteration of said constitutional provision, which is also found in the constitution of the United States.

It is contended that section 23 of the act operates to exempt from its provisions all contracts made prior to its going into effect.

Upon consideration it is difficult to see how this could be its effect. The evident purpose of the general assembly in enacting this section was to furnish a rule of construction to the courts, with a view to preserving the validity of the act against possible attack; fearing, no doubt, that without such provision same part of the act, literally construed, might be in derogation of the constitutional inhibition against impairment of the obligation of contracts.

That this must have been in the mind of the general assembly is apparent when we consider that either with or without this section any law impairing the obligation of prior contracts would be invalid. While, in the absence of this provision, if the courts should find that the legitimate construction to be placed on the language of the act was that it sought to impair the obligation of contracts, the courts, of necessity, must declare the act invalid.

Since the language of the constitution is used in the statute, it must be supposed that the general assembly had in mind the construction that the courts have placed upon the constitutional provision, and that it used the words "impairment" and "obligation" as these terms had theretofore been judicially defined.

The section does not purport to be one of *exemption*, taking out certain classes of contracts from under the operation of the statute, but assumes merely to lay down *a rule of construction*. With or without it, the act would be powerless to impair the obligation of contracts, but, in its absence, the courts might have held that the effect of the statute would be to attempt to do this thing, and that therefore the act would be repugnant to the constitution.

As will be observed from the cases hereafter cited, the state, in the exercise of its police power, may lawfully prohibit the doing of an act even though individuals may have theretofore contracted between themselves to do it; and this prohibition by the state is not construed to be within the constitutional inhibition, even though thereby the carrying out of such private contract is made impossible.

The power of the state is neither extended or abridged by the section in question. In the case of the contract in question, moreover, it is apparent that its *obligation* is in no wise impaired, even if we should take of the section under consideration the well nigh impossible view that it is one of exemption rather than of construction.

The *obligation* of the contract referred to is not impaired. It is only within this state that the act undertakes even to *impose conditions* upon the sale of stock. Both

the corporate principal and the agent, or the company and the underwriter, as the case may be, can proceed to sell the company's stock under the terms of their contract anywhere else in the world; and, even in this state, the statute does not attempt to *impair the obligation* of the contract, as between the parties, but only to prevent the agent from doing a thing as regards third parties, which it is admitted that the principal cannot do. To put any other construction than this upon the statute would be to say that while a corporation of Illinois cannot sell its stock within this state without complying with the statute, yet, if it had, prior to the 8th day of August, entered into a contract with somebody else to sell its stock for it, this act, prohibited to the principal, could be performed within our borders by the agent without lot or hindrance. The mere statement of this absurd proposition furnishes its own refutation.

In the light of the authorities cited, it is clear that where the state has, within the proper exercise of its police power, *prohibited the doing* of a certain act, such prohibition is not in conflict with the constitutional provision referred to, even if private contracts have been entered into for the doing of the probihited thing. How, then, can it logically be contended that the passage of an act, admittedly within the legitimate exercise of the state's police powers, *prescribing conditions* under which a sale of stock may be made within this state, is in derogation of such constitutional provision? Especially in view of the fact that there is nothing within the terms of the contract itself that makes it imperative that it shall be performed within this state.

I have no hesitancy, therefore, in holding that the constitutional inhibition does not apply to or save the contracts to which you refer from the operation of the statute. This statute is passed under the police power, and its object is to promote the welfare of the people at large, and the question is not raised here and it is needless to consider it as the constitutionality of the act and the right of the legislature to regulate the sales of stock of this kind cannot be questioned.

"Palmer vs. State, 39 Ohio State, 236."

As to the question as to whether or not contracts of this character are saved by the constitutional provision I cannot improve upon the language used by Professor Freund in his work on police power, section 556, which is as follows:

> "It seems, however, that the constitutional prohibition applies only to laws impairing the obligation of the contract for the benefit of the party obligated. It is not an objection to an otherwise valid police regulation that it makes the performance of a contract valid in its inception impossible. Thus, the power of the state to regulate railroad rates is not defeated by the fact that the railroad company has made a contract with another railroad company that it will not charge less than the rate fixed by the existing statute (Buffalo East Side Street R. Co. vs. Buffalo Street R. Co., 111 N. Y., 132, 2 L. R. A., 384), or that the railroad company has incurred indebtedness upon the basis of an earning capacity calculated on higher rates, (Chicago, B. & Q. R. Co. vs. Iowa, 94 U. S., 155; this point was made in New York and New England R. R. Co. vs. Bristol, 131 U. S. 556, but not considered by the court) and the mere fact that a high rate of interest on bonds cannot be paid under a proposed tariff, would not make that tariff unreasonable.
>
> "The regulation by the legislature of the pressure of natural gas in pipes was held valid although it affected existing contracts, (Jamieson vs. Indiana Natural Gas & Oil Co., 128 Ind. 55, 12 L. R. A. 652) and it has been held that the operation of an ordinance establishing fire limits is not affected by an existing contract to erect a frame house on premises covered by the ordinance, although lumber has been bought on the faith of the contract. (Salem vs. Manyes, 123 Mass. 372; Knoxville vs. Bird, 12 Lea. (Tenn.) 121. See also, New

York vs. Herdje, 68 App. Div. 370, 74 N. Y. Suppl. 104.) So the validity of an act requiring a railroad company to elevate or depress its tracks would not be a affected by the existence of contracts with adjoining owners for track connections. (See Branson vs. Philadelphia, 47 Pa. St. 329).

"Contrary to this doctrine, it was formerly held in Missouri and Kentucky that the power of the state to prohibit or revoke lottery grants could not be so exercised as to defeat rights of purchasers or lenders upon the faith of the franchise, especially when the sale of the franchise had been expressly authorized; but the United States supreme court has held that the abrogation of monopolies is valid notwithstanding such contracts. If, indeed, the grantees of a lottery franchise can be deprived of rights for which they have paid, it follows logically that those claiming under them must be equally unprotected.

"Undoubtedly in all these cases the obligation of a contract is impaired, but it is not impaired in order to confer a benefit upon the obligor or debtor. The principle is that a person cannot, by entering into a contract, impair the power which the state must have for the protection of peace, safety, health and morals. If this were not so, an owner of property who apprehended that a police regulation would be passed affecting his property, would have it in his power to nullify its effect in advance, by making contracts inconsistent with its enforcement. That the relief from the contractual obligation individually benefits the party previously bound by it, is no objection to the validity of the statute, provided such relief is not the primary object of the law. For this purpose laws which impair existing contracts as being prejudicial to public safety and morals should be treated as not enacted for the primary benefit of the party bound. Upon this theory a law limiting hours of labor in the interest of safety or health may apply to existing contracts, although it is within the legislative power to exempt existing contracts from its operation. Strong considerations of public policy require the exemption of existing contracts, and this policy is raised into a principle of constitutional law when the object of the statute is relief from pecuniary or economic burdens."

It seems that from the above authority and the decisions there cited that clearly a negative answer must be given to both of your questions, and especially to the second question for the reason, as pointed out by Professor Freund in the paragraph quoted above, that a contrary holding would allow corporations and persons, by entering into socalled contracts, whether in good faith or not, during the referendum period, to nullify the laws of this state. A further reason why negative answers should be given to each of your questions is also found in the fact that both of the requests made of you come from corporations and our constitution contains the following provisions, section 2 of article I, and section 2 of article XIII, and even if the law as it stood had allowed these corporations to enter into the class of contracts now claimed, still such laws were subject to amendment or repeal and said corporations acquired no vested rights under the same, nor no privileges which could not thereafter be altered or taken away.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

553.

COMPANIES WRITING LIABILITY INSURANCE AND COMPANIES THAT INSURE CORPORATIONS AND PERSONS AGAINST LOSS OR DAMAGE ON ACCOUNT OF PERSONAL INJURY OR DEATH RESULTING FROM ACCIDENT, OTHER THAN EMPLOYES, MUST MAKE THE DEPOSIT AS REQUIRED BY LAW.

Corporations that write liability insurance, as well as those companies which insure persons or corporations against loss or damage on account of personal injury or death resulting from an accident, other than employes, must make the deposit required by paragraph 2, section 9510, General Code.

COLUMBUS, OHIO, October 13, 1913.

HON. EDMOND H. MOORE, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—In your letter of September 19, 1913, you make the following request for my opinion:

"Paragraph 2, section 9510, General Code, provides that, among other classes of insurance that may be written by companies of the class referred to in such paragraph, such companies may:

" 'Make insuranse to indemnify employers against loss or damage for personal injury or death resulting from accident to employes or persons other than employes, and to indemnify persons and corporations other than employers, against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country, admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance * * * fifty thousand dollars,' etc., etc.

"Liability for personal injury and death resulting to persons other than employes, from accidents occasioned by automobiles, is daily growing to constitute a considerable class of risks against which automobile owners seek indemnity.

"Certain casualty companies which do not write employers' liability insurance, desire to cover under their automobile policies this hazard, but contend that it is unnecessary to make the deposit referred to, and many of them would prefer not to write the insurance rather than to have so large a part of their capital tied up in the shape of a special deposit.

"The usual form of the insuring clause in the automobile liability policy reads substantially as follows:

" 'To indemnify the insured againat loss from the liability imposed by law for damages on account of bodily injuries or death suffered by any person or persons other than employes, as the result of an accident occurring while this policy is in force and caused by reason of the use, ownership or maintenance of the automobile covered hereunder.'

"I respectfully request your opinion upon the following:

"Where an insurance company does not write employers' liability insurance, but merely indemnifies persons or corporations against loss or damage for personal injury or death resulting from accidents to persons *other than employes,* is it necessary for such insurance company to make the deposit referred to in paragraph 2, of section 9510:

"In other words, is the word 'and' used in the phrase 'admitted to transact the business of indemnifying employers and others', to be read 'or'? "

As you have fully quoted the portion of paragraph 2 of section 9510 of the General Code, which gives rise to your inquiry, it is unnecessary to quote it again.

It is well known that the word "or" is frequently used in the same sense as the word "and." In fact there is good authority for holding that the words are interchangeable as may be required to give the statute meaning.

Section 397, of Lewis' Sutherland Statutory Construction, 2nd edition, is as follows:

"The popular use of "or" and "and" is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context."

It seems to me therefore, that the use of the word "and" in the statute now under consideration is an instance where the word should be given the meaning usually expressed by the word "or." If this were not done, and the word "and" should be regarded as used strictly in its ordinary sense, then this statute would fail to accomplish what seems to me is its expressed intent, viz., that foreign companies transacting the business of indemnity insurance shall make a deposit with the superintendent of insurance of this state to protect the holders of policies issued by them.

The first clause of the first sentence of the paragraph provides that companies may be admitted to make insurance "to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or *persons other than employes.*"

The second clause provides that such comapnies may make insurance "to indemnify persons and corporations *other than employers* against loss or damage * * from accidents to other persons or corporations."

The sentence placing the restriction on such companies provides that, "a company * * * admitted to transact the business of indemifying employers and others" must make the deposit.

The clause appearing in the policy issued by the companies which claim to be exempt, as stated by you, provides for insurance "against loss * * * suffered by any person or persons *other than employes* * * *."

The statute is plain upon its face. It authorizes,

First, the issuance of insurance policies to *employers* to insure them against loss or damage on account of injuries or death from accidents to employes or persons other than employes.

Second, the issuance of insurance to indemnify all persons and corporations *other than employers.*

The restrictive portion of the section clearly refers to the two classes named in the first portion of the paragraph, viz., "employers" and "persons and corporations other than employers," referred to by the word "others."

It seems clear to me, therefore, that the restrictive portion of this statute applies to both classes of policies and, if necessary, the word "and" as used may be read as "or." If this is not done, then a company which qualified to make insurance, and did make insurance as authorized by the first section, indemnifying employers only against loss resulting from injuries or death of employes, would not have to make the deposit because it did not issue such insurance to *"employers and others,"* and the company which made insurance as provided by the second clause of the paragraph, insuring persons other than employers would not have to make the deposit because it did not

insure *employers*. This would result in the deposit being required only from companies whom issued policies to employers protecting them against loss or damage on account of injuries or death resulting from accidents to employes or persons other than employes, which, in turn, would mean that it would not only be impossible, but entirely feasible, to write all the insurance authorized by this section without making any deposit whatever. That is, one company could write insurance policies protecting employers against loss on account of injuries to employes, and another company could write policies protecting against loss to persons other than employes, for, manifestly, the fact that a person may be classes as an employer, for instance, the owner of a factory, would not classify him as an employer in case he wished to buy an insurance policy protecting him from accidents caused by his automobile to persons not in his employ.

My opinion, therefore, is that not only the companies which write employers' liability insurance, as commonly understood, but also companies which insure person or corporations against loss or damage on account of personal injury or death resulting from accidents to persons *other than employes*, must make the deposit required by paragraph 2 of section 9510, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

278.

BUILDING AND LOAN ASSOCIATIONS NOT AUTHORIZED TO RECEIVE AND HOLD COUNTY, CITY AND TOWNSHIP FUNDS.

Inasmuch as the statutes do not so authorize, building and loan associations may not become depositories of county, city and township funds.

COLUMBUS, OHIO, May 15, 1913.

HON. E. H. MOORE, *Inspector, Building and Loan Associations, Columbus, Ohio.*
(HON. JAMES A. DEVINE, *Deputy*).

DEAR SIR:—On February 5, 1913, you made the following request for my opinion:

> "Has a building and loan association the right to bid on county, city and township funds, and, if they are awarded same under a bid, are they permitted under the statute to handle such funds?"

I have carefully examined the provisions of the General Code relative to the depositing of public funds of counties, cities and townships and find no authority whatever for depositing any such funds with building and loan associations, nor for building and loan associations bidding for such deposits.

The provisions for the depositing of county funds, sections 2715 to 2745 inclusive, refer only to banks and trust companies. The sections as to municipal funds, sections 4294 to 4299 inclusive, refer only to banks (but I take it that wherever the word "bank" is used trust companies having power to receive money on deposit would also be included).

The sections as to township funds, being sections 3320 to 3326, inclusive, refer only to banks but the word "depository" is also used. The first section relating to township funds, 3320 is as follows:

> "The trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the hands of the treasurer of the township,

and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions."

As the subsequent sections refer only to banks I take it that "depository" as used in section 3320, refers also to banks and probably to trust companies, and cannot be held to include building and loan associations.

An act was passed by the 80th general assembly authorizing the treasurer of state to deposit state funds in a limited amount in building and loan associations located in the districts in Ohio affected by the floods of 1913. This act is now in operation. With this exception I know of no authority in law for depositing the public funds of the state, or any of its political divisions, in building and loan association.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

279.

STREET ASSESSMENTS ON REAL ESTATE OWNED BY BUILDING AND LOAN ASSOCIATION INDISPENSABLY CONNECTED WITH AND SHOULD BE CHARGED TO SUCH REAL ESTATE.

COLUMBUS, OHIO, May 15, 1913.

HON. E. H. MOORE, *Inspector of Building and Loan Associations, Columbus, Ohio.*
(HON. JAS. A. DEVINE, *Deputy*).

DEAR SIR:—In your letter of March 25, 1913, you make the following request for my opinion:

"Where building and loan associations carry real estate accounts, can street assessments be charged as a part of the cost to such real estate accounts?

When a building and loan association is held to pay a street assessment upon real property owned by it, it would seem not only right to charge such street assessment to the cost of such real estate, but in fact that is the only place where it could properly be charged if a real estate account is carried by the association. A street assessment is not an ordinary expense; it is attached to and inseparably connected with the real property on which it is assessed, and should, therefore, be charged to that property.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

392.

BUILDING AND LOAN COMPANY—NAME OF DEPOSITOR SHOULD APPEAR ON CERTIFICATE OF DEPOSIT IN BUILDING AND LOAN COMPANY—RECORD OF CERTIFICATE.

The practice of a building and loan company making certificates of deposit in which the name of the depositor does not appear on the certificate nor on the books of the company, the record of the certificate being kept by number only, is a practice that is obnoxious to the principal upon which building and loan companies are founded and should not be permitted by the building and loan department.

COLUMBUS, OHIO, May 16, 1913.

HON. E. H. MOORE, *Inspector, Building and Loan Associations, Columbus, Ohio.*
(HON. JAMES A. DEVINE, *Deputy*).

DEAR SIR:—On September 14, 1912, you made the following request for my opinion:

"We are enclosing herewith specimen copy of coupon certificate of deposit, recently put into use by a certain building and loan association, and beg to call your attention to the advertising matter on the back thereof, describing the two different forms of these certificates, viz:

"1. Registered; that is, made out in the name of the depositor.

"2. Made payable to bearer, 'in which latter case the name of the depositor does not appear on the certificate nor on the books of the company; the record of the certificates being kept by number only.'

"Will you kindly advise whether the use of this unregistered certificate is permissible under the present building and loan laws, or does the fact that such a certificate (payable to bearer with the possibility of its being transmitted by the depositor to another person without such transfer being entered upon the company's records) and the interest accruing thereon, could be collected by anyone in whose possession the certificate might be, bring the use of such a certificate within the class of business which a building and loan association is prohibited from doing?

"We would also direct their attention to what they say in regard to the 'strictest privacy' afforded by such certificate."

The portions of the advertisement to which you refer are as follows:

"These certificates are either registered, that is, made out in the name of the depositor, or are made payable to bearer, in which latter case the name of the depositor does not appear on the certificate nor on the books of the company; the record of the certificate being kept by number only.

"*This insures the strictest privacy, and thus no one but the depositor himself knows how much money he has on deposit or where it is deposited.*

"For various reasons it frequently happens that it is very desirable that a depositor's surplus funds shall be kept strictly private, and by placing them in an unregistered certificate of deposit, they are free from any kind of outside interference whatsoever, being in this respect safe, convenient and serviceable as unregistered municipal government bonds.

"INCOME.—These certificates bear 5 per cent. interest payable twice a

year; and thus, in addition to the absolute safety they provide, return a much higher rate of interest than municipal or government bonds which yield from 2 to 4 per cent. at the very most. A coupon is attached to this certificate for each six month's interest. When this interest is due, the depositor simply clips it off and deposits it at his bank as he would a check, or cashes it wherever it may be most convenient for him to do so. As the coupons are made payable to bearer, they do not require any endorsement or identification.

"WITHDRAWABLE:—These certificates can, under ordinary circumstances, be withdrawn by the depositor at any time desired. Notice of withdrawal has never been required by the company, although it reserves the right to require the usual sixty days' notice in case of unforeseen emergencies that might arise through causes beyond the control of the company. This right is reserved merely as an additional safety measure andisfor the general protection of all the depositors of the institution, though as above stated, it has never been put into effect, nor is there any special reason to expect that it ever will. Nevertheless it is a safeguard which conservative business methods warrant."

I would call your attention to the following sections of the General Code, relative to deposits in building and loan associations.

"Section 9648. To receive money on deposit, and all persons, firms, corporations and courts, their agents, officers and appointees may make such deposits and stock deposits, but such corporation shall not pay interest thereon exceeding the legal rate. When such deposits or stock deposits are made to the joint account of two or more persons, whether adults or minors, with a joint order to the corporation that such deposits or any part thereof are to be payable on the order of any one or more of such joint depositors, and to continue to be so payable, notwithstanding the death or incapacity of one or more of the persons making them, such account shall be payable to any one or more of such survivors or survivor or order, notwithstanding such death or incapacity. No recovery shall be had against such corporation for amounts so paid and charged to such account.

"Section 8652. To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders."

In the first place the certificate, as described in the advertisement, violates, at least by implication section 9652, because it is practically held out as a demand account, that is, while the association reserves the right to acquire sixty days' notice, it is stated that under ordinary circumstances the deposits can be withdrawn at any time, which of course would amount to "on demand."

In addition, it seems clear to me that section 9648 contemplates that all deposits in building and loan associations shall appear in the name or names of the person or persons making the deposits, or for whose credit the deposit was made. To permit deposits of this character, issuing the certificate of deposit payable simply to bearer, with no record on the books of the company whatever to show by whom the deposit was made, and nothing whatever to identify it except the number, it seems to me would be very bad business for any institution receiving money on deposit, and especially obnoxious to the principle upon which building and loan associations operate.

My opinion is that the receiving of deposits in this manner and the issuance of such certificates should not be permitted by your department.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

P. S. I herewith return the certificate which you forwarded to this department.

399.

MAGAZINES—NEWSPAPERS—AMERICAN BUILDING ASSOCIATION NEWS —BUILDING AND LOAN ASSOCIATION—ANNUAL REPORT.

The distinction between a magazine, especially a monthly magazine, and a newspaper is well marked. A newspaper is not and cannot be considered a monthly magazine.

The American Building Association News is not a newspaper as prescribed by section 683 of the General Code, which provides that annual reports of building and loan associations shall be published in a newspaper regularly issued in the county in which it is located.

COLUMBUS, OHIO, July 22, 1913.

HON. E. H. MOORE, *Inspector, Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—In your letter of July 10, 1913, you make the following request for my opinion:

> "I desire your opinion upon the following question:
>
> "Section 683 of the General Code provides that annual reports of building and loan associations shall be published 'in a newspaper regularly issued in the county in which it is located.'
>
> "I am enclosing with this letter copies of the American Building Association News, a monthly magazine published and issued at Cincinnati, Ohio. The question is, 'Is the American Building Association News a newspaper as prescribed by the statute?'
>
> "I am submitting you copies of the issue of this magazine for December, 1912, January, February, March, April and May, 1913, received at this office monthly as a regular issue and a regular subscriber. I also submit copy of the issue of May, 1913, obtained by request from the Ohio Valley Loan & Building Company, of Cincinnati, who reported in their annual statement that publication had been made in said American Building Association News. You will observe that the sworn statements are not published in the regular issue of this magazine, but that the supplement attached to the May, 1913, issue, shows the form in which these reports are published.
>
> "I also submit a brief sent to this department by the American Building Association News, supporting their contention that they are within the purview of the statutes, a newspaper."

Section 682 of the General Code is as follows:

> "The report required in the preceding section shall be the form and contain such information as is prescribed by the inspector of building and loan associations. It shall be sworn to by the secretary and its correctness attested by at least three directors or an auditing committee appointed by the board. The original shall be filed with the inspector of building and loan associations within forty days after the close of the fiscal year. Such an abstract thereof as the inspector requires shall be posted for sixty days in the office of meeting

place of such association, and published in a newspaper regularly issued in the county in which it is located."

Therefore, the sole question to be answered is whether the American Building Association News is a "newspaper regularly issued in the county in which it is located." I take it from your letter, and from the copies of the magazine which have been submitted to me, that there can be no question but that the American Building Association News is regularly issued in the county in which the Ohio Valley Loan and Building Company is located, i. e., Hamilton county, Ohio, and, therefore, the question is whether this publication is a newspaper?

The law books are full of definitions of the term "newspaper" but though the definitions are so numerous, strangely enough, it seems almost impossible to find one that is definite. Perhaps the best definition is that given in 29 Cyc., page 693, which is as follows:

> "A newspaper is the ordinary acceptation of the term is a publication in sheet form, intended for general circulation, published regularly at short intervals, and containing intelligence of current events of general interest. It follows from this definition that if a publication contains the general current news of the day, it is none the less a newspaper because it is devoted primarily to special interests, such as legal, religious, political, mercantile or sporting."

The Century dictionary defines the term as follows:

> "A paper containing news; a sheet containing intelligence or reports of passing events, issued at short but regular intervals, and either sold or distributed gratis; a public print, or daily, weekly, or semi-weekly periodical, that presents the news of the day, such as the doings of political, legislative, or other public bodies, local, provincial or national current events, items of public interest on science, religion, commerce, as well as trade, market and money reports, advertisements and announcements, etc."

The definition in Webster is as follows:

> "A sheet of paper printed and distributed, at short intervals for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents, and the like."

I have carefully examined the copies of the American Building Association News which you have sent me, viz.: the issue for December, 1912, for January, February, March, April and May, 1913. The publication itself proclaims on the first page that it is a monthly magazine, its caption or title page being as follows:

THE AMERICAN BUILDING ASSOCIATION NEWS
A Monthly Magazine
Official Organ United States League
Offices:—15 West Sixth St., Cincinnati; 314 S. Canal St., Chicago.
Subscription, $2.00 Per Annum. Canadian and Foreign, $2.25
Entered as Second Class Matter at the Post Office at Cincinnati, O., under Act of Congress of March 3, 1879.
Since 1880, The Recognized Authority on Building Association Matters.

Vol. XXXIII. May, 1913. No. 5.

On the cover of the magazine it is also stated that it is published monthly. On examining the copies which you have sent me I find that all of its contents relate to matters of interest to building and loan associations; that is, particularly to the associations themselves. I am unable to find any current or general news whatever, and applying the definitions above given to this publication I cannot find that it answers the definition in any particular. It is not in sheet form; from its purpose and contents it cannot be designed for general circulation; at the widest its circulation could only be among those interested in building and loan association matters; it is not published regularly *at short intervals*, although I take it that it is published regularly, yet it is published once each month, and so far as I can ascertain it contains no intelligence of current events of general interest not any of the current news of the day.

I am, therefore, compelled to hold that it is not a newspaper as contemplated by the statute. Even if this publication did answer some of the requirements held to be necessary to constitute a newspaper, still I would be compelled to hold that it is not a newspaper; it is a monthly magazine, and so proclaims itself, and I have never heard of a monthly magazine being called a newspaper. It will be noted in the definition given in the Century dictionary, above quoted, that a newspaper is a "public print, or daily, weekly or semi-weekly periodical." The same authority also defines a "magazine as" a pamphlet periodically published, containing miscellaneous papers or composition." The definition in Webster is substantially the same. Therefore, the distinction between a magizine, especially a monthly magazine and a newspaper is well marked, and a newspaper is not and cannot be considered as a monthly magazine.

My holding, therefore, is that the American Building Association News is not a newspaper as prescribed by section 683, General Code.

In addition to the above, and upon an examination of the copies of this magazine sent to me, I find that the report of the financial statement of the Ohio Valley Loan and Building Company was not contained in any form in the issue of the magazine for May which was sent to you, but that in another issue of the same magazine for the same month a sheet of paper, called "supplement to the American Building Association News" is pasted in the copy of the magazine. This so-called sheet, or supplement, contains the financial statements of seven building and loan associations and a small advertisement of the American Building Association News, and nothing else. There is no index of the magazine that refers to the supplement, and from the fact that it appears in one copy of the May issue and does not appear in the copy sent to you, it would seem that it was not included in all of the copies of the issue. This, of course, would not be "publication in a newspaper (even if the said magazine were a newspaper) as required by the statute. The statute provides that the statement must be "published in a newspaper" and were the question before me, I would be compelled to hold that the statute means what it says—that the statement must be actually published in a newspaper and not simply printed on a separate sheet and pasted on to the paper which purports to publish it.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

P. S. Copies of the magazine and other papers sent to me are returned herewith.

447.

PERSONS MAKING DEPOSITS IN A BUILDING AND LOAN COMPANY CANNOT BE HELD AS STOCKHOLDERS UNLESS THEY SUBSCRIBE FOR CAPITAL STOCK.

A person making deposits in a building and loan company in the manner provided in their respective constitutions, cannot be treated as a member or stockholder unless he subscribes for a definite number of shares of capital stock of such association.

COLUMBUS, OHIO, July 18, 1913.

HON. E. H. MOORE, *Inspector, Building and Loan Associations, Columbus, Ohio.*
(HON. JAMES DEVINE, *Deputy*).

DEAR SIR:—I am in receipt of your letter of March 25, 1913, in which you make the following request for my opinion:

> "Can a building and loan association carry running stock accounts without a written subscription for a designated number of shares in such association?"

Section 9649 of the General Code is as follows:

> "To issue stock to members on such terms and conditions as the constitution and by-laws provide. Each member may vote his stock in whole or fractional shares, as the constitution and by-laws provide, but no person shall vote more than twenty shares in any such corporation in his own right, nor have the right to cumulate his votes. But every subscriber for stock in accordance with the constitution of the association, may vote the amount of stock so subscribed for, in no event to exceed twenty shares."

You will note that this section refers to "every subscriber for stock." Taking the language of this section and the language of the entire chapter governing building and loan associations there is nothing which can give rise to the inference that stock in an association can be issued in any other way than the method usually followed. That is, that each person desiring to have stock issued to him must, in some manner, subscribe for the same or else have a certificate of stock issued to him. It seems to me that the methods proposed by the constitutions of the associations which are quoted by you do not amount to stock subscriptions at all. They are nothing more nor less than ordinary deposits, and it would be impossible if a person, making a deposit of this kind, objected, to hold him as a stockholder. There would be no agreement, express or implied, by which he could be held unless it could be shown that he had read the constitution and by-laws of the association and fully agreed and assented to them when he made the deposit.

It was held in the case of the Turner Bau-Verein, No. 3 vs. Robert Woodburn, 27 Ohio Law Bulletin, 409, that a person making a general deposit in a building and loan association is not a member. The court at page 411, says:

> "I am aware that for many years section 3834 has given a power to receive general deposits and loan them to members, but these general deposits may be made by non-members without subscribing for shares, and in such unlimited amount as the association may determine; but such depositors are not shareholders or members, and cannot be fined, or share in the dividends, or receive interest or earnings in excess of legal rates."

I would call your attention to section 9642 of the General Code, which reads as follows:

> "To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor and demand commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders."

Though you do not quote the provisions of these constitutions as to withdrawals, yet on deposits made in this extraordinary method, in the absence of anything to the contrary, the suspicion arises that this is a method devised to allow building and loan associations to transact an ordinary banking business, which cannot be done.

My opinion, therefore, is that persons making deposits in building and loan associations in the manner provided in these respective constitutions cannot be treated as members or stockholders unless they subscribe for a definite number of shares of the capital stock of such associations.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Liability Board of Awards)

48.

INFANTS INCLUDED WITHIN EMPLOYERS LIABILITY ACT—PAYMENT FOR INJURIES OUT OF STATE FUNDS VOIDABLE UPON ATTAINMENT OF MAJORITY—PAYMENT TO GUARDIAN.

As a general rule of law, all contracts of an infant, except those for necessaries, are voidable by him at his election made within a reasonable time after he becomes of age. Inasmuch as it has been deemed necessary by the legislature to make express exception in certain cases, with reference to contracts which are binding upon him, (to wit. the receipt of a minor for money deposited by him with a building and loan association or a bank, and the payment for a life insurance policy) and as no such exception has been made with reference to the payment of an infant out of the liability funds for injuries received by him, an infant must be held to have the right to sue at law for injuries sustained, upon the attainment of his majority, notwithstanding such payment.

Where injuries are sustained, therefore, and such minor is entitled to payment from the state fund, such payment should be made to his guardian, and if he has no guardian, the board of awards should require one to be appointed before making payment.

COLUMBUS, OHIO, December 20, 1912.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—In your letter of April 15, 1912, you make the following request for my opinion:

> "We desire your opinion as to the statue of minors under the workmen's compensation act. The questions upon which we desire your opinion are:
>
> "1. Does the manner of election provide in section 20-1 apply to minors as well as adults?
>
> "2. And in case a minor is injured, after his employer has elected to take advantage of the workmen's compensation act, and such minor is entitled to the benefits of the act, should such benefits be paid directly to the minor, or is it necessary that payments be made to a guardian?"

The questions asked by you are very important, and I have had great difficulty in satisfying my own mind as to the same, and, for this reason, I have refrained until now from expressing my opinion.

It seems to be settled that all contracts of an infant, except for necessaries, are, in general, either void or voidable. A contract to supply necessaries, at a reasonable price, is binding upon a minor; except for necessaries, and except where a special statutory provision is made, the rule seems to be as stated above. In the case of Harner vs. Dipple, 31 O. S., 72, at page 73, the court say:

> "Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently."

And again, on page 77, the court say:

> "In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be thus resolved: The privileges of

infancy is accorded for the protection of the infant from injury, resulting from imposition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age."

In the case of Lemmon vs. Beeman, 45 O. S., 505, at page 509, the court say:

"The true doctrine now seems to be that the contract of an infant is in no case absolutely void. 1 Par. Cont. 295, 328; Pol. Cont. 36; Harner vs. Dipple, 31 O. S., 72; Williams vs. Moor, 11 M. & W., 256. An infant may, as a general rule, disaffirm any contract into which he has entered, but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance, on his arriving at age; in other words, infancy confers a privilege rather than imposes a disability."

The question raised by your request is, therefore, whether the case of a minor, employed by an employer who has elected to come under the terms of the Ohio workmen's compensation act, is an exception to the general rule. There are many strong reasons why it should be regarded as such an exception. In the first place, as stated in the letter of Mr. Yaple, accompanying your request, a minor may contract for services on his own account, his parents knowing of this and making no objection, and the child is entitled to his earnings, and payment to him would be a discharge against any claim of the parent. It is true, also, that it was, undoubtedly, part of the purpose in enacting the employers' liability act to provide a method by which an injured employe could receive compensation for his injuries without resurting to court, without the necessity of employing lawyers, and with no expense whatever; in other words, that the entire award should be paid to the employe. This purpose of the act is in part defeated in the case of an injured minor, if it is necessary to have a guardian appointed, to whom the award may be paid, for the reason that the appointment of a guardian necessitates resort to the probate court, court costs, and, in most cases, guardian's compensation and attorney fees. It is also true that the contract under which a minor employe comes under the Obio workmen's compensation act is a contract prescribed by law, a contract, in fact, in pursuance of the declared public policy of this state, and, consequently, a contract which could not possibly be regarded as unfavorable to the minor. It is true, too, that section 35 of the act provides that,

"Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid *only* to such employes or their dependents."

and thus clearly expresses the intent of the act, that in all cases payments are to be made directly to the person entitled thereto, without intervention being necessary from any source.

The above reasons, and each and all of them, tend very strongly to the conclusion that a contract of this character should be regarded as an exception to the general rule in regard to minors, and that payment could legally be made directly to the minor, and that such payment would be an acquittance, not only to the state liability board of awards, but would also relieve the employer from any liability to an action on behalf of the minor. I have given full weight to all of these considerations, and still they do not seem conclusive to me, in face of the firmly established principle of law in regard to minors, above mentioned, and other considerations which I shall now briefly mention.

Aside from contracts, all of the rights of minors are most carefully guarded by our laws; thus in the statutes of limitation, limiting the time within which various

actions may be brought, it is found that an exception is made as to infants and persons of unsound mind, the limitation not starting to run until the disability is removed. There are many of these sections, applying to different kinds of actions, and, in fact, all of our code of civil procedure has woven into it this principle of the protection of minors—the provisions as to wills, as to the administration of estates, time for commencement of actions, proceedings in error, etc. The laws also provide that the action of an infant must be brought by his guardian or next friend.

Then, there is an entire chapter of the Criminal Code specifying and classifying offenses against minors. In this chapter is found a section (section 12989, General Code) providing a penalty for a person or corporation retaining or withholding from a minor, in his or its employment, the wages or compensation, or any part thereof, agreed to be paid and due such minor for work performed. This section, in a way, is responsive to one of the matters referred to in Mr. Yaple's letter—that the wages earned by a minor may be paid to the minor direct; in a way, compels such payment to the minor direct; and is an exception to the general rule.

The various statutes I have above referred to, both civil and criminal, have for their end the preservation of all the rights of a minor, whatever they may be, until he reaches the age of majority; and also seek to protect the minor, in all respects in which it has been demonstrated by experience that, in the matter of employment or otherwise, a minor should be protected.

I am not able to say that my search has been exhaustive but, at this time, I can only point to three statutory provisions by which the acts of a minor are made valid, which, except for the special provision of the statute, under the general rule first mentioned in this opinion, would not be valid. In the act governing building and loan associations is found section 9654, General Code, which is as follows:

> "To issue stock to minors and receive deposits thereon and permit both stock and deposits to be withdrawn, transferred, pledged and voted by such minors as other stock and stock deposits; to receive deposits of money by or for minors and to pay them to such minors, or upon their order. The receipt or paid order of such minor, therefor, shall be a valid acquittance of the rights of all concerned."

In the act relating to the organization and powers of banks is found section 9770, which is as follows:

> "When an account is opened in a savings bank by a minor it shall be payable to such minor, and payment to him shall be as valid as if he were of legal age."

In the act relating to legal reserve life insurance companies is found section 9392-1, General Code, which is as follows:

> "In respect to insurance heretofore or hereafter issued upon the life of any person between the ages of fifteen and twenty-one years, for the benefit of such minor, or for the benefit of the father, mother, husband, wife, child, brother or sister of such minor, the insured shall not, by reason only of such minority, be incompetent to contract for such insurance, or for the surrender of such insurance, or to give a valid discharge for any benefit accruing, or for money payable under the contract."

This last quoted section comes very close to the question we have before us, but it relates only to life insurance companies. Of course, the question could arise, and in fact has often arisen, whether a contract of life insurance, taken out by a minor

is really a contract beneficial to the minor; this depends, of course, on each individual contract. But there can be no question but that the deposits in a building and loan association, and in a savings bank, by minors, are both contracts favored by the law, contracts which are certainly to the interest of the minor; and it could be said of them, as well as of the one which we have under consideration, that there is every reason why, when the deposit is made by the minor, of his own money, it should be proper for the same to be paid to him direct, and not cause him to have a guardian appointed. But it also seems clear, from the enactment of these sections, that, on account of the general rule as to minors, it was felt that a receipt by a minor for money which had been deposited by him with a building and loan association, or a bank, would not be valid in case the minor chose to disaffirm the same after reaching the age of majority; hence, the necessity of these statutes. I regard these provisions, special in their nature, as tending strongly to the conclusion that in the absence of special statutory provision, the rule as to the liability of a minor for his contracts is the same now as that quoted in the first part of my opinion, namely: that all contracts of an infant, except those for necessaries, are voidable.

> "All contracts of an infant, except those for necessaries, are voidable by him, at his election, made within a reasonable time after he becomes of age. Englebert vs. Pritchett, supreme court of Nebraska, as reported in 26 L. R. A., page 177. (See note.)
>
> "Where an infant, seventeen years old, obtains a policy of insurance, upon which he pays the premium and makes several semi-annual payments during his minority, but disaffirms the contract immediately upon his becoming of full age, and offers to surrender his policy to the insurance company, and demands the return of the money so paid, he can, in case of refusal, maintain an action for its recovery. Johnson vs. Northwestern Mutual Life Ins. Company, supreme court of Minnesota, as reported in 26 L. R. A., 187.
>
> "Upon repudiating his contract of life insurance and surrendering to the company its policy therefor, an infant may recover the whole amount of premiums paid by him thereon. Prudential Insurance Co. vs. Fuller, 9 C. C. N. S., 441."

Take a case where a minor employe is injured in the course of his employment, and the employer settles with such minor his claim for damages; it has been held, time and again, that such settlement does not protect the employer, and that the minor, upon reaching majority, can avoid the contract of settlement and bring an action for damages, notwithstanding the same.

The question really before us is:

> "In case a minor employe of an employer who has elected to come under the terms of the Ohio act, is injured in the course of his employment, makes application to your board for an award, and is granted an award as compensation for his injuries, after he reaches the age of majority, within a reasonable time, brings suit against his employer, on account of said injury, for which he had filed a claim and received an award, would the fact that the employer, at the time said injury occurred, was under the protection afforded by your board, and the employe had filed his claim and received an award, be a defense to said action?"

I am disregarding the question as to whether an offer was made by the minor after reaching majority, and before or at the time he brought such action, to repay to the state the amount he had received as an award from your board, as I do not feel

that it is necessary to discuss it here, for we must take the broadest view of this question, and if such action could be maintained at all, it is immaterial for the purposes of this question whether or not restitution is necessary.

My opinion is that this question must be answered in the negative. The Ohio act is entirely silent as to minors; no reference whatever is made as to them; and, with the rule as to the liability of minors upon their contracts so well settled, with the decisions I have quoted in mind, also the further signicant fact that, in certain instances of contracts, which can be classed as of as much benefit to the minor as the contract with your board, the legislature has especially provided that payment to the minor should be an acquittance, I rather incline to the view that the courts would hold, in the absence of any such provision in the compensation act, that a minor could avoid the settlement made with him by your board, and hold his employer responsible.

Answering your questions specifically:

1. The manner of election provided in section 20-1 of the act does apply to minors to this extent; that is, a minor who remains in the employ of an employer, after the notice provided in said section, elects, or contracts, to come under the terms of the act; but he is not absolutely void by such contract; the same is voidable.

2. In my opinion, in case a minor is injured after his employer has elected to take advantage of the workmen's compensation act, and such minor is entitled to the benefits of the act, such payments should not be made directly to the minor, but should be made to his guardian. If he has no guardian the board should require one to be appointed before making payment.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

156.

INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY AC PROHIBITS CORPORATION SUBJECT THERETO FROM TAKINT ADVANTAGE OF THE WORKMAN'S COMPENSATION ACT OF OHIO.

Under section 5 of the federal employers' liability act, any contract, rule, regulation or device, the purpose or intention of which enables any common carrier to exempt itself from liability under said act, is declared void; and in view of this provision a corporation subject to this federal employers' liability act cannot take advantage of the workman's compensation act of Ohio.

COLUMBUS, OHIO, April 1, 1913.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—I am in receipt of the following request for an opinion, dated October 21, 1912:

> "Herewith please find enclosed letter of the 18th inst., from Charles G. Cunningham, general counsel for the Toledo Terminal Railroad Company, of Toledo, Ohio, which raises a question of importance concerning the application of the act of the general assembly of Ohio, under which this department is operating (102 O. L., 524), commonly known as the workmen's compensation law, in cases where the injured employe is employed by a carrier engaged in interstate commerce.

"I take it that the law is well settled that, where the federal government has authority to legislate on a particular question, that its power is supreme, provided it has enacted legislation relative to the subject; but until it has so acted the states may enact legislation on the subject.

"Congress has enacted an employers' liability act which if I am correct in my assumption, supersedes the acts of the several states in all causes of action coming within its scope, viz., actions against an employer engaged as a carrier in interstate commerce by an employe who has been injured while engaged as the servant of such carrier in carrying on interstate commerce. Therefore, I assume that as to all employers who are carriers engaged in interstate traffic that section 21-1 of the Ohio act above referred to would not govern, but the federal law would govern the rights of the parties.

"I believe, however, that as to all such employers and employes who have elected to operate under the corporation law by paying premiums into the state insurance fund, that the state law would govern, as congress has not yet enacted any legislation on the subject.

"As this is an important question, this department would appreciate an opinion from your department at a very early date."

The letter referred to states:

"A large part, if not all, of the employes of the Toledo Terminal fall within the class of interstate employes. While the Toledo Terminal Railroad is located entirely within two counties in the state of Ohio, the business it does is more than 90 per cent. interstate business. That is, it does a large switching business, interchanging cars between railroads and 90 per cent. at least of its cars are moved in interstate business. Under these circumstances, the statutes of the United States controlling the liability of employers engaged in interstate commerce would apply and we would receive practically no protection under the Ohio act. For these reasons, I do not believe it would be of any use to the Toledo Terminal to bring itself within the Ohio law."

As you state in your letter, "Congress has enacted an employers' liability act which, * * * superseded the acts of the several states in all causes of action coming within its scope.

It is stated by chief justice White in the case of the Northern Pacific Railway Company vs. The State of Washington, 222 U. S., page —— (decided January 9, 1912), in speaking of the authority of congress over interstate commerce:

"It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, * * * exists only from the silence of congress on the subject, and ceases when congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state."

Many authorities might be cited upon this proposition, but it is so definitely settled that I deem it unnecessary to go further into this phase of this question. The result is that the Ohio workmen's compensation act is inoperative as an active agent

against employers whose employes are engaged in interstate commerce. Such employers and employes are in a field over which the United States has thrown its jurisdiction by the enactment of the national employers' liability act; and the rules of law applicable to such an employe injured in the course of interstate employment would not be the rules prescribed by the laws of Ohio, but would be the rules provided by the laws of the United States.

In what is known as the "Second employers' liability case" (Mondou vs. N. Y., N. H. & Hartford R. R. Co., and other cases) 223 U. S., page 51, decided January 15, 1912, the validity of the act relating to the liability of common carriers by railroad to their employes in certain cases, approved April 22, 1908, and the amendment thereto, approved April 5, 1910, was sustained. Justice VanDevanter, in delivering the opinion of the court, said:

> "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by congress. * * * The inaction of congress, however, in no wise affected its power over the subject. * * * And now that congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. * * *."

The only question remaining therefore, is that stated in your inquiry, that, "as to all such employers and employes who have elected to operate under the compensation law by paying premiums into the state insurance fund, that the state law would govern, as congress has not yet enacted any legislation on the subject."

It is true, congress has not enacted as yet a worman's compensation act. It is also true that the Ohio workmen's compensation act is not compulsory, and it is optional on both the employer and the employe whether or not they will elect to come under its terms, and it might well be supposed in the absence of legislation or decision to the contrary, that when an employer and employe, even though engaged in interstate commerce, elected, or contracted to come under the provisions of the Ohio act that they would be bound by such contract, but in the second employers' liability act above referred to, the following provision is made:

> "Section 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought."

In the second employers' liability case, 223 U. S. 51, in speaking of this section of the act, the court said:

> "Next in order is the objection that the provision in section 5, declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt itself from the liability which the act creates, is repugnant to the 5th amendment to the constitution as an unwarranted in-

terference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in Chicago, B. & Q. Co. vs. McGuire, 209 U. S., 549; Atlantic Coast Line R. Co. vs. Riverside Mills, 219 U. S., 388; and Baltimore & Ohio R. Co. vs. Interstate Commerce, 221 U. S., 612, that if congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it."

And in the case of Philadelphia, Baltimore & Washington Ry. Co. vs. Schubert, 223 U. S., page ——, decided April 29, 1912, the court passed on section 5 of the second employers' liability act, above quoted, in a case brought against a railway company to recover damages for personal injury sustained by an employe in which the acceptance of benefits under a contract of membership in a company's relief department, is set up as a bar to the action, and justice Hughes in delivering the opinion of the court cited the quotation given above from the second employers' liability cases, and said further:

"Upon similar grounds, congress had the power to enforce the regulations validly prescribed by the act of 1908, by preventing the acceptance of benefits under such relief contracts from operating as a bar to the recovery of damages, and by avoiding any agreement to that effect. The question is whether this power has been exercised; that is, whether the stipulation of the contract of membership, asserted in defense, comes within the interdiction of section 5. The former act of June 11, 1906, * * * which was valid as to employes engaged in commerce within the District of Columbia * * * contained explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that act was as follows:

" 'That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: Provided, however, that upon the trial of such action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative.'

"But it is urged that the substituted provision of section 5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose of congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the act.' *It includes every variety of agreement or arrangement of this nature*; and stipulations contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms."

Considering section 5 of the act, in connection with the language of the court in this case, and also taking into consideration the effect reached by an employer and his employes electing to come under the terms of the Ohio workmen's compensation act (which effect in reality is that the employe shall have compensation, and the employer shall be relieved from liability in an action in the courts) it seems that this

arrangement comes under the inhibition of said section 5, for it must be conceded that the intent and purpose of the employer in electing to come under the Ohio workmen's compensation act is to exempt himself from liability created by the act, that is, liability for personal injuries suffered by his employes as provided by the act.

My conclusion, therefore, is that the Ohio workmen's compensation act would afford no protection to an employer engaged in interstate commerce who elected to come under its provisions, and paid in the premiums provided by law, in case of personal injury to one of his employes, provided such employe wished to bring an action in court. That is, that such action could be maintained under the act of the United States, notwithstanding section 20-1 of the Ohio act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

510.

THE QUESTION OF WHETHER A CLAIMANT IS A DEPENDENT IS A QUESTION OF FACT

Whether a claimant for compensation, under the workmens' compensation act, is a dependent of the killed or injured employe, is a question of fact to be determined by the state liability board of awards.

COLUMBUS, OHIO, September 9, 1913.

HON. WM. ARCHER, *Secretary, State Liability Board of Awards, Columbus, Ohio.*

DEAR SIR:—I have your favor of August 27th, wherein you ask for an opinion as to whether Elizabeth Frederick should be regarded as a dependent upon her son John Moeller, this being your claim No. 8152.

Elizabeth Frederich in her answers to the interrogatories submitted by your board, states that: she is married, resides with her husband who is the proprietor of a tailoring shop, she and her husband with four children, aged respectively fifteen, eighteen, twenty-three and twenty-eight years, reside together. John Moeller, the decedent, *contributed weekly to the family support four ($4.00) dollars per week,* and had resided with her as a member of the family all of his life, he being unmarried and having had no children. This statement is supplemented by the report of your traveling auditor which shows that Mrs. Frederich is living on a plot of ground six acres in extent, which was left to her and her children by her first husband and which, for the past two years, has yielded no profit, according to her claims. The tailoring establishment of her husband is small and its yearly earnings, which have not been ascertained, are based upon the claim that he purchased about $300.00 worth of material each year for the making of suits. The claimant had three sons by a former marriage, two of whom—the decedent and one of his brothers—paid $4.00 per week for board and *gave her additional money when she needed it.* Her daughters contribute nothing to her support.

It will be noted that there is some conflict between Mrs. Frederich's sworn statement and that of the statement of your auditor, in that in the one she says decedent contributed $4.00 a week to her support and in the other it is stated that this payment was for board, it being further said, however, that her sons gave her more money when she needed it.

Section 41 of the act creating the state insurance fund (102 Ohio Laws, 524) provides in part:

"The state liability board of awards shall disburse the state insurance fund to such employes * * *, or to their dependents in case death has ensued."

If there are no dependents the disbursements of the insurance fund shall be limited to the expenses provided for in sections 23 and 24.

If there are wholly dependent persons at the time of death, the payment shall be 66 2-3 per cent. of the average weekly wage, and to continue for the remainder of the period between the time of death and six years after the time of injury, and not to amount to more than a maximum of thirty-four hundred dollars ($3,400.00), nor less than a minimum of fifteen hundred dollars ($1,500.00).

If there are partly dependent persons at the time of death, the payment shall be 66 2-3 per cent. of the average weekly wage and to continue for all or such portion of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred ($3,400.00) dollars.

From this it is clear that in order to justify payment to a claimant he or she must be wholly or partly dependent upon the decedent, and in this case the only question that arises is whether Mrs. Frederich was partly dependent upon her son, as the facts clearly show that she was not wholly dependent upon him.

A careful consideration of the authorities dealing with questions of this kind develops the fact that the meaning of the word "dependent" is purely one of fact—that is, did the claimant wholly or partly depend upon the decedent for support. In deciding this regard should be had:

(*a*) To the station in life of the claimant in order to ascertain what were necessaries for her, as it is the supplying of such necessaries, in whole or in part, that will determine the question of her dependency upon him who furnishes or helps to furnish these necessaries.

(*b*) To the support furnished her by her husband, for if he supplied her with all necessaries proper to her station in life, then she would be dependent upon no one else.

(*c*) To the income from and the value of her property (which by the way is not set out in the question here submitted) as, if her property were supplying her with all that was necessary for her, she would not be dependent upon anyone.

(*d*) To whether decedent gave his mother only $4.00 per week and that in payment of board, as the mere payment of board did not constitute her a dependent upon him who paid the board.

(*e*) To whether the additional sums of money, if any, be paid her, were necessary for her support, or were mere gifts for the purpose of enabling her to purchase things which were not at all necessary for her support in the station of life she occupied.

With these considerations in mind, if your honorable board should find that Mrs. Frederich's husband was not able to, and did not supply her with the necessaries to which her position in life entitled her, and that her property was insufficient for this purpose, and that decedent did so supply her, in whole or in part, then she is a dependent. If, however, her husband's earnings or her own resources, or both, were maintaining her in a manner suitable to her position in life, or, if decedent did not contribute to her support, except by the payment of money for board and lodging, the sum so paid by him being but the reasonable value of such board and lodging, or if decedent paid her more than the reasonable value of such board and lodging and such excess sum was used by her for the purchase of things that were not necessaries, as hereinbefore defined, then she was not a dependent within the meaning of the statutes, provided she was otherwise supplied with necessaries.

I have gone into this matter at some length in order that this opinion may meet with other situations which may arise in your determination of the questions here

suggested, and was compelled to deal with the matter in an abstract way because the facts stated by you are not complete. In addition to this, your board should be the judge of the facts.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

654.

LIABILITY BOARD OF AWARDS—PAYMENT OF AWARD TO DEPENDENTS OF AN ALIEN—FOREIGN CONSUL MAY NOT RECEIVE SUCH AWARD UNLESS AUTHORIZED BY PERSON ENTITLED TO AWARD—NO DISCRIMINATION MAY BE SHOWN—MOST FAVORED NATION CLAUSE IN TREATIES.

Whenever an employe suffers death in such a manner and under such circumstances as to entitle his dependents to an award from the state liability board of awards, then the liability board of awards should merely notify the consul of the country of which the person killed is a citizen of the fact that his dependents are entitled to an award from the board, and should proceed in the same manner in making the award as though the employe were a citizen of this country. No distinction in any way can be made in the matter of aliens dependents. The award may be made only to the dependents, or to a person deemed by the board as a competent and suitable person to receive the same in case of incapacity of the dependent or dependents. These payments may not be made to the consul of the country unless he is duly authorized to receive same.

COLUMBUS, OHIO, September 20, 1913.

State Liability Board of Awards, Columbus, Ohio.

GENTLEMEN:—On March 4, 1913, you made the following request for my opinion:

"This department has been notified of the death of Johann Schatz, an employe of the Columbus Iron & Steel company, of Columbus, Ohio, it being claimed that his death resulted from an injury received in the course of his employment.

"The Columbus Iron & Steel company is a contributor to the state insurance fund.

"The deceased was an alien and a native of Austria-Hungary, in which country, we are advised, a widow and minor child survive him.

"As we interpret the workmen's compensation law, the state liability board of awards is authorized to pay compensation in all cases of death direct to the dependents, and that such dependents may make application for the compensation due them, and that it is unnecessary for an administrator to be appointed in any case unless those sustaining the relation of dependents to the deceased are not *sui juris*.

"We are advised that the imperial and royal Austro-Hungarian conusul for the states of Ohio and Michigan, located at Cleveland, Ohio, claims to be authorized to receive and transmit to those who are entitled thereto, all compensation due to the deceased subjects of his country, by reason of certain provisions contained in existing treaties between the United States of America and his country, by virtue of which consular officers are made the legal representatives of all residents of that country who die intestate in this country.

"As we will no doubt have a great many such claims, we would appreciate your opinion as to the correct method of procedure to be adopted by this board in this and similar cases.

"We are transmitting a copy of this letter to Hon. Ernest Ludwig, imperial and royal Austro-Hungarian consul, of Cleveland, Ohio."

I also received from Hon. Ernest Ludwig, consul for Austria-Hungary for the states of Ohio and Michigan, the following letter, in connection with your request:

"The state liability board of awards of Columbus sent me a copy of a letter, which was addressed to you a few days ago requesting your opinion on the proper way of procedure to transmit benefits of the state fund to the dependent of a deceased, if such dependents live abroad.

"Permit me to draw your kind attention to the booklet herewith enclosed on the treaty rights of foreign consuls with reference to administrations of estates. Consulates are established as instruments of peace and harmony between two countries and co-operate with all courts and state officials in order to protect the rights of their respective foreign subjects. Consulates are the ex-officio representatives, attorneys of all the respective absent citizens as well as the home courts and home state officers.

"In view of the fact that so many hundreds of thousands of our people reside here in this state of Ohio, which belongs to my consular district, I have had the honor to call on His Excellency Governor Cox and Mr. Duffy, the chairman of the above board some time ago that some line of procedure could be worked out whereby the payments made by the board to absent beneficiaries could be made through the medium of the consulate. Estates of Austrian Hungarian aliens have been liquidated and transmitted to the next of kin heirs in the old country by this consulate in the past and as a new law has now been enacted, making workingmen's insurance compulsory and establishing a regular state board of awards, a similar question has come up now for the first time with reference to the death benefit of one John Schatz.

"This imperial and royal consulate in transmitting estates to the rightful heirs does not charge any fees whatsoever except the nominal fee of ¼ of one per cent. prescribed by the consulate tariff which is in force and approved by the governments of both countries. This nominal fee does actually not cover the loss in exchange, as the official exchange is better than under ordinary circumstances any bank of the country could allow. The transmission of such funds is made through official channels and in such a way to insure perfect safety, that the money really reaches those to whom it is intended by law, according to the order of distribution of the courts here or in cases such as the one at issue according to the award made by the state board. This is done because the Austro-Hungarian government desires to afford the maximum of protection (of the rights) to Austrian or Hungarian aliens while at the same time it desires that the friendliest possible relations be established with all local and state authorities.

"If you desire that this consulate's attorneys submit a further brief to you as to the right of consulates in connection with the transmission of estates or death benefits, I will be glad to direct them to do so at your instance."

There has also been submitted to me, in this connection, a brief prepared by Mr. Herman J. Nord, of Messrs. Reed, Eichelberger & Nord, which I have found very helpful in considering this question.

The law establishing the Ohio State liability board of awards (workmen's compensation act) provides:

"Section 1465-54. The state liability board of awards shall establish a state insurance fund from premiums paid thereto by employers and employes as herein provided, according to the rates of risk in the classes established by it, as herein provided, for the benefit of employes of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund.

"Section 1465-59. The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, and have been injured in the course of their employment, wheresoever such injury has occurred, and which have not been purposely self inflicted, or to their dependents in case death has ensued.

"Section 1465-62. The board shall disburse and pay from the fund, for such injury, to such employes, such amounts for medical, nurse and hospital services and medicines, as it may deem proper, not, however, in any case, to exceed the sum of two hundred dollars, in addition to such award to such employe.

"Section 1465-63. In case death ensues from the injury reasonable funeral expenses, not to exceed one hundred and fifty dollars, shall be paid from the fund, in addition to such award to such employe.

"Section 1465-67. In case the injury causes death within the period of two years the benefits shall be in the amounts and to the persons following:

(1) "If there be no dependents, the disbursements from the insurance fund shall be limited to the expense provided for in sections 23 and 24,(General Code, sections 1465-62 and 1465-63).

(2) "If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to continue for the remainder of the period between the date of the death and six years after the date of the injury, and not to amount to more than a maximum of thirty-four hundred dollars, nor less than a minimum of one thousand five hundred dollars.

(3) "If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wage and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-four hundred dollars.

"Section 1465-68. The benefits, in case of death, shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board, which may apportion the benefits among the dependents in such manner as it may deem just and equitable. Payment to a dependent subsequent in right may be made, if the board deem proper, and shall operate to discharge all other claims therefor.

"Section 1465-69. The dependent or person to whom the benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the board.

"Section 1465-70. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

"Section 1465-71. If it is established that the injured employe was of such age and experience when injured as that under natural conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wage.

"Section 1465-72. The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified.

"Section 1465-73. The board, under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

"Section 1465-74. Benefits before payment shall be exempt from all claims or creditors and from any attachment or execution, *and shall be paid only to such employes or their dependents.*"

It will be noted from the above quoted sections that the state liability board of awards is to establish a state insurance fund for the benefit of employes who may be injured and the dependents of such employes who may be killed in the course of their employment, and is to disburse such fund "*to such employes* * * * that have been injured * * * *or to their dependents* in case death has ensued."

It will also be noted that section 1465-54 gives the board power to "adopt rules and regulations with respect to the collection, maintenance and *disbursement* of said fund."

Section 1465-68 specifically provides that in case of death the benefits shall be paid to "such one or more of the dependents of the decedent, for the benefit of all the dependents, as may be determined by the board * * *."

Section 1465-74 is even more explicit than the other sections, as it provides that "benefits before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employes or their dependents."

It has been held, and obviously there can be no question about this holding, that the payments authorized by the above statutes are to be made *directly* to the persons specified therein; the only exception being in the event of incompetency of the person entitled to receive the award as in the case of an injury to a minor employe, where I have held in an opinion to your board dated January 30, 1913, that the compensation due such minor should be paid to his guardian. The reasons for this holding are expressed in the opinion.

The requirement that the payments authorized to be made by your board shall be made directly to persons specified in the above sections was clearly made for the purpose of obviating the necessity for administration.

The consul for Austro-Hungary contends that on account of the treaty between the United States and his country he is authorized to receive and transmit to those who are entitled thereto all compensation due from your board on account of the death of a deceased subject of Austria Hungary, who suffered death in such manner as to entitle his dependents to an award from your board. This contention is supported by a brief filed on behalf of the consul and by a pamphlet entitled "Treaty Rights of Austro-Hungarian Consuls," which contains many abstracts from treaties and quotations from many authorities.

All of the authorities submitted, however, bear primarily upon the question of the right of the counsel of a foreign nation to be appointed as administrator of the estate of a subject of his country who dies in the United States, intestate, and without next of kin in this country, it being asserted by the consul for Austria-Hungary, that under what is called the "most favored nation clause" in the treaty between his country and the United States, there must be read into said treaty the provision of the treaty between the United States and the Argentine Republic, as to the appointment of an administrator upon the estate of a subject of his country, and that under said treaties so construed, the consul of Austria-Hungary has the exclusive right to be appointed

as such administrator. This contention seems to have been upheld by the weight of authority prior to the decision of the United States supreme court in the case of Rocca vs. Thompson, 223 U. S., 317, which will be hereinafter referred to.

Section 2, of article VI, of the constitution of the United States, provides:

> "This constitution, and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In the case of State vs. Vanderpool, 39 Ohio State, 273, the court say, at pages 276-277:

> "By section 2, article 6, of the constitution of the United States, 'This constitution, and the laws of the United States, made in pursuance thereof, *and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges of every state shall be bound thereby,* anything in the constitution and laws of any state to the contrary notwithstanding.'
>
> "This treaty is therefore the law of the land, and the judges of every state are as much bound thereby as they are by the constitution and laws of the federal or state governments. It is therefore the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself."

The treaty between the United States and the monarchy of Austria-Hungary, proclaimed June 29, 1871, contains the following provision:

> "Article XV. Consuls-general, consuls, vice-consuls and consular agents, also consular pupils, chancellors and consular officers, shall enjoy in the two countries, all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the *most favored nation.*"

This is what is commonly called "the most favored nation clause," and is contained in substantially the above form in practically all general treaties. It is claimed that when this clause appears in a treaty, its effect is that there must be read into the treaty under consideration, the most liberal provisions made in any treaty of the United States with any other nation as to the liberties, prerogatives, immunities and privileges granted to consuls and like officers upon any given subject, or in reference to any particular matter.

Article XVI, of the treaty between the United States and Austria-Hungary, provides:

> "In case of the death of a citizen of the United States in the Austro-Hungarian monarchy, or of a citizen of the Austro-Hungarian monarchy in the United States, without having any known heirs, or testamentary executors by him appointed, the competent local authorities shall inform the consuls or consular agents of the state to which the deceased belonged, of the circumstances in order that the necessary information may be immediately forwarded to the parties interested."

Article IX, of the treaty between the United States and the Argentine Republic, provides:

"If any citizen of the two contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence, shall have the right to intervene in the possession, *administration* and judicial liquidation of the estate of the deceased, conformably with the laws of the country for the benefit of the creditors and legal heirs."

Article XV, of the treaty between the United States and the kingdom of Belgium, provides:

"Consuls-general, consuls, vice-consuls and consular agents shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs, or creditors, until they are duly represented."

Article XXXIII, of the treaty between the United States and the republic of Peru, provides:

"Until the conclusion of a consular convention which the high contracting parties agree to form as soon as may be mutually convenient, it is stipulated that in the absence of the legal heirs or representatives of the consul or vice-consul of either party shall be ex-officio the executor or administrator of the citizens of their nation who may die within their consular jurisdiction and of their countrymen dying at sea whose property may be brought within their jurisdiction."

Article XIV, of the treaty between the United States and Sweden, provides in part as follows:

"In case of the death of any citizen of Sweden in the United States or of any citizen of the United States in the kingdom of Sweden without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs, of the circumstances, in order that the necessary information may be immediately forwarded to parties interested.

"In the event of any citizen of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul-general, consul, vice-consul-general, or vice-consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul-general or vice-consul, shall so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate.

"It is understood that when, under the provisions of this article, any consul-general, consul, vice-consul-general, or vice-consul, or the representative of each or either, is acting as executor or administrator of the estate of one of his deceased nationals, said officer or his representative shall, in all matters connected with, relating to, or growing out of the settlement of such estates, be in such capacities as fully subject to the jurisdiction of the courts of the country wherein the estate is situated as if said officer or representative were a citizen of that country and possessed of no representative capacity."

Under the treaty provisions between the United States and Austria-Hungary it was held by judge Wilkin, in the common pleas court of Trumbull county, Ohio, in the case of in re., estates of Joe Stingate and Joe Mora (unreported), that:

> "By reason of the use of what is known as the most favored nation clause in the treaty between the United States and the Austro-Hungarian government, we must read this provision, found on the treaty between this government and the Argentine Confederation.
>
> "It therefore, seems clear to me, that Mr. Ernst Ludwig, the accredited representative of the Austro-Hungarian government, being located at Cleveland, is absent from Trumbull county, and if he appoints a representative to act for him in his absence, and such appointment is so made as to become a matter of record under the authority of the accredited representative in the probate court of this country, then it would be the duty of the probate court to appoint such representative so selected, designated by the accredited representative of the Austro-Hungarian government."

There are a number of other decisions from several other states, principally from New York, holding to this same effect, that under the "most favored nation clause" the consul of a foreign country is entitled to be appointed administrator of the estate of a subject of the country represented by the consul, who dies in this country intestate leaving no heirs or beneficiaries resident of this country. The consul being considered, under the treaties and decisions, as the legal representative of the nonresident heirs or beneficiaries.

It was also held by judge Healea, of the common pleas court of Tuscarawas county, Ohio, in the matter of the estate of Vincenzo Arduine, 9 Nisi Prius (n. s.), 269, that the treaty between the United States and the Argentine Republic provides that the consul of that government shall have the right to be appointed as administrator of a subject of his country who died in this state intestate and leaving no next of kin, and that the provisions of the treaty of the Argentine Republic must be read into the treaty between the United States and Italy, and therefore, the consul of Italy was entitled to administration upon the estate of a subject of Italy who died in this state and sustained a motion to remove an administrator who had been appointed for the estate of such an Italian subject without notice to the consul, and appointed said consul in his stead.

To the same effect are cases found in 191 Mass. 276; 33 Misc. Rep., N. Y., 18; 38 Misc. Rep., N. Y., 77.

Cases found in 34 Misc. Rep., N. Y., 31 and 9 L. A., Ann. 96, hold the contrary view.

This question, however, has now finally been disposed of by the supreme court of the United States in the case of Rocca vs. Thompson, 223 U. S. 317, where it is directly held that:

> "The most favored nation clause in the Italian treaty of May 8, 1878 (20 Stat. at L. 732), does not give an Italian consul-general the right to administer the estate of an Italian citizen dying intestate in one of the United States, to the exclusion of the one authorized by the local law to administer the estate because of the privilege conferred by the Argentine treaty of July 27, 1853 (10 Stat. at L. 1009), art. 9, upon the consular officers of the respective countries as to citizens dying intestate 'to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country for the benefit of the creditors and legal heirs,' since this provision, if applicable, cannot be construed as intended to supersede the local law as to the administration of such esta es."

This was a proceeding in error, from the supreme court of the state of California; the decision in the state court being affirmed by the supreme court of the United States. It will be noted that in this case the provision in the treaty with the Argentine Republic, which is relied on in practically all the cases cited, was construed by the court, and the court held as stated above, that this provision could not be construed as intending to supersede the local laws as to the administration of such estates.

The California statutes provide that in the absence of next of kin of a person dying intestate, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The court (justice Day), says, on page 331:

> "Emphasis is laid upon the right under the Argentine treaty to intervene in *possession*, as well as administration; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of citizens of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.
>
> "So looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the consul-general, to the exclusion of one authorized by local law to administer the estate.
>
> "But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting. Re Ross, 140 U. S., 453, 475, 35 L. ed. 581, 589, 11 Sup. Ct. Rep. 897.
>
> "It is further to be observed, that treaties are subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru, in 1887, it was declared in article 33, as follows: * * *"

The court then cites the provisions of the treaty with Peru and article 14 of the treaty with Sweden, which I have quoted above. These treaties do give the right to consuls to be appointed as administrators of citizens of their nations who may die within their consular jurisdictions; but they were not relied upon in this case as applicable to the Italian consul, perhaps for the reason that the treaties with Peru and Sweden were made subsequent to the treaty with Italy, while the treaty with the Argentine Republic was made prior to the treaty with Italy. This case decisively settles the question that under the treaty with the Argentine Republic the consul is not entitled to be appointed as administrator to the exclusion of the public administrator. In this state, of course, we have no public administrator, and our statutes provide, section 10617, that in case of the death of a person intestate in this state, leaving no husband or wife or next of kin, or competent creditors, the court may commit the administration to such other person as it deems fit, and under this section the decisions of our courts, appointing consuls as administrators, would probably be correct, but not upon the theory that such consuls were exclusively entitled to that right.

The contention, therefore, that the award from your board due to dependents residing in a foreign country should be paid to the consul of such country, so far as such

contention rests upon the argument that such consul is entitled to the administration of the estate of a subject of his country dying intestate and without next of kin in this state, must fail.

As I view the matter even if such contention were upheld by authority in the matter of the appointment of administrators, still the analogy between the right to administer the estate of an alien, and the right to receive awards from your board due to the dependents of such alien, is not sufficiently close to be of great value. The compensation due from your board to the dependents of an employe constitute no part of the estate of such employe, and, as stated above, the purpose of the act is to make unnecessary the payment of such award to an administrator in any event, and there is no way in which an administrator could demand or receive from your board an award due the dependents on account of the death of an employe.

In addition to this, the estate of a person dying intestate in this state descends and must be distributed in the manner provided by our laws governing descent and distribution, while an award to dependents from your board is paid to the persons and in the manner determined by your board without respect to the statute of descent and distribution.

The question, in a way, seems analogous to me to the right of a consul to claim the distributive share in the estate of a deceased alien in the hands of an administrator or court in this country on behalf of the person entitled thereto who are citizens of the country represented by the consul.

I do not find that this question has been expressly determined in any state except New York, and in that state by an inferior court. But in that state the decisions are directly in point to the effect that the consul has such right.

In the matter of the estate of Libretto Tartaglio, deceased, 12 Misc. Rep., 245 (N. Y.) the syllabus is as follows:

> "The consul general of Italy has power under the treaty with that country to maintain affirmatively the rights of his countrymen in any court having jurisdiction, and has a right to demand and receive the distributive shares in an estate which belong to persons in his country and have been deposited in court, upon giving a proper receipt therefor."

The decision in this case is not lengthy, and I, therefore, quote it in full:

> "Application is made by the consul general of Italy at New York to have paid to him the distributive shares of the widow and five minor children in the estate of Libretto Tartaglio, an Italian subject, who died leaving personal property which has been administered in this country, and which distributive shares have been deposited with the county treasurer pursuant to a decree of this court.
>
> "The widow and children are residents and subjects of the kingdom of Italy.
>
> "The county treasurer opposes the application upon the ground that the consul-general has no authority to receive such distributive shares and give such an acquittance as will relieve him from responsibility.
>
> "The rights of cubjects of foreign countries, both as to their persons and property, largely depend upon treaty provisions. The treaty between the United States and the kingdom of Italy provides that consuls-general 'may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen.'
>
> "The term 'defend' as used is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's country-

men, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights. But in the absence of such treaty provision a foreign consul would have much the same power.

"We find the rule laid down in Kent, 'the practice of our courts is that a foreign consul may assert and defend as complainant party the rights and property of a person of his nation.'

"The consul of a foreign nation recognized by the United States is competent to defend and watch over the interests of persons of his nation, and may bring suits for such purpose without any special authority from the parties in interest.

"The Bello Corrunes, 6 Wheat. 168.

"The court says in the case cited 'that a vice-consul duly recognized by our government is a competent party to assert or defend the rights of property of the individuals of his nation in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects wherever the pursuits of commerce may draw them or the vicissitudes of human affairs may force them is the great object for which consuls are deputed by their sovereigns, and in a country where laws govern and justice is sought for in courts only it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it.'

"Foreign consuls have authority and power to administer on the estates of their fellow subjects deceased within their territorial consulate. Wheat. Int. L. (2nd Eng. Ed.) 151; Woolsey Int. L. Sec. 96.

"The right to demand and sue for necessarily implies the authority to acquit and release. In case of a debt due by a resident of this state to the widow and children of Libretto Tartaglio there would seem to be no doubt not only of the consul's power, but his duty under the authorities to demand and collect it, and if so, I can see no reason in principle that would prevent his demanding and receiving moneys or property deposited in court belonging to a subject of such consul's country. Neither can I see that the infancy of some of the parties affects or limits the right or power of the consul. The question as to what disposition may be made of the property after the consul has received and exported it is something with which courts have nothing to do; that is to be settled by the laws or authority of the government to which the foreign subject owes allegiance.

"An order will be made directing the county treasurer to pay the distributive shares of the widow and children of Libretto Tartaglio in his estate, deposited with said county treasurer pursuant to the decree of this court, to the consul-general of Italy at New York upon his executing and delivering a proper receipt therefor."

The case referred to by the court, viz.: The Bello Corrunes, 6 Wheat, 168, is an apt citation so far as the language of the court is given, but in that case the court also remarked and held that while a foreign consul had a right to claim or institute proceedings *in rem* where the rights of property of his fellow citizens are in question without special authority from those for whom he acts, still he could not receive actual restitution of the property in question without specific authority. The court says upon this point:

"Whether the powers of the vice-consul would in any instance extend to the right to receive in his national character the proceeds of property libeled

and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such an authority would certainly not be recognized."

In the matter of the estate of Pietro Fiorentine, deceased, Surrogate's Court, Kings county, N. Y., 43 Misc. Rep. 573, the syllabus of the case is as follows:

"The consul-general of Italy has a right to receive from the public administrator of Kings county a balance payable by him, as administrator, to the next of kin of an Italian subject who dies a resident of that country and it is not necessary that the father and sole next of kin, a resident of Italy, be cited and paid directly."

In this case the deceased was an Italian subject who died in Kings county, New York. The sole next of kin was his father, a resident of Italy. The estate was administered by the public administrator and there was a balance found due to the next of kin. The Italian consul claimed a right to intervene and take possession of said balance. The court refers in his decision to the case in the 12 Misc. Reports above quoted in this opinion, and also to the conflicting opinions upon the question of the right to administer and then says:

"In the case before me the question is simply whether the public administrator shall turn over the balance to the consul-general or cite the next of kin and pay him directly.

"Even if we give to the word 'intervene' as used in the treaty with the Argentine Republic the interpretation placed on the same by Judge Thomas, still the right to so 'intervene' would certainly include the right to receive the property belonging to the alien and hence the money in question here should be paid over to the consul-general."

As stated, these cases are the only cases I find holding to this effect and are cases of an inferior court, and by the same court whose decision as to the right of the consul to be appointed administrator was over-ruled and criticized by the supreme court in the Rocca case above cited, and these decisions seem to be based upon the same reasoning which led the same courts to decide the question in regard to administration. After a full consideration of the Rocca case, it does not seem to me that these cases can be regarded as high authority. In addition to this, the holding in the Tartaglio case seems to be contrary to the holding of the supreme court of the United States in the Bello Corrunes, 6 Wheat, 168 case in the particular that I have pointed out, viz.: that while consul has the right to institute an action, still he has not authority to receive actual restitution of the property in question without specific authority. Also the supreme court in the Rocca case holds that the word "intervene" as used in the treaty with the Argentine Republic does not have the meaning which the Surrogate court of New York gives to it. It is also stated by the supreme court of California in deciding the Rocca case, 37 L. R. A. n. s. 549 (which case was affirmed by the supreme court of the United States in the decision to which I have heretofore referred) that the "right to intervene in a legal proceeding, partaking of the nature of a proceeding *in rem* is not usually understood in either country to include the right to take the property from the custody of the court or from an officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving them the right to appear in court for them, either officially

or in their name, to protect their interests, and requiring that he be served with notices to them when notice is required."

The authority would therefore seem to be contrary to the holding in the New York cases. In addition the New York court says in deciding the Tartaglio case, "the right to demand and sue for necessarily implies the authority to acquit and release."

This does not necessarily follow. A "next friend" is authorized by our statutes to bring suit for a minor. In case such suit is for damages on account of a tort, such friend can bring suit, but in case of recovery he is not authorized to receive the amount of the judgment. Also in this state a minor's defense in an action is made by a guardian adlitem, but the guardian adlitem, while having the authority to appear in the action and do everything to maintain the claim of the minor, has no right to receive the amount found due the minor in such action.

For the above reasons, therefore, especially from the language used by the court in the case of Bello Corrunes, 6 Wheat, 168, above quoted, and from the decision of the supreme court in the Rocca case, I feel that these two New York decisions cannot be regarded as sufficient authority to maintain the proposition that a consul is entitled to demand and receive the distributive shares which belong to persons resident of the country which he represents coming from an estate of a person dying in this country.

In the matter of the settlement of the account of the executor of Ickrow, deceased, 66 Misc. Rep. N. Y. 418, another decision by the surrogate's court of New York in 1910, it was held:

> "The Austro-Hungarian cosul is not entitled to appear for minors, subjects of Austria-Hungary, and legatees under a will duly admitted to probate in this state, in a proceeding for the judicial settlement of the executor's account, without citation having been served upon them."

In this case, practically the same claim was made on behalf of the consul of Austria-Hungary, based upon the "most favored nation clause" as in the other cases to which I have referred. The consul maintained that he had the right to appear for the minor legatees, resident of Austria-Hungary, and to receive their share of the estate without the issuance of a citation directed to be served upon them. The court denied the application of the consul and ordered the citation to be served on the minors in the manner provided by law. This case, taken in connection with the decisions of the supreme court to which I have referred, it seems to me, even if it can be regarded as not deciding the exact contrary to the two New York cases holding that the consul has the right to demand and receive distributive shares of an estate, at least makes the question so doubtful that the said decisions cannot be safely followed as authority for the proposition. I am, therefore, compelled to hold that these cases cannot be regarded as establishing the propositions that under the treaties which I have quoted, a consul of a foreign nation is entitled to receive and demand from your board an award due to dependents resident of the country which he represents.

The only case which I have been able to find, which is in any way really pertinent to the question I am considering, is the case of in re., Holmberg's estate, District Court, N. D. Col., decided Jan. 15, 1912. and reported in 193 Fed. Rep. 260.

Section 4514 of the Revised Statutes of the U. S. provides as follows:

> "If the money and effects of any seaman or apprentice paid, remitted, or delivered to the circuit court, including the moneys received for any part of his effects which have been sold, either before delivery to the circuit court, or by its directions, do not exceed in value the sum of three hundred dollars,

then subject to the provisions hereinafter contained, and to all such deductions for expenses incurred in respect to the seaman or apprentice, or of his money and effects, as the said court thinks fit to allow, the court may pay and deliver the said money and effects to any claimants who can prove themselves either to be his widow or children, or to be entitled to the effects of the deceased under his will, or under any statute, or at common law, or to be entitled to procure probate, or to take out letters of administration or confirmation, although no probate or letters of administration or confirmation have been taken out, and shall be thereby discharged from all further liability in respect of the money and effects so paid and delivered."

The purpose of this statute is obviously quite similar to the purpose of our liability board of awards act. It provides for the payment of money in certain cases without the necessity of administration. This particular case arose upon application of the consul of Sweden to have paid to him, in his official capacity, the money and effects left by one Holmberg, a deceased seaman, and subject of Sweden. The court cites section 14 of the treaty between Sweden and the United States, heretofore quoted in this opinion, and says:

"While the statute of California does not expressly make eligible or provide for the appointment of the representative of a foreign government, as such, as an administrator, it does provide, after the specific enumeration of certain persons to whom letters shall issue, and the order in which they are entitled thereto, that they may be granted to 'any person legally competent.' Since the provisions of a treaty become a part of the law of the land, and are binding and obligatory upon the states, I am of opinion that the above cited stipulation in our convention with Sweden has the effect to bring the applicant within the category of those 'legally competent,' under the statutes of California, to receive a grant of letters.

"It is not necessary, to meet the requirements of section 4544, that the applicant shall appear to have the exclusive right to administer, but only that he shall be eligible to 'take out letters;' and it is therefore unnecessary to determine whether the effect of the treaty would be such as to give him a first or paramount right thereto. It is enough to hold that he is, within the statute, one entitled to have the money and effects of the deceased paid and delivered to him, and the court be thereby 'discharged, from all further liability' therefor. The obvious purpose of the statute is to provide a brief, informal, and summary method of disposing of the money and effects of the class to which it relates, where they do not exceed in value the amount specified, in such manner as to reach those eventually entitled thereto, with the greatest expedition and the least expense, without the necessity of formal administration; and the provision of the treaty is in keeping with this purpose."

It will be noted that the court in this case held that the consul was entitled to have the money belonging to this estate paid to him, although the California statute did not make eligible or provide for the appointment of such consul as administrator.

It will be noted, however, that the treaty with Sweden expressly provided for the appointment of the Swedish consul as administrator in certain cases where the decedent was a subject of Sweden, and, therefore, the statutes of the United States quoted in the opinion, the provision in the treaty with Sweden and the laws of California could all be harmonized in this case in such a way as to expressly carry out the intention expressed in the statute of the United States (section 4544,) above quoted, and the Swedish treaty. In other words, the matter was expressly covered by the statute and

the treaty, and the decedent was a subject of the country with whom the treaty relied upon was made, and the "most favored nation clause" is not considered at all in this case.

From the decision on the Rocca case, as announced by justice Day, we take it that, while treaties are to be liberally construed, still they must be read like other contracts, and that we are not allowed to read into them provisions which could not have been contemplated by the makers of the treaty. The court also seems to regard the construction which is claimed for the "most favored nation clause" by consul for Austria-Hungary as at least doubtful, for it is stated on page 334 of the opinion in the Rocca case that:

> "Our conclusion, then, is that, if it should be conceded for this purpoe that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case) * *."

We can, therefore, regard the decision in the Holmberg case as authority for the construction of section 4544 of the Revised Statutes of the United States in connection with the treaty with Sweden, and not as authority upon the right of consuls-general to receive the money or property due to the next of kin or legatees resident of a foreign country from the estate of an alien in this country.

I again call attention to the provisions of the liability board of awards' act providing how the awards due to dependents shall be paid, and I also call attention to the act passed by the last legislature known as house bill No. 526-103 O. L., 396, entitled "An act to prevent discrimination against alien dependents of killed employes." This act is as follows:

> "Section 1. That it shall be unlawful for the state liability board of awards, or any other body constituted by the statutes of the state of Ohio, or any court of said state, in awarding compensation to the dependents of employes, or others killed in Ohio, to make any discrimination against the widows, children or other dependents, who shall reside in a foreign country; and it shall be the duty of the state liability board of awards, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employes, to pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in the state of Ohio.
>
> "Section 2. When the dependents of killed employes reside in a foreign country, the consul-general, consul, vice-consul or consular agent, duly accredited to the consular district within which such killed employe lived at the time of his decease, by the country wherein such dependents of the killed employe reside, shall furnish the necessary information regarding such dependents of killed employes so that the state liability board of awards may transmit to such dependents the funds provided for in the compensation act of the state of Ohio, or any amendments thereto."

This act can only be regarded as reiterating and making more positive the provisions of the original act, that the compensation to be paid to the dependents of killed employes must be paid to the dependents, and putting foreign dependents upon the same basis as dependents resident of this country. In addition, it must be presumed that the legislature, in passing this act, knew of the treaties between the United States and foreign countries, and also knew of the rights and prerogatives of consuls; and the legislature having before it this very matter of the manner of payment of compensation to dependents, residents of foreign lands, provided, that the consul should

furnish the necessary information regarding such dependents to your board, and then provided that such information should be furnished so that *your board* might transmit such compensation *"to such dependents."*

It seems to me, this is conclusive. If the legislature had regarded that the consul had the right to receive such compensation on the part of such dependents, it certainly would have recognized such fact by the use of some other language; or if it intended that your board should pay such compensation to such consuls, on behalf of such dependents, and that such payment would be an acquittance for your board, it certainly would have so stated in the act.

From all of the above, I am forced to the conclusion that under the treaties and laws as they now stand, there is no authority for consuls of foreign countries to demand and receive compensation due from your board to dependents resident of foreign countries. It seems to me that it would be most proper for the consuls to have this right, and that if they did, the compensation would undoubtedly reach the persons entitled to it with the least possible delay and expense; but it is necessary for this right to be conferred in some way, and until it is, your board would not be safe in so making payments.

My opinion, therefore, is that whenever an employe suffers death in such manner and under such circumstances as would entitle his dependents to an award from your board, and such employe was a subject of a foreign nation, then your board should at once notify the consul of the facts in regard to his death, and the fact that his dependents, if any, would be entitled to an award from your board. Proof must then be furnished your board, in the manner and to the extent that you may by rule require, as to the existence of dependents and as to the proportion in which they may be entitled to an award, and that in determining such dependency and the apportionment your board shall proceed in the same manner as if the employe and dependents were citizens of this country, and that you cannot make any discrimination in any way in the matter of alien dependents.

As to the payment of the award and compensation you can only pay the same to the dependents or to a person deemed by you to be competent and suitable to receive the same in case of the incapacity of the dependent or dependents. These payments cannot be made to the consul unless he is duly authorized to receive the same by the person entitled thereto.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Highway Commissioner)

339.

NECESSITY OF COUNTY COMMISSIONERS TO APPLY FOR APPROPRIATION AND PASS RESOLUTION AND APPROVE CONTRACT BEFORE RECEIVING STATE AID.

Under section 1185, General Code, the county commissioners must apply for their state aid appropriation prior to the first of May of the year in which the appropriation becomes available, and must then proceed to adopt a resolution for the improvement of the roads under the state highway law, agreeing to assume not less than fifty per cent. of the total cost and expense of construction and must furthermore approve the awarded contract of the state highway commissioner as conditions precedent to taking advantage of the state aid provisions. Under the same statute, if such conditions are not fulfilled within the calendar year without good and sufficient cause, or failure so to do, the state aid provisions may not be taken advantage of for that year.

COLUMBUS, OHIO, May 28, 1913.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your letter of February 27th, you inquire of me as follows:

"There are several counties in this state which have applied in due form for the use of the 1912 appropriation, but as yet the contract for the construction of the road for which the application is filed, is not executed. In a few cases the failure to enter into a contract is due to the board of commissioners failing to sign the resolution agreeing to assume 50 per cent. of the cost and expense.

"I most respectfully request your opinion on the provisions of section 1185, whether or not it is mandatory that this work be under contract on or before the first day of April, 1913, i. e., if the county commissioners are to use the funds in co-operation with this department."

Section 1185, General Code, provides:

"The commissioners of a county may make application to the state highway commissioner for aid from an appropriation by the state for the construction, improvement, maintenance, or repair of highways. Such application shall be filed prior to May first of the year in which such appropriation may be made or become available. If the county commissioners have not made use of the apportionment to such county, in the year in which it is available, then the township trustees may make application prior to the first day of April of the succeeding year. And if the township trustees do not make use of the appropriation prior to the first day of July next succeeding, then the state highway commissioner shall have full power and authority to enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof of said county, either by contract, force account, or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof from the said apportionment of the appropriation to said county so unused as aforesaid. Any part of the apportionment to a county remaining unexpended shall remain to the credit of such county and be available for the succeeding year as herein provided."

It will be observed from a reading of the foregoing, that if county commissioners desire to receive the benefit of state aid money apportioned to their respective counties in any year, they must make application therefor to the state highway commissioner prior to May 1st of the year in which such money becomes available. If the commissioners do not make use of the apportionment of state aid money allotted to the county in the year in which the same is available, the trustees of any township or townships in a county may make application therefor prior to April 1st of the succeeding year.

After the application has been made, in proper form, to the state highway commissioner and approved by him, it is his duty under section 1190, General Code, to cause to be made plans and specifications for, and estimates of, the cost of the construction of the improvement, and transmit a copy of such plans and specifications to the commissioners of the county making application, as provided by section 1193, General Code.

The county commissioners may then adopt a resolution that the improvement be made under the state highway law, and agree to assume in the first instance not less than fifty per cent. of the total cost and expense of construction. Until such resolution is adopted, the state highway commissioner cannot advertise for bids or let the contract for the construction of the improvement. After the adoption of such resolution, said highway commissioner must advertise for bids for the construction of the improvement and award the contract therefor to the lowest responsible bidder. The award and contract are both subject to the approval of the county commissioners, and when such approval is given, the power of the county commissioners over the construction of the improvement ceases. It is thereafter carried on under the direction and control of the state highway commissioners.

It is a well established principle of statutory construction that the language used in a statute is to be given its ordinary meaning unless it clearly appears that the contrary was intended. The word "year" as used in section 1185 means, in my judgement, a calendar year.

In order to make use of the state aid appropriation, the county commissioners must take all the steps required of them, after the filing of an application, that is to say, they must adopt a final resolution and approve the award and contract, unless, through no fault of their own, the commissioners have been prevented from so doing.

I am, therefore, of the opinion, that unless the county commissioners in question have adopted a final resolution and approved the award and contract on or before December 31, 1912, except in the absence of good and sufficient reasons for not doing so, they have not made use of the appropriation in the year in which it is available, as understood by section 1185, and such appropriation becomes subject to application by the trustees of any township or townships in the county, prior to April 1, 1913.

Very truly yours,

TIMOTHY S. HOGAN.

Attorney General.

564.

THE HIGHWAY COMMISSIONER IS LIMITED TO THE EXPENDITURE OF $1,200.00 FOR TRAVELING EXPENSES IN ANY ONE YEAR.

Under the provisions of section 1180, General Code, the state highway commissioner shall be allowed in addition to his salary the sum of $1,200.00 for traveling expenses. The highway commissioner may not expend in any one year in excess of $1,200.00 for such traveling expenses.

COLUMBUS, OHIO, October 21, 1913.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your favor of October 8, 1913, is received, in which you quote in full the provisions of sections 1183 and 1184-4, General Code, as amended in 103 Ohio Laws, 449, and then state:

> "You may see by the above that the duties and work thrust upon the head of this department are both extensive and onerous, and that it is impossible for the commissioner to give the state even a fair proportion of the services which it requires, and keep within the limit allowed by law for the traveling expenses.
>
> "Of the two state road systems as provided for above, the main market comprises 2,600 miles, and the "inter-county" 9,200 miles, and it is impossible for the commissioner and his deputies to inform themselves as to the conditions and the problems which arise in these systems without actually traveling over, viewing and investigating this mileage.
>
> "The state now has under contract between $2,000,000 and $2,500,000 of highway construction, and we are anticipating improvements to the amount of $7,000,000 for next year. This has been brought about by the enactment of what is known as the half-mill levy bill Yet with all this extra amount of work thrust upon the department, there has been no provision made for the extra expense necessary to comply with the same.
>
> "Sufficient funds have been appropriated for traveling expenses so that I would not need to call upon the emergency board to help out in this matter.
>
> "The question is, in view of the statutes, has the commissioner the authority to use this, or any other funds available to the department for the said excess?"

The difficulty which confronts you arises because of a provision contained in section 1180, General Code, which limits the traveling expenses of the state highway commissioner to $1,200 in any year.

It appears that sufficient funds have been appropriated to the department for traveling expenses, but that the traveling expenses of the state highway commissioner will exceed the limitation contained in section 1180, General Code.

Said section provides:

> "The state highway commissioner shall be provided with suitable rooms for the use of the department. Such office shall be open at all reasonable times for the transaction of public business and be furnished by the state with necessary stationery, office supplies, fixtures, apparatus for testing materials, engineering instruments and supplies. The salary of the state highway commissioner shall be $4,000 per annum. *In addition to his salary, he shall be allowed his actual traveling expenses incurred in the discharge of his official duties, not to exceed $1,200 in any year.*

The appropriations for the year ending February 15, 1913, were made in accordance with the above limitation.

For example, in 102 Ohio Laws, 400, the appropriation is made in these words:

> "Traveling expenses of commissioner and three deputy commissioners at $1,200 each.....$4,800."

In the partial appropriation act for expenditures after February 15, 1913, the appropriation is made as follows, in 103 Ohio Laws, 50:

> "Traveling expenses of commissioner, three deputies, and 12 engineers.....$5,000."

Also in the general appropriation bill for 1913, as shown at page 616 of 103 Ohio Laws:

> "Traveling expenses of commissioner, three deputies, twelve engineers; unexpended balance and.....$1.000."

These appropriation acts make no limit as to the amount to be used by the commissioner or of the other persons. It is a general appropriation for traveling expenses.

Section 1183, General Code, as amended in 103 Ohio Laws, 449, contains this provision:

> "* * * All expenses incurred by reason of the provisions of this chapter shall be paid out of any fund or funds available for the use of the department."

This is a general provision applicable to all expenses incurred in the state highway department. The limitation as to traveling expenses of the commissioner contained in section 1180, General Code, supra, is in the same chapter as section 1183, General Code.

In order to permit the highway commissioner to use more than $1,200, in any year for his traveling expenses, it must be held that the limitation of section 1180, General Code, is repealed by implication by the provisions of the appropriation acts.

Repeals by implication are not favored. The rule is stated by Sutherland in his work on statutory construction at page 465, as follows:

> "Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative."

Section 1180, General Code, is a part of the statutes of Ohio, and is permanent in character. The appropriation act is temporary, that is, it is for the particular year, and is not a part of the statutes of Ohio.

The limitation contained in section 1180, General Code, may stand with the provisions contained in the appropriation acts. The total appropriation for traveling expenses, for the fiscal year of 1913, is $6,000, and unexpended balance. This sum is to pay the traveling expenses, not only of the highway commissioner, but also of three deputies and twelve engineers. There is nothing in the appropriation act to show that it was intended that the highway commissioner should be allowed in excess of $1,200 for his traveling expenses.

It is to be presumed that the legislature had in mind the limitation contained in section 1180, General Code, when it made the above appropriation.

Section 1180, General Code, is not repealed by the appropriation act and said section limits the amount to be expended by the highway commissioner for his traveling expenses in any year to $1,200.

I am of the opinion that the highway commissioner cannot expend in excess of $1,200 for his traveling expenses in any year. Respectfully,

TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Health)

252.

CHARTER COMMISSION MAY NOT DEPRIVE STATE BOARD OF HEALTH OF JURISDICTION IN CITIES.

Article 18, section 3, of the constitution, and section 7, authorizes a municipality in its charter government to exercise such local sanitary powers only as are not in conflict with general laws.

The charter of a city, therefore, may not oust the state board of health of its supervision over local sanitary matters which is given by general statutes.

COLUMBUS, OHIO, May 6, 1913.

E. F. MCCAMPBELL, M. D., *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—In your letter of March 26, 1913, you say:

> "In a city where a charter commission has been provided a question has been raised as to the authority of a charter commission to provide some form of health organization other than that now provided in section 4404, et seq., of the General Code.
>
> "I shall be glad if you will give me an opinion as to the authority of a charter commission of a municipal corporation to provide for a health commissioner or other form of health organization for a municipal corporation under the provisions of article XVIII of the new constitution."

Article XVIII of the new constitution provides for the establishment of charter governments in municipalities in Ohio; and sets forth the manner of proceeding to perfect this new form of administration therein. The object of this constitutional provision is to afford an opportunity for local self-government to such municipalities as may avail themselves of its provisions.

Section 3 of said article XVIII, reads as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, *sanitary* and such other similar regulations, as are not in conflict with general law."

Section 7, says:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Section 8 provides that the question: "shall a commission be chosen to frame a charter," shall be submitted to the election of the municipality? If the majority of electors vote in the affirmative, the fifteen men elected shall frame a proposed charter. A copy thereof shall be mailed to each elector in the municipality, and an election thereon is held. The last sentence in section 8 then says: "If such proposed charter is approved by a majority of the electors voting thereon *it shall become the charter of such municipality at the time fixed therein.*"

In brief, then, when a municipality has adopted by vote, a charter for its govern-

ment, the same is legal and binding therein, if, in the language of section 3, the same is *"not in conflict with general law."*

The word "sanitary," as used in section 3, is broad enough to cover all phases of the law applying to boards of health, as set forth in sections 4404, et seq., General Code.

In lieu of the titles given in the chapter on boards of health, such as "health officer," "board of health," etc., in the General Code, above cited, a municipality may provide in its charter for a head of the sanitary or health department, and call him "health commissioner" or by any other appropriate name. And such officer is vested with all powers conferred by the charter, ordinances thereunder and the law applying to such department generally.

Such charter cannot deprive the state board of health of its rights as now guaranteed by the general law, to intervene and enforce the provisions of the statutes on health and sanitation. In case a chartered municipality should fail to provide for a system of enforcement of sanitary measures, and clothe some one with the power to act therein, or should defy the state laws on the subject, then the state board of health could intervene and enforce the general laws on the subject.

In my opinion, all municipalities, whether chartered or not, will be subject, as to sanitary matters, to the supervision of the state board of health. Local self-government cannot divest the state of its general rights through its board of health to look after the health and safety of its citizens.

Yours respectfully,
TIMOTHY S. HOGAN,
Attorney General.

368.

COUNTY COMMISSIONERS — TOWNSHIP TRUSTEES — UNHEALTHFUL DEPOSITS IN TOWNSHIP—TAX LEVIES—BOND ISSUE—HEALTH FUND—BOARD OF HEALTH.

In the event of the refusal of the commissioners to act under section 2, of house bill 640, it becomes the duty of the township trustees to act, and they, having incurred obligations by removing the dangerous and unhealthful deposits from their township, must provide funds therefor, either by tax levy or bond issue; or if they have a sufficient amount in the treasury to the credit of the health fund, not appropriated for any other purpose, it is their duty to pay the claim which they have incurred as a board of health out of such money.

COLUMBUS, OHIO, July 9, 1913.

HON. E. F. MCCAMPBELL, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 26th, in which you request my opinion as to the obligation of the county commissioners to pay the claim of the trustee of a township, under the following statement of facts:

> "The flood of March and April, 1913, deposited upon the private lands of the township, a large quantity of matter, the presence of which was inimical to the public health, and the removal of which was thought necessary by the township trustees, in their capacity as township health authorities. Their attention being directed to section 2 of house bill 640, 103 Ohio Laws, 141, the trustees suggested to the county commissioners the advisability of undertaking the work of cleaning up the township as a county enterprise.

The county commissioners refunded to do so; whereupon, the trustees caused deposits to be removed, and presented the bill therefor to the county commissioners."

Section 2 of the act referred to in your question is as follows:

"The council of any municipal corporation, and the commissioners of any county, are hereby empowered to borrow money in the manner specified in section 3 of this act, for the purpose of removing from the public places and private grounds or buildings in the corporation, or, as the case may be, in the county outside of municipal corporations therein, any obstruction or matter deposited therein by the floods mentioned in section 1 of this act, the presence of which is inimical to the public health, safety or convenience. The sum thus borrowed may be expended for the above mentioned purpose, in such manner and through such agencies as such council or commissioners, by resolution, may prescribe. Such resolution shall not be published nor be subject to a referendum. Contracts entered into by such council or commissioners, or by any board, officer or employe authorized by either of them to expend funds acquired under this section, shall not be subject to any provisions of the general law requiring competitive bidding. In the event that the power provided for in this section is exercised, the local boards of health or health officers within and for the territory under the jurisdiction of such council or commissioners as provided in this section, shall not have nor exercise any power or duty respecting the removal of such matter; but all the powers and duties of such local boards of health shall, for the purposes of this act, be vested in and imposed upon such council or commissioners and the agencies designated by them as provided in this section."

In my opinion, the commissioners of the county to which you refer in your letter correctly interpreted this provision. It is not made the duty of the county commissioners to supplant the local health authorities in territory outside of municipal corporations; but they are *empowered* by the act quoted to do so. In this instance, they declined to exercise the power. The result of their non-action was to leave the authority and duty of the township trustees, as local health officers, unimpaired. The trustees proceeded, evidently, to exercise their authority and to discharge their duty. In so doing, thay acted under the provisions of section 3391 to 3394, inclusive, General Code, which said sections, and in particular the last one, vest in the trustees, as a township board of health, "the same duties, powers and jurisdiction * * * as by law are imposed upon or granted to boards of health in municipalities." Among these powers are the powers enumerated in sections 4420 to 4451, inclusive, General Code. These sections need not be quoted, as no question seems to be raised as to the propriety of the township trustees' exercising the powers which they have exercised in the instance mentioned by you.

It is clear, however, that under the general laws of the state, the expense of the prevention of a threatened epidemic in a township is to be borne primarily by the township as a local health unit, and not by the county, and, as I have already stated, the only change in the law with reference to the floods of March and April, 1913, was to *permit* but not to *require* counties to assume this expense in territories outside of municipal corporations.

The trustees have properly incurred the bills as a board of health, it not being necessary, in my judgment, that moneys required for the expenditure be in the township treasury, unappropriated to any other purpose before expenditures of this sort be made or authorized, as required generally by section 5660, General Code, commonly referr ed to as the "Burns' law."

Trustees, then, acting no longer as a board of health, but rather in their capacity as trustees, may, under authority of sections 3295 and 3939, General Code, which must be read together, provide the necessary funds. The first of these sections gives to trustees the same power to issue bonds as is imposed by section 3939 upon the council of a municipal corporation. Section 3939, in turn, specifically authorizes the issuance of bonds by a municipal council for the purpose, inter alia, of "the payment of obligations arising from emergencies resulting from epidemics or floods or other forces of nature."

In the event, therefore, of the refusal of the commissioners to act under section 2 of house bill 640, it becomes the duty of the township trustees to act; and they, having incurred obligations by removing the dangerous, unhealthful deposits from their township, must provide funds therefor, either by tax levy or by borrowing money in the manner above described; or, if they have a sufficient amount in the treasury of the township to the credit of the health fund, not appropriated for any other purpose, it is their duty to pay the claim which they have incurred as a board of health out of such money.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

657.

ABATEMENT OF NUISANCES—HEALTH OFFICER—EXTENT OF AUTHORITY.

The health officer, or other employe of the board of health, can proceed in the summary abatement of a nuisance only by direction of the board of health, and such person has no authority to proceed otherwise.

COLUMBUS, OHIO, November 18, 1913.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—In your letter of July 8, 1913, you ask:

> "What authority has a health officer or other employe of a board of health to proceed with the abatement of a nuisance without the adoption of an order by the board of health declaring a condition to be a nuisance?"

Section 4408, General Code, says:

> "The board of health shall appoint a health officer who shall be the executive officer."

The law as to *nuisances* is found in the chapter applying to boards of health, from sections 4420 to 4424, General Code, inclusive.

Section 4420, supra, provides:

> "The board of health shall abate and remove all nuisances within its jurisdiction. It may by order, therefore, compel the owners, agents, assignees, occupants or tenants of any lot, property, buildings or structure to abate or remove any nuisance therein, and prosecute them for neglect or refusal to obey such orders."

Section 4421, in speaking of all natters therein which come within the jurisdiction of the health department, uses this language: "The board of health may regulate;" "the board of health may declare;" "the board of health may order;" "the board may remove, abate, etc."

Section 4422 also speaks of what the board of health may do or cause to be done.

Sections 4423 and 4424 likewise speak of what the "board of health" may do, etc.

Again section 4413 provides that "the board of health" may make rules for the abatement of nuisances, etc.

There is no statutory authority vesting in the health officer power to determine what is a nuisance and to abate it. Therefore, I am of the opinion that the health officer or other employe of the board of health can proceed in the summary abatement of nuisances only by direction of the board of health, and has no power to proceed otherwise.

It will require additional powers to be conferred on him by statute before he can so proceed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State Dental Board)

14.

EXPENSES, TRAVELING—OHIO STATE DENTAL BOARD—NOT ALLOWED TO DELEGATES ATTENDING NATIONAL BOARD MEETINGS OR FOR PAYING DUES BY THE NATIONAL DENTAL BOARD.

The fact that the funds of the Ohio state dental board are not paid into the state treasury, nor the fact that such board is self-supporting, does not tend in any way to modify the rule of law that expenses of attending national conferences may not be allowed to state officers, in the absence of a statute imposing such duty or authorizing the payment of such expenses.

COLUMBUS, OHIO, January 2, 1913.

DR. H. C. MATLACK, *President, Ohio State Dental Board, Cincinnati, Ohio.*

DEAR SIR:—Under date of October 23rd you state as follows:

> "In view of the fact that the funds of the Ohio state dental board are not paid into the state treasury, and that no money is ever drawn from the state treasury when there is a lack of funds in the treasury of the dental board, and if there is a lack of funds in the treasury of the dental board, the members reduce their per diem, as has been the case, do the opinions rendered relating to state board expenses include the dental board, with reference to sending delegates to national dental board meetings and paying dues in the national dental board."

In my opinion there is no distinction to be made between your board, the funds of which are not paid into the state treasury, and that of a board, the funds of which are paid into the state treasury. It is a settled principle of law that the funds under the control of a board such as yours, whether the same be paid into the state treasury or are retained by the treasurer of the board, cannot be used in any way not authorized by statute. Since there is no authorization by statute for the payment of the expenses of delegates to national dental board meetings, or any duty devolving upon the members of such board to attend such meetings, I am of the opinion that the per diem and the expenses of a member of your board attending as a delegate to a national dental board meeting cannot be paid out of the funds belonging to your board even though the same are not turned over to the state treasury but retained by the treasurer of your board.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

16.

STATE DENTAL BOARD—DENTISTRY—PERSON WHO OWNS A DENTAL OFFICE MUST HAVE LICENSE FROM STATE DENTAL BOARD

Since, under section 1329, General Code, the proprietor of a place for performing dental operations is regarded as practicing dentistry, and under section 1320, General Code, no person may practice dentistry without having obtained a license from the state dental board, a person who owns a dental office and conducts the same by employing legally licensed men to perform the dental work, is guilty of a violation of section 12714, General Code, providing a penalty for a violation of the laws relating to the practice of dentistry, when such person conducts such business without having obtained a license.

COLUMBUS, OHIO, January 12, 1913.

DR. H. BARTILSON, *Secretary, Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—Under date of November 8th you advised me as follows:

> "A, who is not a legally licensed dentist owns a dental office, and employs legally licensed man to conduct his place and perform the dental work."

and you then inquire:

> "Can the owner of such dental office be prosecuted under the dental statutes?"

Section 1320, General Code, provides as follows:

> "Unless previously qualified as provided by law, no person shall practice dentistry in this state until he has obtained a license from the state dental board as hereinafter provided."

Section 1329, General Code, provides in part as follows:

> "A person shall be regarded as practicing dentistry who is manager, proprietor, operator or conductor of a place for performing dental operations * * *."

Section 12714, General Code, provides in part:

> "Whoever violates any provision of law relating to the practice of dentistry, * * * for which no specific penalty has been prescribed, shall be fined not less than fifty dollars nor more than one hundred dollars, or imprisoned not less than ten days nor more than thirty days, or both."

On examination of section 1320, General Code, it is to be noted that it is provided that no person shall practice dentistry in this state until he has obtained a license so to do, and section 1329, General Code, provides who shall be considered as practicing dentistry in this state, and stipulates that one who is a manager, proprietor, operator or conductor of a place for performing dental operations shall be considered as practicing dentistry.

The word "proprietor" is defined by Webster to be:

> "One who has the legal right or exclusive title to anything, whether in

possession or not; an owner; sometimes, esp. in statutory construction, in a wider sense, a person having an interest less than an absolute and exclusive right, as the usufruct, or present control and use of property.'

In the statement of facts which you submit you state that A *owns* a dental office. Being, therefore, the owner of a dental office he is under the statute what is designated as a proprietor.

Therefor, A, being a proprietor of a place for performing dental operations, as provided in section 1329, General Code, and therefore, being regarded as practicing dentistry, and since it is provided in section 1320, General Code, that no person shall practice dentistry in this state without obtaining a license so to do, and since in the law regarding the practice of dentistry no specific penalty is prescribed therefor, section 12714, General Code, would apply, and I am, therefore, of the opinion that the owner of such dental office can be prosecuted under the dental statutes as above provided.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Pharmacy)

146.

POWER OF BOARD TO SUSPEND IMPOSITION AND EXECUTION OF FINE OR PENALTY.

In Ohio the authority of the court to remit a fine when the statutory language will so permit and the right to suspend the execution of a sentence is admitted to be an inherent power. When a person pleads guilty or is convicted therefore of an offense under section 12705, General Code, of the pharmacy statutes, such person, in accordance with the terms of the statute, must be fined not less than $20.00. If the court sees fit, however, by reason of special facts to suspend the execution of such fine, it is empowered so to do.

COLUMBUS, OHIO, March 7, 1913.

MR. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of January 24th, you requested my opinion as follows:

"Mr. John Smith, upon affidavit issued by the secretary of the state board of pharmacy, was found guilty of violating section 12705 of the pharmacy law, before a justice of the peace, and was fined $20.00 and costs, and later the fine being remitted: the question is, has the justice of the peace the authority to remit said fine?"

Section 12705, General Code, is as follows:

"Whoever, not being a legally registered pharmacist, manages or conducts a retail drug store unless he has in his employ in full and actual charge of the pharmaceutical department of such store, a pharmacist legally registered under the laws of this state, and, whoever, being a legally registered pharmacist, shall manage or conduct a retail drug store without being personally in full and actual charge of such store, or unless he has in his employ in full and actual charge of the pharmaceutical department of such store a pharmacist legally registered under the laws of this state, shall be fined not less than twenty dollars nor more than one hundred dollars * * * * * *

"Fines are to be fixed with reference to the object which they are designed to accomplish, and their imposition and regulation belong to the legislature, to whose discretion and judgment the widest latitude must be conceded. The courts cannot with discretion or propriety question the actions of the legislature or control or restrain its discretion in the matter of fixing the amount of a fine, however, except where the minimum penalty is so plainly disproportioned to the offense or act for which it is imposed as to shock the sense of mankind."

13 American and English, page 60.

"The court or jury, in assessing a fine on conviction of an offense, must conform to the statute prescribing the punishment for the offense, and as a general rule any departure therefrom makes the sentence illegal."

19 Cyc., page 547.

"A sentence is not the discretionary act of the court; it is the judgment of the law which the court is commanded to pronounce. The act of passing

sentence, like the mere entering of judgment upon a verdict, is purely a ministerial duty, and, therefore, its performance may be compelled by mandamus; such writ may as well issue to the successor of the judge, before whom the cause was tried, as to such judge since the duty is perfunctory, containing no element or ingredient of discretion."

25 American and English, page 292.

Section 12705, General Code, prescribes that a person guilty of the offense set out, *"shall be fined not less than $20.00 nor more than $100.00."* This language is clear and explicit, and in the light of the above authorities, when a person is found guilty of violating this statute, the court has no discretion, and is obliged to render sentence for not less than $20.00. To permit such fine to be remitted, after it has been imposed, would render the mandatory act of the judge nugatory, and such a procedure therefore, could not be authorized.

The authorities, however, recognize a clear distinction between the right to *remit* a fine, and the right of the court to suspend the execution of a fine which has been imposed in accordance with the terms of the statute.

Upon the question of the right of the court to suspend the *execution* of a fine, however, there is a very marked conflict in the decisions. Thus, on page 313, of the 25th volume, American and English, the following appears:

"But the right to suspend sentence, or to defer rendition of sentence for an indefinite time, after a regular conviction had been had, has, in some cases, on the ground that the exercise of such right would be an intringement upon or a usurpation of the pardoning power, been declared not to be within the power of the court. But other authorities have denied that it is a complete objection to the claim of this authority in the courts that its use is equivalent to a pardon, and, in professional pursuance of long established usage which they declare supportable upon forceful considerations of public policy, hold that its exercise in proper cases is within the judicial discretion of the court."

And in 12 Cyc., page 772, the following is said:

"Whether the court, in the absence of statute, has power to suspend sentence for an indefinite period, is not absolutely decided. It has been held that where there are extenuating circumstances, or a like case is pending on appeal, or where for any sufficient cause, an immediate sentence is not required, the court may, with the consent of all parties, and upon terms which to it seem just, suspend sentence. Some cases hold, however, that courts have not the power to suspend indefinitely the passing or the execution of the sentence, and that an attempt to do so is a usurpation of the power to pardon or to remit the punishment, which belongs solely to the executive."

In Ohio, the courts have taken the rule that the court has the inherent power to suspend the execution of a sentence in whole or in part, unless otherwise provided by statute.

"The power to stay the execution of a sentence in whole or in part, in a criminal case is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute."

Webber vs. State, 58 O. S., 619.

"In the absence of a statutory enactment to the contrary, the power to

suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made."

In re., Clara Lee, 3 N. P., N. S. 533.

On page 535 of this case, in taking up the argument of the contrary rule, to the effect that the power to suspend the execution of a sentence is a usurpation of the executive power to grant pardons, judge Dillon says:

"Without quoting further it may be pertinent to observe that the theory of the courts which have decided the right to enforce sentence at a term subsequent to the conviction, is not based upon the time of the sentence, but has for its chief support and argument the fact that it is delegating to the judge the power to exercise parole and pardon in violation of the fundamental law of the state. These cases seem not to have observed that it already lay in the power of the same courts to discharge the prisoner at will at the conclusion of the state's evidence or if the verdict of the jury was not satisfactory, to set it aside."

In support of this Ohio rule also the case of People vs. Court of Sessions 141, N. Y., page 288, may be cited. On page 294 thereof, the court says:

"The power to suspend sentence and the power to grant reprieves and pardons as understood when the constitution was adopted, are totally distinct in their origin and nature. The former was always a part of the judicial power. The latter was always a part of the executive power * * *. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all his civil rights; it makes him as it were, a new man, and gives him a new credit and capacity."

Whilst there is, therefore, vast conflict of authorities upon the question of the inherent right of a court to suspend the execution of a sentence and whilst the weight of the authorities outside of this state seems indeed to be opposed to this right, the decisions of our court must be followed, and I am of the opinion that in this state, the court, unless otherwise provided by statute, has the inherent power to suspend sentence or the execution thereof. In the present case, the language of the statute will not permit *remissions or suspensions of the imposition of the sentence itself*, and I am of the opinion that sentences must be imposed upon the finding of the defendent guilty, or when he pleads guilty of a violation of section 12705, General Code, to the extent of at least $20.00.

In view of the above authorities, however, I am of the opinion that the *execution of a sentence* may be indefinitely suspended, when in the discretion of the court, the facts seem to justify such action.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

199.

PHARMACY—PRESCRIPTIONS MAY BE FILLED ONLY BY REGISTERED PHARMACIST OR BY REGISTERED ASSISTANT PHARMACIST ACTING UNDER THE CONTROL AND MANAGEMENT OF A REGISTERED PHARMACIST—STATE AND CITY INSTITUTIONS.

In state and city institutions where drugs are sold and physicians' prescriptions are filled, the department conducting such work constitutes a retail drug store within the meaning of section 12705, General Code, and such department may, therefore, not be conducted under said statute without having in charge thereof a legally registered pharmacist.

Under section 12706, General Code, prescriptions may not be filled in such departments by other than a legally registered pharmacist or a legally registered assistant pharmacist, when a legally registered pharmacist is in control thereof.

COLUMBUS, OHIO, April 9, 1913.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under favor of November 21, 1912, you request my opinion as follows:

"At a meeting of the state board of pharmacy, held in October, I was instructed to file a request for an opinion from your office concerning state and city institutions wherein drugs are sold, and physicians' prescriptions are filled by non-registered pharmacists.

"The doctor or doctors of said institutions are not in charge of the drugs, neither do they supply their patients personally; but, they issue prescriptions to the drug department and this department fills said prescription and delivers to the nurse for administering to the patient.

"Can such institution be legally conducted without having employed in full and actual charge of the drug department of said institution a legally registered pharmacist under the laws of this state?"

Sections 12705 and 12706 of the General Code are as follows:

"Section 12705. Whoever, not being a legally registered pharmacist, manages or conducts a *retail drug store*, unless he has in his employ in full and actual charge of the pharmaceutical department of such store, a pharmacist legally registered under the laws of this state, and, whoever being a legally registered pharmacist shall manage or *conduct a retail drug* store without being personally in full and actual charge of such store, or unless he has in his employ in full and actual charge of the pharmaceutical department of such store a pharmacist legally registered under the laws of this state, shall be fined not less than twenty dollars nor more than one hundred dollars. Each day's violation of this section shall constitute a separate offense. *A retail drug store, within the meaning of this section, shall be any room, rooms or place of business wherein drugs, poisons, chemicals or pharmaceutical preparations shall be offered or displayed for sale at retail,* or upon which as a sign the words 'pharmacy,' 'drugs,' 'drug store,' 'pharmacist,' 'pharmaceutical chemist,' 'apothecary' or any of these words, or their equivalent in any language, are or is displayed.

"Section 12706. Whoever, not being a legally registered pharmacist, or a legally registered assistant pharmacist, employed in a *pharmacy* or drug store under the management or control of a legally registered pharmacist, *compounds, dispenses* or sells a drug, chemical, poison or pharmaceutical

preparation, shall be fined not less than twenty dollars nor more than one hundred dollars. Each day's violation of this section shall constitute a separate offense."

The facts stated in your letter do not sufficiently detail the situation so as to make clear that the drug department of these institutions comes within the definition of a retail drug store, as is comprehended by section 12705, General Code.

Webster's dictionary defines the term "retail" as follows:

"To cut up and dispose of in small parcels; to sell at second hand—opposed to selling by wholesale."

The Century dictionary defines the term as follows:

"To sell in small quantities or parcels."

Inasmuch as you state in your letter that drugs are sold in these institutions, I take it that it is very probable that these drug departments come within the definition of section 12705, General Code. If the facts are such that drugs are sold in these departments and the physicians pay for the prescriptions obtained, it is clear that, under the terms of section 12705, such departments must be conducted and managed by a legally registered pharmacist.

Whether or not this be the case, however, it is clear that under the terms of section 12706, General Code, the filling of a prescription is covered by the terms "compounds" and "dispenses," as used in this section, and such prescription, therefor, may not be filled by other than either a legally registered pharmacist or a legally registered assistant pharmacist, acting under the control and management of a legally registered pharmacist. I reach this latter conclusion under the clearly justified assumption that the term "pharmacy," as used in section 12706, includes such a drug department as that referred to in your letter.

In conclusion, and direct answer to your inquiries, such institutions may not be legally conducted without having in full and actual charge thereof a legally registered pharmacist, if drugs are actually sold therein. Second—Prescriptions may not be filled in such departments by other than a legally registered pharmacist; or by a legally registered assistant pharmacist, when a legally registered pharmacist is in control thereof.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

207.

PRESCRIPTIONS MAY BE FILLED ONLY BY LEGALLY REGISTERED PHARMACIST AND BY LEGALLY REGISTERED ASSISTANT PHARMACIST ACTING UNDER CONTROL OF FORMER.

Under section 12706, General Code, prescriptions may not be filled by other than legally registered pharmacists or by a legally registered assistant pharmacist, when employed in a pharmacy or drug store, under the management and control of a legally registered pharmacist.

COLUMBUS, OHIO, April 9, 1913.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of November 21st you request my opinion as follows:

> "At the last meeting of the state board of pharmacy I was instructed to ask for an opinion from your office concerning the compounding of medicines and filling of physicians' prescriptions by non-registered pharmacists in all religious and benevolent institutions.
>
> "If such institutions have a drug department wherein physicians' prescriptions are received, can any other than a legally registered pharmacist compound or fill said prescription?"

Section 12706 of the General Code is as follows:

> "Whoever, not being a legally registered pharmacist, or a legally registered assistant pharmacist employed in a *pharmacy* or drug store under the management or control of a legally registered pharmacist, *compounds, dispenses* or sells a drug, chemical, poison or pharmaceutical preparation, shall be fined not less than twenty dollars nor more than one hundred dollars. Each day's violation of this section shall constitute a separate offense."

Under this section drugs may not be compounded or dispensed by other than a legally registered pharmacist or by a legally registered assistant pharmacist when employed in a pharmacy or drug store which has in charge thereof a legally registered pharmacist.

This section clearly applies to your case, and I am of the opinion that under its terms none other than a legally registered pharmacist or a legally registered assistant pharmacist, when the latter is acting under the control and management of a legally registered pharmacist, may compound or fill prescriptions in such institutions.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

218.

PRESCRIPTION—FILLING BY DRUGGIST WHEN DATE AND NAME NOT INSCRIBED THEREON, ILLEGAL.

It is the intention of section 12672, General Code, that a prescription for cocaine or any of its salts or compounds shall not be filled by a druggist unless there has been inscribed thereon by a physician, veterinary surgeon or druggist issuing it, the date of issue and the name of the person for whom it is issued.

A druggist, therefore, who himself fills out these items upon the prescription is guilty of a violation of this section in filling out the same.

COLUMBUS, OHIO, April 30, 1913.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under favor of January 9th, you request my opinion as follows:

"Following is a copy of a prescription upon which the board requests an opinion from your office as to whether it can be legally filled under section 12672 of the cocaine law.

"John Doe, Druggist,
423 Adams street, corner Main.....City, Ohio.

Cocaine Hyd.....Gr. X.
Acetanilid.....Oz. SS.
Triturate thoroughly.
Sig: Snuff a little Triturate thoroughly up the nose twice a day.
J. H. Smith, M. D."

"The druggist before delivering the medicine the prescription called for asks the bearer of same to write his name on the face of the prescription. This he does, and then the druggist fills in the date on same and delivers the said medicine."

Section 12672 of the General Code is as follows:

"Whoever sells, barters, furnishes or gives away any quantity of cocaine, alpha or beta eucaine or alypin, or any of their salts or compounds, or any preparation or mixture containing any of the aforesaid drugs or their salts or compounds of any of the combinations, of the same, except upon the prescription of a physician, veterinary surgeon or dentist duly licensed under the laws of this state, which prescription shall contain the name of the physician, veterinary surgeon or dentist issuing it, *the date of issue and the name of the person for whom it is issued*; or fails to keep such prescription on file for at least two years, in such manner that it is accessible at all reasonable times to the inspection of the proper officer or officers of the law and the members of the state board of pharmacy and the secretary of the state board of pharmacy, or fills said prescription more than once, shall be fined not less than fifty dollars, nor more than five hundred dollars, for the first offense, and for each subsequent offense shall be imprisoned not less than one year nor more than five years in the penitentiary. This section does not extend to sales at wholesale of any quantity of the above mentioned drugs to duly registered pharmacists, physiciains, dentists or veterinary surgeons."

It is manifestly the intention of this statute that the question of the policy of issuing such prescriptions and the control of their date of issue, the person to whom issued and the quantity of ingredients should be vested, in the first place, in a physician, veterinary surgeon or dentist, duly licensed under the laws of this state. It is just as important, as far as the policy of the law is concerned, that the physician dictate the time at which such prescription should be obtained and the person who is to be permitted to receive the same, as it is that a physician should dictate the constituent parts and the amount of the medicine that is to be obtained. I am of the opinion that the act intends that a prescription, with all these conditions, should be the work of the physician himself, and that the date and the name of the person should be designated in the prescription at the time the same is signed by the physician.

At any rate, in the present case, since the druggist took it upon himself to fill in the date on the prescription, whilst the statute prescribes that no cocaine shall be sold except when *the date of issue* and the name of the person appear upon the prescription issued for the same, there is a clear violation of the statute, and I am of the opinion that the prescription was illegally filled by this druggist.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

266.

FINE ASSESSED FOR VIOLATION OF COCAINE LAW TO BE PAID TO SECRETARY OF STATE BOARD OF PHARMACY AND NOT TO LAW LIBRARY ASSOCIATION.

Section 3056, General Code, providing for the payment of a certain portion of fines assessed by the police court, is a general law to which section 12673, General Code, (providing for payment of fines assessed for violations of said law to the secretary of the Ohio board of pharmacy), which is a special and a later law, is to be considered an exception.

Fines assessed under the later section, therefore, must be paid as therein directed.

COLUMBUS, OHIO, April 19, 1913.

State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN:—Under date of March 6th you state as follows:

> "One J. B. was found guilty of violating section 12672 of the cocaine law, in Cincinnati police court on March 5, 1913, and fined. The clerk of the police court is not clear as to where to deposit this fine, and asks for an opinion from your office."

Since you state that the said J. B. had been fined under section 12672, General Code, I assume that he was so fined as being guilty of the first offense.

By virtue of section 4577, General Code, the police court has jurisdiction of, and to hear, finally determine, and to impose the prescribed penalty for any misdemeanor committed within the limits of the city, or within four miles thereof. I assume that the only question which arises is as to the disposition to be made of the fine which was assessed by said court.

Section 12673 of the General Code reads as follows:

> "It shall be the duty of the Ohio board of pharmacy to enforce the provisions of section 12672, and all fines collected under section 12672 *shall be*

paid to the secretary of the Ohio board of pharmacy, and by him covered into the state treasury to be credited to the use of the Ohio board of pharmacy."

Section 3056, General Code, provides in part as follows:

"All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 per cent. of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor."

The question, therefore, arises as to whether the fine as assessed under section 12672, General Code, should by virtue of the provisions of section 12673, General Code, be paid to the secretary of the Ohio board of pharmacy, or by virtue of section 3056, General Code, should be paid to the trustees of the law library association of Hamilton county.

A study of the relative age of the statutes will disclose that the provisions of section 12673 of the General Code were first enacted May 9, 1908 (99 O. L., 473). The provisions of section 3056, General Code, were enacted originally on April 27, 1872 (69 O. L., 166). I will not attempt to follow the statute through the 89th Ohio Laws and the 91st Ohio Laws. In the 94th Ohio Laws 135, section 2680, Revised Statutes (now section 3056, General Code), was again amended so as to read in part as follows:

"All fines and penalties which are assessed and collected by the police court for offenses and misdemeanors in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court, in state cases, which shall be retained by the clerk, shall be paid by the clerk quarterly to the trustees of such law library associations mentioned in the next two preceding sections, except those in cities of the first and second grades of the first class, but the sums so paid shall not be less than five hundred dollars per annum, if there be such an amount."

Said section 2680, Revised Statutes, as found in 94 O. L., 135, was carried into the General Code of Ohio as section 3056.

This section was subsequently amended in 101 Ohio Laws, 295. It may be stated, however, that the provisions of said section 3056, General Code, practically in the form in which they are now found, were enacted prior to the provisions of section 12673, General Code. So that section 12673, General Code, having been enacted alter than section 3056, General Code, would be read as an exception to the provisions of section 3056, General Code.

Again it is a proposition of law that such a special statute as section 12673, General Code, being a statute dealing with a part of the fines which might be assessed by the police court, should be read as an exception to the general provisions relative to such fines as found in section 3056, General Code.

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if

possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one, where the general act is later, the special will be construed as remaining and an exception to its terms, unless it is repealed in express words or by necessary implications."

See also opinion of Marshall, J., in the case of city of Cincinnati vs. Holmes, Adm'r., 56 O. S., 104, at page 114, wherein it is stated:

"It is a rule constantly observed in the construction of statutes, that where the general provisions of a statute conflict with the more specific provisions of another, or are incompatible with its provisions, the latter is to be read as an exception to the former."

For the reason, therefore, that the provisions of section 12673, General Code, were enacted after the provisions of section 3056, General Code, and the further reason that section 12673, General Code, deals but in part with the subjects embraced in section 3056, General Code, I am of the opinion that the provisions of section 12673, General Code, would control and that, therefore, the clerk of the police court of the city of Cincinnati should pay to the secretary of the Ohio board of pharmacy fines assessed by the said police court for violations of section 18672, General Code, and that no part of said fines should be paid under the provisions of section 3056, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

309.

RETAIL DRUGGIST WHO MANUFACTURES AND SELLS INSECTICIDES AND FUNGICIDES IS SUBJECT TO PROVISION OF ACT PROVIDING REGULATION FOR MANUFACTURE AND SALE OF SAME.

COLUMBUS, OHIO, June 5, 1913.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Under date of May 20th you inquire as follows:

"I am enclosing a copy of house bill No. 230, Mr. Bogg, to regulate the manufacture and sale of insecticides and fungicides in Ohio. The bill provides that manufacturers of insecticides shall pay a license of $20 per year.

"The question arises, will the provisions of this act apply to retail druggists who manufacture bedbug poisons, etc?"

This bill, copy of which accompanies your letter and which I return herewith, is entitled "An act to regulate the manufacture and sale of insecticides and fungicides in Ohio."

"Manufacture" is defined in the Century dictionary as follows:

"To make or fabricate, as anything for use, especially in considerable quantities or numbers, or by the aid of many hands or machinery."

And in Webster's dictionary the following is said:

> "To make or fabricate from raw material by the hand, by art or machinery and to work into forms convenient for use."

Your request is expressly with relation to retail druggists who manufacture bedbug poisons, etc. In section 3 of the act it is said:

> "The term 'insecticide' as used in this act shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling or mitigating any insects which may infest vegetation, man or animals, or households, or be present in any environment whatever."

This definition of "insecticide" clearly includes bedbug poisons. I know of no reason why retail druggists who engage in the manufacture of such should be exempted from the safeguarding and regulatory provisions of this act; and as in the act there is not the slightest suggestion of any intention to except any one class of manufacturers, I am of the opinion that retail druggists who manufacture bedbug poison must comply with all related provisions of the act.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

127.

(To the State Board of Charities)

BUILDING FOR OHIO STATE REFORMATORY FOR WOMEN—LIMITATION OF FORMER LEGISLATURE AS TO COST NOT BINDING UPON FUTURE GENERAL ASSEMBLIES.

It is beyond the power of one legislature to pass an act which is not subject to amendment or repeal by a succeeding legislature. The limitations therefore, placed in the appropriation bills of 1911 and 1912, restricting the cost of a building for the Ohio state reformatory for women to $350,000, is not binding upon present legislators and they may authorize an expenditure for that purpose in excess of such sum.

COLUMBUS, OHIO, March 20, 1913.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 18th requesting my opinion upon the following question:

> "In 1911 the general assembly appropriated for the expenses, uses and purposes of the site and building commission for the Ohio state reformatory for women the sum of one hundred thousand dollars for each of the years 1911 and 1912, inserting in the appropriation clause the following language: 'Building to cost not to exceed $350,000 complete.' " (102 O. L., 383-409).

The act providing for the institution and construction of the building through the commission (102 O. L., 207) imposed no limitation upon the cost of the building or buildings necessary for the purposes of the institution to be known as the Ohio reformatory for women.

The question is now raised as to whether or not the prresent general assembly is bound by the above quoted language in the two general appropriation bills passed by the last legislature.

In my opinion the present general assembly is not so bound. It is beyond the power of one legislature to pass an act of legislation which is not subject to amendment or repeal by a succeeding legislature. It is quite true, undoubtedly, that the legislature of 1911 would not have appropriated as it did for the purpose of purchasing a site and erecting buildings thereon for the Ohio reformatory for women except with the reservation which has been referred to. That is to say, it was a part of the legislative idea entertained by that session of the general assembly that the first building erected should not exceed in cost $350,000.00. This limitation serves as notice to the succeeding legislatures that the legislature creating it had this definite idea. Its binding force upon succeeding legislatures is limited, however, to their respective consciences.

There is absolutely no legal or constitutional restraint upon the present session of the general assembly by virtue of the provision which has been quoted and discussed.

The conclusion which I have reached renders it unnecessary for me to consider your specific question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Accountancy)

125.

APPOINTMENT AS CERTIFIED PUBLIC ACCOUNTANT NOT VALID UNTIL CERTIFICATE GIVEN—CERTIFICATE VOID WHEN CONDITIONS NOT FULFILLED.

An appointment as certified public accountant by the board of public accountancy is not complete until the certificate has been signed and issued. The fact, therefore, that the board at an informal meeting, under a mistaken conception of the facts had promised a certificate, does not of itself entitle the applicant to the degree, and such informal promise may be revoked at any time prior to the issuance of a certificate.

COLUMBUS, OHIO, March 8, 1913.

The Honorable State Board of Accountancy, Columbus, Ohio.

GENTLEMEN:—Your honorable board has submitted to this department for consideration, a request in regard to the right of Mr. W. Wilson MacFarlane, to act as a certified public accountant, under the following statement of facts:

> "I am enclosing correspondence of the state board of accountancy with Mr. W. Wilson MacFarlane, 15 Wall street, New York City.
>
> "The first letter requires some explanation on my part as secretary of the state board. The first paragraph of this letter refers to a meeting of the state board of accountancy, June 8th. This was not a regular, but informal meeting, only two members being present, Mr. Thomas and myself, and in the consideration of this application, we were under the impression that the applicant was a member of the chartered accountants of England When we, at the September meeting, discovered our error, we advised Mr. MacFarlane of the facts, and stated that we could not issue him a certificate except on examination as noted in letter attached, under date of September 11th.
>
> "Mr. MacFarlane has taken exceptions to our ruling as noted by the attached correspondence, and the writer was interviewed by Mr. Bond, of New York, and Mr. Allen, of this city, attorneys, apparently representing Mr. MacFarlane, and demanding the issuance of a certificate in accordance with our letter of June 17th. The attached letter of October 28th will convey to you the attitude of Mr. MacFarlane as represented by his attorney.
>
> "The purpose of this letter is to advise you of all the facts in the case and ask for an opinion as to the standing of the board in relation to Mr. MacFarlane."

In reply to your inquiry, section 1370 of the General Code, provides for the establishment of a state board of accountancy, as follows:

> "There shall be a state board of accountancy, consisting of three members, not more than two of whom shall belong to the same political party. Each member of the board shall be a person skilled in the knowledge and practice of accounting, and actively engaged as a professional public accountant within this state."

Section 1373 of the General Code prescribes who may become certified public accountants, as follows:

"A citizen of the United States, or a person who has duly declared his intention to become such citizen, not less than twenty-one years of age, of good moral character, a graduate of a high school, or having received an equivalent education, with at least three years experience in the practice of accounting, and who has received from the state board of accountancy as herein provided, a certificate of his qualifications to practice as a public expert accountant, shall be styled and known as a certified public accountant. No other person shall assume such title or use the abbreviation "C. P. A.," or other words or letters to indicate that he is a certified public accountant."

Section 1374 provides for an examination of applicants for certificates, as follows:

"Each year, the state board of accountancy shall hold an examination for such certificate. Each applicant shall be examined in theory of accounts, practical accounting, auditing and commercial law as affecting accountancy. If three or more persons apply for certificates within not less than five months after the annual examination, the board shall hold an examination for them. The time and place of each examination shall be fixed by the board."

Section 1376 provides that the state board of accountancy may recognize certificates granted by other states or territories of the United States, or by foreign nations, as follows:

"A person who is a citizen of the United States, or has declared his intention of becoming such citizen, who is at least twenty-one years of age, of good moral character, who has complied with the rules and regulations of the state board of accountancy, and who holds a valid and unrevoked certificate as a certified public accountant, issued under the authority of another state or territory of the United States or the District of Columbia, or of a foreign nation, may receive from the board a certificate as a certified public accountant if the board is satisfied that the standards and requirements for a certificate as a certified public accountant thereof are substantially equivalent to those established by this chapter. Such person may thereafter practice in this state as a certified public accountant and assume and use the name, title and style of "certified public accountant" or any abbreviation or abbreviations thereof."

Section 1377 of the General Code provides the manner whereby a certificate issued by the state board of accountancy may be revoked, as follows:

"For sufficient cause the state board of accountancy may revoke a certificate issued under this chapter if a written notice has been mailed to the holder thereof at his last known address at least twenty days before hearing thereon. Such notice shall state the cause of such contemplated action and appoint a time for hearing thereon by the board. No certificate issued under this chapter shall be revoked until after such hearing."

It appears that on June 8th, 1912, the state board of accountancy held a meeting (a majority of the members being present), and acted favorably upon Mr. MacFarlane's application to become a certified public accountant. It is furthermore disclosed by a letter of date June 17th, 1912, from the state board of accountancy to Mr. MacFarlane, that the certificate making Mr. MacFarlane a certified public accountant was not signed nor executed by the board, and that such certificate was not to be forwarded to the applicant until a later date.

In the meantime, the state board of accountancy, for the reason set forth in the inquiry, reversed its action taken on June 8th, 1912, and refused to issue a certificate to Mr. MacFarlane making him a certified public accountant.

As a general proposition of law, such an appointment as a certified public accountant is not complete until the certificate has been signed and issued by the state board of accountancy; that is to say, the appointment was not fully consummated until the issuing of the certificate properly executed by the board.

> "Where provision is made for the exercise of a power to commission, the appointment is not complete until the commission has been signed."
>
> (29 Cyc., page 1372.)

Conger vs. Gilmer, page 75:

> "The appointment to office by the board of supervisors is not complete until the person appointed has received a certificate of his election under the seal of the board, signed by the proper officers of the board. An appointment made by a majority of the board may be revoked at any time before such certificate is issued, and another person may be appointed."

Magruder vs. Tuck, 25 Maryland, page 217:

> "No clerk of court has authority to qualify a person elected before he has been commissioned, for, in the absence of a commission, there would be no sufficient evidence of an election or appointment."

In the case of Marbury vs. Madison, 1 Cranch's Report, at page 151 of the opinion, the court says:

> "The appointment of such an officer (justice of the peace in the District of Columbia) is complete when the President has nominated him to the senate and the senate has advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed."

In the syllabus of the last quoted case, the court holds as follows:

> "When a commission for an officer not holding his office at the will of the President is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable and the appointment is complete."

In the case of State vs. McCollister, 11 Ohio Reports, page 46, at page 50 of the opinion, the court says:

> "I cannot concur with counsel, that a man appointed or elected to an office thereby becomes an incumbent of that office. An incumbent of an office is one who is legally authorized to discharge the duties of that office. For instance, a man who is elected county treasurer is required to give bond and to take an oath of office. These things must be done before he can discharge the duties of the office and if not done in due time, the office itself is vacant. There is no incumbent; so where a man is elected judge, he does not by the election become a judge; *he must receive a commission as evidence of his authority to act.*"

From the statement of facts, it is clear that a certificate making Mr. MacFarlane

a certified public accountant has never been issued by the board. For the reasons above given, Mr. MacFarlane has never been legally appointed a certified public accountant by the state board of accountancy.

Furthermore, every person desiring to become a certified accountant, without taking the examination required by section 1374 of the General Code, supra, must comply with the requirements of section 1376 of the General Code, supra.

From the statement of facts in your inquiry, and the correspondence thereto attached, it is disclosed that Mr. MacFarlane did not hold a valid and unrevoked certificate as a certified public accountant, issued under the authority of another state or territory of the United States, the District of Columbia, or of a foreign nation as required by said section 1376 of the General Code.

It follows therefore, that the state board of accountancy was without authority to issue a certificate, as a certified public accountant to Mr. MacFarlane, without requiring him to take an examination. The board, under the circumstancec, being without legal authority to issue such certificate in the first instance, and such certificate, as a matter of fact, never having been issued, it is my final conclusion that Mr. MacFarlane is not a certified public accountant under the laws of Ohio.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

531.

WOMEN ARE PERMITTED TO TAKE THE EXAMINATION FOR CERTIFIED PUBLIC ACCOUNTANTS IN OHIO WHEN THEY COMPLY WITH THE PROVISIONS OF SECTION 1373, GENERAL CODE.

All women who are citizens of the United States have a legitimate right to sit at an examination for certified public accountants in this state, providing they have the other qualifications set forth in section 1373, General Code.

COLUMBUS, OHIO, September 27, 1913.

HON. J. J. MCKNIGHT, *Secretary, State Board of Accountancy, Columbus, Ohio.*

DEAR SIR:—On August 30, 1913, this department received from you the following communication:—

> "The enclosed inquiry was submitted to the writer, and feeling that I had no authority to make any ruling in this case, I submitted the letter to Mr. E. S. Thomas of Cincinnati, president of the Ohio state board of accountancy. He has returned it to me with notation. Will you be kind enough to submit to the board, an opinion in this matter?"

The question referred to in said communication, and upon which you desire an opinion, is as follows:

> "Whether or not women are allowed to sit at the certified public accountancy examinations in the state of Ohio?"

In reply thereto I desire to say that section 1373 of the General Code provides as follows:

> "A citizen of the United States, or a person who has duly declared his intention to become such a citizen, not less than twenty-one years of age,

of good moral character, a graduate of a high school, or having received an equivalent education, with at least three years experience in the practice of accounting, and who has received from the state board of accountancy, as herein provided, a certificate of his qualifications to practice as a public expert accountant shall be styled and known as a certified public accountant. No other person shall assume such title or use the abbreviation 'C. P. A.' or other words or letters to indicate that he is a certified public accountant." Section 1 of article 14 of the constitution of the United States is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In construing said section, the supreme court of the United States in the case of Minor vs. Happersett, 88 U. S. report, 21 Wallace's report, page 162, holds that a woman, if born of citizen parents within the jurisdiction of the United States, is a citizen of the United States, in the following language:

"The word 'citizen' is often used to convey the idea of membership in a nation.

"In that sense, women, if born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States, as much so before the adoption of the fourteenth amendment to the constitution as since."

In the case of William E. Ritchie, plaintiff in error, vs. people of the state of Illinois (155 Ill., 98), 29 L. R. A., 79, the supreme court of Illinois in its opinion uses the following language:

"It has been held that a woman is both a 'citizen' and a 'person' within the meaning of this section. Minor vs. Happersett, 88 U. S. 21, Wall. 162, 22 L. ed., 627. The privileges and immunities here referred to are, in general, 'protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole'. Slaughterhouse cases, 83 U. S., 16 Wall., 36, 21 L. ed., 394. *As a citizen*, woman has the right to acquire and possess property of every kind. As a person, she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty or property without due process of law. Involved in these rights thus guaranteed to her is the right to make and enforce contracts. *The law accords to her, as to every other citizen*, the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions or other vocations. Before the law, her right is to a choice of vocations cannot be said to be denied or abridged on account of sex. Re Leach's petition, 134, Ind. 665, 21 L. R. A., 701."

By virtue of the foregoing, it follows that all women who are born or naturalized in the United States, thereby become citizens of the United States, and being citizens

of the United States, I am of the opinion that they have a legal right to sit at the certified public accountancy examinations in this state, provided they also possess the other qualifications set forth in section 1373, General Code, Supra.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

632.

WHERE AN APPLICATION FOR AN EXAMINATION IS FILED WITH THE OHIO STATE BOARD OF ACCOUNTANCY, ACCOMPANIED BY THE REQUIRED FEE FOR SUCH EXAMINATION, AND THE APPLICANT IS REJECTED, THE FEE SHOULD BE RETURNED TO THE APPLICANT.

In case an application for an examination is filed with the Ohio state board of accountancy accompanied by a certified check or its equivalent, and the applicant is not in the judgment of the board eligible for examination, and the application is rejected by the board and the applicant denied examination, the board should return to the rejected applicant the fee which he had deposited.

COLUMBUS, OHIO, November 24, 1913.

The State Board of Accountancy, Columbus, Ohio.

GENTLEMEN:—Under date of November 15, 1913, your department submitted to this department for an opinion, the following request:

> "Chapter 26, section 1375 (99 vs. 332, p. 4), states:
>
> "At the time of filing the application for such examination and certificate, each applicant shall pay to the treasurer of the state board of accountancy a fee of twenty-five dollars. Such examination fee shall not be refunded, but an applicant may be re-examined without the payment of an additional fee within eighteen months from the date of his application.
>
> "In case an application is filed with the Ohio state board of accountancy, accompanied by certified check or its equivalent, and the applicant is not in the judgment of the board eligible for examination, and such application is by the board rejected, and the applicant denied examination, may the board within the law, return to such applicant his fee, or is this fee to be understood as that designated by the law which shall not be refunded? The board has in some instances, upon the rejection of an application, returned the fee to the applicant. The question of the validity of such action has been raised, and the board desires an opinion as to the correct interpretation of the law."

In reply thereto, section 1373 of the General Code, provides that a person who has received from the state board of accountancy a certificate of his qualifications to practice as a public expert accountant, shall be styled and known as a certified public accountant, as follows:

> "A citizen of the United States, or a person who has duly declared his intention to become such citizen, not less than twenty-one years of age, of good moral character, a graduate of a high school, or having received an equiva-

lent education, with at least three years' experience in the practice of accounting, and who has received from the state board of accountancy, as herein provided, a certificate of his qualifications to practice as a public expert accountant shall be styled and known as a *certified public accountant.* No other person shall assume such title or use the abbreviation 'C. P. A.,' or other words or letters to indicate that he is a certified public accountant."

Section 1374 of the General Code provides that the state board of accountancy *shall hold an examination for such certificate each year,* as follows:

"Each year, the state board of accountancy shall hold an examination for such certificate. Each applicant shall be examined in theory of accounts, practical accounting, auditing and commercial law as affecting accountancy. If three or more persons apply for certificates within not less than five months after the annual examination, the board shall hold an examination for them. The time and place of each examination shall be fixed by the board."

Said section 1374, supra, specifically provides that *"each applicant shall be examined in the theory of accounts, practical accounting, auditing and commercial law as affecting accountancy,"* and section 1375, General Code, which you cite and quote in your request, supra, specifically provides that "at the time of filing the application *for such examination and certificate,* each applicant shall pay to the treasurer of the state board of accountancy a fee of $25.00."

From the foregoing language, as employed in the two foregoing sections of the General Code, I gather that the said fee of $25.00 is paid for the taking of the examination and for the certificate issued, if such applicant is successful in passing the prescribed examination. In fact, the last sentence of section 1375, General Code, which is the cause of the difficulty about which you request an opinion, refers to such fee as an examination fee in the following language:

"Such examination fee shall not be refunded, but the applicant may be re-examined without the payment of an additional fee within eighteen months from the date of his application."

It could hardly be said that such fee is an examination fee if such applicant is not eligible to take the examination, by reason of the fact that his application is rejected by the board of accountancy and the applicant denied an examination for not possessing the required qualifications, as stated in your inquiry. Furthermore, while said section provides that "such examination fee shall not be refunded," nevertheless, in lieu of such refunder, where the applicant has taken the examination and failed to secure a certificate, it is to be noted that such "applicant may be re-examined without the payment of an additional fee within eighteen months from the date of his application." It is apparent that an applicant cannot be re-examined unless he has taken a previous examination, and said fee of $25.00 which is paid to the treasurer of the state board of accountancy, being termed an examination fee by said section 1375, cannot be said to be an examination fee in the strict sense of the word, unless such applicant has taken the examination; and the board of accountancy cannot legally refuse to refund such fee of $25.00 unless the applicant gets within the provision of section 1375 of the General Code, supra, by having taken the examination so as to be entitled to a re-examination in lieu of such refunder. If for any cause an applicant is not eligible to take such examination, and his fee of $25.00 is retained by the board of accountancy, then such applicant has paid such fee without having received anything in return therefor, and not even an opportunity of taking such examination. I do not think that this is the intent of the above quoted legislative enactment. On the other hand,

I believe the intent of said sections to be, that such applicant is first entitled to an examination, and if he fails in such examination, his examination fee shall not be refunded, but in lieu thereof, he is entitled to a re-examination within the prescribed time. Therefore, if in the judgment of the state board of accountancy, an applicant is not eligible for examination and the application of such applicant is rejected and the applicant denied an examination, it is my conclusion that said board of accountancy is without legal authority to retain the said fee of $25.00 and the same should be refunded to the applicant, as not coming within the purview of section 1325 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Agriculture)

35.

APPROPRIATION—RECEIPTS FROM SALE OF SERUM MAY BE USED BY STATE BOARD OF AGRICULTURE FOR THE PURPOSE OF BUILDING AND EQUIPPING PLANT FOR THE PRODUCTION OF SERUM FOR THE TREATMENT OF HOG CHOLERA TO THE EXTENT OF THE DIFFERENCE BETWEEN THE AMOUNT AUTHORIZED TO BE EXPENDED FOR SUCH BUILDING AND THE AMOUNT SPECIFICALLY APPROPRIATED THEREFOR.

Since the legislature has authorized an expenditure of $75,000.00 for the purpose of building and equipping a farm for the production of serum for the treatment of hog cholera, and since the legislature has appropriated only $60,000.00 for this purpose, the appropriation made by the legislature in addition thereto of receipts and balances will permit such receipts and balances to be devoted to the purpose of building and equipping such plant to the extent of the difference between the amount specifically appropriated and the amount authorized to be expended, to wit: $15,000.00.

COLUMBUS, OHIO, December 27, 1912.

Ohio State Board of Agriculture, attention Dr. Paul Fischer, State Veterinarian, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of December 19th, wherein you state:

> "In reference to the work of serum production operated under the direction of the state board of agriculture.
>
> "The plant now in operation was developed from an original appropriation of three thousand dollars, equipment, etc., as it was needed from time to time, being provided from the funds obtained by the sale of serum.
>
> "The new plant is being built with the special appropriation of sixty thousand dollars. In both cases it was understood that the proceeds of the sale of serum be used to carry on and develop the work, as well as to purchase such apparatus as was needed from time to time and replace worn-out and broken articles.
>
> "We are now about to remove the equipment from the old to the new laboratories, as far as practicable, without interrupting the progress of the work. We should like to be advised by your office whether there is an obstacle in the law which would prevent the use for the new plant of the funds accumulated from the sale of serum produced in the old laboratories, in the same manner in which these funds have been used in the past for the original plant."

The original appropriation referred to in your letter was included in the general appropriation made to your department by the general assembly in 1909, 100 O. L., 31, as follows:

> "Serum for hog cholera ..... $3,000.00."

The general assembly at its session in 1910, 101 O. L., 178, appropriated for:

> "Purchase and equipment of serum farm of prevention of hog cholera ..... $25,000.00."

And at the session of 1911, 102 O. L., 374, appropriated for year 1911:

"Building and equipment for serum farm to cost complete $75,000.00 ..... $30,000.00."

And at the same session, 102 O. L., 394, appropriated for the year 1912:

"Building and equipment for serum farm to cost $75,000 complete ..... $30,000.00."

In addition to these items there was appropriated the sum of $2,700.00 for the salaries of laborers at said serum farm for each of the years 1911 and 1912. The legislature at all of the sessions hereinbefore mentioned appropriated to the Ohio state board of agriculture the receipts and balances of that department. This was necessary in order to permit the department to expend its receipts, otherwise those receipts would have reverted to the general revenue fund in the state treasury.

The fact that the legislature appropriated only $60,000 for the building and equipment of a serum plant and limited the total cost thereof to $75,000 and also appropriated receipts and balances of your department, is, to my mind, strong evidence of the intent of that body to permit the expenditure for the equipment of the new plant from the fund arising out of the sale of serum at the old plant, of an amount equal to the difference between the appropriation of $60,000 and the total cost of the building and equipment of the new plant as limited by the appropriation bill to $75,000, that is the sum of $15,000.

I am, therefore, of the opinion that you are legally authorized to expend for the building and equipment of the new serum plant any sum not to exceed $15,000 out of the funds arising from the sale of serum at the old plant.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the Agricultural Commisson)

615.

COUNTY AGENTS FOR THE AGRICULTURAL COMMISSION SHOULD NOT ENTER INTO CONTRACTS FOR THE BENEFIT OF THE FARMERS IN THE COMMUNITY IN WHICH THEY ARE WORKING.—THE AGRICULTURAL COMMISSION MAY REQUIRE EMPLOYES TO GIVE BOND WHEN THEY DEEM IT NECESSARY THAT BOND SHOULD BE GIVEN.

1. Persons employed by the agricultural commission with the official title "county agents" should not enter into contracts with persons, firms or corporations for furnishing farmers supplies of the right quality at correct prices.

2. The agricultural commission may make the giving of a bond a condition of employment, when the same is not prescribed by statute, should they deem the same reasonably necessary. The premium on the bond of a public official may not be met with public funds unless the statutes so prescribe.

COLUMBUS, OHIO, November 21, 1913.

HON. BENJ. F. GAYMAN, *Secretary, Agricultural Commission of Ohio, Columbus, Ohio.*

DEAR SIR:—Under favor of November 20th, you request my opinion as follows:

> "1. Can a state official, board or commission, or employe of the same, enter into contracts for the benefit of private parties, firms or corporations?
>
> "This question is raised by the following conditions: The commission employs certain persons with the official title of "county agent," whose duties are to instruct farmers and farmer's organizations in improved methods in agriculture and to advise and assist them in the purchase of proper supplies for the increase in the production of food products. It is sometimes the custom of these agents to enter into contracts with persons, firms or corporations for furnishing to farmers supplies of the right quality at correct prices. The question is, should the agent make these contracts or should they be made by the farmers themselves?"

The constitution of the state prohibits the state from, in any manner, giving, loaning to or aiding by its credit any private enterprise. (Article VIII, section 4). And the statutes nowhere authorize any official board or commission, or any employe of the same, to enter contracts for the benefit of private parties, firms or corporations, or to in any way back up, support or guarantee, in any manner, a private enterprise. It is clear beyond the slightest doubt that the agents you mention would be without power, in their official capacity, to either make these contracts or to in any way lend the sanction of the state as security for their performance.

Should these agents, in their personal capacity, and upon their own individual responsibility, enter into such contracts, in behalf of private individuals, out of an excessive zeal for the welfare of the individuals concerned, or for the progress and success of the work the agent is undertaking, I know of no legal principle which would invalidate such a course of action. The proceeding, however, would present a very doubtful policy, and when viewed in the light of the very probable results of the situation in which such agent would be placed, such action, as a general proposition, would be justly attended by suspicion. I understand that it is the view of the board that such a practice is a very undesirable one. I may, therefore, venture the suggestion that the situation is very easily controlled through the authority which the board has in the employment of such assistants.

The agents are employed under section 9 of the agricultural commission act, section 1087, General Code, which authorizes, in general terms, the employment by the commission of such experts, assistants and employes as they deem necessary, subject to the approval of the governor. Under this provision the commission may make such terms of employment with these agents as it deems advisable, and may lay down the condition that contracts of the nature referred to shall not be entered into.

You next inquire:

> "When the General Code does not explicitly provide that employes shall be required to give bonds to the state, is the commission warranted in requiring bonds of employes and paying the premiums thereon from funds appropriated for the uses and purposes of the commission?"

It is settled beyond doubt that the premium on the bond of a public official may not be met with public funds in the absence of express legislative authority therefor. The premium on bonds required of employes of the agricultural commission, therefore, may not be paid from funds appropriated for the uses and purposes of the commission.

I am of the opinion, however, that the commission is empowered to make the giving of a bond a condition of employment, when the same is not prescribed by statute, should they deem the same reasonably necessary. In such event, however, the individual would be required to pay the premium on his own bond.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

640

THE GOVERNOR IS EX OFFICIO A MEMBER OF THE AGRICULTURAL COMMISSION AND CONCERNING MATTERS COVERED BY SECTION 9 OF THE AGRICULTURAL COMMISSION ACT, HE MUST ACT AS GOVERNOR, WHETHER HE ACTS AS A MEMBER OF THE COMMISSION OR NOT, AND UNTIL HE APPROVES WHAT HAS BEEN DONE BY THE COMMISSION, ITS ACTS ARE INEFFECTIVE.

The governor is made a member ex officio of the agricultural commission by virtue of his office, and when present his action and vote is taken and considered as a member of the board, not as governor, until it comes to the matters covered by section 9 of the agricultural commission act, when he may act as a member of the board, or as governor, or as both. Concerning matters covered by section 9, he must act as governor, whether he acts as a member of the commission or not. In these matters he is the controlling power, and until he acts affirmatively, by approving what has been done by the commission, its acts are ineffective.

COLUMBUS, OHIO, November 26, 1913.

HON. BENJ. F. GAYMAN, *Secretary, The Agricultural Commission, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 21st in which you call attention to section 9 of the agricultural commission act, section 1087, General Code, and ask:

> "At nearly every meeting held by the commission some action is taken involving the expenditure of money. In view of this condition, is it necessary to submit the record of proceedings of each meeting to the governor for his

approval? I shall be glad to receive, at your earliest convenience, your opinion on the legal interpretation that should be placed on the language requiring the governor's approval of the acts of the commission."

Section 9, to which you refer, reads:

"The agricultural commission is authorized to employ a secretary, heads of bureaus, experts, clerks, stenographers and other assistants and employes, and to fix their compensation and these and all similar acts involving expenditures of money shall be subject to the approval of the governor. The commissioners, secretary, experts, clerks, stenographers and other assistants and employes that may be employed, shall be entitled to receive from the state their actual and necessary traveling expenses while traveling on the business of the agricultural commission. Such expenses shall be itemized and certified to by the person who incurred the expense, and allowed by the agricultural commission."

Inasmuch as the language of this section is "secretary, heads of bureaus, experts, clerks, stenographers and other assistants and employes, and to fix their compensation and *these and all similar acts involving the expenditure of money* shall be subject to the approval of the governor," the language used must be construed as limiting the acts which are subject to the approval of the governor to those named, and "similar acts involving the expenditures of money," and may not be construed to include all acts of the commission involving the expenditure of money; and, consequently, it is not necessary to submit the record of every action of the board to the governor for his approval, but only such actions as are included in section 9, and acts similar thereto.

To illustrate: Section 31 of this act reads:

"The agricultural commission shall appoint a competent veterinarian who shall perform the duties prescribed by the commission and be subject to its rules and regulations. The veterinarian so appointed shall receive such compensation as the commission may fix. In case of an outbreak of disease among animals, if it deem it advisable, the commission may appoint temporarily additional veterinarians or other persons for special work in connection with its duties, and fix their compensation."

This furnishes a "similar" condition, and one that must be submitted to the governor for his approval.

Section 37 of the act, 103 O L, 312, reads:

"If an animal is killed under the provisions herein relating to the agricultural commission, the compensation to be made for the slaughtered animal shall be computed on the basis of the actual value of such animal at the time of killing; for an animal that has been kept in the same building or enclosure, two-thirds of such value, and for any other animal, the full value of such animal without reference to the suspicion of contagion. No compensation, however, shall be made to a person who has brought animals into this state affected with such contagious disease, or from a district in which such contagious disease existed, or who has wilfully concealed the existence of such disease among his stock or on his premises, or who by wilful neglect or purposely has contributed to the spread of such contagion. In case of the destruction of a horse, mule or ass affected with glanders or farcy, no compensation for it shall be made, if it was so diseased when it passed into posses-

sion of its owner. In appraising animals to be killed as hereinbefore provided, no allowance shall be made because such animals are thoroughbred or pedigreed stock."

This presents a situation absolutely unlike those described in section 9, and one where the action of the board is not subject to the approval of the governor.

I believe that calling your attention to these two sections will sufficiently present the question to you, and fully enable you to determine what actions of the board are, and what are not subject to the approval of the governor.

The governor is made a member of the board ex officio by virtue of his office, and when present, his action and vote is taken and considered as a member of the board, not as governor, until it comes to the matters covered by section 9 of the act, when, as a matter of fact, he may act as a member of the board or as governor or as both. Concerning matters covered by section 9, he must act as governor whether he acts as a member of the commission or not. As to these matters he, as governor, is the controlling power, and until he acts affirmatively, by approving what has been done by the commission, its acts are ineffective.

Yours truly,

TIMOTHY S HOGAN,

Attorney General.

(To the Agricultural Experiment Station)

27.

BOARD OF CONTROL—AGRICULTURAL EXPERIMENT STATION—MANDATORY DUTY OF COUNTY COMMISSIONERS TO APPROPRIATE MAINTENANCE FUND AFTER AGREEMENT MADE WITH BOARD OF CONTROL—DUTY TO MAKE AGREEMENT NOT MANDATORY.

Section 1165-8, General Code, provides that the county commissioners shall appropriate as a maintenance fund for the conduct of an agricultural experiment station such funds as may be agreed upon by the commissioners with the board of control of such farm, not to exceed $2,000.00 annually.

Under this section the county commissioners may not be mandamused to enter into such agreement for the reason that this duty involves a discretion.

When such agreement has been made, however, the statute imposes a mandatory duty upon the commissioners to appropriate an amount agreed upon; this duty is mandatory and may, therefore, be enforced by mandamus.

COLUMBUS, OHIO, December 3, 1912.

HON. CHARLES MCINTIRE, *Agent of Board of Control, Ohio Agricultural Experimental Station, Troy, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your communication of September 9, 1912, wherein you inquire as follows:

> "We desire some information and advice in regard to the maintenance fund for the county experiment farms of the state. In Clermont county we began to operate the farm in October, 1911. The county commissioners have made no effort to provide maintenance fund and are not likely to as they say the county funds are already overdrawn. The original bond issue has been used for purchase and equipment of farm which has also been maintained by this fund to present time. The farm can be kept going but a short time longer unless the maintenance fund is provided. Section 1165-8 of the General Code provides that the county commissioners shall provide a maintenance fund. Under the circumstances, can the commissioners be forced to provide this fund, and what course would you advise us to pursue?"

In a communication received from you under date of November 26, 1912, you state that the board of control submitted estimates at the beginning of operations, including the maintenance fund for the first year for the operation of the Clermont county experimental farm, and that the same was accepted by the commissioners of Clermont county, but that said fund was not provided by the said county commissioners.

In reply to your inquiry I desire to say that section 1165-8 of the General Code provides for the maintenance and equipment of the county experimental farms as follows:

> "The equipment of an experimental farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control of the experiment station for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the

first season. The county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purpose of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between said commissioners and the board of control of the experiment station."

Section 1165-13 of the General Code provides that if an experiment station shall cease to use such farm, then such farm and its equipment shall be sold at public auction as follows:

"In case the experiment station shall cease to use for the purposes herein specified any farm established under this act, such farm and its equipment shall be sold at public auction to the highest bidder after notice of such proposed sale shall have been published for four consecutive weeks in two newspapers of opposite politics, once a week, published in and having the largest circulation in the county within which the farm is located, and the proceeds of such sale shall be covered into the county treasury, the sums thus covered to be placed to the credit of the school funds of the county."

From the wording of the above sections, it is my opinion that so long as a farm has been established and equipped as an agricultural experiment farm, and inasmuch as the board of county commissioners of Clermont county and the board of control of the experimental farm agreed upon the first year's maintenance fund, it becomes mandatory upon the commissioners of said county wherein such farm is located to appropriate such sum as is necessary for the payment of the wages to laborers employed in the management of such farm and for the purchase of supplies and materials necessary to the proper conduct of such farm for the first year, not exceeding two thousand dollars, and so agreed upon between the said commissioners and the board of control of the experiment station, in event the board of commissioners fail to comply therewith, I am of the opinion that such board could be compelled to comply with said agreement by issuing a writ of mandamus. In event the board of county commissioners and the board of control of the experiment farm fail to agree upon a maintenance fund, then a different situation arises, for the reason that said section 1168-8 of the General Code, supra, leaves some discretion to the board of county commissioners as to the amount to be agreed upon for the annual maintenance of such farm, and the courts will not attempt in any way to control that discretion.

Section 34 of High's extraordinary legal remedies, and section 42 of the same provides:

"Section 34. An important distinction to be observed in the outset, and which will more fully appear hereafter, is that between duties which are peremptory and absolute, and hence merely ministerial in their nature, and those which involve the exercise of some degree of official discretion and judgment upon the part of the officers charged with their performance. As regards the latter class of duties, concerning which the officer is vested with discretionary powers, while the writ may properly commend him to act, or may set him in motion, it will not further control or interfere with his action, nor will it direct him to act in any specific manner. But as to the former class of cases, where mandamus is sought to compel the performance of a plain and unqualified duty, concerning which the officer is vested with no discretion, a specific act or duty by law required of him, the writ will command the doing of the very act itself.

"Section 42. We come next to the consideration of a fundamental

rule, underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And whenever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given. Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that if any reasonable doubt exists as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer."

In conclusion I desire to say that I know of no method whereby the board of county commissioners of Clermont county could be compelled to agree upon an annual maintenance fund if they fail to agree upon the amount of such fund with the board of control of the experimental farm after having fulfilled their statutory duty in attempting to agree upon such maintenance fund, and after having exercised their statutory discretion.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the Chief Examiner of Steam Engineers)

466.

BOARD OF BOILER RULES HAS AUTHORITY TO CONDEMN THE USE OF ANY UNSAFE BOILERS.

The board of boiler rules may condemn the use of any steam boiler that is unsafe. It has no power to remove the boiler or to condemn it as is done in appropriation proceedings, but it should have the boiler labeled as unsafe and attached thereto the penalty for its use.

COLUMBUS, OHIO, September 9, 1913.

HON. CHARLES WIRMEL, *Chief Inspector Steam Boilers, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 25, 1913, in which you inquire:

> "If the Ohio board of boiler rules, under section 1058-8 of the Ohio boiler inspection laws (a copy of which is herewith appended), has the authority to condemn and order discontinued from further service, such boilers as have become dangerous and, in the opinion of the board, are a menace to life and property?"

In reply thereto, permit me to say:
Section 1058-8, to which you refer, reads:

> "It shall be the duty of the board of boiler rules to formulate rules for the construction, installation, inspection and operation of steam boilers, and for ascertaining the safe working pressure to be carried on such boilers, to prescribe tests, if it is deemed necessary, to ascertain the qualities of materials used in the construction of boilers to formulate rules regulating the construction and sizes of safety valves for boilers of different sizes and pressures, for the construction, use, and location of fusible plugs, appliances for indicating the pressure of steam and level of water in the boiler, and such other appliances as the board may deem necessary to safety in operating steam boilers; to make a standard form of certificate of inspection, and to examine applicants for certificates as boiler inspectors as hereinafter provided."

In your use of the word condemn, I take it that you mean not to take away or appropriate, as sometimes comes within the meaning of that word, but to condemn its condition as suitable or safe for use. There is no power in your office to take away, or condemn as property is condemned in appropriation proceedings, but you have full power, and it is your duty, to condemn the use of any and all unsafe boilers or boilers not in such condition to comply with the rules of your department.

My suggestion is, that you prepare a tag which can be securely fastened and at tached to a boiler by the inspector, and which he can sign officially, and that a tag in the following, or similar language, would answer your wants.

> "This boiler is unsafe.
> "Certificate is refused.
> "Penalty of from $20.00 to $500.00 for using the same will be enforced.
>
> ----------
> Deputy inspector of steam boilers."

In my opinion, with this class of notice, an owner will hesitate a long while before using a boiler so labeled, and that this course will carry out the objects of the law and meet the approbation of all good citizens.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

58. (To the Chief Inspector of Workshops and Factories)

BUILDING CODE COMMISSION MAY NOT RECEIVE EMERGENCY ALLOWANCE.

Inasmuch as the building code commission is not an institution or department of the state, that commission cannot be held to come within the terms of section 2312, General Code, authorizing an emergency board to permit officers of state institutions or departments to create a deficiency.

COLUMBUS, OHIO, December 17, 1912.

HON. THOMAS P. KEARNS, *Chief Inspector, Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 6th in which you state:

> "The seventy-eighth general assembly, which convened in 1910, created a commission known as the 'Building Code Commission,' composed of the chief inspector of workshops and factories, the secretary of the state board of health, and the state fire marshal, for the purpose of drafting a state building code, and appropriated for its use a fund of $2,500.00 which was used to defray the expenses of compiling the present state building code, which was adopted by the seventy-ninth general assembly.
>
> "This commission was continued by an act of the seventy-ninth general assembly, and an additional fund of $5,000.00 was appropriated for this work.
>
> "The work of the commission is not quite completed and the funds appropriated are about exhausted. It will be necessary, in order to complete this work, to secure additional funds, and I would be pleased to have you render an opinion as to whether or not this could be considered an emergency, and whether or not it would be a legal transaction for the emergency board to make an appropriation for this purpose."

The act of the general assembly creating the building code commission is found in 101 O. L., 202. The objects and purposes for which said commission was created are sufficiently stated in your letter, and I do not deem it necessary to set them out at length here.

The act of 1911 continuing said commission in existence and prescribing a maximum expenditure of $5,000.00 by the commission is found in 102 O. L., at page 440.

An emergency board is provided for and its powers and duties defined by sections 2312 and 2313 of the general code as follows:

> "Section 2312. There shall be an emergency board to consist of the governor, auditor of state, attorney general, chairman of the state finance committee and chairman of the house finance committee, which board may authorize deficiencies to be made. The governor shall be the president, and the chairman of the house finance committee shall be secretary of the board. The secretary shall keep a complete record of all its proceedings. The necessary expenses of the chairman of the senate and house finance committees, while engaged in their duties as such members, shall be paid from the fund for expenses of legislative committees, upon itemized vouchers approved by themselves, and the auditor of state is hereby authorized to draw his warrant upon the treasurer of state therefor.
>
> "Section 2313. In case of an emergency requiring the expenditure of a greater sum than the amount appropriated by the general assembly for an institution or department of the state in any one year, or for the expenditure of money not specifically provided for by law, the trustees, managers, directors or superintendent of such institution, or the officers of such department, may make application to the board for authority to create a deficiency, or to expend money not specifically provided for by law. Such officer shall fully set forth to the secretary in writing the facts in connection with the case. As soon as can be done conveniently, the secretary shall arrange for a meeting

of the board, and shall notify such officer of the time and place of the meeting, and request his presence. No permit shall be granted with the approval of less than four members of the board, who shall sign it."

The word "emergency" is not defined in our statutes, hence there is nothing to indicate that the legislature intended it to have any other than its ordinary meaning. It is defined by Webster as:

"An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency."

I am of the opinion that when an institution or department of state requires more funds for its maintenance and operation than could reasonably have been foreseen during the session of the legislature immediately preceding the time of making the application to the emergency board or when funds are needed for a purpose not specifically provided by law, and such need was not apparent during the preceding legislative session, the emergency board has the discretionary power to authorize the head of a state institution or department to create a deficiency in a sum to be fixed by said board. The fact that the funds appropriated for the use of the building code commission are exhausted and the work of the commission is not completed, in my judgment constitutes an emergency.

It will be observed, however, that the emergency board may authorize only an "*institution or department of state* to create a deficiency."

The answer to your second question depends entirely upon whether the building code commission is an institution or department of state. I am clearly of the opinion that it is not. Said commission has no governmental functions of any sort. It merely acts in an advisory capacity, empowered by the act establishing it to complete the code of building regulations and submit the same to the consideration of the general assembly at its forthcoming session.

For the reason, therefore, that said commission does not come within the purview of the statute which permits the emergency board to authorize the creation of deficiencies, I am of the opinion that said board is without legal power to authorize the building code commission to create a deficiency.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

409.

MINORS—FEMALES UNDER SIXTEEN AND MALES UNDER FIFTEEN YEARS OF AGE MAY NOT BE EMPLOYED—WAGE AND SCHOOLING CERTIFICATES MUST BE SECURED—INTERPRETERS MAY NOT BE EMPLOYED TO EXAMINE CHILDREN WHO SPEAK A FOREIGN LANGUAGE.

Under section 12993, General Code, boys under fifteen and girls under sixteen years of age may not be employed at any kind of employment referred to in said section.

Under section 12994, General Code, it will be necessary for minors to secure a new age and schooling certificate when this law goes into effect.

It is necessary for children who speak a foreign language to pass the same test as a native born person.

Board of education are not authorized to employ interpreters to examine minors who speak a foreign language and those who cannot take the examination because of this fact will be denied the privilege of working until they have passed the age when a certificate is required.

COLUMBUS, OHIO, August 5, 1913.

HON. THOMAS P. KEARNS, *Chief Inspector, Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—I have your favor of July 30th, wherein you submit several questions the first of which is as follows:

"The new minor labor law, section 12993, raises the age limit at which minors may be employed in any class of employment to fifteen for boys and

sixteen for girls. There are at present a number of boys under fifteen and girls under sixteen employed at the various occupations throughout the state, which was permissible under the old law. I would ask you to kindly advise me whether or not these minors may continue in their present employment, or must they be dismissed until they have arrived at the age required under the new law?"

In reply, thereto, I beg to advise you that under section 12993 of the General Code, boys under fifteen years and girls under sixteen years may not continue in their present employments referred to in said section. The statute, being one in relation to police powers, is not limited in its application to future employments.

Your second question is as follows:

"Section 12994 of the minor labor law provides that boys under sixteen and girls under eighteen years of age must secure the proper age and schooling certificate as provided by law before they can be employed at any kind of employment. Section 7766 of the compulsory education law provides that such minor, if a male, must pass a satisfactory 6th grade test, and if a female, a satisfactory 7th grade test before such certificate will be issued. This is an advance of one grade in each case of the test required under the old law, and there seems to be some question as to whether or not this law will apply to minors who are now working with certificates secured under the provisions of the old law. Kindly advise me whether or not minors so employed may continue in that employment with their present certificate, or if it will be necessary on and after August 12, 1913, when the new law goes into effect, for all minors, if males under sixteen, and if females under eighteen, to secure new age and schooling certificates as prescribed by the new law."

In reply to this question I have to say that the same principle applies as did in reference to section 32993, and that under this section it will be necessary for minors on and after August 12, 1913, when the new law goes into effect, if male under sixteen and if female under eighteen, to secure new age and schooling certificates as provided by the new law.

You will keep in mind in connection with this section the provisions in relation to vacations, which is contained in the last paragraph of section 7766, and which reads as follows:

"The superintendent or person authorized by him may issue special vacation certificates to boys under sixteen years of age, and girls under eighteen years of age, which shall entitle the holder thereof to be employed during vacation in occupations not forbidden by law to such children, even though such child may not have completed the sixth grade, but provided he has complied with all the other requirements for obtaining the certificate hereinbefore described."

Your third question is as follows:

"The compulsory education law, section 7762, enumerates the studies in which applicants for schooling certificates must be examined, namely: reading, spelling, writing, arithmetic, *English grammer and geography.* There are a great many foreign born children in our state who can neither speak or understand the English language and for that reason could not take this examination, except in their own language. Under these circumstances, is it necessary for these children to pass the same test as a native born child, and would it be legal for the various boards of education throughout the state to employ interpreters or men who understand the various foreign languages to examine these minors in their respective languages, or shall those who cannot take the examination in the English language be denied the privilege of working until they have passed the age when no certificate is required?"

The requirements of section 7762 are:

> "All parents, guardians and other persons who have care of children, shall instruct them, or cause them to be instructed, in reading, spelling, writing, English grammer, geography and arithmetic."

It is apparent that the studies herein referred to are the same branches an applicant is required to pass an examination in who desires a teacher's certificate, insofar as the branches in section 7762 go, and it is necessary that the instruction in each of these branches be in the English language. No other test seems to be contemplated by the statutes.

My answer, therefore, to your inquiry is that it is necessary for the children to which you refer to pass the same test as native born children, and that boards of education are not authorized to employ interpreters or men who understand various foreign languages to examine minors who speak a foreign tongue, and that those who cannot take the examinations required in the English language are denied the privilege of working until they have passed the age when no certificate is required.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

441.

GIRLS OVER SIXTEEN AND UNDER EIGHTEEN YEARS OF AGE MAY LABOR AT EMPLOYMENTS NOT PROHIBITED BY LAW.

Under the provisions of the act of April 28th, 103 O. L. 914, girls over sixteen and under eighteen years of age may labor at employments not prohibited by law, providing they can pass a satisfactory educational test. It is not the intention of the legislature to permit them to remain out of school and not labor. The insertion of the words "over eighteen" in section 7766, is a mistake; it was intended that it should be "over sixteen." With this construction the law becomes operative.

COLUMBUS, OHIO, August 14, 1913.

(Supplementary to opinion of August 5, 1913).

HON. THOMAS P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—Since writing you in August 5, 1913, and answering the questions then propounded by you concerning the act of April 28, 1913, 103 O. L., 864-914, many questions have been asked concerning said act, and one of them a very great number of times. It is:

> "Whether a female over sixteen and under eighteen years of age may work in a factory or any employment whatever, on account of the conflict found between sections 7765 and 7766?"

The first of said sections reads:

> "Section 7765. No boy under sixteen years of age and no girl under eighteen years of age shall be employed or be in the employment of any person,

company or corporation unless such child presents to such person, company or corporation an age and schooling certificate herein provided for, as a condition of employment. Such employer shall keep the same on file in the establishment where such minor is employed for inspection by the truant officer or officers of the department of workshops and factories."

From this it is apparent that the legislature intended that females over sixteen and under eighteen might be employed and accept employment provided they could pass a satisfactory educational test.

Section 7766 reads in part as follows:

"An age and schooling certificate shall be approved only by the superintendent of schools, or by a person authorized by him, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having such superintendent, upon satisfactory proof that such child, if a male, is over fifteen years of age, or, if a female, is over eighteen years of age, and that such child has been examined and passed a satisfactory sixth grade test, if a male, and seventh grade test, if a female, in the studies enumerated in section seventy-seven hundred and sixty-two, * * *.

"Provided * * * that the employment contemplated by the child is not prohibited by any law regulating the employment of children * * *."

The conflict between these provisions is so apparent that it cannot be over-looked, and it is impossible for a female under eighteen to make the proofs required by section 7766. An adherence to the language of section 7766 would result in the conclusion that girls between 16 and 18, possessed of the educational requirements set forth, would not be compelled to attend school and would be prohibited from working at any employment whatever, notwithstanding the fact that they are not expressly prohibited therefrom, while the right to work is clearly inferred from all the other provisions of the act.

In order to ascertain the legislative intention as to this matter, other sections of the act should and must be considered. Section 7768 provides that every child between 8 and 15, if a male, and 8 and 16, if a female, and every male between 15 and 16 *"not engaged in some regular employment"* shall be subject to the laws relating to delinquent children. This section carries with it by strong implication the idea that boys between 15 and 16 may engage in some regular employment.

Section 12993 prescribes the character of work in which children may engage.

Section 12994 reads:

"No boy under sixteen years of age and no girl under eighteen years of age shall be employed or permitted to work on or in connection with the establishments mentioned in section 12993 of the General Code, or in the distribution or transmission of merchandise or messages unless such employer first procures from the proper authority the age and schooling certificate provided by law."

This section recognizes the right of boys under 16 and girls under 18 to engage in labor provided he or she procures the age and schooling certificates required by law.

Section 7764 reads:

"In case such superintendent, principal or clerk refuses to excuse a child from attendance at school, an appeal may be taken from such decision to the judge of the juvenile court of the county, upon the giving of a bond, within ten days thereafter, to the approval of such judge, to pay the costs of the appeal. His decision in the matter shall be final. All children between the ages of

15 and 16 years, not engaged in some regular employment, shall attend school for the full term the schools of the district in which they reside are in session during the school year, unless excused for the reasons above named."

It will here be observed that *children* between the ages of 15 and 16 shall attend school when not engaged in some regular employment, and not excused as provided by section 7763, General Code.

Section 12995 gives a right of action in favor of a child whose employment is terminated against the employer who fails for two days to return its certificate to the superintendent of schools, or other authority legally issuing it.

Section 12998 requires that employers shall keep two lists, each of which shows:

1. All boys under 16, and
2. All girls under 18, one of which shall be posted near the principal entrance and the other kept on file.

Section 12993 prescribes the character of work in which children may engage, fixing the age limit at 15 for boys and 16 for girls, as already stated in my communication of August 5th.

Section 12994, General Code, above quoted, clearly shows that the age and schooling certificate mentioned in section 7765, and provision for the issuance of which is found in section 7766, was for boys under 16 and girls under 18.

Attention is also called to the fact that section 7765 refers to *boys under 16* and *girls under 18*; while section 7766 refers to boys *over 15* and girls *over 18* years of age, evincing an intention in so far as boys were concerned to make provision for those who were included in section 7765, or, in other words, an intention on the part of the legislature to provide a means whereby the children described in the preceding section might qualify for performing labor. When sections 7765 and 7766 are compared, however, it will be seen that the age limit of boys in the first is reduced one year, while as to girls it is changed from *under* 18 to *over* 18, this in terms excluding from the authorization of employment certificates females under 18 years of age; and as females over 18 are not compelled to go to school, and not required to furnish an employment certificate, it follows, if we construe section 7766 literally, that females over 16 and under 18 are left out of the compulsory education law, and prohibited from engaging in any employment whatever. This construction violates every idea and object of both laws, and presents the question whether this enactment may be so construed as to make it harmonize with the legislative intention and at the same time make it operative and effective.

Without going into any of the rules of construction other than the one which is paramount to all others, i. e., the determination of the legislative intent, I will close this with one statement before setting forth my conclusion.

It is stated to me that in section 7766, as originally typewritten "eighteen" where applied to females read "sixteen;" but without knowledge as to when and by whom this change was made, the presumption obtains that it was done in a proper manner, and by the proper authority after presentation and before passage. I feel quite certain that this suggestion furnishes no aid in ascertaining what is intended by this law.

However, it is apparent from the entire act, and clearly so, that girls between the age of 16 and 18 might labor in the employments, and in doing the things not prohibited, that it was not intended to permit them to stay out of school and not labor and I, therefore, hold that the entire act when properly considered, clearly shows that the insertion of the words "over eighteen" in section 7766, was a mistake; that it was intended that it should be "over sixteen," and with this construction I feel that the entire act is made operative, harmonious, and that in doing what I have, I am fully sustained by the authorities upon constitutional and statutory construction.

I desire this as a supplement to my former opinion, which I feel to be correct as to the matters considered and not to include the matters herein discussed.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Chief Inspector of Mines)

90.

STATE CHIEF INSPECTOR OF MINES—COLLECTOR PERMITTED ON MINING MACHINE—NOT A LOCOMOTIVE.

Section 947, General Code, providing that a collector or any device attached to the cable as a substitute for a trolley may not be permitted to be used, upon a locomotive, cannot be construed to apply to a mining machine.

COLUMBUS, OHIO, February 14, 1913.

HON. J. C. DAVIES, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 12, 1913, in which you inquire whether power may be used through a *collector* on a mining machine for the purpose of propelling the same through entries in a mine.

In order to answer your inquiry it will be necessary to consider section 947 of the General Code, that being the only provision of the General Code which would prevent the use of a collector for this work, if it be prohibited on a mining machine.

Section 947, General Code, provides in part as follows:

> "* * * No *locomotive* shall be operated by means of a person holding and sliding upon or frequently making contact with the positive wire with any device attached to the cable as a *substitute* for a trolley, * * *."

A "collector," as I understand the term, is a device used by an operator of a mining machine as a *substitute* for a trolley, the operator holding the device in contact with a positive wire in moving machine about in mine. This is prohibited as to *locomotives* by section 947, General Code, just quoted.

A mining machine is propelled by a motor which is a part of the machine.

A "locomotive" is defined in the century dictionary as follows:

> "* * * Having the power to produce motion to move something else from place to place."

The word "locomotive" as popularly used implies a machine or power used in moving something else from place to place. It is so used in mining code.

Section 943 of the General Code, provides in part as follows:

> "The owner, lessee or agent of a mine at which *locomotives* are used for hauling coal shall keep a light on the front end of the locomotive when it is in use * * *."

Section 958, General Code, provides in part:

> "Motormen and trip-riders shall use care in handling the *locomotive* and cars, and shall see that the signal or marker, * * * is used as provided. * * * They shall warn persons forbidden to ride on the *locomotive* or cars * * *."

The term "locomotive," as used in these two sections and other sections of the General Code, always refer to a separate car or power as used in hauling

cars in the mine. Wherever the term "mining machine" is used, although it has its own motive power, is always designated and referred to in the General Code as a *mining machine* and never as a *locomotive* or *motor*. So that the word "locomotive" as used in section 947, General Code, refers to car used to haul coal in a mine. Therefore, section 947, General Code, does not prohibit the use of a collector on a mining machine for the purpose of propelling the same through the mine.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

179.

MINES AND MINING—PROPS OF "APPROXIMATE" LENGTH.

Section 953, General Code, requiring miners to keep each working place supplied with props of "approximate" length, must be construed to require miners to have in readiness props as nearly of the proper length as circumstances will reasonably permit.

COLUMBUS, OHIO, April 12, 1913.

HON. J. C. DAVIES, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Your letter of April 10th received. You ask me to interpret section 953, General Code, relative to the length of props supplied to miners, which reads as follows:

> "He shall see that the working place of each miner is kept supplied with props of approximate length, etc."

It becomes the duty of the mine foreman under this section, a part of which you quote, to see that the working place of each miner is kept supplied with props of *approximate* length, caps and other timber necessary to securely prop the roof of his working place.

In some coal fields, like Jackson County, where there is a solid vein of coal, with but little draw slate, and the vein running uniformly in various entries, it is plainly the duty of the company to furnish props of the length required, as the various lengths of the props that miners require in this district are easily ascertainable. But from the statement contained in your letter, and also made to me personally by you, I learn that there is no uniformity in the height of coal or in the length of props required in a single entry; that because of the different depths of draw slate and the varying thickness of the coal, many sizes of props are required in a single entry or room in these mines. The question arises, then, what is the duty of the mine foreman as to furnishing props? Under this section he is required to supply miners with props of approximate length. Does that mean that the foreman must ascertain the exact length required in every part of the entry, and have props of varying sizes and lengths at the miners' working places, so that timber of the proper length can be always had?

"Approximate" is defined in the century dictionary as follows:

> "Near in character; nearly approaching accuracy or correctness."

On account of the conditions which you state exist in the eastern Ohio coal field, it would be practically impossible to furnish the exact length of props required in each

instance. The statute does not require it. The statute recognizes the natural condition which requires different lengths of props and only makes it the duty of the foreman to supply props of *approximate* length; that is, as defined in the century dictionary nearly approaching accuracy or correctness; near in length, not exactly. However, if the operator can ascertain what length of props will be required in an entry or room, or working place, it is his duty to furnish that length; and he must exercise diligence to ascertain, if he can, what lengths may be required, and furnish either the exact length or as nearly the exact length as the conditions require.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the State Inspector of Oils)

503.

STATE INSPECTOR OF OILS IS NOT PERMITTED TO RECEIVE FEES FOR INSPECTION OF OIL UNLESS THE INSPECTION IS ACTUALLY MADE.

Where oil has never been inspected, but the fee for inspection is remitted to the state inspector of oils, the fee should be returned to the remitter, unless the oil is actually inspected. Where oil is sold before it has been inspected, there is a violation of section 12569, General Code, and the offense may be prosecuted.

COLUMBUS, OHIO, August 13, 1913.

HON. B. J. MCKINNEY, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Under date of July 7, 1913, you referred to this department for an opinion thereon, the following request:

"The following is respectfully referred to you for your opinion and advice:

"Some weeks ago I received information that one H. L. Granger, of Aurora, Ohio, had received a shipment of refined oil at that place, and "rumor" said that it had been inspected.

"I at once, under date of April 23, 1913, instructed S. M. Raymond, deputy inspector of oils for district No. 31, to investigate the affair and report results to me. Of date of May 3d, Mr. Raymond reported the result of his investigation. His report is attached hereto, being marked exhibit "A." In this report I desire to call your particular attention to what is said about Mr. Granger's mental condition, due to alleged sun-stroke. Mr. Raymond has since verbally reiterated to me what he had written.

"Under date of May 6th, Mr. Granger wrote me admitting the sales of three cars of oil and enclosing an express money order for $14.98 to pay the inspection fees on same; said money order is still in my possession unused. Mr. Granger's letter is marked exhibit "B."

"I replied to Mr. Granger's letter on May 13th, a copy of my letter being attached as exhibit "C."

"Mr. Granger wrote again on May 19th, his letter being marked ex-exhibit "D"; since its receipt I have not written him, but have been leaving the matter hanging over him undecided, as far as he knew.

"What I would like if you please, is: First, your opinion as to my authority to receive these inspection fees, no inspections having been made. General Code, section 850. Second, your opinion as to whether or not Granger should be prosecuted, taking his reported mental troubles into consideration, for his violation of the provisions of section 12569 of the General Code. That is, shall I accept his money and close up the case, or shall I refuse his money and take steps to prosecute him?"

In reply thereto, I desire to say that section 850 of the General Code provides as follows:

"Each owner of oil inspected under this chapter shall pay to the state inspector or the deputy inspector for such inspection the following fees:

"For a single barrel, package or cask, fifty cents;

"When the lot inspected does not exceed ten barrels of fifty gallons each in the aggregate, for each barrel, thirty cents;

"When the lot inspected does not exceed fifty barrels of fifty gallons each in the aggregate, for each barrel, twenty cents;

"When the lot inspected exceeds fifty barrels of fifty gallons each in the aggregate, for each barrel, seven cents.

"All fees under this chapter shall be payable on demand of the state inspector, and in no case shall payment thereof be deferred beyond the tenth day of the next month after the inspection is made, and such fees shall be a lien on the oil so inspected."

You state that under date of May 6, 1913, Mr. Granger wrote you a letter enclosing an express money order for $14.98, to cover the inspection fee for inspecting three cars of oil, although you state in your request that said oil had never been inspected. Said fee of $14.98 was at the rate of 7 cents per barrel, for 214 barrels of oil, as disclosed by the said letter of Mr. Granger, which reads as follows:

"I have sold three tanks of oil. I have not paid the 7 cents per barrel state inspection, through no willful neglect on my part, and I trust this tax will now be accepted.

Empire Oil Works, Reno, Pa.

July, 1912	Tank No. 152, 70 bbl., 7 cents,	$4 90
October, 1912	Tank No. 154, 72 bbl., 7 cents,	5 04
April, 1913	Tank No. 154, 72 bbl., 7 cents,	5 04
		$14 98

"Enclosed please find money order, $14.98."

It is to be noted that said section 850 of the General Code, supra, specifically requires that the owner of oil inspected under the provisions of said chapter, shall pay to the said inspector, or deputy inspector, certain inspection fees for the oil actually inspected. In this case, the oil never having been inspected, that is to say, the dealer having sold the oil before the same was inspected, it follows therefore, that your department is without legal authority to receive said inspection fees above referred to, and the check received by your department covering the same should be returned to Mr. Granger.

In answer to your second question, section 12569 of the General Code provides as follows:

"Whoever, for himself or as agent for another, sells or attempts to sell oil to be consumed within this state for illuminating purposes, whether manufactured in this state or not, before it is inspected according to law, shall be fined not less than one hundred dollars nor more than three hundred dollars."

Technically speaking, Mr. Granger violated said section 12569 of the General Code, in selling said oil before it had been inspected according to law, but in view of the fact that your deputy inspector reported to the effect that Mr. Granger was weak mentally, due to an alleged sun-stroke, which he received some time previous to the time he received said oil I would suggest that you suspend or withhold the prosecution in this instance, but that you admonish Mr. Granger not to let the same occurrence happen again.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

504.

STATE INSPECTOR OF OILS IS WITHOUT AUTHORITY TO PROSECUTE MERCHANTS WHO SELL OIL THAT HAS BEEN PROPERLY INSPECTED.

Where oil has been properly inspected and approved by the state inspector of oils, the oil inspection department is without authority to prosecute merchants who sell this oil, unless there is a violation of some statute regulating the inspection and sale of oils.

COLUMBUS, OHIO, September 26, 1913.

HON. B. J. MCKINNEY, *State Inspector of Oils, 1010 New Hayden Bldg., Columbus, Ohio*

DEAR SIR:—On June 27, 1913, you submitted to this department the following letter of inquiry:

"The following is respectfully submitted to you for your opinion as to what are the further duties, if there are any, of this department in reference to the matters therein recited.

"On March 19, of this year, I was notified by telephone that there had been a number of supposed oil explosions at or near Kenton, Hardin county, and that several deaths had resulted therefrom; I at once decided to have the matter investigated and immediately called up Mr. George W. Montgomery, of Findlay, deputy inspector of oils for the fourteenth district, and requested him to be in Kenton the following morning, where and when he would receive a letter of instructions from me. A copy of said letter is hereto attached and is marked exhibit 'A'.

"Mr. Montgomery went to Kenton as directed, stayed there two days, and in addition to telephonic and verbal reports made a written report to me. His report is marked exhibit 'B.' I neglected to state that I had asked fire marshal Zuber to send a deputy to Kenton and that deputy fire marshal Bell was there at the same time my deputy was there. When the report of deputy Montgomery was received I felt that my duty in reference to these explosions was performed and that I had nothing more to do with or about them. Mr. Zuber was of the same opinion as to his department. At a later date, however, as I had learned that the people of Hardin county were not satisfied with the results of the investigation, and at the solicitation of the prosecuting attorney, I sent Mr. J. L. Strange of Greenfield, deputy inspector of oils for district No. 12 to Kenton to make another investigation. A copy of my letter of instructions to Mr. Strange is hereto attached marked exhibit 'C.'

"This investigation has been completed and the report thereof is hereby submitted to you as exhibit 'D.'

"Thanking you in advance for any light you may throw upon any course that should be mine as to these explosions, I am,

[Signed] Ben. J. McKinney,
State Inspector of Oils".

In reply thereto, sections 844 to 871 inclusive, of the General Code, create the state department of oil inspection and provide for the inspection of petroleum oil and its products in the state of Ohio.

Section 854 of the General Code specifically provides for the inspection of all petroleum oil and all products thereof, before the same shall be sold for illuminating purposes, as follows:

"Before being offered for sale to a consumer for illuminating purposes within this state, all mineral or petroleum oil, and any fluid or substance, the product of petroleum, or into which petroleum or a product of petroleum enters or is a constituent element, whether manufactured within this state or not, shall be inspected as provided in this chapter."

Section 855 of the General Code provides that such inspection shall be made by an apparatus known as the "Foster cup," as follows:

"Such inspection shall be made by the apparatus known as the 'Foster cup,' or Foster's automatic oil tester, in accordance with the following directions:

"(1.) Remove the thermometer with its mountings from the oil cup.

"(2.) Lift off the oil cup containing the flashing taper and fill open water bath with water to the mark upon the inside.

"(3.) Take the wick holder from the oil cup, and fill this vessel with the oil to be tested, pouring in the oil at the place of the wick holder and noting the gauge mark at the themometer hole, pouring very gradually as the surface approaches the gauge mark. The gauge mark consists of a small pendant shelf and the oil cup is properly filled when the upper surface of the oil just adheres to the lower surface of the gauge mark. Too much care cannot be taken at this point. Having ceased pouring, tip the cup so that the oil flows away from the gauge, then gradually restore it to the horizontal, and if the surface does not again adhere, add a little more oil.

"(4.) Adjust the wick of the flashing taper to give a flame that does not exceed one-quarter of an inch in height and that exhibits as much blue at its base as yellow at its top.

"(5.) Set the oil cup on top and into the water bath, return the flashing taper to its place, inverting the conical thimble around it, and return the thermomcter to its place upon the cup. In doing this be sure that the casing of the latter is pushed down upon the cup as far as it will go.

"(6.) Fill the lamp beneath half full of alcohol, light and place it beneath the water bath. Note the rate of increase in temperature as shown by the thermometer and adjust the wick to raise the temperature at the rate of two degrees per minute. When the temperature has reached one hundred degrees, light the flashing taper and observe it closely. As soon as the oil under test has reached its 'flashing point,' the flame of this taper will be extinguished by the first 'flash,' and the point of attention is the temperature at the instant the flame of the taper is extinguished. This 'flashing point' is the point of temperature at which the oil generates vapor."

Section 856 of the General Code provides for a flashing test limit for illuminating oil, as follows:

"Any oil described in this chapter which bears a flashing test of one hundred and twenty degrees Fahrenheit, as shown by the test prescribed in the preceding section, may be sold for illuminating purposes. No oil or other substance which, by such test, flashes at a temperature below one hundred and twenty degrees Fahrenheit shall be sold or offered for sale to a consumer for illuminating purposes in this state."

Section 858 of the General Code provides that if the oil inspector meets the requirements of said section 856, above quoted, the inspector shall affix by stencil or brand on the package, cask or barrel containing it, the word "approved," as follows:

"The inspector of oils and his deputies shall make a flash test of mineral or petroleum oils, or any oil, fluid or substance, the product of petroleum, or into which petroleum or any product of petroleum enters, or is a constituent element offered or intended to be offered for sale to consumers for illuminating purposes in this state. If, upon test, such oil or substance meets the requirements herein specified, the state inspector or a deputy shall affix by stencil or brand on the packages, cask or barrel containing it, the word 'approved' with the date of inspection and his name and official designation. If so approved, a manufacturer, vender or dealer may sell such oil, fluid or substance to be consumed within the state for illuminating purposes."

Section 859 of the General Code provides that if the oil inspected does not meet the requirements of said section 856, above quoted, the inspector shall affix by stencil or brand on the package, cask or barrel containing it, the words "rejected for illuminating purposes," and further provides a penalty if such oil so rejected is sold by a manufacturer, vender or dealer, as follows:

"If, upon test, an oil, fluid or substance does not meet the requirements, the state inspector or his deputy shall mark by stencil or brand, in plain letters, on the package or barrel containing it the words 'rejected for illuminating purposes,' and give the date of such inspection and his name and official designation. If so rejected, no manufacturer, vender or dealer shall sell or offer for sale, oil so branded or rejected, to be consumed within the state for illuminating purposes. Whoever violates a provision of this section shall be fined not to exceed one thousand dollars, or be imprisoned in the county jail not to exceed twenty days, or both."

Section 860 of the General Code provides the method of inspecting oil at refineries or in tank cars, as follows:

"Oil intended for sale for illuminating purposes within this state, as defined herein, shall be inspected within this state. When consigned to a distributing station in tank cars, oil shall be inspected at the refinery where manufactured, if located in this state, or at the distributing station to which it is consigned, at the discretion and direction of the state inspector. When inspection is made, the inspector or his deputy shall deliver to the owner or his agent, a certificate of inspection which, in addition to the word 'approved,' shall set forth the car initials and number, the date of inspection and the official signature of the officer making the inspection. Such certificate shall be attached to the car containing the oil so inspected, or be delivered to the owner or his agent at the distributing station, as directed by the state inspector, and the oil may then be transferred to a storage or receiving tank from which illuminating oil is distributed to consumers or dealers."

Section 861 of the General Code provides that if oil in tank cars is rejected, the certificate in addition to the word "rejected" shall set forth the car initials and number, the date of inspection and the official signature of the officer making such inspection, and further provides for imposing a penalty upon whomsoever transfers the contents of such car to a storage or receiving tank, from which illuminating oil is distributed to consumers of dealers within this state, as follows:

"If upon inspection oil in tank cars is rejected, the certificate, in addition to the word 'rejected,' shall set forth the car initials and number, the date of inspection, and shall be delivered to the owner of the oil or his agent. Who-

ever transfers the contents of such car to a storage or receiving tank from which illuminating oil is distributed to consumers or dealers within this state shall be fined not less than one thousand dollars or imprisoned in the county jail not exceeding twenty days, or both."

Section 862 of the General Code provides that wagons from which oil intended for use for illuminating purposes within this state is delivered to consumers or dealers, shall bear a certificate in duplicate with that issued by the inspector or his deputy, covering the contents of the car last emptied into the storage or receiving tank from which such wagon was filled, as follows:

"Wagons from which oil intended for consumption for illuminating purposes within this state is delivered to consumers or dealers, shall bear a certificate in duplicate with that issued by the inspector or his deputy, covering the contents of the car last emptied into the storage or receiving tank, from which such wagon was filled. Such duplicate certificate shall be issued without additional fee. Whoever, being a driver of such wagon, violates this provision shall be fined ten dollars for each day of such violation."

Section 863 of the General Code provides as follows:

"Barrels or packages filled from such storage or receiving tank with oil intended for illuminating purposes within this state shall be branded by the inspector or his deputy without additional fee. Whoever offers for sale to dealers or consumers for illuminating puposes within this state such oil not so branded shall be fined ten dollars."

Section 864 of the General Code provides for the inspection of oil delivered by pipe lines as follows:

"Each delivery of oil from refineries to local trade by pipe line or means other than tank cars into such storage or receiving tank, before such delivery, shall be inspected in the same manner as prescribed herein for the inspection of cars, except the certificate issued by the inspector or his deputy shall state the date of inspection and the number of barrels inspected. Whoever delivers such oil to a dealer or a consumer for illuminating purposes within the state without the certificate required by this section shall be fined ten dollars."

Section 865 prohibits the sale of unstamped gasoline, petroleum ether or similar or like substances, under whatever name called, whether manufactured within this state or not, as follows:

"Gasoline, petroleum ether or similar or like substances, under whatever name called, whether manufactured within this state or not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils or his deputies. Upon inspection, the state inspector or a deputy shall affix by stamp or stencil to the package containing such substance a printed inscription containing its commercial name, the word 'dangerous,' the date of inspection and the name and official designation of the officer making the inspection. For such inspection, the state inspector or his deputy shall receive the same fees as for the inspection of oil, which shall be paid into the state treasury as herein provided for other fees. Such fees shall be a lien on the gasoline, petroleum ether or similar substances so inspected. For such inspections, deputy inspectors shall receive the same

fees and shall make a monthly report of such inspections, as provided herein, for the inspection of oils. Whoever sells or offers for sale any gasoline, petroleum ether or similar or like substance, not stamped as provided in this chapter, shall be fined not more than one thousand dollars or imprisoned in the county jail not exceeding twenty days, or both."

I have quoted quite extensively from the sections of the General Code, regulating and governing the inspection and sale of petroleum oil and its products for the reason that you have stated orally in a conference, that all the oil sold in and about Kenton, prior to the time the explosions occurred, which are mentioned in your letter of inquiry, had been inspected by your department in accordance with the provisions of the above quoted sections, and that none of the oil had been found to be below the requirements contained in said sections.

The report of Mr. George W. Montgomery, the deputy inspector of oils, whom you sent to Kenton after the explosions mentioned in your inquiry had occurred, for the purpose of making a special investigation, is as follows:

"The following are the tests that I made on the samples that I was able to secure from the dealers:

	Oil temperature.	Light flashed.
Cozart Grocery	60	127
A. D. Close, residence	60	126
Vancamper Grocery	60	138
Wilkin & Brigg Grocery	60	121
E. D. Briggs Grocery	60	128
Wray & Son	60	125
Pearl Martin (farmer)	60	120
Robinson Grocery	60	130
Peter Herbert Grocery	60	135

60 degrees was the temperature of the oil when placed in cup. Flash was the final test. My Pearl Martin sample was exactly the same as that which Mr. Bell took to Columbus. The rest of the samples may vary a little from Mr. Bell but ought not to be very much. Hoping to see you soon, I remain,

[Signed] Geo. W. Montgomery."

The said report shows that none of the samples of oil inspected by said inspector were below the required standard of section 856, General Code, supra.

On May 28, 1913, you sent Mr. Strange of Greenfield, Ohio, a deputy oil inspector from another district, to Kenton for the purpose of making a second special investigation. The report of deputy oil inspector J. L. Strange discloses that he first made a number of tests of oil furnished by the prosecuting attorney of Hardin county, said samples having been collected by the county detective, and that none of these samples of oil came up to the standard as required by law. The report further discloses that he procured samples of oil from several citizens in and about Kenton, who had purchased oil from various local dealers, and in nearly every instance the test showed that said samples of oil were below the standard required by section 856 of the General

Code, above quoted, that is to say, in nearly every instance the samples flashed less than 120 degrees Fahrenheit, under the test prescribed by section 855 of the General Code, supra. In one instance, the oil flashed at 94 degrees Fahrenheit, and other samples flashed at various degrees, even as low as 69 and 70 degrees Fahrenheit.

The list of accidents attached to the report of the last mentioned inspector, discloses that the explosions resulted in six deaths and about the same number of injuries. In every instance, where the explosion resulted in the loss of lives, and in all but one or two instances where the explosions resulted in serious injury, the parties were engaged in pouring the oil from a can for the purpose of starting fires, and may thereby have contributed to their own injury. However much the unfortunate accidents resulting in the death of six persons and resulting in the injury of as many more is to be deplored and lamented, nevertheless, it is to be borne in mind that the criminal offense of the dealers or venders of oil consists in selling oil, petroleum or the products thereof which has been rejected, and so marked or labeled as having been "rejected for illuminating purposes" by the inspector at the time such oil or petroleum or the products thereof were inspected by the inspector. In other words, if the oil so sold by the dealers or venders thereof had been inspected and approved, and the word "approved" had been affixed by stencil or brand on the package, cask or barrel or other receptacle containing oil, then no criminal liability attaches to such dealers or venders under the above quoted sections.

Section 12569 of the General Code provides for the imposing of a penalty upon those selling uninspected oils, as follows:

> "Whoever, for himself or as agent for another, sells or attempts to sell oil to be consumed within this state for illuminating purposes, whether manufactured in this state or not, before it is inspected according to law, shall be fined not less than one hundred dollars nor more than three hundred dollars."

But as above suggested, inasmuch as this oil had been inspected, the provisions of the last quoted section does not apply in this instance.

Section 12565 of the General Code provides as follows:

> "Whoever, being a retail dealer in gasoline, benzine, or naphtha, delivers it except in a barrel, cask, package or case having the word 'gasoline,' 'benzine' or 'naphtha' plainly painted or stencilled thereon or being a purchaser thereof for use, fails to procure and keep it in a barrel, cask, package or can so painted or stencilled, shall be fined not less than five dollars nor more than fifty dollars, or imprisoned in the county jail not more than ninety days, or both."

Section 12567 of the General Code provides as follows:

> "Whoever, being a retail dealer in kerosene, delivers it except in a barrel, package, cask or can having the word 'kerosene' plainly painted or stencilled thereon, or being a user thereof or keeping it for use, keeps it in a barrel, package, cask or can not so painted or stencilled, shall be fined not less than five dollars nor more than fifty dollars or imprisoned not more than ninety days, or both."

Section 12571 of the General Code provides as follows:

> "Whoever adulterates for the purpose of sale, or for use for illuminating purposes, oil obtained from petroleum or coal so as to render it dangerous to use, or knowingly sells, offers for sale or uses oil obtained from petroleum or coal, or the products of either, for illuminating purposes, which will flash at a

temperature less than one hundred and twenty degrees Fahrenheit, under the test prescribed by law, shall be fined not more than five hundred dollars or imprisoned not more than one year, or both."

In conclusion I desire to say that inasmuch as the oil which was sold by the dealers in this case had been inspected and approved by the inspector, it is the opinion of this department that your department is without authority to prosecute the said dealers under the provisions of sections 854, 855, 856, 859, 861, 862, 863, 864 and 865 of the General Code, above quoted, unless it should develop upon further investigation by your department that the retail dealers had delivered gasoline, benzine or naphtha in barrels, casks, packages or cases not having the word "gasoline," "benzine" or "napthha" plainly painted or stencilled thereon in violation of section 12565 of the General Code, above quoted; or, that such retail dealers had delivered kerosene in barrels, packages, casks or cans not having the word "Kerosene" plainly printed or stencilled thereon, in violation of section 12567; or, that said retail dealers had adulterated the oil for the purpose of sale or for use for illuminating purposes or had knowingly sold said oil for illuminating purposes, which will flash at a temperature less than 120 degrees Fahrenheit, in violation of section 12571, General Code, above quoted. In other words, if such investigation discloses that there had been any violation of said sections 12565, 12567 and 12571 of the General Code, then it would be possible to prosecute such dealer or dealers who had been found to have so violated said sections.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

650.

THE OFFICE OF DEPUTY INSPECTOR OF OILS AND COUNTY LIQUOR LICENSE COMMISSIONER ARE COMPATIBLE.

There is nothing in the statutes that will prohibit a deputy inspector of oils from being appointed to the position of county liquor license commissioner, and he may perform the duties of both offices until a successor is appointed for him as deputy inspector of oils.

COLUMBUS, OHIO, December 10, 1913.

HON. WILLIAM F. MASON, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—In your favor of December 9, 1913, you advise that a deputy inspector of your department was appointed to the position of liquor license commissioner of Lorain county early in September, that he continued his duties as deputy inspector of oils whilst occupying the office of liquor license commissioner and performing the obligations thereof. You further state that said deputy's resignation was accepted and a successor appointed in his place as deputy inspector of oils on the 30th day of September and you request my opinion as to whether or not the resigning deputy may receive the fees for services performed by him as such deputy during the month of September, whilst occupying during this time the position of liquor license commissioner.

Section 7 of the act providing for the liquor license commission occurring on page 218, O. L., provides that county license commissioners shall not hold any other public office for profit except that of notary public.

Section 846 of the General Code provides for the position of deputy inspector of oils as follows:

"The state inspector of oils shall appoint a suitable number of deputy inspectors of oils, who shall have the same qualification, be empowered to perform the duties of inspection, and be liable to the same penalties as the state inspector of oils * * *."

In Ohio it is well settled that a deputy proper is not to be considered a public officer.

"Volume 11, page 214, Encyc. Digest of Ohio reports. Supplement to the same work for the year 1911, page 843."

The authorities herein cited seem to establish definitely that in the absence of contrary provision in the statutes a deputy is not a public officer, and it may, therefore, be concluded that a liquor license commissioner is not probihited from performing the duties and receiving the fees attached to the position of deputy inspector of oils by virtue of section 7 of the liquor license commission law above quoted, which prohibits county liquor license commissioners from holding any other public office for profit.

Since neither of these offices can in any wise be viewed as entailing obligations of supervision, control or check over the other, and since there is nothing in the statutes requiring the encumbents of either of these positions to devote their entire time to the obligations thereof, I am of the opinion that they may not be deemed incompatible.

Whatever lack of policy there may appear therefor, or however inadvisable it may seem to permit any individual to hold two such positions, I am of the opinion that there is nothing in the law which makes such a situation prohibitive. In the present situation it seemed quite necessary and proper that the deputy in question should continue the performance of his duties until the appointment of a successor, and I am of the opinion that it is certainly not unfair and clearly not illegal for the person in question to receive his compensation for the duties so performed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Supervisor of Public Printing)

483.

DEPARTMENT OF PUBLIC PRINTING MAY DO PRINTING FOR STATE INSTITUTIONS UPON REQUISITION OF THE BOARD OF ADMINISTRATION.

The department of public printing has authority to do whatever binding may be required by the state institutions on the requisition of the board of administration, so far as it may be practicable for the department so to do with its equipment. Where it is not practicable for the department to do binding it may be done on contract let to the lowest responsible bidder.

COLUMBUS, OHIO, September 4, 1913.

HON. FRANK HARPER, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—Under date of July 18, 1913, you write and ask opinion of me as follows:

> "This department has been requested by the deaf and dumb institution, through the state board of administration, to make a set of blank books for its use. Up to this time the printing department has not been doing any printing or binding for any of the state institutions.
>
> "An opinion is desired as to whether there is authority under the law for the printing department to do printing and binding for the state institutions."

Section 2 of article XV of the state constitution as amended September 3, 1912, provides as follows:

> "The printing of the laws, journals, bills, legislative documents and papers for each branch of the general assembly, with the printing required for the executive and other departments of state, shall be let, on contract to the lowest responsible bidder, or done directly by the state in such manner as shall be prescribed by law. All stationery and supplies shall be purchased as may be provided by law."

Prior to the amendment of this section of the constitution the provision was that the printing therein designated should be let on contract to the lowest responsible bidder by such executive officers and in such manner as shall be provided by law. No statutory provision has been made making effective the amendment to the constitution providing that the printing for the legislative, executive, and other departments of state may be "done directly by the state in such manner as shall be provided by law," and we are remitted on a consideration of the questions presented to prior existing statutes upon the subject.

Section 754, General Code, provides that the printing for the state shall be divided into seven classes, and shall be let in separate contracts as follows:

> "First Class. * * * * * *
>
> "Second Class. * * * * * *
>
> "Third Class. Reports, communications and other documents ordered by the general assembly or either house thereof, or by the executive departments to be printed in pamphlet form, not including the bulletins of the agricultural experiment station.

"Fourth Class. * * * * * *

"Fifth Class. Blanks, circulars and other work for the use of the executive departments, not including those to be printed in pamphlet form.

"Sixth Class. * * * * * *

"Seventh Class. The report of the secretary of state, auditor of state, commissioner of common schools, superintendent of insurance, railroad commission, commissioner of labor statistics, state board of agriculture, and other reports of executive officers required by law to be bound in either cloth or half law binding, not including the laws, joint resolutions and journals of the house and senate."

This section further provides that the printing for each of the classes designated in the section, except the seventh class, shall be let in one contract; and that the printing for the seventh class may be let in one or more contracts, as the commissioners of public printing in their discretion may require. Sections 755 to 778, inclusive, General Code (except section 776, repealed) related statutes to 754, make provision for bids for public printing to be advertised for by the commissioners of public printing, the letting of contracts therefor, and the manner in which the work contracted for shall be done. Section 786, General Code, provides as follows:

"All printing and binding for the state not authorized by the provisions of this chapter shall be subject to the provisions thereof so far as practicable, and whether provided for by law or resolution, the commissioners of public printing may advertise for proposals and let contracts therefor as herein provided."

By the provisions of section 1835, General Code, state institutions are placed under the control and management of the Ohio board of administration. This board is undoubtedly an executive department, and the members thereof executive officials as those terms are used in the various provisions of section 754, and this board may make requisitions on the department of public printing for such printing as is therein authorized and provided for. Under the present state of the law, however, such printing will have to be done on contract let by the commissioners of public printing on bids submitted responsive to advertisements therefor. By constitutional mandate, printing for the executive and other departments of the state government must be let on contract to the lowest responsible bidder, or done directly by the state in such manner as shall be provided by law. As before noted, no provision has as yet been made whereby the state may do the printing for its several departments of government directly, and it follows that printing for the state institutions as managed and controlled by the board of administration, must be done on contract let to the lowest responsible bidder (60 O. S. 406, 420).

You also inquire as to the authority of the department of public printing to do binding for the state institutions.

Sections 750 and 779, General Code, provide as follows:

"Section 750. The supervisor of public printing shall have charge of the book binding establishment at the state school for the deaf; he shall provide the necessary materials, implements, machinery and fixtures thereof; he shall have supervision and control thereof and the exclusive management of its practical operation.

"Section 779. The commissioners of public printing shall provide for the necessary binding of the state in such manner, upon such terms and for such periods as they may deem most advantageous to the state. Before a contract for binding is awarded, the contractor shall execute a bond to the state in the sum of five thousand dollars with two or more sufficient sureties, conditioned for

the faithful performance of the work specified in the contract. In the execution of the work of binding and the transportation of sheets, bound copies and documents, the commissioners and the contractors shall be governed so far as practicable by the rules relative to contracts for public printing."

Section 1879, General Code, provides, as does section 750, that the book binding at the state school for the deaf shall be under the supervision of the supervisor of public printing, and section 1880, General Code, provides as follows:

"As far as practicable, the book binding for the state shall be done at this institution, and the supervisor of public printing shall have reference to this object in the organization of the business and preparation for work. When the book binding is let to others the supervisor may arrange with the contractors to do any part of the work in addition to the work for the state then let, that can be done at the institution on proper terms. If fair rates cannot be had from such contractors to employ the pupils engaged in this department, the supervisor may contract for and perform other binding."

Harmonizing the provisions of the sections just noted and of section 786 hereinbefore set out, as far as possible, and resolving whatever conflict there may be therein in favor of the provisions of section 1880, as the later statute, I am of the opinion that the department of public printing, under your supervision, has authority to do whatever binding may be required by the state institutions on the requisitions of the board of administration so far as it may be practicable for your department to do the particular work required with the equipment the department may have. Insofar as it may not be practicable for your department to do any particular binding for which requisition may be made, the same may be done on contract let to the lowest responsible bidder therefor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Librarian)

469.

TOWNSHIP TRUSTEES HAVE AUTHORITY TO ACCEPT GIFT ON BEHALF OF THE TOWNSHIP AND TO ESTABLISH TOWNSHIP LIBRARY.

Where an offer of a Carnegie library building has been received by the people of a township, if the library is to be a township institution, a vote of the people is required in order to establish and maintain it.

Upon a favorable result of such election, the trustees will have authority to borrow money or issue bonds in order to acquire a site for the erection of a building. The trustees cannot turn over the library to a library association. They would be required to appoint three library trustees in the manner provided by law.

COLUMBUS, OHIO, September 6, 1913.

HON. J. H. NEWMAN, *State Librarian, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 23d, and have noted your request therein for an early consideration of the question submitted, which is as follows:

> "Mr. Carnegie has offered to the people of a certain township for the erection of a library building, an amount equal to ten times as much as may be annually received by taxation for the support of the proposed library.
>
> "A special election has been held under the provisions of section 3403, et seq., General Code, at which the proposition to establish a township public library was carried. The necessary levy has been made and the first installment of the proceeds will be available in February, 1914.
>
> "The township now has in sight, so to speak, the necessary funds for the construction of a building and for the support and maintenance of the library but lacks a site upon which to construct the building.
>
> "A library association has been organized.
>
> "You ask whether or not the money produced by the tax levy may be used in part for the purchase of a site, and if this can be done, whether or not it would be lawful to anticipate the proceeds of the tax by borrowing money for that purpose?"

Before answering your question specifically, I wish to clear up some points upon which you appear to have made erroneous assumption.

In the first place, the question which you speak of could not lawfully have been submitted at a special election. The only township election on the question of a public library is that provided for by section 3403, General Code, which is required to be held at the time of holding the general election in November.

In the second place, under an election, such as that of which you speak, the organization of a library association is uncalled for.

Chapter 2, title II, division III, part first, of the General Code, is divisible into two parts. The first five sections refer to a township library organized under authority of the vote of the electors. The last four sections refer to the support of a private association maintaining and furnishing a free public library.

Your letter is not clear in that it speaks both of an electon and of the organization of a library association, and in that you refer to section 3407, General Code, which is the section respecting the support by taxation of a private association. I shall, therefore, have to answer your question in two ways; first, upon the assumption that

the proposed library is a township library, and the further assumption that you are in error in stating that the election was a special one, and, second, upon the assumption that the proposed library is to be maintained by a private association.

I will first discuss the second of these two assumptions.

If the library association has been formed, and if the library is to be under the control of such an association, then the township has no right to furnish a building or site. Sections 3407 to 3430, inclusive, provide that the private association shall, by subscription or otherwise, furnish the site and erect a building thereon. Then it becomes lawful for the trustees of the township, without any vote of the people, to levy the tax of one-half mill, and to pay it to the private association for the support of the library. It is not lawful, however, for the township to build a library building or to furnish a site therefor, for the use of such an association.

In this connection, of course, I recognize the possibility of the election having been held upon the question you speak of, because of the limitation of the Smith one per cent. law and because of a desire to make a levy outside of such limitations. Such an election, however, under section 5649-5a, et seq., could only be held in November. So that this supposition does not explain the fact referred to in your letter that a "special election was held."

I will now discuss the first of the two assumptions made by me:

If the library is to be a township library, then, as already remarked, there is no place for a library association. The institution is to belong to, and be established and maintained by the township as such, under the control of three trustees, to be appointed by the township trustees. (Section 3405, General Code.)

The question to be submitted at the regular election is as to the *establishment* and maintenance of the library, and the proceeds of the tax may be used under section 3404, which is the governing section for "the establishment and maintenance of a library and the procuring of a suitable room or rooms therefor." In other words, section 3407, to which you refer, has nothing whatever to do with the expenditure of the proceeds of the tax authorized by an election held under section 3404.

If the library is to be a township institution, and is not to be maintained by a library association, then, in my opinion, the township trustees have authority to secure funds for the purchase of a site. Section 3404, General Code, of itself, seems to authorize the application of the proceeds of the levy referred to therein to the "procuring of suitable room or rooms therefor," which, by inference, would carry with it the authority to purchase a site and to erect a building.

Section 3281, General Code, authorizes the township trustees to receive "on behalf of the township any donation by bequest, devise, or deed of gift, or otherwise of any property, real or personal, for any township use," which would authorize them to accept Mr. Carnegie's gift of money, and to apply it to the intended use.

In addition to the provisions just mentioned, however, the township trustees have authority by virtue of the provisions of sections 3295 and 3939, General Code, read together, to borrow money and levy taxes for the re-payment of the same for any of the purposes mentioned in the last named section, which are township purposes. The establishment and maintenance of a library, and the procuring of a suitable room or rooms therefor, being by virtue of section 3404, a township purpose, and the trustees being authorized under section 3281, General Code, to accept donations for township purposes, I am of the opinion that when section 3939 authorizes a municipal corporation, in paragraph 15, thereof, to borrow money "for establishing free public libraries and reading rooms," and in paragraph 1, thereof, "for procuring real estate * * * for an improvement authorized by this section, or for purchasing real estate with a building or buildings thereof to be used for public purposes," these powers, by virtue of section 3295, General Code, are thereby conferred upon township trustees.

The powers thus conferred, however, must be exercised under the limitations of

sections 3939, et seq., so that if the amount desired to be borrowed and expended for the purpose of acquiring a site is such that with the out-standing indebtedness already incurred by the township, and subject to limitation, would exceed two and one-half per cent. of the total tax duplicate of the township, it would be necessary to refer the question to a vote of the electors; if the amount desired to be expended, together with other similar indebtedness incurred during the current year would exceed one per cent. of the duplicate of the township, the authority of the electors would be likewise required; and if the indebtedness in question, together with the other out-standing indebtedness of the township would exceed five per cent. of the duplicate, then the township trustees would have to wait until enough of the out-standing indebtedness were retired to exercise the borrowing power.

You will observe that my answer to your letter is indirect and somewhat equivocal. It was necessarily so because of the somewhat conflicting statement of facts upon which my opinion was requested. Repeating my conclusions, they are as follows:

1. If the proposed library is to be established and maintained by a private association, then the moneys derived from taxation for the support of such association may not be used by the association in the purchase of a site; but funds for this purpose must be raised by the association itself. The association being a private corporation, might borrow money on such terms as it would be able to negotiate, but before the levy could be paid at all to the association, it would have to qualify by "maintaining and furnishing a free public library." That is to say, to make my answer clear on this point, I do not attempt to hold that if the association has obligated itself by borrowing money for the purchase of a library site, it may not, after the library is in operation, and it is receiving the proceeds of the levy made under section 3407, use a part or for a time, all of the proceeds of such levy in retiring the indebtedness which it has incurred. This, I am inclined to think, would be proper, but until the library is actually in operation, a private association is not qualified to receive the proceeds of the tax levy under section 3407. The trustees are without authority to make the levy for the purpose of contributing to an association which is not actually maintaining a library, and an attempted levy for this purpose could be successfully enjoined as unlawful. So that if there is an association in existence, the arrangement of which you speak, could only be worked out by having the members of the association borrow the money on their individual responsibility, and by permitting them, when the building is erected, to use a part or all of the money derived from taxation under section 3407, for the retirement of that indebtedness; but until the building is erected, the association would not have any right to the tax moneys at all. Therefore, the moneys cannot "accumulate," as you phrase it in your letter, until the building is erected, and then be used for the purposes suggested. Therefore, also, and if this is the state of affairs, the first available proceeds of the levy of which you speak, which could be paid to the library association, would not be those accruing in February, 1914, but would be those of the first levy made after the library was actually in operation. And, finally, if the association has been organized and is operating a library, then no election is necessary to authorize the trustees to levy a tax for its support. This, the trustees have the right to do without the authority of the electors, and if the election of which you speak was merely for the purpose of avoiding the limitation of the Smith one per cent. law, in any event it should have been at a general election and not at a special election.

2 If the library is to be a township institution, then a vote of the people was required in order to establish and maintain it. This vote should have been taken at a regular election. If legally held, however, a favorable result of such an election would authorize the trustees to accept Mr. Carnegie's gift, and by borrowing money or using the proceeds of a levy to acquire a site for the erection of a building. In such an event,

however, it would not be competent for the trustees to turn over the management of the library to a library association. They would be required to appoint three library trustees in the manner provided by law.

If, upon receipt of this opinion, you are in doubt as to how to advise the persons interested in the particular transaction about which you inquire, I suggest that you obtain a more complete statement of facts, so that I may be able to reach a definite and unequivocal conclusion in the matter.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Pardons)

45.

GOVERNOR—COMMUTATION OF SENTENCE CANNOT AUTHORIZE PARDON BOARD TO PAROLE PRISONER OTHERWISE NOT ENTITLED TO PAROLE.

The power to define crimes, to prescribe the mode of procedure for their punishment and to fix the kind and manner of their punishment, as well as to provide disciplinary regulations for prisoners, is a legislative power. Inasmuch as the legislature has provided, under section 2169, General Code, that the board of administration may not pardon any prisoner under sentence for murder in the first or second degree, or any prisoner previously convicted of felony and having served a term in a penal institution, except where the prisoner under sentence has served under said sentence twenty-five years, the fact that the governor commutes the sentence of such prisoner would not operate to give such board power to parole.

COLUMBUS, OHIO, January 30, 1913.

Ohio State Board of Pardons, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication in which you request my opinion upon the following question:

> "Can the governor of Ohio grant a commutation of sentence to a prisoner who is not eligible to parole, for the express purpose, stated in the commutation, of making such prisoner eligible to parole; and does such specific action on the part of the governor remove the statutory ineligibility to parole in such case?"

In reply to your inquiry I desire to call your attention to section 11 of article III of the constitution of Ohio, which provides as follows:

> "He (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, etc."

Commutation of sentence, in its legal sense, means:

> "Substitution of a less for a greater penalty or punishment."

Section 2169 of the General Code provides as follows:

> "The board of managers (now the board of administration) shall establish rules and regulations by which a prisoner under sentence other than for murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted and not previously convicted of felony or not having served a term in a penal institution, or a prisoner under sentence for murder in the first or second degree having served under such sentence twenty-five full years, may be allowed to go upon parole outside the buildings and enclosures of the penitentiary. * * *"

The sovereign power of the state is vested in three departments, namely: the legislative, executive and judicial departments. It is a well established rule of law

that one of the legislative powers vested in the legislature is to define crimes, to prescribe the mode of procedure for their punishment, to fix by law the kind and manner of punishment, and to provide such disciplinary regulations for prisoners, not in conflict with the fundamental laws, as the legislature deems best.

The legislature has provided as to what prisoners are eligible to parole, and has vested the board of administration, under the provisions of the above quoted section of the General Code, with the power to make such rules and regulations, under which such eligible prisoners may be paroled; and in so doing, has exercised its legislative function under our state government.

Under the above quoted section and article of the constitution of Ohio the general power to grant reprieves, commutations and pardons, to prisoners convicted of crimes and offenses, except cases of treason and impeachment, is vested in the governor, and no other person can exercise such right, because whatever power is vested in either the executive or judicial departments cannot be exercised by the legislative; and, under the organic law of our state, giving the pardoning power to the governor, the legislature is without authority to vest any other party or parties with such power.

While the section of the constitution, above quoted, confers upon the governor the power 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, I am of the opinion that certain conditions, such as the governor may think proper, may be made the basis of a pardon, but there can be no conditions to reprieves or commutations of sentences. Further, said unlimited pardoning power, constitutionally vested in the governor, does not vest him with the power to grant a commutation which would make the prisoner eligible to parole, if such prisoner were ineligible to parole under the provisions of section 2169, General Code. In other words, the governor is not vested with legislative power and, therefore, could not delegate to the board of administration the power to parole a prisoner ineligible to parole, nor, by commutation of sentence of such ineligible prisoner make him eligible to parole, as that would be the exercise of a legislative power by an executive officer, something not sanctioned nor authorized under the laws of this state.

The legislature, under section 2169, General Code, has made it impossible for any prisoner, under sentence for murder in the first or second degree, or any prisoner previously convicted of a felony and having served a term in a penal institution, to be paroled, except where the prisoner under sentence has served under such sentence twenty-five full years; and under the rule above laid down, any prisoner serving a sentence for murder in the first or second degree, by having had his sentence commuted, would not become eligible to parole, as the commutation is only a substitution of a less for a greater penalty or punishment, inflicted upon said prisoner for the crime, and not a change of the crime for which he was sentenced.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Board of Administration)

89.

WARDEN—ACCOUNTABILITY FOR PENITENTIARY FUNDS—LIABLE FOR SHORTAGE IN CONVICT FUND.

Under sections 2187, 2188 and 2189, General Code, the warden of the penitentiary is given express supervision and charge of penitentiary funds. When, therefore, a shortage occurs in the convict fund, he is responsible therefor. Interest which accrues on the convict fund may not be applied to cover a shortage in such funds, but must be made a part of the convict fund for which the warden must account.

COLUMBUS, OHIO, February 13, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am replying to your inquiry of January 15, 1913, concerning a shortage in the convict fund of the Ohio penitentiary.

The facts, as set forth by you, are as follows:

At the close of business on April 30, 1909, the cash journal showed $31,355.92 on hand in all of the funds of said institution. Of this amount $7,994.96 was in the convict fund.

Underneath the above showing of balances on said cash journal appears another statement that at said date, April 30, 1909, there was a shortage in said convict account, over and above said $7,994.96, of $1,304.88. It is recited in this last statement that this shortage was caused by errors in bookkeeping of former prison clerks prior to May 1, 1900. (Signed) "C. B. Shook, Clerk." Under the above statement is written the following receipt:

"April 30, 1909.

Received of C. B. Gould, $31,355.92.

(Signed) T. H. B. Jones."

The above receipt of Warden Jones included $7,994.96 belonging to the convict fund.

On the 2nd day of May, 1912, at the close of business, there was $12,344.73 in said convict fund, and the face of the convict ledger at the same time was $13,981.97, a difference of $1,637.24, or a shortage to that amount of paying in full the face of the convict ledger accounts. This makes an additional shortage of $332.36, as shown in the convict account between April 30, 1909, and May 2, 1912, all occurring in the term of the present warden. You then ask "an opinion as to who would be responsible for this increased shortage of $332.36, which apparently occurred between April 30, 1909, and May 2, 1912."

On the same date as the foregoing communication, January 15, 1913, you addressed the following communication and request to me:

"In my report of the examination of the accounts of the Ohio penitentiary, submitted to the board of administration under date of July 3, 1912, their attention was called to the shortage in the convict fund amounting to $1,637.24. Mention was also made in this report that interest on this fund at that time amounted to $189.80.

"Your attention is respectfully called to the fact that it is impossible to distribute the accumulated interest among the one thousand or more convict accounts, and your department is requested to render an opinion as to what

action this board should take in regard to making up the deficit in this convict fund of $1,637.24, and whether or not the $489.80 accumulated interest should be applied toward making up this deficit."

Inasmuch as both of these letters pertain to "convict funds," I will take them up and embrace them in the same reply.

The warden of the Ohio penitentiary has charge of all money which goes to make up the fund known as the "convict fund." It is very largely made up of the prisoners' earnings. Section 2208, General Code, provides that the warden may place to the credit of each prisoner, except life prisoners, an amount of his earnings, not to exceed twenty per cent, part of which can be paid to the prisoner or his family; but that twenty-five per cent. thereof shall be paid to him on regaining his liberty. Five cents a day is the limit for life prisoners. This was the law for many years before the General Code. Revised statutes 7388-12.

Prisoners occasionally receive gifts of money, all of which, together with funds from any other sources, is taken charge of by the warden in a separate account with each convict. There is no officer other than the warden who lawfully can handle the funds of a convict, whether earnings or gifts.

Section 2189, General Code (R. S. 7418) provides:

"All revenues of the penitentiary, except as otherwise provided by law, shall be paid to the warden."

The language, "otherwise provided by law," refers to matters spoken of in sections 2193 and 2200, General Code (sections 7421 and 7417, R. S.), sales of tickets and amounts due from contractors.

Section 2188 prohibits the steward from collecting amounts due the penitentiary, and says payment must be made alone to the warden. (Section 7416, R. S.). Section 2187, General Code, requires the warden to balance his cash account monthly, furnish the auditor of state a detailed report of his receipts for the preceding month, and pay the money into the state treasury, as ordered by the board. (Section 7400, R. S.).

Section 2192, General Code, says: "The clerk shall keep the accounts of the penitentiary in such a manner as to accurately exhibit the financial transactions relating to it." (Section 7407, R. S.).

The warden has entire charge of the penitentiary; he selects all other employes, and can discharge them. I have cited the statutes applying to this institution, to show the unlimited control of the warden; *and that all financial matters connected therewith* are *daily, weekly and monthly under his immediate personal supervision.* His relations with the finances thereof, are such, that he ought to know, *on any day, the exact status of each and every fund of said prison,* including the amount due each convict out of the convict fund. He is responsible for the actions of his clerks, stewards and subordinates, in all matters, with full power of removal if they go wrong.

If any fund is *short* in the *whole system, he is bound to know it*: he is responsible therefor, and must make the same good; because it occurred, as a matter of law, as the result of his own acts. So then, if an additional shortage of $332.36 is found to have occurred in the convict fund, as set forth in your letter, between April 30, 1909, and May 2, 1912, the present warden must account for it. He receipted for $31,335.92 in money, April 30, 1909, including $7,994.96 of convict fund. At that time there was a shortage of $1,304.88. On May 2, 1912, this shortage had increased $332.36. The warden and his bondsman must explain this, or make it good.

Replying to your last inquiry: You say you have $489.80, interest on the convict fund. I am of the opinion that you have no right to apply that amount, or any other such interest accumulation, towards making up the deficit in this convict ac-

count, unless authorized by an act of the legislature so to do. And it is doubtful whether it can be done in that manner. You may, however, deposit this interest as a part of the convict fund. The "convict fund" *produced* this interest, and it is a fair disposition of it to let it augment that fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

109.

OHIO BOARD OF ADMINISTRATION MAY COMPEL COUNTY AND MUNICIPAL OFFICERS TO PURCHASE—QUALITY AND PRICE.

Under sections 1846 and 1847, General Code, the board of administration may compel county and municipal officers to purchase articles manufactured by state institutions under the control of the board, except such officers as maintain institutions which produce the articles themselves. The price shall be uniform, however, and no higher than the usual market price.

COLUMBUS, OHIO, March 10, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of February 27th in which you request my opinion as follows:

> 1. "What interpretation is to be placed on the term 'political divisions' as contained in sections 14 and 15 of the act creating the Ohio board of administration?
> 2. "How far do the powers of the board extend under said sections?
> 3. "Can the board compel county and municipal officers to purchase state made articles, prices and quality, of course, to be equal to similar goods made elsewhere?"

On October 31, 1911, I rendered a very carefully prepared opinion to your board which answers your first and second questions in full.

As to the third question I desire to say that under the rules of law laid down in the cases cited in the opinion above referred to, and the ruling made under that opinion, I am of the opinion that your board, under sections 1846 and 1847, General Code, can compel county and municipal officers to purchase articles manufactured by state institutions under your control, subject, however, to the proviso in section 1847, General Code, which is as follows:

> "This provision shall not apply to any officer, board or agent of any municipality which maintains an institution that produces or manufactures articles of the kind desired."

Provided, further, that the prices shall be uniform, as fixed by your board, and not higher than the usual market price for said articles, that is, the price at which said articles can be purchased by the respective county and municipal officers or boards in the open market.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

110.

PENITENTIARY—PRISONER SENTENCED FOR TWO CRIMES AT THE SAME TIME SERVES THEM CONCURRENTLY WHEN NOT OTHERWISE PROVIDED.

When a judge sentences a prisoner for two crimes on the same day, not specifying in either sentence when it was to take effect, such sentences shall be served concurrently.

COLUMBUS, OHIO, March 11, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication dated December 30, 1912, in which you enclose a letter from James Blair, a prisoner now confined in the Ohio penitentiary, having been sentenced by the common pleas court of Pickaway county in January, 1911, for two crimes—one for grand larceny for which he was sentenced to serve a term of two years in the Ohio penitentiary, and the other a charge of grand larceny for which he was sentenced to serve two years, in which letter he stated that he had served out one of the terms and had begun on the second, and requested the opinion of your board as to whether or not he is not now being illegally held, on the ground that the sentences should have been designated by the court imposing the same "one to take effect at the expiration of the other;" and you request the opinion of this department as to the question propounded to your board by the said prisoner.

In reply thereto I desire to say that the certificates of sentence for the two crimes above specified for which the prisoner is now incarcerated in the Ohio penitentiary on file in the auditor of state's department show that the said James Blair was sentenced on each charge to serve a term of two years and pay the costs of prosecution in each case, and the certificate of sentence does not show that the judge in imposing the same designated in the entry therein that one should commence to run at the expiration of the other.

On December 3, 1912, I rendered an opinion to Honorable T. H. B. Jones, warden of the Ohio penitentiary, on the same question involved in your inquiry, a copy of which I am sending you, and in which I held that where more than one sentence was imposed upon a prisoner at the same time without specification of the time of their commencement or that one should should follow the expiration of the other, that then the prisoner will be serving the two or more sentences concurrently.

I am, therefore, of the opinion that the prisoner James Blair, under the rules of law and the opinion rendered as above referred to, has served all the time under the two sentences that he can be compelled to serve, and that the two sentences were served concurrently, and that he should be released from the Ohio penitentiary at once.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

136.

BOARD HAS POWER TO GIVE INDETERMINATE SENTENCE TO PENITENTIARY—CONSTITUTIONAL LIMITATION.

Although when section 7388-6, revised statutes, was inserted into the code by the codifying commission, the express authority of the court to render sentences for indeterminate imprisonment in the penitentiary was dropped from the statutes, nevertheless, the recognition of that power which still remained within the terms of this statute, as it appears in the code, and also the recognition contained within the terms of section 13697, General Code, providing for the furnishing of a record by the clerk to the warden in the case of an indeterminate sentence, justifies the resort to the original statute for the purpose of settling the ambiguity which is apparent in the statutes with relation to the power of the court to render such general sentences.

Under this mode of construction, therefore, the power to render a general sentence must be construed to remain with the courts.

COLUMBUS, OHIO, March 13, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Your communication requesting me to give you my opinion in regard to the powers of your board concerning indeterminate sentences to the penitentiary is received, as is also your supplemental letter in which you state that one Lawrence Kaufman, alias Bailey No. 41719, was received in the month of January from Lucas county to serve on an indeterminate sentence for horse stealing and larceny, and you request my opinion bearing on this case as to whether or not your board would have to release this prisoner on the ground that he was given an illegal sentence.

In order to properly answer your first question it is necessary first to look to the section in reference to indeterminate sentences to the penitentiary and trace the history of such section from its enactment, which includes any and all amendments and supplementary sections to the original section.

Section 2160 of the General Code provides in part as follows:

> "The board of managers (the board of administration, successor to the board of managers) shall provide for the conditional or absolute release of prisoners under a general sentence of imprisonment, and their arrest and return to custody within the penitentiary. * * * A prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the minimum term provided by law for the crime of which he was convicted; and he shall not be kept in the penitentiary beyond the maximum term provided by law for such offense."

The section of the General Code just quoted was original section 7368-6 Bates revised statutes, and the codifying commission dropped from said original section the following:

> "May be, if the court having said case, thinks it right and proper a general sentence of imprisonment in the penitentiary."

Section 13695 of the General Code provides as follows:

> "If the defendant has nothing to say or if he shows no sufficient cause why judgment should not be pronounced, the court shall pronounce the judgment provided by law, etc."

This section was original section 7319 Bates revised statutes, and no change whatever was made by the codifying commission between the said code section and original section of the revised statutes.

Section 7388-7 of Bates' revised statutes was enacted into the code by the codifying commission, and is now section 13697 of the General Code which provides as follows:

> "The clerk of a court by which a criminal has been sentenced to the penitentiary, if the term of such sentence is not fixed by the court, shall furnish the warden a record containing a copy of the indictment and of any special plea, the name and residence of the judge presiding at the trial and of the jurors and witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem necessary for the full comprehension of the case together with his reasons for inflicting the sentence. The clerk shall be entitled to such compensation for such record as the presiding judge certifies to be just and shall be paid by the county wherein the trial was held. Upon such sentence the clerk shall forthwith transmit to the warden of the penitentiary a notice thereof."

In construing a codified statute, which, like section 2160, above referred to, is on its face ambiguous, the rule is as follows:

> "That if a codified section is ambiguous on its face, in construing the same you may look to the language of the prior law for the purpose of resolving the ambiguity, the presumption being that any verbal changes in the codified statutes made in the process of codification, were made without the intention of changing the meaning of the law."

Under the codification, adopting the rule of construction above quoted, the powers still being vested in the board of managers, now the board of administration, under section 2160 to provide for the conditional or absolute release of prisoners under general sentence of imprisonment, and the further provision that no such prisoner under general sentence to the penitentiary shall be released by the board until he has served the minimum term provided by law for the crime for which he was convicted, and shall not be kept in the penitentiary beyond the maximum term provided by law for such offense, and the further fact that the codifying commission left intact section 7388-7 of the revised statutes, being section 13697 of the General Code defining the duties of the clerk when the term of the convict is not fixed, and his compensation, leads me to the opinion that it was not the intention to deprive the court of the power to give a general sentence to a prisoner convicted of a crime, and that the court still has the power, the same as it had prior to the codification.

This being the case, I am of the legal opinion that your board, under section 2160, has the power to provide for the conditional or absolute release of any prisoner or prisoners sentenced under a general sentence of imprisonment in the Ohio penitentiary, subject, however, to the provisions of said section 2160, and particularly the latter part of said section, which provides that no prisoner under general sentence to said institution shall be released until he has served the minimum term provided by law for the crime for which he was convicted, and he shall not be kept in the penitentiary beyond the maximum term provided by law for such offense.

This last section of the General Code referred to gives your board authority to release all such prisoners either conditionally or absolutely after having served the minimum period or term for the crime for which he was sentenced upon such rules and regulations as your board may adopt.

In answer to your second question I am of the opinion that the said Lawrence Kaufman, the prisoner referred to in your inquiry, is now legally confined in the Ohio

penitentiary, and for the reasons above set forth his sentence is not illegal, and therefore, you should not release him until he has served the minimum term for the crime for which he was sentenced under the rules and regulations of your board for the release of such prisoners serving indeterminate sentences.

I might say in addition to the above that even if the power to sentence prisoners to a general or indeterminate sentence in the penitentiary, as provided by section 7388-6 Bates' revised statutes, has been repealed by the codification under section 2160 of the General Code, and there are incarcerated in the Ohio penitentiary certain convicts under general sentence, nevertheless unless there be a showing of lack of jurisdiction upon or *dehors* the record of conviction *habeas corpus* proceedings would not lie in behalf of such convicts, where the court sentencing them had jurisdiction of the person of the prisoner or prisoners, and of the offense of which they were charged and a verdict is valid, and the judgment not void but merely irregular, such prisoner cannot be released under a petition for *habeas corpus:* but your board should refuse to release such prisoners other than in conformity to said section 2160 of the General Code, and in case of any such attempt on the part of any such prisoner, the prosecuting authorities of the county from which said prisoner was committed, should be notified in order that they may protect the state's interest in the premises.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

220.

BOARD OF ADMINISTRATION AUTHORIZED TO BOOK BUT ONE COMPREHENSIVE REPORT AS TO ALL INSTITUTIONS UNDER ITS CONTROL.

Section 1870, General Code, which requires a board of administration to report annually to the governor all its acts and proceedings for the fiscal year, with a complete financial statement of the various institutions under its control, comprehensive that such report shall contain all necessary details with reference to each institution and must be construed to impliedly repeal other sections of the statutes which formerly provided for separate reports by each institution, prior to the time such institution came under the control of the board.

COLUMBUS, OHIO, April 8, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—In your letter of February 12, 1913, you say:

> "Will you please render this department an opinion as to whether the repealing of section 1871 carries with it section 2270, General Code; also, as to whether the state printer could not, under section 2270, General Code, include these biennial reports in the executive documents."

This involves an examination of the statutes governing state institutions as to the duties of the officers thereof, relative to reports and their printing before and since the creation of the Ohio board of administration.

This board was established by statute, May 11, 1911, and became effective on the 15th of the following August.

Part of section 645, R. S., as amended, passed into original General Code section 1871, and reads as follows:

"After the close of the fiscal year next preceding the regular session of the general assembly, the board of trustees or managers of each benevolent and correctional institution shall make a report to the governor of their proceedings during the two years, and of the condition, progress and wants of the institution, with a report by the superintendent and such other employes thereof as the trustees deem important. * * *"

Part of section 63, R. S., as amended, passed into original General Code, section 2270, and reads as follows:

"The biennial reports of the state benevolent institutions shall be printed as follows: For each institution, five hundred copies of the report of such institution. Board of state charities, for the board, one thousand copies."

On the 10th day of January, 1910, said original section 2270, was amended to read as follows:

"The biennial reports of the state benevolent and correctional institutions shall be printed as follows: Five hundred copies of the report of each institution. Board of state charities, two thousand copies."

So long as the various state institutions remained under separate boards of trustees and managers, no questions originally arose under the above statutes; and the making and publishing reports of the various institutions was not difficult to carry out. The officials of each institution managed the same separately and independently of each other; and but little confusion could arise, if the statutes were followed.

But, as I have said before, on the 11th day of May, 1911, the legislature created the board of administration to take charge of the various institutions named in the act; and on the 15th day of August, 1911, *all separate boards for these institutions were abolished, and their powers vested in the present board.*

This act, 102 O. L., at page 223, repealed the above section, 1871; and the last section (41) of the act says:

"And that all parts of sections inconsistent with the provisions of this act be, and the same are hereby repealed in so far as said inconsistencies exist."

All printing of reports since the creation of this board of administration, must be in accordance with said act. So that the biennial reports of 1910 and 1911, of the various state institutions under control of the central board, should not be published as under the repealed section 1871. The same must appear under the act creating the present board of administration, which directs annual reports section 36 (General Code, 1870), of which, reads as follows:

"The board shall annually report to the governor its acts, proceedings and conclusions for the fiscal year, giving a complete financial statement of the various institutions under its control. * * *."

Therefore, I believe, that when section 1871, General Code, was repealed, *as to the separate reports for each institution,* and section 36 of the act above referred to was enacted, requiring the central board to report their acts *as a whole,* there could be no such thing as printing any number of *separate reports* of each institution.

It was an economical provision to avoid the multifarious printing of separate

reports, and effected a consolidation thereof *in one general report.* I am of the opinion that when section 1871 was repealed, it carried with it section 2270, so far as it applied to the publication of separate reports, provided for in section 1871.

After the board of administration assumed control of *all of these institutions*, there could be no such thing as *separate reports to the governor.* It was the duty of the board thereafter to make a report *as a whole*, covering *all these institutions of which it had charge.*

It is only the report of the board of administration, *as a department*, that can be printed in the "Executive documents," as shown by section 2275, General Code.

There could be no objection to the central board taking the reports in hand, of the various institutions, for 1910 and 1911, condensing the same, and incorporating the same in a report to the governor, and then have the same incorporated in the "Executive documents." But all such data must come from the board *in one document*, as their report of *all institutions* under their jurisdiction, instead of separately, and cannot be otherwise printed in the "Executive documents."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

283.

ABSTRACT OF TITLE—PROPERTY SITUATED IN GALLIPOLIS.

COLUMBUS, OHIO, May 26, 1913.

The Ohio State Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of abstract of title and warranty deed for the following described real estate which it is proposed to purchase for use in connection with the Ohio hospital for epileptics at Gallipolis, to **wit:**

> "Situated in the township of Gallipolis, county of Gallia and state of Ohio, and known as being all that portion of eight acre lots 1185 and 1186, lying south and west of the Mill Creek road as it now is and adjoining lands of Mary Wade and David Conrad, supposed to contain 5 acres more or less, except 17-100 of an acre in the southwest corner of lot No. 1185. Also a part of eight acre lot 1186 bounded and described as follows: Beginning at a Mulberry tree three inches in diameter in the west lune of eight acre lot 1186, thence south 42 degrees, east 2 chains and 68 links to the center of the Mill Creek road, thence along said road in the middle thereof south 50 degrees, west 2 chains and 45 links to a stake in the west line of said land, thence north 3 chains and 50 links to the place of beginning containing 32-100 of an acre more or less."

The abstract discloses no liens or incumbrances against said premises, except the second half of the 1912 taxes, due June 20, 1913, and the undetermined taxes for the year 1913. An affidavit should be attached to the abstract as to whether Eliza A. Blazer, one of the grantees in instrument 15, is the same as Addie E. Blazer, one of the grantors in the deed to the state of Ohio. The name of Harvey Betz appears as one of the grantees in the same instrument, but insofar as the abstract shows his interest has not been conveyed either in the deed to the state of Ohio or otherwise, and a deed should be procured from him.

Subject to the foregoing, I am of the opinion that the state of Ohio will acquire a good and sufficient title to the above described premises in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

297.

ABSTRACT OF TITLE—PROPERTY SITUATED IN GALLIA COUNTY FOR USE OF THE OHIO HOSPITAL FOR EPILEPTICS AT GALLIPOLIS.

COLUMBUS, OHIO, June 5, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of amended abstract of title for certain real estate in Gallia county which your board is to acquire for the use of the Ohio hospital for epileptics at Gallipolis, and upon examination thereof, I find that the suggestions made in my former opinion have been complied with. The title and deed are therefore approved.

You have also transmitted to me for examination and approval an unexecuted deed from Wilson Blazer and wife to the state of Ohio for seventeen one-hundredths of an acre of land in the southwest corner of lot No. 1185, which land was included in the other abstract. Upon examination of said deed, I am of the opinion that the state will acquire a good and sufficient title to said land, in fee simple, upon the execution and delivery thereof.

The abstracts, deeds and other papers forwarded by you, are herewith enclosed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

300.

BANKS AND BANKING—SPECIAL DEPOSIT OF TRUST FUNDS DEVISED TO STATE BOARD OF ADMINISTRATION WITH POWER TO LOAN AT INTEREST MAY NOT BE PREFERRED IN THE LIQUIDATION OF INSOLVENT BANK.

When the state board of administration, in accordance with the terms of a bequest, made to said board, deposits the sum thereof generally in a bank possessing therefor the ordinary pass book containing the rules applicable to all general deposits, in accordance with the express power of said bequest to loan the fund at interest, such deposit must be treated as all general deposits and may not be treated as a claim preferred over the claims of other creditors, when the bank in which such deposit is made is undergoing liquidation.

COLUMBUS, OHIO, May 21, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—On March 25, 1913, you submitted to me proof of claim covering the account of the Ohio board of administration with the Columbus Savings & Trust Company, also receipt given by Daniel H. Sowers, special deputy in charge of liqui-

dation of the Columbus Savings & Trust Company, No. 1304, issued to your board for savings pass book No. 36881, delivered by your board to said liquidating agent, on March 23, 1912. You also enclose a copy of the will of Sarah Ann Kyle, and you have also asked for my opinion whether the deposit made by your board with said bank, evidenced by said savings pass book, and amounting to $1,649.02, is a special deposit of trust funds which can be preferred in the liquidation of said bank over the claims of the general depositors. The facts as I understand them are as follows:

On the 22nd day of June, 1908, Sarah Ann Kyle, of Carroll county, Ohio, executed her last will, in which the following bequest was made:

> "After the death and burial of my husband, David Kyle, I desire my farm to be sold and the proceeds, with the balance of my personal property, if any, to be given to the Ohio institutions for the blind and deaf."

After her death, under this provision of her will, and by the decree of the court of common pleas of Carroll county, the sum of $1,585.00 came into the hands of the board of trustees of the Ohio state school for the blind. Though this is not shown by the documents before me, I presume that this sum of $1,585.00 was invested in some manner until on August 28, 1911, it had amounted to $1,616.70, on which date it was deposited with the Columbus Savings & Trust Company, and savings pass book No. 36881 was issued in the name of "Ohio board of administration, by A. W. Thurman pt." The only entries in this book are as follows:

> "Aug. 29, 1911, deposited.....$1,616.70, balance, $1,616.70.
> "Interest to Jan. 1, 1912..... 32.32, balance, 1,649.02."

This pass book, which is the only evidence of this deposit submitted to me, is the ordinary pass book issued by the Columbus Savings & Trust Company to the savings depositors, and was subject to the following rules and regulations:

> "1. All sums deposited herein not exceeding $10,000, shall draw interest at four (4) per cent. per annum, from the last day of the month in which the deposit is made, provided said sums remain on deposit until the first day of January or July, next following, at which time the interest shall be credited.
>
> "Deposits made on or before the tenth days of January or July, shall draw interest from the first days of said months. Interest shall not be allowed in sums less than five dollars nor on fractional parts of a dollar.
>
> "Deposits in excess of $10,000 must be subject to special agreement.
>
> "2. Deposits, as a general rule, may be withdrawn at any time without notice, but to protect the interests of depositors, and avoid sacrifice of securities, sixty days' notice of withdrawal may at any time be required.
>
> "3. Depositors shall not be entitled to receive any part of their principal or interest unless the original deposit book be produced, that such payment may be entered therein, or unless they shall prove to the satisfaction of the secretary that such book has been lost or destroyed, in which case a written discharge shall be required and bond of indemnity at the discretion of the bank.
>
> "As the officers of this bank may not be able to identify every depositor, the bank will not be responsible for loss sustained where the depositor has not given notice of the pass book having been stolen or lost, if such deposit be paid in whole or in part, on presentation of pass book.
>
> "Whenever such notice shall not have been given, all payments made to persons producing the deposit book shall be deemed good and valid payments to the depositor.

"4. The amount that may be credited herein shall be payable only to the depositor, his or her order, or to his or her legal representative; and deposits made by minors or married women shall be fully under their control, and payable to them or their order, without regard to parents, guardians or husbands.

"5. These rules and regulations, including the rate of interest to be credited, may be changed, amended or added to at any time, and such changes, amendments or additions shall be obligatory and binding upon all depositors after due notice."

On May 31, 1911, the legislature of Ohio passes an act with reference to the investment of this fund. This act is found in 102 O. L., page 315, and is as follows:

"An act to provide for the investment and disposition of the interest arising from the investment of a certain legacy left to the Ohio state school for the blind.

"Whereas, by the will of Sarah Ann Kyle, of Carroll county, Ohio, the Ohio state school for the blind and the Ohio state school for the deaf, were made residuary legatees of her estate; and

"Whereas, the estate of such testatrix has been settled in accordance with such will and pursuant to a decree of the court of common pleas of Carroll county, and the circuit court of the seventh district of the state of Ohio; and

"Whereas, by the terms of the said settlement there have come into the hands of the board of trustees of the Ohio state school for the blind, the sum of one thousand, five hundred, eighty-five dollars ($1,585); and

"Whereas, from the statement of the scrivener who wrote the will, it appears that the intent of the said testatrix was to benefit 'those poor people,' meaning thereby the blind and deaf, therefore,

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. That the board of trustees of the Ohio state school for the blind be authorized, empowered, and directed hereby forthwith to invest the such one thousand, five hundred, eighty-five dollars ($1,585) in such manner as to provide proper security and to yield as large an interest return as possible, and to keep such sum so invested, and that the income arising from such investment be used for the sole purpose of assisting worthy needy blind persons who have been students of the Ohio state school for the blind to secure a start in life by loaning money to such persons, under proper rules and regulations.

"Section 2. And, that for the purpose of this benevolence the board of trustees of the state school for the blind shall appoint an advisory committee of three well-known and competent graduates of the Ohio state school for the blind, one to serve for three years, one to serve for two years, and one to serve for one year, each from the date of appointment, and thereafter one to be appointed annually to serve for three years, and the duties of such advisory committee shall be to investigate the conditions surrounding any benevolence proposed under the terms of this act, and to make recommendations to the board of trustees as to the proper action thereon."

I presume from the date of this act, May 31, 1911, and the date of the deposit by your board as evidenced by the pass book, that this fund was originally deposited with the Columbus savings and trust company, by the board of trustees of the Ohio state school for the blind, and that on August 29, 1911, the deposit was simply transferred to your board as successor to the board of trustees of the Ohio state school for the

blind; or it may have been deposited by said trustees in some other bank, and upon your board succeeding said trustees the deposit may have been withdrawn and redeposited with the Columbus Savings & Trust Company; this, however, is immaterial, because this particular deposit dates from August 29, 1911, and is by your board with the Columbus Savings & Trust Company, whether or not it was a new deposit at that time or was simply a transfer to your board of the deposit previously made by the trustees of the Ohio state school for the blind.

Under the will of Sarah Ann Kyle, and the act of the legislature above quoted, the trustees of the Ohio state school for the blind, held this fund in trust as provided by the will and the act, with power especially granted to invest the same in such manner as to provide proper security and to yield as large an interest return as possible, and to keep such sum so invested, and your board as successor to the board of trustees of the Ohio state school for the blind also succeeded to this trust and it vested in your board, subject to the same conditions, restrictions and limitations as attached to it while the board of trustees of the Ohio state school for the blind.

The question to be decided in this case is whether this deposit made by your board with the Columbus Savings & Trust Company is a special deposit, and so entitled to preference. This question depends upon whether or not your board was authorized to make the deposit in the manner in which it was made.

It is not necessary in this opinion to go into the subject of the duty of the trustees in the preservation and management of trust property, and it is also unnecessary to discuss the question as to when a trustee has the implied right to invest trust funds, or to loan the same and thus create the relation of debtor or creditor because the act above quoted gives the trustees in this instance the express authority to invest this fund and to create this relation.

In Morse, on Banks and Banking, section 185 (4th ed.), it is stated:

> "When money is deposited to pay a specified check drawn or to be drawn, or for any purpose other than mere safe keeping, or entry on general account, it is a specific deposit, and the title remains in the depositor until the bank pays the person for whom it is intended, or promises to pay it to him."

This is a good general statement of the matter though, of course, it is subject to many distinctions and qualifications, especially in the matter of collections and authorization of deposits. The same author in section 186, further states:

> "A deposit is general unless expressly made special or specific. Or the circumstances are such as to imply that the deposit is not meant to be general * * *." (Citing a number of authorities to sustain this proposition).

It is also stated that,

> "Wherever the bank has the right to mingle the funds deposited with its own, and treat them as a debt due from it, even though the money may be trust property given to the bank on condition that it would pay a certain sum to the *cestui* during life, the deposit is general. In the absence of evidence to show that it is the bank's duty, by agreement express or clearly implied, to keep the funds and their investment separate, it must be treated as a general deposit." (Vail vs. Newark Savings Institute, 32 N. J., eq., 627).

Bearing in mind the above definitions, which from an examination of the authorities may be said to be well settled principles, I find nothing in relation to this deposit by your board with the Columbus Savings & Trust Company which would entitle it to be considered as a special deposit, and to be given preference over other saving

deposits in said bank. The evidence of the deposit, that is the savings deposit pass book, is the ordinary pass book issued by said bank to all savings depositors, the contract under which the deposit is made is the identical contract made with all savings depositors in said bank, and the interest paid is the same. It is a trust fund, but that fact does not place it in a class separate from the other savings deposits because the law governing the management of the fund expressly authorizes its investment, and therefore the deposit will have to be treated as a general savings deposit in said bank and entitled to share on an equality with the other claims against said bank for like deposits.

You will note from the above, that the determining feature in regard to a deposit of this character is whether or not the trustee is authorized or has the power to make the deposit and incur the relation of debtor and creditor. This is clearly indicated in two cases, in one, McLain vs. Wallace, 103 Indiana, 562, it is held that where a deposit is made by a clerk of court *under its order* and not kept separate from the other funds of the bank, the deposit is general and the clerk is not entitled to be preferred to other creditors of the bank in case of its failure.

In the case of Otis vs. Gross, 96 Ill., 612, it is held that a deposit of school district funds by its treasurer is *not within his power*, and the deposit does not become general.

For a very full opinion upon this question I further refer you to the case of Smith et al., trustee, vs. Fuller, et al., assignee, 86 O. S., 57, paragraphs 1, 2, 3, and 4, of the syllabus, are as follows:

> "1. It is the duty of a trustee appointed to wind up and settle the affairs of an insolvent savings company to protect the trust property in every reasonable way; to get possession of the assets, reduce them to money, and under the direction of the court appointing him, after the payment of expenses, apply the funds to the satisfaction of the claims of creditors of the insolvent company."
>
> "2. Such trustee has not, in the absence of a proper order of court the right or power to loan the funds of the trust coming into his hands as such trustee.
>
> "3. A general deposit by such trustee of the trust funds in a bank is in legal effect a loan to the bank, and unless authorized by the court, is a violation of duty by the trustee.
>
> "4. Where a trustee deposits trust money in a bank, taking as evidence thereof a certificate of deposit, certifying that he as trustee, has deposited the fund payable to self on return of the certificate properly indorsed, the same not being subject to check, and no stipulation for interest made, a presumption will be indulged, in the absence of proof to the contrary, that the trustee intended to perform and not violate his duty, and that the deposit was intended as a special, and not a general, deposit."

The court, at page 62, says:

> "It cannot, we think, be seriously contended that the trustees had, in the proper discharge of their duties as such, the right or power, by express contract, to create the relation merely of debtor and creditor; that is, to loan out the trust funds."

The court further says, in brief, that when funds are so deposited or loaned, that such an act in the absence of authority from the court, would clearly be inconsistent with, and a violation of, the duty of the trustee; that if he has no right to make such loan general, it is clear that a loan to a bank by way of a general deposit would be

equally beyond his power, and that in the absence of clear proof showing that a deposit was made as a loan to the bank by way of a general deposit, such purpose (that is the purpose to *loan* the money) cannot be attributed to the trustee.

And it will be seen from the syllabus and the opinion, that the court decided that the deposit in the case before it was a special deposit largely upon the ground that the trustee was without authority to make a general deposit.

Your case is the converse of this for the reasons stated above, viz., that your board was expressly authorized by law to do this very thing.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

366.

MADISON HOME—BOARD OF ADMINISTRATION MAY MAKE IMPROVEMENT—ADMINISTRATOR—FUND DERIVED FROM BEQUESTS.

1. Where money was bequeathed to the Madison home for the benefit of state institution, the board of administration is authorized to receive such money from the administrator of the deceased.

Such funds may be used for making any improvement at the institution which would be within the legal power of the board to make from any other funds at its disposal for state purposes.

2. The erection of a cellar and the digging of a well would be lawful improvements, such as may be paid for by the board of administration out of such money.

3. Under section 1840, General Code, the funds derived from such bequests should be kept separate and apart from other funds and the board should keep an itemized account of the receipts and disposition thereof.

COLUMBUS, OHIO, July 3, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication, dated June 30th, in which you enclose correspondence from the superintendent of the institution known as the Madison home, together with copies of two wills, executed by former members of said institution, namely; Mary Eliza Rehren and Mary W. Babcock; and request my opinion as to whether or not the money devised to your board under the provisions of said wills can be used by your board for the purpose of erecting at said institution a frost-proof cellar, and digging a well at said institution.

In order to properly advise you in the premises, I desire to quote the provisions of both wills above referred to. In the will of Mary Eliza Rehren the following provision or item is contained:

> "It is my wish and desire that all money in bank as shown by my bank book and checks in the hands of the managing officer of the Madison home at the time of my death (should I die while a member of the home) after paying my funeral expenses here at the home, be given to the board of managers of the Madison home, Madison, Lake county, Ohio; for the benefit of the home as they may deem best."

In the will of Mary W. Babcock is the following provision:

> "It is my wish and desire that all moneys, checks, notes, bonds or securi-

ties whatsoever, belonging to me, or that may hereafter accrue to me from bequest or otherwise, shall at my death (should I die while a member of this home), after paying all of my funeral expenses, be given to the board of managers of the home for Ohio soldiers, sailors, marines, their wives, mothers, widows and army nurses, to be used by them for the benefit of said home, as in their best judgment they may deem best."

Under the provisions of both of said wills there can be no question but that the intent of the testatrix in each case was that all of said moneys or securities remaining after the payment of her debts and funeral expenses should go to your board, as the board of managers of said institution, to be used by you as you deem best.

The main question for determination after the intent of the testatrix is arrived at is whether or not, under the provisions of law relating to devices, bequests and gifts for the benefit of any state institution, your board has the legal authority to spend said bequest for the purposes set forth in your inquiry.

Section 18 of the General Code of Ohio is as follows:

"The state, a county, township or cemetery association, the commissioners or trustees thereof, a municipal corporation, the council, a board or other officers thereof, a benevolent, educational, penal or reformatory institution, wholly or in part under the control of the state, the board of directors, trustees or other officers thereof, may receive by gift, devise or bequest moneys, lands or other properties, for their benefit or the benefit of any of these under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest. This section shall not affect the statutory provisions as to devises or bequests for such purposes."

Section 1840, General Code, being section 9 of the act creating your board, provides as follows:

"The board shall accept and hold on behalf of the state, if deemed for the public interest, any grant, gift, devise or bequest of money or property made to or for the use or benefit of said institutions or any of them, whether directly or in trust, or for any pupil or inmate thereof. The board shall cause each such gift, grant, devise or bequest to be kept as a distinct property or fund, and shall invest the same if in money, in the manner provided by law; * * The board shall include in the annual report a statement of all such funds and property and the terms and conditions relating thereto, * * * but each such officer shall keep an itemized book account of the receipt and disposition thereof, which book shall be open at all times to the inspection of any member of the board of administration or of the board of state charities."

Under the two sections of the General Code above quoted there can be no question as to the authority of your board to receive bequests such as those set forth in the two wills above referred to. The only remaining question is whether or not your board may use the funds derived from said bequests for the purpose of erecting a frost-proof cellar and digging a well at said institution. As to this proposition I would say that in the case of Christy vs. Commissioners of Ashtabula County, 41 O. S., 711, the supreme court of our state held that, where a testator devised and bequeathed the residue of his property to the county of Ashtabula, in the state of Ohio, for educational purposes to be under the full control of said commissioners, to use and expend as seems best in their judgment to promote and advance the cause of education in said county of Ashtabula, the board was competent to take and hold it and was authorized to spend the said funds for any legal educational purpose, as the board of county commissioners

deemed best to promote and advance the cause of education in said county. By analogy I am of the opinion that under the terms of the wills above referred to, your board is authorized to expend, upon receiving the same from the administrators of the respective decedents, the funds so bequeathed to your board for the benefit of said institution, in making any improvement or improvements at said institution which would be within the legal power of the board to make for the benefit of said institution from any other funds at its disposal for said purpose.

I am further of the opinion that the erection of such a cellar and the digging of such a well would come within such lawful improvements as those above referred to; for, under section 1840 of the General Code, a board is authorized to invest or expend the money in the manner provided by law, which means that the terms of the will which authorize your board to use their discretion in expending said bequest for the benefit of the institution, should be carried into effect.

I am further of the opinion that, under section 1840, General Code, the funds derived from the bequests above referred to should be kept separate; and that your board, through its officers, should keep an itemized account of the receipts and disposition thereof.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

408.

BOARD OF ADMINISTRATION—GRAND JURY—WITNESS MAY BE SUBPOENAED FROM STATE HOSPITAL—GRAND JURY NOT PERMITTED TO DEPART FROM ROOM—HEARSAY EVIDENCE—MANAGER OF STATE INSTITUTION ENTITLED TO HEARING—OHIO PENITENTIARY——PAROLE.

1. There is no limitation as to who may or may not be compelled to testify before a grand jury. A prosecuting attorney may subpoena attendants or inmates of the state hospital to appear as witnesses before a grand jury.

2. A grand jury has no right to depart from the rooms wherein they are in session for the purpose of making an investigation of the state hospital.

3. The powers and duties of the board of administration are very broad, as expressed in section 1868, General Code. It may make investigations as it deems necessary; may administer oaths and force attendance of witnesses and the protection of books and papers and when the chief officer of an institute is removed, shall give him a hearing if he so desires it.

4. Where charges have been made against a managing officer of a state institution, the person preferring the charges has no right to be represented by counsel.

5. The board of administration may make rules prohibiting the introduction of hearsay evidence.

6. The provisions of senate bills Nos. 83 and 87 apply to all persons in the Ohio penitentiary as to their eligibility to parole.

COLUMBUS, OHIO, July 28, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Your communication of May 23, 1913, received in which you request my opinion upon the following questions:

> "1. Can a prosecuting attorney subpoena attendants or inmates of a state hospital to appear before a grand jury?"

"2. Can a grand jury visit a state hospital for the purpose of making an investigation?"

"3. What are the powers and duties of the board of administration as provided in section 1868, General Code?"

"4. In case charges are made against a managing officer of a state institution, has the person preferring charges the right to have an attorney conduct the examination of witnesses, etc., at a hearing before the board?"

"5. Can the board make a rule to prohibit the introduction of hearsay evidence in such cases?"

"6. Do senate bills Nos. 83 and 87, by Senator Wieser apply to *all* prisoners confined in the Ohio penitentiary, or only to those prisoners sentenced after said laws become effective?"

I will answer each of your questions in the order in which they are asked:

In answer to your first question I desire to say that section 13563 of the General Code provides:

"When required by the grand jury or the prosecuting attorney, the clerk of the court in which such jury was impaneled, shall issue subpoenas and other process to any county to bring witnesses to testify before such jury."

Under said section there can be no question as to the power of the prosecuting attorney to cause to be subpoenaed attendants or inmates of a state hospital to appear before a grand jury, there to testify in any matters that may lawfully be inquired of before such grand jury, as there is no limitation as to who may or who may not be compelled to testify before a grand jury under the provisions of said section.

Having arrived at the legal conclusion that the prosecuting attorney can compel the attendance of inmates or attendants of an insane asylum to testify before a grand jury, the further question arises as to how the attendance of any inmate of an asylum as a witness before a grand jury could properly and legally be compelled. I find no statutory provision covering the question in this state nor any decisions on the subject, but where the person, whose attendance as a witness is desired, is lawfully restrained as an inmate of an insane asylum his attendance is secured by means of a writ of *habeas corpus ad testificandum* which is directed to the custodian of the witness and requires him to have the body of the witness in the court at the time specified in said writ that he may give his testimony. Under the decisions of the different states it has been held that it is an inherent power of the court to issue such a writ, and I am of the opinion that as the legislature has provided by statute the means of securing the attendance of prisoners confined in penal institutions in this state for the purpose of testifying, and not having provided by statute for those, such as inmates of insane asylums, this writ above referred to should be issued by the courts under their inherent power so to do for the purpose of securing the attendance of such inmates to testify in any trial or before the grand jury in any county where the grand jury is in session, pertaining to any matters properly before said grand jury, or to testify in any case before such court.

In answer to your second question I desire to say, that sections 13554, 13555, 13556 and 13557 provide for the grand jury and matters legally to be done before they retire to hold the inquiry which they are chosen to hold.

Section 13558 of the General Code provides that:

"The grand jurors, after being sworn, shall be charged as to their duty by the judge, who shall call their attention particularly to the obligation of secrecy which their oaths impose, and explain to them the law applicable to such matters as may be brought before them."

Section 13559 of the General Code provides:

> "After the charge of the court, the grand jury shall retire, with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county in and for which it was impaneled and sworn."

From the statutes relating to grand juries and our criminal procedure it is plainly to be seen that the grand jurors are sworn secrecy. It is also plainly to be seen that the intention of the legislature was that the grand jury should retire to some place where such secrecy could properly be maintained while they were deliberating in matters coming properly before it, and it is plainly to be seen that the grand jury must retire to the jury room for their sessions, for under section 13561, General Code, it is provided that:

> "The official stenographer of the county, at the request of the prosecuting attorney, shall take shorthand notes of the testimony and furnish a transcript thereof to him and to no other person, *but the stenographer shall withdraw from the jury room before the jurors begin to express their views or give their votes on a matter before them.*"

Therefore, taking all of these matters which we find in the sections above referred to into consideration, I am of the opinion that a grand jury, as soon as it is sworn, shall retire to its room and there continue to hold sessions from time to time, they to be the judge of their sessions until their deliberations are complete, and that they have no right, as a grand jury, to depart therefrom and visit a state hospital for the purpose of making an investigation.

Your third question is, what are the powers and duties of the board of administration as provided in section 1868, General Code?

That section of the General Code is as follows:

> "The board may make such investigations as it may deem necessary to the performance of its duties, and to that end it or any member thereof shall have the same power as a justice of the peace to administer oaths and to enforce the attendance and testimony of witnesses and the production of books and papers. It shall keep a record of such investigations stating the time, place, charges or subject, witnesses summoned and examined, and its conclusions.
>
> "In matters involving the conduct of an officer, a stenographic report of the evidence shall be taken and a copy thereof, with all documents introduced, kept on file at the office.
>
> "The fees of witnesses for attendance and travel shall be the same as in the court of common pleas, but no officer or employe of the institution under investigation shall be entitled thereto. Any judge of the probate or of the common pleas court, either in term time or in vacation, upon application of any member of the board, may compel the attendance of witnesses, the production of books or papers and the giving of testimony before said board, or before any member of the board, by a judgment for contempt or otherwise, in the same manner as in cases before said courts."

Under said section, just above quoted, the powers of your board are very broad in that it may make such investigations as it may deem necessary to the performance of its duty, may administer oaths and force the attendance and testimony of witnesses, and the production of books and papers. I might say in addition, that one of your duties is that you shall give to any chief officer appointed by your board a hearing

where you have removed him for any of the causes specified in section 1842 of the General Code, being section 11 of the act creating your board and defining its powers and duties, for under said section it is provided in part that:

> "Such chief officer shall be appointed by the board to serve for the term of four years unless removed for want of moral character, incompetency, neglect of duty, or malfeasance, *after opportunity to be heard.*"

Therefore, it is the duty of your board, under the provisions of section 1868, taken in conjunction with the provisions of section 1842, just quoted, to have a hearing, should the chief officer so removed desire it.

But as to all employes of the state institutions under your supervision I am of the opinion that you, under the provisions of section 1842, General Code, have the power to discharge any employe of any institution for reasons set forth in writing, where you deem it proper in order to carry into effect the proper administration relating to said institution where said employe has been employed.

I believe that I have sufficiently set forth your powers under said provisions of the code as well as your duties, as the provisions of the code are so explicit, taken in conjunction with section 1842, that you cannot be misled as to either the powers of your board or its duties.

In answer to your fourth question, viz.: In case charges are made against the managing officer of a state institution, has the person preferring charges the right to have an attorney conduct the examination of witnesses, etc., at a hearing before the board? I desire to say that I think the answer will have to be in the negative. I believe it is your duty, where charges have been preferred against a managing officer of a state institution under your supervision to give a hearing to said officer as indicated in my answer to your third question, and your board has the right to have the attorney general, or some one assigned by him to your board, to sit in the hearing and examine witnesses on behalf of your board, and the accused officer has the right to be represented by counsel and cross examine witnesses who take the stand for the purpose of testifying in support of the charges filed against said officer; but I do not believe that the person preferring the charges has the right to be represented by counsel and conduct the examination of witnesses at the hearing before the board, for that is against the system of procedure of our courts, and where the procedure is not specifically defined and set forth under the code, I think that that procedure adopted by our courts should be followed in all hearings, such as would be conducted and referred to in your fourth question.

In answer to your fifth question I desire to say that your board can make a rule to prohibit the introduction of hearsay evidence for in all judicial and extra-judicial proceedings hearsay evidence is not admissable, and the hearing of such cases by your board are extra-judicial proceedings; hence your board can make such a rule—and should make such a rule prohibiting the admissibility or introduction of hearsay evidence in all such cases.

In your sixth question you ask me to give you my opinion as to whether senate bills Nos. 83 and 87, passed by the 80th general assembly, apply to all prisoners confined in the Ohio penitentiary, or only to those prisoners sentenced after said laws become effective.

Senate bill No. 83, referred to in your sixth question, is to be found in 103 Ohio Laws at page 29, which bill amended section 2166 of the General Code relating to the sentences to be imposed upon prisoners sentenced to the Ohio penitentiary for certain felonies, and could not in any manner, shape or form apply to prisoners confined in the Ohio penitentiary prior to the law becoming effective, and, therefore I see no reason for your inquiry as to the bill just referred to because it can only apply to prisoners to

be sentenced from and after the date said law became effective, as it pertains only to the sentencing of criminals who have been convicted, or plead guilty to felonies, by the courts of the state having the sentencing power over said criminals.

In answer as to whether or not senate bill No. 87, passed by the last general assembly, applies to all prisoners confined in the Ohio penitentiary, I desire to say that said senate bill so passed by the last general assembly is to be found in 103 Ohio Laws at page 474, and said bill amended section 2169 of the General Code to read as follows:

> "The Ohio board of administration shall establish rules and regulations by which a prisoner under sentence other than for treason or murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted, and who had not previously been convicted of felony or served a term in a penal institution, or prisoner under sentence for murder in the second degree having served under such sentence ten full years, may be allowed to go upon parole outside of the building and enclosure of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner. The board may designate geographical limits, within and without the state, to which a paroled prisoner may be confined, or may at any time enlarge or reduce such limits, by unanimous vote."

This law became effective August 6th and thereafter will guide your board in relation to the granting of paroles to all prisoners therafter confined in the Ohio penitentiary so long as said section remains in the code unrepealed or amended, and it will apply to all prisoners in the Ohio penitentiary as to their eligibility for parole after said law becomes effective, regardless of the time when said prisoners were received at said institution, because a law, when amended, becomes effective as amended and regulates those things pertaining to the amended section, and it is not, in my opinion, retroactive in any sense of the word, but is effective from the 6th day of August and applies to the paroling of prisoners then or thereafter confined in the Ohio penitentiary so long as it remains in force and effect.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

472.

GUARDS AT THE OHIO PENITENTIARY ARE NOT PERMITTED TO CARRY CONCEALED WEAPONS UNDER THE PROVISIONS OF SECTION 12819, GENERAL CODE, AS AMENDED IN 103 O. L. 553.

All persons are liable under the law for carrying concealed weapons unless they come within the excepted classes.

Guards at the Ohio penitentiary do not come within the excepted classes, and they are therefore liable under the law for carrying concealed weapons.

COLUMBUS, OHIO, September 10, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—In your letter of August 15, 1913, you inquire:

> "What effect, if any, has house bill 33, amending section 12819 of the General Code, prohibiting the carrying of concealed weapons, have upon guards

and parole officers of the penal and correctional institutions of the state, and other officers and attendants of the state institutions under the control of the board of administration?"

Section 12819, General Code, as amended in 103, Ohio Laws, 553, reads as follows:

"Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the penitentiary not less than one year, nor more than three years. Provided, however, that this act shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code, to go armed when on duty. Provided, further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code, to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

Old section 12819, General Code, read as follows:

"Whoever carries a pistol, bowie knife, dirk or other dangerous weapon, concealed on or about his person, shall be fined not more than two hundred dollars or imprisoned not more than thirty days, and, for each subsequent offense, shall be fined not more than five hundred dollars or imprisoned not more than three months, or both."

It will be noted that the old section made the offense a *misdemeanor*, and contained *no exceptions*. The new law makes the offense a felony, and also excepts certain classes of persons from its provisions. This statute being a general one on the subject, and enumerating the classes of persons who may carry concealed weapons, *includes and protects only the the persons named therein; and excludes all other persons not so named.*

It will be necessary then to carefully analyze the statutes and see who are excepted.

1. The special officers mentioned in section 2833, are all persons called by the sheriff to his aid in the execution of his duties as required by law.

2. Section 4373 includes additional patrolmen and officers appointed by the mayor in cases of riot and like emergency.

3. Section 10070 provides for the appointment of agents by humane societies who have power to arrest violators of humane laws.

4. Section 10108 provides that officers of cemetery associations may appoint watchmen, who are vested with powers of policemen.

5. Section 12857 refers to persons called on to assist a sheriff, constable, coroner or other ministerial officer in securing and conveying accused persons to prison.

The above five classes of persons, together with sheriffs, regularly appointed police officers of cities and villages and regularly elected constables, are the only ones who can carry weapons while on duty, without giving bond.

This section further provides that deputy sheriffs and specially appointed police officers (except those who are appointed or called into service by the last five named sections) are permitted to go armed if they give a bond of $1,000.

Now, the "guards and parole officers of the penal and correctional institutions of the state, and other officers and attendants of the state institutions, under the control of the board of administration," mentioned in your inquiry, are not included in the list who can carry concealed weapons either with or without bond. Therefore, such officers and employes as you named are prohibited from so doing under the new laws.

There is another statute, being section 13693, General Code, on the subject, which reads as follows:

> "Upon the trial of an indictment for carrying a concealed weapon, the jury shall acquit the defendant if it appear that he was at the time engaged in a lawful business, calling or employment, and that the circumstances, in which he was placed, justified a prudent man in carrying such weapon for the defense of his person, property or family."

This section is the only relief for violators of the new law, and was in force under the old. But each person indicted must take his chances of coming strictly within the provisions thereof. Each case will depend on the peculiar circumstances thereof, alone; and this section is not intended to extend the right to carry concealed weapons promiscuously to persons who do not fall within the provisions of section 12819, General Code, as amended.

The object of the new statute is to *restrict the carrying of concealed weapons*, and lessen the dangers resultant from such practices. If the legislature intended to extend the privilege *to others* to carry concealed weapons, it should have said so in section 12819. Whatever the practice or custom in that behalf was, under the old law, the same is no longer permissible under the new; and until additional legislation is had on the subject, all persons are liable under the law, unless they come within the classes of exceptions enumerated. Such state employes as named by you do not fall within the excepted and protected class.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

474.

BOARD OF ADMINISTRATION MAY REQUIRE THE MANAGING OFFICER TO GIVE BOND FOR ALL SUBORDINATE OFFICERS UNDER HIS CONTROL—SUBORDINATE OFFICERS SHOULD GIVE BOND TO MANAGING OFFICER.

Since the managing officer of the board of administration appoints all subordinate employes, he should be responsible for their acts and should give bond to the board of admin stration. He in return may require a bond from each one of the subordinate officers for his own protection.

COLUMBUS, OHIO, September 15, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—In your letter of August 14, 1913, you call my attention to section 1855, General Code, which reads as follows:

> "The board shall require its secretary and fiscal supervisor and each officer and employe of every institution under its control who may be charged

with custody or control of any money or property belonging to the state or who is now required by law to give bond, to give a surety company bond, properly conditioned, in a sum to be fixed by the board which when approved by the boards, shall be filed in the office of the secretary of state. The cost of such bonds, when approved by the board, shall be paid from funds available for the board or the respective institutions."

You then ask:

"Whether or not, under the provisions of the section above quoted, the board can by resolution place the entire responsibility for all money and property at each institution under its control upon the managing officer thereof."

Section 1842, General Code, provides:

"Each of said institutions shall be under the executive control and management of a superintendent or other chief officer designated by the title peculiar to the institution, *subject to the rules and regulations of the board* and the provisions of this act."

This section further provides that "he shall select and appoint the necessary employes."

Section 1853, General Code, provides:

"The board shall make rules for the proper execution of its powers and *may require the performance of additional duties by the officers of the several institutions* * * *"

The last part of the section provides that if there are any apparent conflicts between the powers conferred by law as a managing officer and those conferred by this act upon the board, the presumption shall be conclusive in favor of the board.

In view of the very broad powers conferred on your board by the provisions of this act, as above quoted, and by the whole act itself, I am of the opinion that your board can lawfully adopt such a resolution as you refer to; and require a bond from the chief officer, holding him responsible for all money and property of such institution, of which he is given control. This would be a matter of economy, and obviate the trouble of requiring bonds from subordinates.

Inasmuch as the chief officer appoints all the subordinate employes, he should be held responsible for their acts; and if he desires to protect himself, he should require a personal bond from such appointees to himself.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

533.

THE BOARD OF ADMINISTRATION IS NOT AUTHORIZED TO PRODUCE AND SELL IN THE OPEN MARKET ROAD BUILDING MATERIAL PRODUCED BY CONVICT LABOR.

Section 41, article 2, of the constitution of Ohio, invalidates section 2235-1, General Code, which provides that the board of administration may sell road building and ballasting material, dimensions and other stone in the open market.

At the present time the board of administration has no authority to produce and sell through convict labor any of the above mentioned commodities in the open market.

COLUMBUS, OHIO, August 27, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—In your letter of August 15, 1913, you say:

> "Your attention is called to an amendment to section 41 of article II of the constitution of Ohio, which was passed at a special election held September 3, 1912, and which reads as follows:
>
> "Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory, while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the state of Ohio, and such goods made within the state of Ohio, and such goods made within the state of Ohio, excepting those disposed of to the state, or any political subdivision thereof, or to any public institution owned, managed or controlled by the state or any political subdivision thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made.' Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to the state or any political subdivision thereof, or for or to any public institution owned or managed and controlled by the state or any political subdivision thereof.
>
> "I am directed to respectfully request your opinion as to whether the amendment quoted above invalidates section 2235-1 of the General Code, which provides that the board of administration are authorized to sell road building and ballasting materials, dimension and other stone, in the open market."

Your inquiry raises the interesting question whether the above quoted section 41 of article II, of the new constitution is self exacting; and whether in the light of its provisions, section 2235-1, General Code, is still in force, or repealed by implication.

Section 2235-1, General Code, reads as follows:

> "That the board of managers of the Ohio penitentiary shall erect upon the said land described in this act, such building or buildings as are necessary for the operation of a stone crushing plant and quarry, and shall equip the said building or buildings for the purpose of manufacturing and the production of crushed stone, and in the preparation of road building and ballasting ma-

terials to be sold by the board of managers of the Ohio penitentiary in the open market, and may also conduct the business of quarrying and selling dimensions and other stone."

This section has never been specifically repealed, and is still in force, unless repealed by implication by the above section and article of the constitution.

The schedule to the new constitution provides that the several amendments, when adopted, shall take effect January 1, 1913; and that *"all laws then in force, not inconsistent therewith shall continue in force until amended or repealed."*

This presents the question squarely: Is section 2235-1 *inconsistent* with section 41, article II, of the new constitution?

I think it is; and that said statute is repealed by implication and no authority now exists for the board to operate thereunder by producing and selling in the open market such commodities as are mentioned in said statute.

Note the language in the above article and section of the new constitution *"And no person in any such penal institution or reformatory* (referring to all such institutions in the state), *while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away."*

The provisions of the constitution above quoted, are *clear, positive, unambiguous, mandatory* and *self explanatory.* It only remains to determine whether the kinds of labor, materials and products, enumerated in section 2235-1, General Code, fall fairly within the purview of the inhibitive provisions of the above quoted specification of the new constitution. I believe they do.

The operation, by convict labor, under section 2235-1, *of a stone crushing plant, the manufacture and production of road and ballasting material, the quarrying and selling dimensions and other stone, in the open market,* certainly fall clearly within the prohibitive language of the new constitution.

It is just what the people of the state voted to prevent, when they adopted the part of the new constitution, relative to convict labor. The people are presumed to have known of the existing statute, and to have intended to abrogate it, and insert their will to that effect in article II, section 41.

The constitution is the supreme law on a subject which it covers; and it is the law that statutes must yield to the constitution, where it is clear that the *intention* of the framers and adopters are manifest to that effect.

Judge Bartley, in 1 O. S., 451, says:

> "No one will presume to controvert the position that all laws of the state *inconsistent with any express provision and the clear intent of the constitution, were abrogated when the constitution went into operation."*

He also recites the fact that the framers of the constitution of 1851 saw fit to provide therein, that all laws *consistent* with said constitution should remain in force until amended or repealed, leaving it as a conclusion that those *not consistent do not remain in force.*

In 2 O. S., 607, the supreme court, Thurman J., in referring to the constitution of 1851, says:

> "It follows, that all laws in force when the latter took effect, *and which were not inconsistent with it* would have remained in force without an express provision to that effect; *and all inconsistent laws fell simply because they were inconsistent; in other words, all repugnant laws were repealed by implication."*

The supreme court of Illinois, 60 Ill., 86, says:

"It must be presumed that the people who adopted the constitution understood the force of the language used * * *. When the act is prohibited by clear and unambiguous language of the constitution, the policy of such inhibition, or the inconvenience that may ensue from its enforcement, is a matter with which the court has no concern, its duty being faithfully to enforce it."

The same doctrine is laid down in Cooley on constitutional limitations, section 55. Chief justice Marshall in Gibbons vs. Ogdon, 9 Wheat, 188, says:

"The framers of the constitution and the people who adopted it must have been understood to have employed words, in their natural sense, and to have intended what they meant."

On page 92 of the above authority, the court in referring to the effect of the adoption of a new constitutional provision on a general subject says:

"If such an act would be unconstitutional if passed *after* the adoption of the constitution, because of the inconsistency with it, would not the same act be annulled by it, if in existence at the time of its adoption? This court has said it would."

I am, therefore, of the opinion that section 2235-1, if it had been passed since the taking effect of the new constitution, would be void; and that although it was on the statutes at the latter date, it was repealed by the express provisions of article II, section 41, aforesaid; and your board has no right to produce and sell through convict labor, the commodities mentioned, in the open market.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

575.

ABSTRACT OF TITLE.

Deed from Pliny O. Van Fleet and others to Toledo state hospital.

COLUMBUS, OHIO, October 31, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of abstract of title to, and deed from Pliny O. Van Fleet and others, heirs of Lucretia T. Van Fleet, to the Toledo state hospital for the following described premises:

Situate in the township of Adams, county of Lucas and state of Ohio, and known as being

"The west one-half (½) of the south one-half (½) of the southwest quarter (¼) of section number seventeen (17) in township number three (3) United States reserve of twelve miles square at the foot of the rapids of the Miami of Lake Erie containing forty (40) acres more or less."

I have carefully examined the abstract and while some defects in the early history

of the title are apparent therefrom, I am of the opinion that the present owners have a good and sufficient title. However, there are some ambiguities which should be explained.

By the will of Lucretia Van Fleet, found on page 27 of the abstract, all of her property was devised to her children, among whom are mentioned William F. Van Fleet and Blanch Pennington. The deed is signed by William T. Van Fleet and Mary Blanche Pennington, among others, and an affidavit as to whether these two persons who signed the deed are the same as those named in the will should be attached to the abstract.

There are no uncancelled mortgages against said premises as disclosed by the abstract, except the mortgage given by Oscar White to James Buckingham, dated May 2, 1862. This, however, has been long since barred by the statute of limitation and is not now a lien.

A mortgage appears to have been given by Mary E. Pray to Norman Billings on July 17, 1909 on a part of the premises described in the caption. This mortgage was cancelled and my reason for calling attention to it is that the abstract does not disclose that Mary E. Pray was at any time a party to the title. If this is a mistake in copying the description, as stated in a letter from the superintendent of the state hospital, the abstract itself should be amended so as to show that fact. From what is before me, I cannot assume that the description of the real estate described in said mortgage, as shown by the abstract, is erroneous nor that said Mary E. Pray did not in fact have an interest in the land. If she did have any interest in the land, a quit claim deed from her should be obtained.

The taxes for the year 1912, according to certificate of the abstractor, have been paid but the taxes for the year 1913, amount undetermined, are listed as a lien.

The deed has a clause which in effect exempts the grantors from the payment of taxes and assessments due and payable after the date thereof. The lien of the taxes and assessments, the payment of which is sought to be avoided by the grantors, had attached at the time of the making of the deed and your board is without authority to exempt the grantors from the payment of such taxes by an agreement to assume the payment of the same. Before the purchase price is paid, the taxes for the year 1913 should be fully paid or an amount sufficient to pay the same should be deducted by your board from the purchase price.

No examination appears to have been made in the United States courts for pending suits or judgments against the grantors in said deed. In lieu of such examination, a certificate of the clerk of said court would be attached to abstract. The deed is given to the Toledo state hospital instead of the state of Ohio and it should be corrected in that respect. This can be done when the deed is rewritten for the purpose of eliminating the objectionable clause as to taxes.

Your attention is also called to the necessity of having an affidavit as required by section 2768, General Code, as amended in 102 O. L., p. 99, before the property can be transferred.

Subject only to the foregoing qualifications, I am of the opinion that the state of Ohio will, upon the correction of the deed and abstract in the particulars above mentioned, acquire a good title to said premises in fee simple.

The abstract and deed are herewith returned.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

638.

AN EPILEPTIC CRIMINAL, NOT A RESIDENT OF THE STATE OF OHIO, SHOULD BE TAKEN CARE OF BY THE OHIO STATE BOARD OF ADMINISTRATION, AND SHOULD NOT BE CONFINED IN THE COUNTY JAIL.

In the matter of John Henry Robinson, an alleged criminal epileptic, now confined in the Hamilton county jail, and being a non-resident of Ohio, the probate court of Hamilton county should notify the Ohio state board of administration under section 1819. Then the board should proceed under section 1820, and if they find him to be a resident of some place in Kentucky, or other point outside of Ohio, they should order his transportation thereto, as provided in said section. If his residence cannot be determined, then he should be disposed of under section 1817, General Code.

COLUMBUS, OHIO, December 2, 1913.

The State Board of Administration, Columbus, Ohio.

GENTLEMEN:—In your letter of September 27, 1913, which is accompanied by considerable correspondence and exhibits, you ask what action your board should take with reference to John Henry Robinson, colored, an alleged criminal epileptic, now confined in the Hamilton county jail, awaiting disposition by the proper authorities?

It appears, from the facts submitted herein, that said Robinson has been an epileptic for over fourteen years. He was confined in the Eastern state hospital of Kentucky, from June 7, 1910, to April 19, 1912, when he was discharged as "improved." On September 25, 1913, he was brought before the probate court of Hamilton county, Ohio, as an epileptic. The report of the physicians shows he is a dangerous, malicious, criminal epileptic, with daily epileptic convulsions. He shot an officer, and is of low mental calibre. The court refused to commit him to the Ohio hospital for epileptics, because he had only been in Ohio a couple of months and was therefore a non-resident. He is further confined in the jail charged with shooting a police officer, with intent to kill. The prosecuting attorney of Hamilton county, where he is now confined, writes me as follows:

> "There is absolutely no evidence narrating this office prosecuting the case to trial, as it would be absolutely impossible to prove the necessary intent."

The prosecutor further says, that at the time Robinson committed the act, he had enough cocaine in him to kill ten ordinary men, and that he did not recover consciousness for three or four days. The prosecutor also says, that Robinson was "absolutely irresponsible for his act at the time he committed the crime, and did not know what he was doing."

I therefore conclude, from all the facts disclosed by the prosecuting attorney of Hamilton county, Ohio, that Robinson is an insane epileptic. It would be dangerous to turn him loose; and from his mental and physical condition he should not be sent to any penal or reformatory institution. The evidence before me shows that said Robinson, when confined in the Kentucky institution, was a resident of Girard county, in said state. The probate judge of Hamilton county, Ohio, has not lost jurisdiction of Robinson, and can notify your board of the true situation as shown by the facts set out above.

Section 1818, General Code, provides as follows:

> "When application to a judge of the probate court is made for the commitment of a person to a hospital for insane, a hospital for epileptics or the in-

stitution for the feeble minded, or whenever application to the superintendent of any other benevolent institution is made for the admission of a person thereto, such judge or superintendent shall require answers to the following questions:

"1. Where was the person born?

"2. When did he become a resident of this state?

"3. When did he become a resident of this county?

"4. If not a legal resident of state and county, on what ground is the application made?"

Section 1819, General Code, as amended in 103 O. L., 446, reads as follows:

"If the judge or superintendent finds that the person whose commitment or admission is requested has not a legal residence in this state, or his legal residence is in doubt or unknown, and is of the opinion that such person should be committed or admitted to such institution, he shall notify without delay the Ohio board of administration, giving his reasons for requesting commitment or admission."

Section 1820, General Code, as amended in 103 O. L., 446, reads as follows:

"The board of admistration by a committee, its secretary or such agent as it designates, shall investigate the legal residence of such person, and may send for persons and papers and administer oaths or affirmations in conducting such investigation. At any time after investigation is made, and before or after the admission or commitment to such institution, a non-resident person whose legal residence has been established, may be transported thereto at the expense of this state."

Robinson being an epileptic insane person, and a non-resident of Ohio, the probate court of Hamilton county should notify your board under section 1819. Then your board should proceed under section 1820; and if you find him to be a resident of some place in Kentucky, or other point outside of Ohio, you should order his transportation thereto, as provided in said section.

This is the shortest and most practical solution of the case. If he is not a legal resident of the state, and his residence cannot be ascertained, then he should be disposed of under section 1817, General Code, which reads as follows:

"A person not a legal resident of the state shall not be admitted to a benevolent institution, but, after investigation as hereinafter provided, the board of state charities may authorize the reception of such person into an institution, if the legal residence cannot be ascertained, or the peculiar circumstances of the case constitute, in their judgment, a sufficient reason therefor."

Whatever disposition is made of him should be done speedily, as the jail is not a proper place for an insane epileptic. It is demoralizing on the other imates. Possibly, correspondence with Kentucky authorities would result in their taking him back, without formal action on your part, as a matter of comity between states.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

659.

INSANE PRISONERS TO BE MAINTAINED BY STATE—COUNTY FROM WHICH PRISONERS ARE RECEIVED NOT REQUIRED TO PROVIDE CLOTHING FOR SUCH PRISONERS.

Where a man sent to the penitentiary is later transferred to the Columbus state hospital as an insane prisoner, the state must pay the expenses of maintaining such insane prisoner at the state hospital. The provisions of section 1816, General Code, providing for the payment of bills for the support of inmates of hospitals for the insane by the county from which the person came, has no application in this case.

COLUMBUS, OHIO, November 18, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—In your letter of July 21, 1913, you say:

> "Your attention is respectfully called to the attached correspondence, the substance of which is as follows:
>
> "Chas A. Madder, a convict, was sent to the Columbus state hospital from the Ohio penitentiary and his papers state that he was from Seneca county. In accordance with section 1816, General Code, 1910, the managing officer of the Columbus state hospital sent to the auditor of Seneca county a bill for clothing furnished Madder. The same was referred to the prosecuting attorney of Seneca county, who writes that while Madder was sent to the penitentiary from Seneca county, he was a resident of Stark county and, consequently, Seneca county could not be expected to pay for his clothing.
>
> "Will you please render this department an opinion as to whether Madder should be considered as a resident of Stark county or of Seneca county, and, also, as to which county we should look to for payment for clothing furnished him."

I am of opinion that section 1816, General Code, has no application to Madder and that neither of the counties named in your letter is responsible for his clothing under the circumstances.

It is admitted that Madder was sent to the penitentiary from Seneca county and later transferred to the Columbus state hospital as an insane prisoner.

The Lima state hospital not being open to receive insane convicts, such prisoners are disposed of under sections 2222, et seq., General Code. Section 2222 provides that when a convict in the penitentiary becomes insane, the warden shall notify the physician, who shall forthwith examine him, and if the prisoner is found by him to be insane, he shall so certify to the warden, who shall forthwith confine the convict in the insane department of the penitentiary.

Section 2223 then provides that after the confinement of such convict in the insane department of the penitentiary, if it is necessary, and the superintendent of the Columbus state hospital and the penitentiary physician so certify, such insane prisoner may be removed to said state hospital and confined in the portion thereof set aside for such purpose.

Under section 2224, General Code, when the penitentiary physician or superintendent of the Columbus state hospital certifies to the warden of the penitentiary that a convict transferred from the penitentiary to the said hospital is restored so far to his proper mind that it is safe to put him at labor under his sentence, then said convict shall be returned to the penitentiary from said hospital and placed at labor under his sentence.

It will be seen that at all stages after being received at the penitentiary such a convict is subject to be conveyed thereto. He is in no sense an inmate of the state hospital, as others are, who are sent there *directly* from the various counties of the state through the probate courts. It follows then that the provisions of section 1816, General Code, which provide for the payment of bills for the support of inmates of hospitals for the insane by *"the county from which the person came,"* have no application to the class of persons such as Madder. There is no provision in the statutes requiring counties from which such a convict was sent to pay for his clothing. Section 1815, General Code, provides that all persons admitted to, or who are inmates of benevolent institutions, shall be maintained at the expense of the state, except provision is made therefor in chapters relating to particular institutions. There being no special provision made, the state must pay under the general statute and the county is exempt.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

660.

ABSTRACT OF TITLE.

Deed to state of Ohio from J. Wesley Phillips and Stella Phillips.

COLUMBUS, OHIO, December 15, 1913.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge the receipt of your letter of December 9th, in which you enclose, for my examination and approval, abstract of title and deed to the state of Ohio from J. Wesley Phillips and Stella Phillips, for the following described real estate:

> "Situate in section 23, Gallipolis township, Gallia county, Ohio; being part of eight (8) acre lots numbers 1186 and 1187, section 23, township 3 and range 14 of the Ohio company's purchase, and bounded and described as follows:
>
> "Beginning at the southwest corner of eight acre lot No. 1187, and running thence north along the west line of said lot four hundred and ninety-five (495) feet, or to the center of the Mill Creek Road; thence with the center of said road north 50¾ degrees, east four hundred and sixty-two (462) feet; thence north 43½ degrees, east sixty-six (66) feet; thence north 9 degrees, east two hundred and thirty-five and one-half (235½) feet, or to the north line of said lot No. 1186; thence east with the north line of said lot two hundred and fifty-two and three-fourths (252¾) feet, or to the northeast corner thereof; thence south with the east line of said lots Nos. 1186 and 1187 seven hundred and eighty-four (784) feet, or to a point thirty (30) feet distant northwest from the center line of the main track of the Hocking Valley Railroad; thence along the northwesterly side of the Hocking Valley Railroad, south 53½ degrees, west, or parallel with and thirty (30) feet distant from the center line of the main track of said railroad, about four hundred and ninety-five (495) feet, or to the south line of said 8 acre lot No. 1187; thence west on the south line of said lot about two hundred and ninety-five (295) feet to the place of beginning and containing twelve (12) acres, be the same more or less."

I have carefully examined these documents and from such examination I find

that the deed is properly signed, acknowledged and witnessed, and is sufficient in form to convey to the state of Ohio a fee simple title. However, I advise that before payment is made, the abstract be corrected in the following particulars, to wit:

"1. The interest of Sarah Moch, acquired by virtue of deeds shown at pages 17 and 18 of the abstract, does not appear to have been extinguished. If she is living, a quit claim deed should be obtained from her, and if she is dead such deed should be obtained from her legal heirs.

"2. The abstract does not disclose any connection of the Columbus, Hocking & Toledo Railway Co. with this title, prior to the time that deed was given by said company to Moses Moch, as shown at page 21 of the abstract. The abstract should be amplified so as to show how this corporation acquired title to the portion of the premises so sold by it to Moses Moch.

"3. An affidavit showing whether Francis Stewart, mentioned in the affidavit of Lillian Stewart as one of the heirs at law of R. L. Stewart, deceased, is the same person as F. R. Stewart who signed quit claim deed to J. Wesley Phillips, shown at page 30 of the abstract.

"4 The statement of the county treasurer of Gallia county, as to the unpaid taxes against this land, is indefinite and vague in that it does not disclose whether the amount mentioned represents taxes for the full year 1913, due December, 1913, and June, 1914. These are now a lien upon the land and should be discharged before deed is finally accepted and payment of the purchase money made.

"5. While action is probably barred by the statute of limitations on the mortgage for $750.00, given by Moses Moch to John T. Halliday, on November 22, 1884, as shown by the affidavit of J. E. Halliday, yet in order that there may be no question about it, we would prefer to have the mortgage released specifically, by the heirs of John T. Halliday.

"6. The mortgage from J. Wesley Phillips to Albert Moch, for $400.00, dated December 28, 1912, is a lien and should be discharged."

I am returning to you herewith the abstract for correction in the respects indicated above, and will retain the deed in my possession until abstract is returned and approved.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the Officers of the Various State Institutions)

(To the Ohio Penitentiary)

29.

PRISONERS—SENTENCE IMPOSED WHILST PRISONER IS AN INMATE OF PENITENTIARY COMMENCES AT EXPIRATION OF PRESENT TERM.

Under the rule of the common law, when it is not otherwise provided, a sentence of imprisonment commences with the date of incarceration and if the subject of the sentence is serving a term, such sentence imposed whilst serving such term will run concurrently with the term being served.

In Ohio, however, under sections 13601 and 13605, General Code, when a prisoner who is already serving a sentence in the penitentiary, receives a second sentence for another offense, the second sentence will not begin to run until the expiration of the term which the prisoner is presently serving.

COLUMBUS, OHIO, November 25, 1913.

HON. T. H. B. JONES, *Warden Ohio State Penitentiary, Columbus, Ohio.*

DEAR SIR:—In your letter of October 7th, you submit, for my opinion, the following state of facts:

> "No. 37363 was received at the Ohio penitentiary on January 15, 1907, from Belmont county, to serve three years for having in his possession burglar tools. On the 19th day of October, 1907, he was taken to the common pleas court of Franklin county for trial on another charge, and on the 25th day of October, 1907, he was sentenced by judge F. N. Bigger, to serve ten years in the Ohio penitentiary, and returned to this institution. The administration then in charge caused him to serve out his time on the first sentence, which expired on March 26, 1909, and then under a new number (39008) he began serving his ten year sentence, which will expire July 25th, 1915."

You desire to know whether the prisoner's sentence began on the day he was returned to the penitentiary, October 25, 1907, or whether said sentence would commence at the expiration of the first sentence.

It is a well settled rule that sentences need only state the duration and the place of imprisonment; it is not necessary to specify the time upon which the imprisonment is to commence.

12 Cyc., page 779, No. 76, is as follows:

> "Date of commencement of punishment. All sentences in criminal proceedings take effect and begin to operate from the date of their entry, unless a different date be fixed by the court in the judgment. Hence it is not necessary that the date when punishment begins shall be inserted in the judgment. Rhea vs. U. S., 6 Okla., 45, 43 Pac. 1072. See also Ex. p. Gafford, 25 Nev. 101, 57 Pac. 83 Am. St. Rep. 568."

The following is stated on page 967, 12th vol. Cyc.:

> "When term begins.—(1) In General. The general rule is that the term of imprisonment for which the convict is sentenced begins with the first day

of actual incarceration in the prison to which his sentence has consigned him." And on page 968 of the same volume, the following statement is made:

"When terms are concurrent. In the absence of a statute, if it be not stated in either of two or more sentences imposed at the same time, that the imprisonment under any of them shall take effect at the expiration of the others, the periods of time named will run concurrently and the punishment be executed simultaneously. The fact that the terms of imprisonment are to be successive must be clearly and expressly stated."

In the case of ex parte, Gafford, 25 Nevada, 101, at page 103, the court said:

"Petitioner alleges that he is illegally restrained of his liberty by the warden of the state prison. It is shown that on the 26th day of January, 1895, the petitioner was duly sentenced by the district court of Washee county to serve a term of four years in said prison, for the crime of an attempt to break jail; second, that on the 5th day of May, 1895, the petitioner and one Seward Leeper, upon a joint indictment, trial and conviction for the crime of an assault with intent to kill, were jointly sentenced by said court to serve a term of seven years in said prison, that it was not specified when said second term should begin, and that the petitioner has fully served said first term.

"Council contends that the second sentence is void for uncertainty, in that it neither provides that the second term shall begin at the expiration of the first, nor at any other specified time. But a sentence which does not specify any time for imprisonment to commence is not void. The better practice is not to fix the commencement of the term, but merely to state its duration and the place of confinement, where the statute does not otherwise provide. (State vs. Smith, 10 Nev.; Bish. New Cr. Proc. 804, and cases cited).

"Where the defendant is already in execution on a former sentence, and the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first, in the absence of a statute providing a different rule. (21 Am. & Eng. Enc. Law, 1075, note 4).

From these authorities, the general rule of law is apparent that sentences of imprisonment must be definite and certain, and that when not otherwise definitely and certainly provided, the sentence will begin to run from the first day of incarceration in the prison to which sentence consigns the prisoner.

In Ohio, however, express legislation has been provided for the situation presented by you. I beg to refer you to sections 13601 and 13605, General Code, which are as follows:

"Section 13601. A convict in the penitentiary who escaped or forfeited his recognizance before receiving sentence for a felony or *against whom an indictment is pending*, may be removed to the county in which such conviction was had or such indictment was pending, for sentence or trial, upon the warrant of the court of such county. This section shall not extend to the removal of a convict for life, except the sentence to be imposed or the indictment pending against him, is for murder in the first degree.

"Section 13605. If such convict is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his term, but, if he is sentenced to imprisonment in the penitentiary, he shall forthwith be returned thereto by the sheriff and the *term of such imprisonment*

shall begin at the expiration of the term for which he was imprisoned at the time of his removal. If he is sentenced to death, such sentence shall be executed as if he were not under sentence or imprisonment in the penitentiary."

From these statutes, which are a codification of sections 7234 and 7238, Revised Statutes, and which were in effect at the time the prisoner referred to was sentenced, it is clear that when a prisoner, confined in the penitentiary, against whom an indictment for felony is pending, is removed for trial upon such indictment, and he is sentenced to imprisonment in the penitentiary, the time of such imprisonment shall begin at the expiration of the term for which *he is imprisoned* at the time of his removal for trial. This provision clearly supersedes the rule of common law above stated.

I, therefore, conclude that the term of imprisonment, for which No. 39008, in this case, was sentenced by judge Bigger, will not run concurrently with the balance of the term which the prisoner was serving at the time of the second sentence, but will begin at the expiration of the first term as provided by section 13605, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

433.

WHERE A PRISONER IS SENTENCED FOR TEN YEARS FOR BURGLARY AND SENTENCE IS SUSPENDED DURING GOOD BEHAVIOR AND HE IS AFTERWARDS SENTENCED FROM ANOTHER COUNTY FOR FIVE YEARS, AND THEN THE SENTENCE FOR TEN YEARS IS PUT INTO EFFECT, HE SHOULD BE CONSIDERED AS SERVING THE SENTENCES CONCURRENTLY AND BE RELEASED AT THE END OF THE TEN YEARS SENTENCE.

Cumulative sentences may be made in Ohio and also sentences may be made to commence in futura.

Where a prisoner had been sentenced from Licking county to serve ten years for burglary and the sentence is suspended during good behavior and the person is afterward convicted in Franklin county and sentenced five years for burglary and larceny, the sentence to begin at the expiration of the Licking county sentence, the said prisoner is serving the sentences concurrently if he is serving the Franklin county sentence at all and should be released when he has served the maximum time under the Licking county sentence.

COLUMBUS, OHIO, July 23, 1913.

HON. P. E. THOMAS, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication dated May 10, 1913, in which you give the following statement of facts, duly received:

"On the 1st day of May, 1913, there was received at this institution one Theodore Hays, who was sentenced by the Franklin county common pleas court to serve 5 years in this institution for burglarizing an inhabited dwelling and larceny. Upon the certificate of sentence appeared the following:

" 'And it being made to appear to the court that the defendant is already under sentence for the crime of burglarizing an inhabited dwelling, it is ordered that the sentence herein imposed upon the said Theordore Hays shall begin at the expiration of a sentence of ten years to the Ohio penitentiary, imposed

by the court of common pleas of Licking county upon the said defendant, Theodore Hays, on the 14th day of February, A. D., 1913, and suspended during good behavior.'

"On the day this prisoner was received, viz: May 1, 1913, we had received no official knowledge of any such sentence from the courts of Licking county and therefore disregarded the above order, which was impossible to carry out, and started the prisoner Hays upon the said five year sentence immediately.

"On the 5th day of May, 1913, we received a subpoena from the Licking county court, and in obedience thereto, on the 6th day of May, our deputy warden delivered the prisoner Hays before the court of that county, whereupon the former sentence, which had been suspended, was placed in course of operation by the following order of the court:

" 'This day came the prosecuting attorney, Howard Jones, on behalf of the state; also came the said Edward Fisher, alias Ted Hays, in custody of an officer, and it appearing to the court that the said defendant did on the 14th day of February, 1913, enter a plea of guilty to the charge of burglary, and the court sentenced him, the said Edward Fisher, alias Ted Hays, to serve ten years in the Ohio penitentiary and pay the costs of prosecution; and for good cause shown the court suspended the sentence on conditions that the said defendant conduct himself as a law abiding citizen, and refrain from the use of intoxicating liquors'.

" 'It now appearing to the court that the said Edward Fisher, alias Ted Hays, has grossly violated the conditions of the suspension of his said sentence, the court orders that the suspension thereof be, and the same is hereby revoked, and the said defendant is ordered to be taken forthwith to the Ohio penitentiary to begin his former sentence of ten years'.

"When the prisoner Hays was returned to the penitentiary, on the evening of the 6th day of May, with certificate of sentence and the above order, we thought it our duty to have the ten year Licking county sentence begin on the 6th of May and run concurrently with the balance of the Franklin county sentence, which had commenced on the 1st of May.

"*Query:* In view of all the facts as above stated will you kindly advise me if we have acted correctly in this matter?"

I desire to say in answer to your inquiry that it must be conceded that in this state cumulative sentences may be made, and that sentence may be pronounced to commence *in futura*. This is clearly recognized in Williams vs. State, 18 O. S., 47.

Sentences, whether they commence at once or in the future, must be definite and certain. The sentence of the Franklin county court provides as follows:

"And it being made to appear to the court that the defendant is already under sentence for the crime of burglarizing an inhabited dwelling, it is ordered that the sentence herein imposed upon the said Theodore Hays shall begin at the expiration of a sentence of ten years to the Ohio penitentiary, imposed by the court of common pleas of Licking county upon the said defendant, Theodore Hays, on the 14th day of February, A. D., and suspended during good behavior."

From this it will appear, (1) that Hays was already under sentence for burglarizing an inhabited dwelling; (2) said sentence was suspended during good behavior; (3) that if said Hay's crime was properly described there was no power in the court to suspend under the provisions of section 13708, General Code; (4) that the term of Hays was to commence at the expiration of a suspended sentence; (5)

that jurisdiction of the suspended sentence was in Licking county, Ohio, and, (6) that the ten-year term could not commence until its suspenslon was set aside, and this involved the action of the Licking county court upon information and the production of Hays before that court.

The commencement of the five year term, fixed by the court of Franklin county, Ohio, was without any degree of certainty at all, and in fact could not have been fixed at the time the Franklin county court imposed the same. I think the case of Williams vs. State, 18 O. S., 47, fully sustains this proposition and leaves it an open question as to whether Hays should be returned to the Franklin county court and resentenced or should be left to serve both terms concurrently as stated in your letter.

I am of the opinion that the prisoner should be left as you have him, and that your action in the premises is correct, as I doubt the right of the state to ask for a re-sentence, and as Hays is not injured by the construction given, and action taken, he will not be heard to complain.

I am, therefore, of the opinion that your action is correct and that the said prisoner is serving the sentences concurrently if he is serving on the Franklin county sentence at all, and as soon as he has served the maximum time under the Licking county sentence it will be your duty to discharge him.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

512.

WHERE PRISONER IS PAROLED FROM THE PENITENTIARY AND HE IS AFTERWARDS SENTENCED ON ANOTHER CHARGE AND HIS PAROL IS REVOKED, THE LAST SENTENCE BEGINS AT THE EXPIRATION OF THE FIRST SENTENCE.

Where a prisoner is sentenced to the penitentiary for life, under the habitual criminal act, the right of parole is a part of the sentence and there is no legislative authority to take this right of parole away.

If this be true, section 2175, General Code, controls cases where prisoner is released on parole and afterwards sentenced on another charge. The last sentence would begin at the expiration of the first sentence.

COLUMBUS, OHIO, August 11, 1913.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 8th in which you state:

> "That one Addis Lewis was sentenced to the penitentiary for life under the habitual criminal act; that Governor Herrick commuted his life sentence to twenty years; that on February 20, 1906, he was released on parole. The Parole was revoked October 11, 1906, and on December 5, 1906, he was sentenced to the Ohio penitentiary for ten years from Pickaway county for forgery."

Your queries are:

> "The habitual criminal act having been repealed May 6, 1902, was there

power to parole him on February 20, 1906, and should the ten year sentence commence with the expiration of the twenty year sentence, or be served concurrently with it?"

By the terms of the habitual criminal act, an habitual criminal was subject to parole. Lewis' sentence was for life, subject to such right of parole. The commutation by the governor could not place him in the category of a prisoner to whom a parole might be granted after serving the minimum term, consequently the question is whether the repeal of the habitual criminal act deprived Lewis of his right to a parole.

This raises a question of far-reaching effect and of the greatest importance, and while there is no saving clause in the repealing act, and there is no doubt of the power of the legislature to make the repeal, yet there is grave doubt as to its being effective to deprive Lewis of a right which was his under his sentence.

This does not raise the question as to whether the repeal was retroactive, but merely the power of the legislature to deprive Lewis of his right to parole.

In my opinion the right to a parole, as found in section 2 of the habitual criminal act, must be read into and made part of the sentence for life, and that there was no legislative power to take it away.

If this view be correct, section 2175, General Code, is applicable, and the Pick-away term commences with the expiration of the twenty year sentence. If it is not correct, then the parole was without authority, but inasmuch as it was given at Lewis' request, and he accepted it, he will not be heard to question its legality and his mouth is closed as to the validity of the parole, and the result is the same.

The question as to when the first term expires must be determined under the rules controlling other cases.

Yours very truly,
TIMOTHY S. HOHAN,
Attorney General.

515.

THE INDETERMINATE SENTENCE LAW RELATES TO ALL SENTENCES IMPOSED BY THE COURT AFTER THE INDETERMINATE SENTENCE LAW WENT INTO EFFECT.

The indeterminate sentence law, found in volume 103, Ohio Laws, 29, was filed in the office of the secretary of state February 27, 1913, and was effective on the 29th day of May, 1913.

Any person sentenced on or after the 29th day of May, 1913, except those found guilty of treason or murder in the first degree, shall receive an indeterminate sentence.

COLUMBUS, OHIO, September 26, 1913.

HON. P. E. THOMAS, *Warden Ohio State Penitentiary, Columbus, Ohio.*

DEAR SIR:—In your letter of August 28, 1913, you inquire when the law as to indeterminate sentences to your institution became effective. This law, volume 103, O. L., page 29, was filed in the office of the secretary of state February 27, 1913.

This law was passed since the new constitution became effective. The time when laws are operative under the new constitution is expressed in article II, section 1-c, as follows:

"No law passed by the general assembly shall go into effect until ninety

days after it shall have been filed by the governor in the office of the secretary of state."

It only remains then to compute the time according to the statutes. Section 10216, General Code, says:

"Unless otherwise specifically provided, the time within which an act is required by law to be done shall be computed by excluding the first day, and including the last; except that the last shall be excluded if it be Sunday."

Section 10217, General Code, says:

"When an act is to take effect, or become effective, from and after a day named (in the new constitution in this case), no part of that day shall be included."

Under the above rules, the law was effective on the 29th day of May, 1913, at any time after midnight of the 28th.

You also ask if the date of sentence governs, as to whether a man is to be committed definitely or indefinitely, regardless of the date of his conviction; and whether, when persons are sentenced for a definite number of years, after the above indeterminate sentence law was in effect, they should be entered on your records as indeterminates, regardless of the date of their conviction.

Section 166, General Code, above referred to, says:

"Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration."

The latter part of the section says:

"If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section."

In view of the fact that this statute relates only to the *sentence*, the court should impose an indeterminate one, and you should enter such persons in your records as indeterminates, if sentenced after the above section was in force.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

623.

THE CLERK OF COURT UNDER THE NEW INDETERMINATE SENTENCE LAW IS REQUIRED TO FURNISH THE DOCUMENTS AND INFORMATION PROVIDED FOR IN SECTION 13697, GENERAL CODE, TO THE WARDEN OF THE PENITENTIARY.

It is the duty of the clerk of court under section 13697, General Code, to furnish the documents and information provided for in the said section in the cases of prisoners sentenced under the new indeterminate sentence law upon demand to the warden of the penitentiary.

COLUMBUS, OHIO, November 24, 1913.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Under date of October 20th, you inquire as follows:

"Is the clerk of court of various counties required, upon demand by me, to furnish the documents and information provided for in section 13697 of the General Code, in cases of prisoners sentenced under the provisions of the new Indeterminate Sentence Law (103 O. L. p. 29)?"

The original indeterminate sentence law (Bates R. S. 7388-6 and 7388-7) conferred on the courts the power to impose a "general sentence to the penitentiary" and prescribed the powers and duties of the board of managers of the penitentiary, and the duty of the clerk of courts when said general sentence had been imposed.

These sections read as follows:

"Section 7388-6. Every sentence to the penitentiary of a person hereafter convicted of a felony, except for murder in the second degree, who has not previously been convicted of a felony and served a term in a penal institution, may be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board of managers, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted and sentenced; and no such prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime of which he was convicted. Provided, that any person now serving a sentence in the penitentiary, or that may hereafter be sentenced to the penitentiary for two or more separate offenses, where the term of imprisonment for a second or further term is ordered by the court to begin at the expiration of the first and each succeeding term of sentence named in the warrant of commitment, shall be entitled to have his succeeding term or terms of imprisonment terminated by the board of managers, as provided by law, at the expiration of the first term of sentence named in said warrant of commitment, without serving the minimum term as herein provided under more than one of said sentences."

"Section 7388-7. Every clerk of any court by which a criminal shall be sentenced to said institution, whenever the term of such sentence may not be fixed by the court, shall furnish the warden or other officer having such criminal in charge, a record containing a copy of the indictment and of any special

plea; the name and residence of the judge presiding at the trial; also of the jurors and of the witnesses sworn on the trial; with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case; and of his reasons for the sentence inflicted. The clerk of the court shall be entitled to such compensation in every case in which he shall perform the duties required by this act, as shall be certified to be just by the presiding judge at the trial, and shall be paid by the county in which the trial is had, as part of the court expenses. The clerk shall, also, upon any such conviction and sentence, forthwith transmit to the warden of the penitentiary notice thereof."

The codifying commission in writing the present General Code carried into it that part of the indeterminate sentence law relating to the powers and duties of the board of managers, and that section prescribing the duties of the clerk of courts when such sentences were imposed, but failed to write into the code that part of the law conferring power on the courts to impose such general or indeterminate sentences.

The two sections carried into the code by the commission, are now known as sections 2160 and 13697, and read as follows:

"Section 2160. The board of managers shall provide for the conditional or absolute release of prisoners under a general sentence of imprisonment, and their arrest and return to custody within the penitentiary. A prisoner shall not be released, conditionally or absolutely, unless in the judgment of the managers there are reasonable grounds to believe that his release is not incompatible with the welfare of society. A petition or application for the release of a prisoner shall be entertained by the board. A prisoner under general sentence to the penitentiary shall not be released therefrom until he has served the maximum term provided by law for the crime of which he was convicted; and he shall not be kept in the penitentiary beyond the maximum term provided by law for such offense.

"Section 13697. The clerk of a court by which a criminal has been sentenced to the penitentiary, if the term of such sentence is not fixed by the court, shall furnish the warden a record containing a copy of the indictment and of any special plea, the name and residence of the judge presiding at the trial and of the jurors and witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem necessary for the full comprehension of the case together with his reasons for inflicting the sentence. The clerk shall be entitled to such compensation for such record as the presiding judge certifies to be just and shall be paid by the county wherein the trial was held. Upon such sentence the clerk shall forthwith transmit to the warden of the penitentiary a notice thereof."

On March 31, 1913, I rendered an opinion to the Ohio board of administration, the substance of which was that, inasmuch as the codifying commission carried into the General Code as section 13697 all of section 7388-7, R. S., relative to the clerk's duties when indeterminate sentences have been imposed, and also carried into the General Code as section 2160, that part of section 7388-6 R. S., relative to the powers and duties of the board of managers when such indeterminate sentences have been imposed, it was not the intention of the legislature to deprive the court of the power to give an indeterminate sentence; that such power was still in the courts of this state, and that sections 7388-6 and 7388-7 R. S., were in effect in their entirety.

But, aside from this opinion, now that the legislature has seen fit in 103 O. L., p. 89, to again confer on the courts the power to impose indeterminate sentences to the penitentiary, the clerk of courts finds himself in the same position as before the codi-

fication was made, and it is his duty under section 13697 of the General Code, when indeterminate sentences have been imposed to furnish the warden of the Ohio penitentiary such information as such section requires.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

625.

SECTION 2166, OF THE GENERAL CODE, CONFERRED UPON THE BOARD OF ADMINISTRATION POWER TO PAROLE PRISONERS AT THE END OF THEIR FIRST TERM WHEN THEY ARE SERVING MORE THAN ONE TERM CONSECUTIVELY. UPON REPEAL OF THIS SECTION THE BOARD IS WITHOUT SUCH AUTHORITY.

Under section 2166, General Code, the Ohio board of administration had power to parole prisoners at the expiration of their first term, when they were sentenced to two or more terms running consecutively. Said section was subject to repeal by the legislature, and upon its repeal the board is without authority to parole such prisoners, notwithstanding such section was in full force and effect at the time sentence was imposed.

COLUMBUS, OHIO, December 1, 1913.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 20th, in which you inquire substantially as follows:

> "Did section 2166 of the General Code confer authority on the Ohio board of administration to parole prisoners at the expiration of their first term when they were sentenced to two or more terms running consecutively?"
>
> "And if so, does the repeal of said section by the 'indeterminate sentence law' (103 O. L. 129) deprive such prisoner sentenced when said section was in operation, of the right to a parole thereunder at this time?"

Section 2166 of the General Code reads as follows:

> "A person serving a sentence in the penitentiary, or hereafter sentenced thereto for two or more separate offenses, where the term of imprisonment for a second or further term is ordered by the court to begin at the expiration of the first and each succeeding term of sentence named in the warrant of commitment, shall have his succeeding term or terms of imprisonment terminated by the board of managers, as provided by law, at the expiration of the first term of sentence named in such warrant, without serving the minimum term under more than one of such sentences."

In answering your first question, I am of the opinion that the Ohio board of administration, which succeeded to the powers and duties of the board of managers of the penitentiary, had authority under this section to parole prisoners serving two or more terms consecutively at the expiration of the first term.

Your second inquiry, however, raises a more difficult question. The supreme court of this state, in re Kline, 70 O. S. p. 25, held that a conviction and sentence under

section 7388-11 R. S., commonly known as the "Habitual Criminal Act," does not confer upon the prisoner the right to be paroled at the discretion of the board of managers, which remains to him after repeal of said act. This court construed a parole statute as merely a "disciplinary regulation" and said:

> "As a disciplinary regulation it would no more confer a vested right upon the prisoner than would any other rule or regulation which may be promulgated from time to time for the regulation of prisons and prisoners. It 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 for the reason that it is not a part of the sentence, but extraneous to it, because it is only a tentative rule for prison government, a repeal of such legislation neither takes away any right of the prisoner nor in any manner affects his sentence theretofore made and put into execution."

While the case just quoted was qualified to some extent in State vs. Lawrence, 74 O. S., 43, the holding in the latter case in no way affects the question under consideration here, and I am of the opinion that section 2166 conferring authority on the board to parole certain prisoners was subject to repeal by the legislature, and upon such repeal the board is without authority to parole such prisoners, notwithstanding such section was in full force and effect at the time of sentence.

This opinion modifies one rendered to you under date of September 26, 1913, in re Addis Lewis, but does not affect the conclusion arrived at in that opinion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

648.

THE COURT IS WITHOUT AUTHORITY TO SUSPEND A PART OF A SENTENCE IMPOSED UPON A PERSON FOUND GUILTY OF A FELONY.

Where the court sentences a prisoner to be confined in the Ohio penitentiary for a period of two years at hard labor, and the court, upon further consideration, suspends one year of the sentence and directs that after the prisoner has served one year, less the time that may be allowed for good behavior, the suspension of the balance of the sentence shall take effect. The court is without authority to pass sentence of this kind, and the prisoner must serve his sentence of two years subject to any clemency that may be extended by the board of administration or the governor.

COLUMBUS, OHIO, November 17, 1913.

HON. P. E. THOMAS, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—In your letter of November 8, 1913, you request my opinion as follows:

> "I should like your opinion as to when Mita Eremich, No. 41991, who was committed to this institution under the following certificate of sentence, should be released?
>
> "The regular form of certificate of sentence is filled out, stating that he was indicted for stabbing with intent to wound, and having entered a plea of guilty of stabbing with intent to wound, it is therefore the sentence of the

court that he be imprisoned in the penitentiary of this state, and kept at hard labor (no part of said time to be kept in solitary confinement) for the term of two years and that he pay the costs of the prosecution, etc.

"Immediately below this, on a type-written sheet, pasted to the certificate of sentence, appears the following:

"It is the sentence of the court that the defendent be taken hence to the jail of this county and there safely kept, and that within five days he be taken to the Ohio state penitentiary at Columbus, Ohio, there to be imprisoned for the period of two years at hard labor, but no part of said sentence to be solitary confinement, and that he pay the costs of this prosecution, for which judgment is hereby rendered against him.

"Upon further consideration, the court suspends the execution of one year of the aforesaid sentence, and directs that after the defendant has served one year, less the time that may be allowed for good behaviour, the said suspension of the balance of said sentence shall at once take effect; providing the defendant conducts himself while so imprisoned as to obey fully all the rules and regulations of said Ohio state penitentiary.

"It is a further condition of this suspension, that upon the defendant leaving said penitentiary, he shall absolutely refrain from using intoxicating liquors or visiting places where intoxicating liquors are sold or handled, and that he live generally a sober and industrious life, and obey fully the laws of the state of Ohio.

"It is further provided, that during the time of said suspension said defendant shall be under the supervision of the penitentiary authorities.

"Will you therefore kindly advise if it is my duty to discharge said Mita Eremich after he has served the short time under a one-year sentence, under the provisions of said certificate of sentence, and place him on parole during the remainder of his two-year sentence?"

In the absence of statutes to the contrary, courts imposing sentences have the power to suspend them. In this state, however, the legislature has provided, in section 13706 of the General Code, how and when sentences may be suspended, and the courts of this state in suspending sentences are restricted by such provisions. This section reads as follows:

"In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law."

When a prisoner has been sentenced to the Ohio penitentiary and the sentence has been suspended, the effect of this section is to place him on probation under the control of the Ohio board of administration, as provided in section 2210 of the General Code, which reads:

"When a sentence to the penitentiary or to the reformatory has been imposed, but execution thereof has been suspended, and the defendant placed

on probation, the effect of such order of probation shall be to place the defendant under control of the management of the board of managers of the institution to which he is sentenced. and he, shall be subject to the same rules and regulations as apply to persons paroled from such institutions."

In the case under consideration, the court did not see fit to suspend the sentence and place the defendant under the control of the Ohio board of administration, but sentenced the prisoner to two years in the Ohio penitentiary, with the additional order that after the short time on a year's sentence should expire the remainder of the sentence should be suspended provided the prisoner's conduct be good, and upon the condition that he refrain from the use of intoxicating liquor during the remaining year.

This, I am of the opinion, the court was without authority to do.

The constitution of the state, and various sections of the General Code, delegate to the governor the power to grant pardons and commutations of sentences, and section 2169 of the General Code authorizes the Ohio board of administration to parole prisoners after they have served the minimum term provided by law for the crime of which they were convicted.

This, I think, clearly shows that it was the intention of the legislature that if a prisoner in the penitentiary should so conduct himself there as to deserve clemency, this clemency should be granted him at the hands of the governor or parole board. In other words, I believe the prisoner's conduct record in the penitentiary is to be considered by the prison authorities and the governor and not by the trial judge at the time of sentence.

Admitting, then, that the court had no authority to suspend the latter half of the prisoner's sentence conditional upon his good conduct in prison, the question is what effect, if any, had the additional order of the court with reference to the suspension of the latter half of the sentence, upon the two-year sentence first imposed?

The court, without question, had authority to impose the two-year sentence but for reasons stated above, the second part of the sentence attempting to suspend the second year of imprisonment, was void.

It has often been held, that where a sentence imposed is valid in part and void in part, the void portion should not necessarily, or generally, vitiate the valid portion. See United States vs. Pridgeon, 153 U. S., 48 (38 L., ed. 631).

For this reason, therefore, I am of the opinion that the prisoner, Mita Elemich, must serve the sentence of two years, subject of course, to any clemency that may be extended by the Ohio board of administration or the governor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Ohio State University)

406.

ABSTRACT OF TITLE—PROPERTY OF J. C. BELT, SITUATED IN CLINTON TOWNSHIP, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, July 31, 1913.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title to lands owned by J. C. Belt, which the trustees of the Ohio state university desire to purchase. Description of said land as given in the deed from Minnie Matlack and husband to J. C. Belt on page 89, is as follows:

> "Situated in the county of Franklin, in the state of Ohio, and in the township of Clinton, bounded and described as follows, to wit:
>
> "Being in quarter township three (3), township one (1), range nineteen (19), United States military lands. Beginning at the intersection of Lane avenue and the Fleniken pike; thence north eighty-five degrees (85 deg.) thirty-five minutes (35″) west along the center of Lane avenue thirty-eight hundred and eighty-three feet (3883 ft.) to a stone in the center of the township road; thence south three degrees (3 deg.) thirty minutes (30″) west along the center of said township road and the Fairview Free Pike four hundred and sixty-four feet (464 ft.); thence south eighty-five degrees (85 deg.) thirty-five minutes (35″) east eleven hundred and fifty-nine feet (1159 ft.) to a stone; thence south three degrees (3 deg.) twenty-five minutes (25″) west six hundred and seventy-nine feet (679 ft.) to a point; thence south four degrees (4 deg.) thirty-five minutes (35″) west one hundred seventy-one and five-tenths feet (171.5 ft.) to an iron pipe; *thence south eighty-five degrees (85 deg.) thirty-five minutes (35″) west one hundred seventy-one and five-tenths feet (171.5 ft. to an iron pipe,* thence south eighty-five degrees (85 deg.) thirty-five minutes (35″) west twenty-seven hundred eleven and seven tenths feet (2711.7 ft.) to the center of the Fleniken Pike; thence north four degrees (4 deg.) fifteen minutes (15″) east thirteen hundred fourteen and five tenths feet (1314.5 ft.) to the beginning, containing ninety-three and eighty-six hundredths acres (93.86 acres) of land more or less, excepting seventeen and twenty hundredths (17.20) acres of land heretofore sold by grantors, leaving to be conveyed by this deed a balance or remainder of 76.76 acres more or less."

The part of the aforesaid description which is underscored is a repetition and should be omitted from the deed to be made to the university.

It will be observed that said deed calls for 93.86 acres, except 17.20 acres of land theretofore sold by the grantors therein. The description of such tracts as were previously sold are found on pages 73, 74 and 78 of the abstract and should be incorporated in the deed as an exception to the general description of the 93 acre tract.

No examination appears to have been made of the United States court records to determine the existence or non-existence of pending suits or judgments in said court against the present owner of said premises. A certificate of the clerk of said court as to these matters should be attached to the abstract.

No liens of any character against said premises are disclosed by the abstract except a certain mortgage for $8,500.00 from Minnie Matlack and husband to the Buckeye State Building and Loan Company (page 83), the last half of the 1912 taxes amounting

to $40.36, the undetermined taxes for the year 1913 and the unpaid portion of a special assessment for the improvement of North Star avenue.

Upon the discharge of the aforesaid liens and the execution and delivery of a proper warranty deed, I am of the opinion that the university will acquire a good and marketable title to said real estate in fee simple.

The abstract is herewith enclosed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

407.

ABSTRACT OF TITLE—PROPERTY OF HENRY HANSBERGER, SITUATED IN CLINTON TOWNSHIP, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, July 31, 1913.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus Ohio.*

DEAR SIR:—I beg to acknowledge receipt of abstract of title to land owned by Henry Hansberger, which the trustees of Ohio State University desire to purchase described as follows:

> "Situated in the county of Franklin, in the state of Ohio, and township of Clinton.
>
> "Being lot No. 2 as the same appears upon the plat marked exhibit 'A' attached to the report of the commissioners in partition and as described in their report in the case of Lucy T. Nyers, plaintiff, against Minnie Matlack and others, defendants, court of common pleas, Franklin county, Ohio, and numbered on the dockets of said court 46847, and recorded in the complete records of said case, volume 253, page 408, et seq. to which case, plat report and the records thereof, reference is here made and more fully bounded and described as follows: Situated in and being a part of Quarter township 3, township 1, range 18, I. S. M. lands in Clinton township, Franklin county, Ohio, beginning at a point at the center of Fleniken Pike; south 4 deg., 15″; west 1314.5 feet from the intersection of Lane Ave. and said Fleniken Pike; thence north 85 deg., 35″; west 2711.7 feet to an iron pipe; thence south 4 deg., 35″; west 1209 feet to an iron pipe; thence south 85 deg., 35″; east 2720 feet to a point in the center of Fleniken Pike; thence north 4 deg., 15″; east along the center of Fleniken Pike, 1209 feet to the place of beginning, containing 75.38 acres more or less."

A careful examination of said abstract discloses the existence of several ambiguities and omissions, to which I desire to direct your attention.

The deed of conveyance from John Huffman to Charles W. Hess (page 12) purports to be for the same premises described in transfer No. 12, page 10.

Reference to the latter shows that the property was acquired by *Joseph* Huffman from Washington Lakin. The abstract of title to the piece of property owned by J. C. Belt, which I have examined and which covers part of the same promises included in this abstract, shows that the deed for said tract was from Joseph Huffman to Hess (see page 32, abstract of Belt property).

Belson A. Sims and Westley O'Harra do not appear to have had title to the land conveyed by them to Ephraim Sells (page 25). This is also true of Margaret Shrum

et al., grantors in No. 28. This abstract shows no title in William Tepper and wife for the premises conveyed by them to Ephraim Sells (page 26). However, the Belt abstract at page 38 thereof, shows that Tepper acquired title from Charles W. Hess.

The proceeding leading up to the execution of the sheriff's deed on page 37 are not abstracted and it is impossible to learn the nature thereof, the names of the parties thereto or the description of the land sold, except by reference to page 20 of the Belt abstract. The latter discloses that said proceedings were for the foreclosure of mortgages and marshalling liens, and that the premises were sold to Ephraim Sells. The abstract should be amplified so as to supply the aforesaid omissions.

No examination appears to have been made of the United States court records to determine the existence or non-existence of pending suits or judgments in said court against the present owner of said premises. A certificate of the clerk of said court as to these matters should be attached to the abstract.

No liens of any character against said premises are disclosed by the abstract except the last half of the 1912 taxes ($40.40), the undetermined taxes for the year 1913 and the unpaid portion of a special assessment for the improvement of North Star Avenue.

Upon the correction of the abstract as above indicated, the payment of said liens and the execution and delivery of a proper warranty deed, I am of the opinion that the university will acquire a good and marketable title to said real estate in fee simple.

Said abstract is herewith enclosed.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Ohio University)

233.

ABSTRACT OF TITLE—PROPERTY OF ELI DUNKLE SITUATED IN ATHENS COUNTY.

COLUMBUS, OHIO, May 6, 1913.

HON. DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—You have submitted to me for approval, an abstract of title of Eli Dunkle, for the following described real estate, which the president and trustees of Ohio university propose to purchase, situated in the city of Athens, county of Athens and state of Ohio, to wit:

> "Beginning six (6) feet north and five (5) feet west of the southeast corner of in-lot number four-hundred and fifty-six (456) in the city of Athens; thence running north fifty-four (54) feet; thence west to the west line of in-lot number four hundred and fifty-seven (457); thence south to a point ten (10) feet south of the southwest corner of said in-lot number four hundred and fifty-seven (457); thence south eighty-five and one-half (85½) degrees east 138 feet to the place of beginning."

A careful examination of said abstract discloses that the warranty in the deed from Jane Hibbard to Eli Dunkle (page 26) is made subject to a promissory note for $200.00 executed by said Dunkle to said Jane Hibbard. This claim should be released of record.

The second half of the 1912 taxes are unpaid, and the undetermined taxes for the year 1913 are a lien against said premises. On the discharge of said liens and the execution and delivery of a proper warranty deed, the president and trustees of the Ohio university will acquire a good and sufficient title to said premises, in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

234.

ABSTRACT OF TITLE—PROPERTY OF GEORGE R. WALKER, SITUATED IN ATHENS COUNTY.

COLUMBUS, OHIO, May 6, 1913.

HON. DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—You have submitted to me for approval an abstract of title and warranty deed from George R. Walker for the following described real estate which Ohio university proposes to purchase, situated in the city of Athens, county of Athens state of Ohio, to wit:

> "Beginning sixty (60) feet north and five (5) feet west of the south-east corner of in-lot number four hundred and fifty-six; (456) thence running north fifty (50) feet; thence west parallel with the north line of said in-lot to the

west line thereof; thence south on the west line of said in-lot number four hundred and fifty-six (456), fifty (50) feet to the northwest corner of Eli Dunkle's lot; thence east on the north line of said Eli Dunkle's lot to the place of beginning."

A careful examination of said deed and abstract discloses no liens or incumbrances against said premises, except the second half of the 1912 taxes, due June 20, 1913, and the undetermined taxes for the year 1913.

Upon the discharge of said liens and the execution and delivery of the deed from George R. Walker, the president and trustees of Ohio university will acquire a good and sufficient title to said premises in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

235.

ABSTRACT OF TITLE—PROPERTY OF HATTIE J. BURSON, SITUATED IN ATHENS COUNTY.

COLUMBUS, OHIO, May 6, 1913.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—You have submitted to me for approval an abstract of title and warranty deed from Hattie J. Burson and husband, to the president and trustees of Ohio university, for the following described real estate, situated in the city of Athens county of Athens, state of Ohio, to wit:

"Beginning twenty-five (25) feet west of the southeast corner of in-lot numbered sixty-four (64) and thence running west, forty-three (43) feet; thence north, one hundred and thirty-two (132) feet, more or less, to the north line of said in-lot numbered sixty-four (64); thence east, forty-three (43) feet; thence south, one hundred and thirty-two (132) feet, more or less, to the place of beginning."

A careful examination of said deed and abstract discloses no liens or incumbrances against said premises except the second half of the 1912 taxes, due June 20, 1913, and the undetermined taxes for the year 1913.

Upon the discharge of said liens and the delivery of said deed, the president and trustees of Ohio university will acquire a good and sufficient title to said premises in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

369.

OHIO UNIVERSITY—ELECTRIC LIGHT PLANT—ADVERTISEMENT AND RECEPTION OF BIDS—CONTRACT.

Money appropriated for the Ohio university by the legislature by house bill 674, in the sum of $15,000, for the completion of the electric light plant, comes within the requirements of sections 3216 and 3218, et seq., providing for the advertisement and reception of proposals or bids, and providing for the execution of the contract entered into on the bid or proposal accepted.

COLUMBUS, OHIO, July 3, 1913.

HON. ALSTON ELLIS, *President of Ohio University, Athens, Ohio.*

DEAR SIR:—I have your favors of May 26 and 29, 1913, in which you call my attention to a recent appropriation by the legislature to Ohio University in the sum of $15,000, for the completion of an electric light plant, and in which you ask my opinion as to the expenditure of the appropriation which you state is special for the purpose named. You further say:

> "Auditor Donahey writes me that the appropriation is not subject to referendum, and so is available for present use. However, he is in doubt as to whether we are not under the provisions of the general Code, which provides the manner in which public officers must proceed in the erection of public buildings. We have no building to put up, but finally ready to complete lighting extensions that are now half put in. My wish is to use that $15,000 just like we use our appropriation for buildings and grounds, and for apparatus and equipment; for as I see the matter, the cases are exactly the same. If we advertise for the work and give it to one bidder, we shall be delayed in getting our plant, and in addition to that, we will loose about $3,000 in the matter of construction. Our people here are prepared to do all the necessary work, and all that we would have to do would be to make purchase of the different kinds of apparatus needed to put it in place. Of course, in buying this apparatus, we should solicit bids, but no one piece we require would cost more than the legal limit for such purchases We have all the boilers that are required. Further, we have most of the conduits already laid, and many of them already wired, so that is just a statement of the facts, as our purpose is to use the $15,000 for putting in some appliances at the power house, extending a few conduits, and placing the proper wires in them. All this is preliminary to my asking definite information as to what we can do in the matter, taking it for granted that the statements I have made herein are absolutely correct."

The money referred to in the above inquiry is an appropriation for Ohio University, made by the legislature in house bill No. 674, April 28, 1913, and which reads as follows:

> "Completion of electric light plant, $15,000."

Section 7925, General Code, makes provision for the support of this institution by annual tax levy; states the rate of taxation therefor, and further provides as follows:

> "This levy shall not hereafter be increased, but this shall not prevent such appropriations from time to time, as may be necessary, for apparatus for university purposes, exclusive of buildings."

Section 2314, General Code, provides as follows:

"Before entering into contracts for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law, charged with the supervision thereof, shall make or cause to be made, the following: Full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required, with such directions as will enable a competent mechanic or other builder to carry them out, and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Section 2315, General Code, provides that the plans, specifications, etc., shall be submitted to the governor, auditor of state and secretary of state, for approval Sections 2316 and 2317, General Code, provide for the giving of public notice of the time and place for the reception of sealed proposals from bidders on the work to be done.
Section 2318, General Code, provides as follows:

"On the day named in the notice, such officer, board or other authority, shall open the proposals and award the contract to the lower bidder. No proposals shall be considered unless accompanied by a bond from the bidder, with sufficient sureties, conditioned that, if accepted, the bidder will enter into and faithfully perform a proper contract in accordance with the proposal, plans, specifications and descriptions which shall be made a part thereof. The contract shall not be binding on the state until submitted to the attorney general and he certifies thereon that he finds it to be in accordance with the provisions of the chapter."

I assume it is not questioned but Ohio university is a state institution, and the buildings thereof are public buildings within the provisions of section 2314, and that the question for determination here is whether the purpose calling for this appropriation, and for which it is to be expended, in an improvement or addition to a state institution or building within the provisions of this section requiring contracts therefor to be made on competitive proposals or bids as provided for therein, and in the succeeding sections above noted.

It appears that the erection of a building for, and as a part of, the electric light plant, is not called for, but the vital question is whether the conduits, material and appliances to be furnished in the expenditure of this appropriation do not, when installed, become such a component and permanent part of the buildings and realty of this institution as to constitute an improvement or addition thereto. The appropriation is for the completion of an "electric light plant" and these words in themselves, in the connection in which they are used, carry some import to the point that the appropriation is for a permanent improvement. Moreover, I take it, the conduits to be laid and the material and appliances to be furnished and installed are, for the most part to be so constructed, fixed and adjusted as to become fixtures and a part of the buildings and realty. This being true, it seems impossible to escape the conclusion that the installation of an electric light plant is an improvment to this insti-

tution and the buildings thereof. The above observations are based on the facts stated in your inquiry. I note however, that by act of the general assembly, April 30, 1910, Ohio university received an appropriation, the terms of the act awarding the appropriation reading as follows:

> "Four central heating plants, with facilities for electric lighting and power, $20,000.00."

It can be assumed consistent with the facts stated in your inquiry, that the plant to be completed is the plant for which the appropriation just noted was made.

Section 2343, General Code, formerly section 795, Revised Statutes, provides:

> "When it becomes necessary for the commissioners of a county to erect or cause to be erected, a public building, * * * or an addition to or alteration thereof, before entering into any contract therefor or repair thereof, or for the supply of any materials therefor, they, the commissioners, shall cause full and accurate plans and specifications preliminary to the reception of bids for such work."

Under this section, in circuit court of Crawford county, in the case of State, ex rel., vs. Commissioners, 17 C. C., 370, held as follows:

> "When the necessary machinery, pipes, radiators and appliances, constituting a steam heating plant, is erected in a public building, and is so securely fastened to and connected with the building, as when completed, to form a part of it, such steam heating plant is 'an addition to such building' within the meaning of section 795, Rev. Stat., and the construction of such plant by the commissioners is governed and controlled by the provisions of that section."

The court in its opinion says:

> "Counsel for respondents urges that this particular contract for the erection of a steam heating plant, is not included or covered by the provisions of the section just quoted, as not being a building, an addition or alteration of a building, and therefore, there is no requirement that the contract for its construction be let at public or competitive bidding. The suggestion is not warded by the facts, and is wholly untenable as a legal proposition. The steam heating plant is of such character, and is attached to the building in such manner and for such purpose, that it becomes a part of it, and so included and referred to in the section as 'an addition to a building' and the letting of a contract for its construction is governed by the provisions of the section."

In the case of State, ex rel., vs. Commissioners of Butler county, 18 C. C., 275, where one of the questions involved was whether the construction of an elevator in a court house was an addition thereto, within the meaning of this section, the court says:

> "It seems clear to us, that if the putting in of this elevator into the court house is an addition or repair thereof, that the commissioners, by the terms of this section, must advertise as provided in the section, if the estimated cost is over $1,000.00, as was the case here. And it seems equally clear to us that the improvement in question was an addition to, or an alteration of, the court house. It is evident from the proposals submitted and the specifications of the character of the work to be done, and what it would be when completed and attached to the building, that it would be a part thereof—

certainly a fixture, and would pass with the realty. We see no reason whatever for likening it to articles of furniture, purely personal property, as to which the claim is that any amount may be purchased at private sale by the commissioners, which is doubtful. On this ground alone we would be of the opinion that the commissioners should be perpetually enjoined from carrying out this alleged contract."

On the considerations above noted it is plain that were this appropriation and the expenditures thereof for the construction or ercetion of a complete electric light plant in buildings already erected, the same would constitute an improvement and addition within the meaning of section 2314. Nor am I able to see that the completion of an unfinished plant calling for the expenditure of the sum of money carried by this appropriation presents a question any different in kind. The question as I see it is not one as to furnishing equipment which is to be and remain personal property, but one as to the erection or installation of a plant or system which becomes a component and permanent part of a state institution in its physical aspect as including its ground and buildings as well as the buildings themselves. If, on the considerations before noted, the erection of an electric light plant at this institution is an improvement and addition thereto and to the buildings thereof, the completion of an unfinished plant is no less such.

You state that in buying apparatus needed in the completion of the plant, it was your intention to solicit bids, but no one piece that you would require would cost more than the legal limit for such purchases. As to this, it is to be noted that the purpose calling for this appropriation was one single and entire, to wit: the completion of an electric light plant, and it would be a violation of the spirit of the sections before noted applicable to the consideration of this question, to separate the money called for by this appropriation and the items of material needed in the completion of the plant into amounts less than $3,000.00 for the purpose of avoiding the competitive bidding required by these sections.

Lancaster vs. Miller, 58 O. S., 558, 573.
Wing vs. Cleveland, 15 Bull. 50.

I have no reason to take issue with your contention that this work can be done more advantageously and economically on the plan suggested and desired by you, but such considerations can have no bearing on the question submitted for my determination, to wit, whether the purpose of this appropriation is within the sections noted and by them controlled.

These statutes were enacted on a consideration of a well defined purpose, looking to the protection of the state in the erection of its public buildings and improvements, and they are not to be set aside in any particular instance on considerations of convenience or even assumed or real advantage.

I am of the opinion, therefore, that the expenditure of the money called for by this appropriation, comes within the requirements of sections 2314-2318, and succeeding sections, providing for the advertisement for and reception of proposals or bids, and providing for the execution of the contract entered into on the bid or proposal accepted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

317.

ABSTRACT OF TITLE—PROPERTY SITUATED IN ATHENS, OHIO.

COLUMBUS, OHIO, June 12, 1913.

DR. ALSTON ELLIS, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—I acknowledge the receipt of the abstract of title and warranty deed rom Louis Clark Moore and wife, to the president and trustees of the Ohio University, for the following described real estate, to wit:

> "Situated in the city of Athens, county of Athens and state of Ohio, and known as being ten feet (10 ft.) off of the south side of inlot numbered 52 in said city, excepting all the stone coal under said ten feet, (10 ft.); also sixty feet (60 ft.) off of the north side of inlot numbered 53 in said city."

A careful examination of said abstract discloses no liens or incumbrances against said premises except the undetermined taxes for the year 1913. The deed is duly signed and acknowledged by Louis Clark Moore and wife.

Subject to the foregoing liens, I am of the opinion that the grantees in said deed will acquire thereby a good and sufficient title to said premises, in fee simple.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

375.

ABSTRACT OF TITLE—PROPERTY SITUATED IN ATHENS COUNTY, OHIO.

COLUMBUS, OHIO, July, 12, 1913.

DR. ALSTON ELLIS, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—You have this day submitted to me for examination and approval an abstract of title to, and deed from Clinton L. Poston and wife, to the president and trustees of Ohio University, for the following described real estate situated in the city of Athens, county of Athens and state of Ohio, to wit:

> "*First Tract.* Beginning at the southwest corner of outlot number thirty-one (31) in said city, and thence running east four and fifty-five hundredths (4.55) chains to within fifty (50) feet of the middle of the Baltimore & Ohio Southwestern Railroad; thence north sixteen degrees (16 deg.); east, parallel with, and fifty (50) feet from the middle of said railroad, one and sixty-seven hundredths (1.67) chains; thence west five (5.00) chains; thence south one and forty hundredths (1.40) chains to the place of beginning, containing sixty-seven hundredths (0.67) of an acre, more or less, and being the same premises conveyed to Jane Root by Eliakim H. Moore, by his deed dated October 14, 1896, and recorded in deed book 77, at page 271 of record of deeds in said county.
>
> "*Second Tract.* Beginning at the southwest corner of out-lot number thirty-two (32) in said city, and thence running north twenty and one half degrees (20½ deg.); west, one and fifty-three hundredths (1.53) chains; thence east five and sixty-four hundredths (5.64) chains; thence south one and forty hundredths (1.40) chains to the southeast corner of said out-lot number thirty-

two (32); thence west five (5.00) chains to the place of beginning, containing eighty hundredths (0.80) of an acre, more or less.

"*Third Tract.* Beginning at the northwest corner of out-lot number thirty-three (33) in said city, and thence running south one and thirty-eight hundredths (1.38) chains; thence east five (5.00) chains to the east line of said out-lot number thirty-three (33); thence north one and thirty-eight hundredths (1.38) chains to the northeast corner thereof; thence west five (5.00) chains to the place of beginning and containing seventy-two hundredths (0.72) of an acre, more or less.

"*Fourth Tract.* Beginning at the northwest corner of out-lot number thirty-three (33), and thence running south one and thirty-three hundredths (1.33) chains; thence west two chains (2.00) to the west line of out-lot number one hundred and eighty-seven (187); thence north one and eighty-one hundredths (1.81) chains; thence east one and eighty hundredths (1.80) chains to the east line of said out-lot number one hundred and eighty-seven (187); thence south twenty and one-half (20½ deg.) degrees; east, fifty-five (55) links to the place of beginning, containing thirty-six hundredths (0.36) of an acre, more or less, being a part of out-lot number one hundred and eighty-seven (187) in said city, and also being the same premises deeded to Jane Root by Johnson H. Welch and wife, by their deed dated December 17, 1857, and recorded in deed book 77, at page 270 of record of deeds in said county.

"*Fifth Tract.* Beginning at the southwest corner of out-lot number thirty-two (32) in said city, and thence running north twenty and one-half (20½) degrees; west, one and fifty-three hundredths (1.53) chains; thence thence west twenty-one (21) links; thence south twenty and one-half (20½) degrees; east, two and eight hundredths (2.08) chains; thence west twenty (20) links to the east line of out-lot number one hundred and eighty-seven (187); thence south twenty and one-half (20½) degrees; east, fifty-five (55) links to the northwest corner of out-lot number thirty-three (33); thence east five (5.00) chains to the northeast corner of said out-lot number thirty-three (33); thence north fifty (50) links; thence east four and forty hundredths (4.40) chains to within fifty (50) feet of the middle of the Baltimore & Ohio Southwestern Railroad; thence north sixteen (16) degrees; east, parallel with and fifty (50) feet from the middle of said railroad; fifty-one (51) links to the south line of out-lot number thirty-one (31); thence west along the south lines of out-lots numbered thirty-one (31) and thirty-two (32), nine and fifty-five (9.55) hundredths chains to the place of beginning, containing eighty hundredths (0.80) of an acre, more or less, and being out-lot numbered two hundred and nine (209) in said city."

I have made a careful examination of said abstract and as a result of such examination I find that no liens or incumbrances against said premises are disclosed by the abstract except the second half of the 1912 taxes, due June 20, 1913, and the undetermined taxes for the year 1913. No examination appears to have been made of the records of the United States court and I would suggest that a certificate of the Clerk of said court, as to the existence or non-existence of judgments against the present owner of said property and liens against the same, be attached to the abstract. The deed from C. L. Poston and wife to the president and trustees of the university is duly signed and acknowledged and is in proper form, and I am of the opinion that upon the discharge of the above mentioned liens, the grantee will acquire by said deed, a good and sufficient title to said premises in fee simple.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General

384.

ABSTRACT OF TITLE—PROPERTY OF ALBERT J. JONES AND WIFE, SITUATED IN THE CITY OF ATHENS, ATHENS COUNTY, OHIO.

COLUMBUS, OHIO, July 25, 1913.

DR. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—You have this day submitted to me for examination and approval abstract of title to and deed from Albert J. Jones and wife to the president and trustees of Ohio university for the following described real estate, situated in the city of Athens, county of Athens and state of Ohio, to wit:

"*First Tract.* Beginning four (4.00) chains south of the northwest corner of out-lot No. 30 and thence running east 1.81 chains to within fifty (50) feet of the middle of the Baltimore & Ohio Southwestern railroad; thence south 33 deg. west, parallel with, and fifty (50) feet from the middle of said railroad 1.10 chains; thence south 28½ deg. west, parallel with, and fifty (50) feet from the middle of said railroad, 1.75 chains to the north line of land formerly owned by Johnson M. Welch; thence west 61 links to the west line of said out-lot No. 30; thence north 2.62 chains to the place of beginning, containing forty hundredths (0.40) of an acre, more or less, and being the east part of the same premises conveyed to Evan J. Jones by Johnson M. Welch and wife by their deed dated September 7, 1883, and recorded in deed book 56 at page 4.

"*Second Tract.* Beginning four (4.00) chains south of the northwest corner of out-lot No. 31, and thence running east 5.00 chains to the east line of said out-lot No. 31; thence south 2.62 chains to the north line of land formerly owned by Johnson M. Welch; thence west 5.00 chains; thence north 2.62 chains to the place of beginning, containing 1.31 acres, more or less, and being the west part of the same premises conveyed to Evan J. Jones by Johnson M. Welch and wife by their deed dated September 7, 1883, and reported in deed book 56 at page 4.

"*Third Tract.* Beginning 4.34 chains south of the northeast corner of out-lot No. 32, and thence running south 2.28 chains to lands formerly owned by Johnson M. Welch; thence west 7.14 chains to a point 26 feet south of the northeast corner of in-lot No. 58; thence north 2.28 chains; thence east 7.14 chains to the place of beginning, containing 1.63 acres, more or less, and being the same premises conveyed to Evan J. Jones by Samuel Axtell and wife by their two several deeds dated December 2, 1881, and March 29, 1888, and recorded in deed books 50, at page 571 and 62, at page 289, respectively.

"*Fourth Tract.* Eighty-one and one-half (81½) feet off of the east end of out-lot numbered one hundred and ninety-eight (198) in E. H. and D. H. Moore's addition to said city."

I have made a careful examination of said abstract and as a result of such examination I find no liens or incumbrances against said premises as disclosed by the abstract except the undetermined taxes for the year 1913.

The deed from Albert J. Jones and wife to the president and trustees of Ohio university is in proper form and is duly signed, acknowledged and attested.

It is my opinion that upon the discharge of the above mentioned liens the grantee will acquire by said deed a good and sufficient title to said premises in fee simple.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

386.

OHIO UNIVERSITY—BOARD OF TRUSTEES MAY NOT APPROPRIATE PRIVATE PROPERTY BY CONDEMNATION PROCEEDINGS—STATE NORMAL COLLEGE.

The board of trustees of the Ohio university have no right under the statutes of Ohio to appropriate private property by condemnation proceedings for the needs of the university or of the state normal college.

COLUMBUS, OHIO, July 19, 1913.

HON. ALSTON ELLIS, *President of the Board of Trustees of Ohio University, Athens, Ohio.*

DEAR SIR:—Your favor of July 14, 1913, is received in which you inquire:

> "Has the board of trustees of Ohio university the right to condemn property in a case such as has been instanced—or in any case? If the trustees of the university, as such, have not such power, have they not as trustees of the state normal college established by legislative act passed in 1902?"

You call attention to the appropriations of money made at the last session of the legislature to construct a building for the agricultural department and the domestic science department of the state normal college. You state that the trustees of Ohio university have purchased a lot, prepared plans and have let a contract to construct such building. Also that the lot selected for the site of the building is not of sufficient size because of the provisions of the building code, and that you desire to purchase additional ground adjoining this lot but that you are unable to agree with the owner as to the price.

The right to appropriate private property for public purposes is a power which exists in the sovereign state under its right of eminent domain. The exercise of this right is given to various political subdivisions and to private corporations by the legislature. Such acts are necessary in order to authorize the exercise of such right and they are strictly construed.

The rule is stated in 15 Cyc. at page 567:

> "Inasmuch as the right of eminent domain is one which lies dormant in the state unless legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise, the right to exercise the power must be conferred by statute, either in express words or by necessary implication. The power should not be gathered from doubtful inferences, but should be unmistakably expressed.
>
> "The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it."

The Ohio university was made a body corporate by act in second Ohio Laws, page 193, under the name of "The President and Trustees of the Ohio University."

Section 2 of said act provided:

> "And be it further enacted, that there shall be and forever remain in the said university, a body politic and corporate, by the name and style of 'The President and Trustees of the Ohio University,' which body politic and cor-

porate shall consist of the governor of the state (for the time being), the president, and not more than fifteen nor less than ten trustees, to be appointed as hereinafter provided."

This act did not grant to the trustees of the university the right to condemn property. The reason therefor is apparent. By virtue of section 11 of the act the land of two townships was vested in the trustees for the purposes of the university.

By virtue of section 16 of said act the trustees were authorized to reserve land sufficient for the buildings of the university.

Said section 16, read:

"And be it further enacted, that the said corporation shall have full power from time to time to contract for and cause to erect such building or buildings as they shall deem necessary, for the accomodation of the president, professors, tutors, pupils and servants, of said university; as also, to procure the necessary books and apparatus, for the use of said university, and shall cause payment therefor to be made out of the funds of the university, and shall reserve such lot or lots in said town of Athens, as they deem necessary for the purposes aforesaid, and for the erection of buildings for the use of the town and county."

You call attention to the provisions of the act establishing a state normal school at the Ohio university. This act is now known as sections 7897 to 7901, inclusive, of the General Code.

Section 7897, General Code, provides:

"There are hereby created and established two state normal schools to be located as follows: One in connection with the Ohio university, at Athens, and one in connection with the Miami university, at Oxford.

Section 7898, General Code, provides:

"Boards of trustees of such universities shall maintain at their respective institutions a normal school which shall be co-ordinate with existing courses of instruction, and be maintained in such a state of efficiency as to provide proper theoretical and practical training for all students desiring to prepare themselves for the work of teaching. Such normal schools in each case shall be under the general charge and management of the respective boards of trustees of such universities."

This act does not authorize the trustees of Ohio university to appropriate private property for the purposes of the normal school.

The appropriations of money for the proposed building are made for the Ohio university, Athens, Ohio.

In 103 Ohio Laws, 622, the appropriation is made as follows:

"Building for agricultural department and the domestic science department of the state normal college; cost not to exceed $90,000.00 . . . $25,000.00."

Also on page 643 of 103 Ohio Laws:

"Building for the agricultural department and the domestic science department of the state normal college; cost not to exceed $90,000.00 . . . $65,000 00."

No reference is made in these appropriations as to the purchase of any real estate.

I find no direct or specific authority of statute granting to the trustees of the Ohio University the right to appropriate private property, either for the university or for the normal college.

Section 1807, General Code, provides:

> "When, in the judgment of the board of trustees or managers of a *state benevolent, correctional or penal institution*, it is necessary for such institution or for the accomplishment of the purposes for which it was organized, or is being conducted, to acquire any real estate, right of way or easement in real estate, and the board is unable to agree with the owner or owners thereof upon the price to be paid therefor, it may appropriate such property in the manner hereinafter provided."

The Ohio university is not a correctional or penal institution. If it comes within the provisions of this section it must be because it may be classed as a benevolent institution.

I find no legal definition of the term "benevolent institution" which fits the present situation.

In Dunham vs. Kauffman, 10 Nisi Prius, N. S., 49, it is held:

> "An organization whose main purpose is to prmote the temporal, moral or intellectual uplift of others, without pecuniary reward to itself or its promoters, is a benevolent organization within the meaning of the statute authorizing benevolent and charitable institutions to consolidate."

On page 51, Rogers, J., says:

> "Benevolence does not merely consist in feeding the hungry and clothing the poor. It has a broader significance where the religious and moral needs of humanity are involved. Without going into a detailed discussion of what a benevolent society is, I am satisfied that whatever organization has for its main purpose the lending of a hand to promote the spiritual, intellectual and moral uplift of others, whether it be its members, without pecuniary reward to the society or its promoters, is a benevolent organization, and certainly these two organizations come within that definition, and the connection that they do not come within the statute, in my opinion, is not sound."

The statutes under consideration in this case are sections 10033, et seq., General Code, and the phrase "benevolent or charitable association" is used throughout the statutes. This signifies that the words "benevolent" and "charitable" are similar in meaning. The two organizations involved in the above case were the Women's Educational and Industrial Union and the Young Women's Christian Association.

Loomis, J., says, on page 71 in case of Adye vs. Smith, 44 Conn. 60:

> "While it is true that there is no charitable purpose which is not also a benevolent purpose, yet the converse is not equally true, for there may be a benevolent purpose which is not charitable, in the legal sense of the term."

In case of Chamberlain vs. Stearns, 111 Mass., 267, Gray, J., says:

> "The word 'benevolent,' of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity, but also any acts dictated by kindness, good will or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the

needy, the sick or the afflicted, the support of public works or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense."

In case of Norris vs. Thomson's Executors, 19 N. J. Eq., 307, the Chancellor, says on page 313:

"The word benevolent is certainly more indefinite and of far wider range than charitable or religious; it would include all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it. It has no legal meaning, separate from its usual meaning. The word 'charitable' has acquired a settled limited meaning in law, which confines it within known limits.

From these definitions it appears that the word "benevolent" is a broader term than the word "charitable." That the term "benevolent" includes all purposes that are charitable and others which are not considered as charitable in the legal meaning of that term.

Education is considered as a charity, in the legal sense, not only in this country but in England as well.

In Gerke vs. Purcell, 25 Ohio St., 229, it is held:

"A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor."

White, J., says on page 243:

"The meaning of the word 'charity,' in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose. 3 Steph. Com. 229.

"The maintenance of a school is a charity. Gifts for the following purposes have been declared to be charities: For schools of learning, free schools, and scholars of universities; ....."

The work of education as promoted by the Ohio University would not be considered a charity in the common meaning of that term, but in its legal meaning the Ohio University is engaged in promoting a public charity, to wit—the education of youth.

It may be urged that as the term "benevolent" applies to all things which are embraced by the word "charitable" in its legal sense, that therefore the Ohio University, as an educational institution may also be termed as a charitable institution and is therefore a benevolent institution.

The Ohio university is no doubt doing a work of benevolence in the broad meaning of that term. That is, it is promoting "the intellectual and moral uplift of others."

In what sense is the term "benevolent institution" used in section 1807, General Code, supra? Does it apply to all institutions that are doing a work of benevolence, or does it apply to those institutions which are doing a work of charity in the common meaning of that term?

The intent of the legislature may be found by an examination of the history of section 1807, General Code, and by the manner in which benevolent institutions and educational institutions have been treated and classified in the different divisions of he statutes.

The provisions now found in sections 1807, 1808 and 1809, General Code, were first enacted by act of March 30, 1875, as shown in 72 Ohio laws, 148. Under this act the power of appropriation was given to the board of trustees of "any of the benevolent institutions organized and conducted under the laws of the state."

This act did not refer to correctional or penal institutions, nor was it placed under any particular heading or title of the statutes. It was carried into the revised statutes of 1880, as section 623 and placed in title V of part I, which title was headed "Benevolent institutions." It was amended in 92 Ohio laws, 343, to read the board of trustees "of any benevolent institution of the state."

It remained under the above heading until the passage of the General Code, wherein title V of part I was headed, "State Institutions," and correctional and penal institutions were included in the terms of the statute, and these institutions were also placed under title V.

The various benevolent institutions of the state were treated in the revised statutes under said title V. They included, under separate chapters, the board of state charities, the institutions for the deaf and dumb, for the blind, for feeble minded youth, soldiers and sailors home, the boy's and girl's industrial homes and similar institutions.

Educational institutions, schools, colleges, and universities were placed under a separate title and part of the statutes. Benevolent institutions were considered under the part of the statutes classified as political, and schools and colleges under the part classified as civil.

It is apparent from these classifications and divisions of the statutes that the legislature did not mean to include educational institutions in the term "benevolent institution" as used in section 1807, General Code. It has been seen that statutes conferring the right to exercise the power of eminent domain are strictly construed and it would require a liberal construction of this act in order to have it include educational institutions.

Special provision of statute is made to authorize boards of education to appropriate private property. The trustees of Ohio university were not granted that power by the act by which it was organized or by the act establishing a normal college at that university.

The term "benevolent institution," therefore, as found in section 1807, General Code, does not include educational institutions, such as colleges and universities.

In any event another feature of the statutes would make section 1807, General Code, unavailable at the present time, in your case.

Section 1809, General Code, provides:

> "Upon the adoption of the resolution, application may be made by the board in its name to the court of common pleas or probate court of the county wherein the property is located, for the appropriation of the property or easement. Such property may be appropriated, appeals taken, and error prosecuted in all respects as provided for the appropriation of private property by municipal corporations. *No such proceedings may be instituted unless sufficient money has been appropriated by the general assembly for the purpose of acquiring such real estate, right of way or easement.*"

It does not appear that sufficient money "has been appropriated by the general assembly for the purpose of acquiring such real estate." The money appropriated is for the construction of the building and not for the purchase of real estate.

I am of the opinion, therefore, that the board of trustees of Ohio university have no right, under the statutes of Ohio, to appropriate property by condemnation proceedings, for the needs of the university of the state normal college.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

(To the Secretary C. N. & I. Board, Wilberforce University)

596

A MEMBER OF THE BOARD OF TRUSTEES OF WILBERFORCE UNIVERSITY WHO ACTS AS SECRETARY MAY NOT RECEIVE COMPENSATION FOR SUCH WORK.

Where a member of the board of trustees ***of*** *Wilberforce university acts as secretary for the board, he may not receive compensation for such work, although an appropriation has been made by the legislature for the purpose of compensating him for his extra work.*

COLUMBUS, OHIO, November 5, 1913.

HON. B. F. STEWART, *Secretary C. N. & I. board, Wilberforce university, Norwalk, Ohio.*

DEAR SIR:—I have your letter of July 15, 1913, as follows:

"On May 22, 1913, I was appointed by the governor of Ohio, as one of the trustees of the C. N. & I. board, Wilberforce university, Wilberforce, Ohio. On July 14, 1913, I was elected secretary of the above named board.

"The duties of the secretary are to keep a record of the business transactions of said board at its regular and special meetimgs. In addition to said duties of the regular and special meetings, said secretary has, on or about the 15th of each and every month, requiring from one to two days, to examine all bills of expenses and salaries, certifying to the correction thereof, of the C. N. & I. schools, and to sign all warrants for the payment of said expenses and salaries.

"Being a member of the said trustee board, the law governing the same does not provide any compensation for said trustees other than the traveling and necessary expenses to and from their place of residence to Wilberforce, Ohio, the place of meeting of said board.

"The last legislature made an appropriation of $750.00 for salaries of secretary and trustee expenses section 103 O. L., 623). The question is whether the said secretary is entitled to compensation out of said appropriation for the said additional and necessary duties. Does the fact that said secretary, being also a member of the trustee board, bar him from compensation for necessary work done outside of the regular and special meetings of said board, inasmuch as there is an appropriation for the salary of a secretary and expenses of the trustee board."

In reply to which I desire to say:

The appropriation to which you call attention is in the following language:

"Wilberforce university."

* * * * * * * * * *

"Salary of Secretary and trustees' expenses.....$750

* * * * * * * * * *."

Section 7980, General Code, reads in part:

"The trustees shall receive no compensation, but shall be reimbursed their traveling and other reasonable and necessary expenses out of the appropriations under this subdivision of this chapter."

The board of trustees may select one of their own number to act as secretary of the board cannot be questioned, but when it comes to fixing his compensation as secretary, a very different question is presented, as it involves the right of the secretary, as a member of the board, to vote on the matter of his own salary.

It has been held:

> "Contracts entered into between a board of gas trustees of a municipality and an incorporated company, when a member of the board of gas trustees is at the same time an officer and personally interested in the incorporated company, are against public policy and void."

(Coblet Co., vs. City of Findlay, 5 C. C., 418, 5th Syl.)

That this, as a proposition of law cannot be questioned, must be conceded by all.

The reasoning of Seney, J., on pages 429 and 430, in disposing of this quetion, is neither as clear nor as satisfactory as the 5th paragraph of the Syllabus above copied.

That a member of the board of trustees may not act in a matter in which he is personally interested is too well established to call for authority to support it. In some cases his action is void; in others voidable merely; in others criminal, but in none may he reap an advantage from his position and action in connection therewith. The fact that he does not act, and leaves the matter to his co-trustees, who constitute a quorum of the board, does not aid the matter, nor change the situation; the result is the same.

That the secretary performs duties for which he should be paid is clear, but the question here presented is whether a member of the board, who must serve as such without compensation, may be selected as secretary and recover compensation as such, merely because an appropriation has been made to pay a secretary. I find that similar appropriations have been heretofore made, and while they clearly evince a legislative intention that the board of trustees of the Wilberforce university should have a secretary, and that he should be paid for his services, yet, I cannot conclude that such board is authorized to select one of their number to so act and pay him, in the absence of express authority to do so.

The reason for this conclusion is that as an individual, he will endeavor to get not only the job, but the highest attainable compensation, while as trustee it is his duty to secure the best secretary at the lowest price. A disposition has been shown in many courts of late years to look at results merely, and where a trustee did not act in a matter in which he had an interest, or his vote was not essential to the result, to leave the matter stand unless some undue or unreasonable advantage was obtained. I believe the old rule to be the better, and that the strongest statement yet made and applicable to the situation is that the true doctrine does not rest upon wrong done or advantage gained, but as stated by one of the great English chancellors upon that older principle of—"Lead us not into temptation."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the President of Bowling Green Normal School)

557.

A CORRIDOR MAY BE CONSTRUCTED AS A PART OF A BUILDING FOR SCIENCE AT BOWLING GREEN NORMAL SCHOOL AND PAID FOR FROM THE APPROPRIATION FOR THIS BUILDING—LABORATORY FIXTURES THAT ARE PERMANENTLY ATTACHED TO THE BUILDING MAY BE PAID FOR FROM THE APPROPRIATION MADE FOR THE CONSTRUCTION OF THE BUILDING.

1. A part of the appropriation made for the construction of a building for science and agriculture at the Bowling Green normal school may be used for the construction of a corridor, this corridor to be a part of this building.

2. All laboratory fixtures that are permanently attached to the science building should be made a part of the plans and specifications for such building. Bids for such furnishings should be asked for as part of the entire bid for construction of the building.

COLUMBUS, OHIO, October 14, 1913.

HON. H. B. WILLIAMS, *President of Bowling Green Normal School, New York City, N. Y.*

DEAR SIR:—In reply to your request of recent date in which you inquire:

"The undersigned, having advisory power under the law in determining building plans for the Bowling Green state normal college, and having been especially directed by the board of trustees to approve the plans and specifications for a building for science and agriculture for which there is an appropriation of $100,000; $50,000 in 1913 and $50,000 in 1914, respectfully requests an opinion on the following questions:

"1. Can any part of this appropriation be used for the construction of a connecting corridor between the administration building and the science building, provided the plans for such corridor are made a part of the plans for the latter building?

By way of explanation, permit me to say that the general building scheme contemplates the erection of three buildings for instruction purposes, viz.: the administration building, a building for science and agriculture, and a building for combined purposes of a library and practice school. The plans for the administration building, which is now under construction, provide for locker rooms for both sexes. It is proposed to connect the administration and science buildings by an enclosed corridor and to eliminate locker rooms from the plans for the latter. It will be necessary also to build a tunnel between these buildings to carry the heating mains, and it is found that these two connecting features can be constructed at the same time at a saving of considerable expense.

"2. Can any part of this appropriation be used for the installation of laboratory fixtures such as standard students' and instructors' tables for the teaching of agriculture, biology, physics, and chemistry, if such equipment is connected with the general plumbing or wiring of the building?

"3. If, in your opinion, part of this appropriation can be used for the purposes mentioned in question 2, must the plans for each equipment be made a part of the general plans and specifications, or may they be separated from the general plans, and may contracts for the same be let apart from the general contract, or even at a later date, the object being to have gas, water, and

electricity roughed in only under the plans and specifications now being prepared by the architects, Howard & Merriam?

"While in Columbus, recently, I went over these questions with judge McGillivary, and since they are involved in the preparation of the plans for the building for science and agriculture, work on which is now in progress, an early reply will be appreciated."

The appropriation for 1913, found on page 624 of 103 Ohio Laws, reads as follows:

"Building for science and agriculture; cost not to exceed $1000,000. ----------$50,000."

And your first inquiry really goes to the question whether you can use any part of this for the construction of a corridor connecting the administration and science building, provided the plans thereof are made part of the plans of the science building.

This corridor being a necessary and proper part of the general plans of the school buildings, I can see no valid reason why it cannot be made a part of the science building and paid out of the appropriation mentioned.

The answer to your second question really involves the determination whether these laboratory fixtures are or are not made part of the science building. If they are made parts of the building, instead of mere furnishings of it, that is, if they are permanently attached to and made part of the science building and not merely placed in it, as furnishings which may be taken out and placed elsewhere at pleasure, they can be included and should be in the plans and specifications of the science building. If not so included, and made part of that building, their purchase and installation would have to be deferred until such time as an appropriation was made for the purpose of furnishing the building.

In answer to yout third inquiry, I desire to say that if the fixtures mentioned in your second question are made part of the plans and specifications of the science building, and thereby made payable from this appropriation, they become a part of the general plans of the building and should not be separated from them this appropriation, they become a part of the general plans of the building and should not be separated from them, but bids for such furnishings should be asked for as part of the entire bid for construction of the building.

In regard to whether such equipment be made a part of the general plans and specifications or may be separated from the general plans * * * and may contract for the same be let apart from the general contract, or even at a later date, I am of the opinion that as section 2362, General Code, provides that the officers or board authorized to contract shall, "advertise and receive proposals for furnishing materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for such separate and distinct trade or kind of mechanical labor employment or business entering into the improvement," and sections 2363 and 2364, read:

"Section 2363. When more than one trade or kind of mechanical labor, employment or business is required no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole of for two or more kinds of work or materials are lower than the separate bids therefor in the aggregate."

"Section 2364. The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment or business or for the furnishing of materials therefor, or both, shall be awarded by such officer, board or other authority in its discretion, to the lowest and best separate

bidder therefor and shall be made directly with him or them in the manner and upon the terms, conditions and limitations as to giving bond with security and otherwise as prescribed by law, unless it is let as a whole, or to bidders for more than one kind of work or materials. The provisions of this and the preceding two sections shall not apply to the erection of buildings and other structures of a less cost than ten thousand dollars."

It seems clear to me that while the general plans should, and must include full details of the improvement and the advertisement for bids must be as broad as the plans and specifications, yet in making the contract or contracts and accepting the bids the board must be governed by the restrictions found in section 2363, General Code and the limitations as to estimates and appropriations found in section 2323, General Code.

Believing the above fully answers your inquiry, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Lima State Hospital)

247.

EMPTYING OF SALT WATER OF OIL WELLS INTO STREAMS FROM WHICH STATE HOSPITAL RECEIVES WATER SUPPLY NOT SUBJECT TO CRIMINAL PROSECUTION—INJUNCTION.

Since the occasional emptying of salt water of oil wells into streams in which a state hospital receives its water supply is not to be classified as a public nuisance, detrimental to health or comfort, nor as a pollution of the source of any public water supply, such an act is not covered by criminal statutes in this state.

When such act amounts to a substantial interference with rights, however, an injunction is the proper remedy to protect the same.

COLUMBUS, OHIO, April 30, 1913.

HON. S. A. HOSKINS, *President Lima State Hospital Commission, Wapakoneta, Ohio.*

DEAR SIR:—In your letter of February 26, 1913, you say:

> "I am directed by the commission for the erection of the Lima state hospital to procure your opinion upon the following state of facts:
>
> "There is a stream of water running through the state lands at the Lima state hospital known as Sugar creek, and it is from this stream that the commission finds it necessary to procure its water supply for the institution. In the Sugar creek valley and extending several miles above the state lands are a number of oil wells now being pumped from time to time, and the salt water from these wells is emptied into Sugar creek, and so contaminates the water as to make it unfit for boiler uses. These wells are not abandoned wells, but are all wells of several years standing, which are only pumped intermittently. The water is only emptied into the stream from time to time, and there are days when the water is comparatively free from salt, but at other times the conditions are such as to render the water unfit for use.
>
> "The commission desires to know whether or not there is any authority by which the emptying of this salt water into Sugar creek can be stopped."

From your statement of facts, it does not appear that this discharge of salt water amounts to a pollution of the stream so as to interfere with the public health, or with the health of those who will occupy your institution. Therefore the act complained of does not fall within any criminal statute of Ohio, as to the pollution of streams.

Section 12647, General Code, provides:

> "Whoever intentionally throws deposits or permits to be thrown or deposited, coal dirt, coal slack, coal screenings or coal refuse from coal mines, refuse or filth from a coal oil refinery or gas works, or whey or filthy drainage from a cheese factory, into a river, lake, pond or stream, or a place from which it may wash therein, or causes or permits petroleum, crude oil, refined oil, or a compound, mixture, residuum of oil or filth from an oil well, oil tank, oil vat or place of deposit of crude or refined oil, to run into or be poured, emptied or thrown into a river, ditch, drain or watercourse, or into a place from which it may run or wash therein, upon conviction in the county in which such coal mine, coal oil refinery, gas works, cheese factory, oil well, oil tank, oil vat or place of deposit of crude or refined oil is situated, shall be fined not less than fifty dollars nor more than one thousand dollars."

This statute is not broad enough to cover the case submitted by you. Section 1249, General Code, provides:

"Whenever the council or board of health of a city or village, the commissioners of a county, or the trustees of a township set forth in writing to the state board of health, that a city, village, corporation or person is permitting to be discharged sewerage or other waste into a stream, water course, lake or pond and is thereby creating a public nuisance detrimental to health or comfort, or is polluting the source of any public water supply, the state board of health shall forthwith inquire into and investigate the conditions complained of."

You will see by this section, the act must amount to a *public nuisance detrimental to health or comfort, or the pollution of the source of any public water supply,* before the board of health can take the matter up. If the act continues, and amounts to a substantial interference with your use of the water for boiler purposes, an injunction would, in my opinion, be the proper remedy to protect the same. This is the only remedy which I now see covering the matter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

552.

ABSTRACT OF TITLE MARY D. DUNN TO STATE OF OHIO, PROPERTY SITUATED IN COUNTY OF ALLEN, STATE OF OHIO.

COLUMBUS, OHIO, October 14, 1913.

DR. M. F. HUSSEY, *Superintendent Lima State Hospital, Lima, Ohio.*

DEAR SIR:—Under date of September 12th, you submitted to me for approval a warranty deed from Mary D. Dunn to the state of Ohio for the following real estate situated in the county of Allen, state of Ohio, to wit:

"A certain tract of land in Bath township, Allen county, Ohio, in the east half of the southeast quarter of section 7, town 3 south, range 7 east, described as follows:

"Beginning at a pin in the center line of Sugar Creek road, nine hundred and ninety-four and 2/10 (994.2) feet west of a stone at the southeast corner of said section, said line bearing about south eighty-nine degrees and thirty minutes (89-30) west, thence turning a deflection of one hundred and eight degrees and fifty-three minutes (108-53) to the right for a distance of six hundred and fifty-seven and 34/100 (657.34) feet to a corner of a fence along the right of way of the Lima and Toledo Traction company, thence turning a deflection angle to the left of six degrees and one minute (6-01) for a distance of fifty-one and 24/100 (51.24) feet to a stake along the right of way of the Lima and Toledo Traction company, thence turning a deflection angle to the left of ninety-nine degrees and four minutes (99-04) for a distance of five hundred and twenty-five and 95/100 (525.95) feet to a pin in the center line of a road, thence turning a deflection angle of ninety-one degrees and forty-six minutes (91-46) to the left for a distance of seven hundred and seven and 15/100 (707.15) feet to a pin in the center of Sugar Creek road, thence turning

a deflection angle to the left of ninety-two degrees and four minutes (92-04) along the center line of Sugar Creek road for a distance of three hundred and twenty-five and 8/10 (325.8) feet to the place of beginning, containing six and 8/10 acres.

"And the said grantee does for itself and assigns hereby agree and covenant with said grantor, her heirs and assigns, to keep open permanently a road that now begins at Sugar Creek road and runs north through above described premises and through other land owned by said grantor, which land lies north of above described premises, so that said grantor, her heirs and assigns shall always have a mode of ingress and egress to and from her said land by said road."

Said deed has been duly signed, acknowledged and recorded.

Pursuant to my request on October 9th, you furnished abstract of title to said premises.

I have carefully examined the abstract and find no defects in the title as disclosed thereby. Taxes for the year 1913 are a lien and should be discharged before the purchase price is paid or a sufficient amount should be retained out of the purchase price to pay said taxes. No examination appears to have been made in the federal court for pending suits and judgments against Mary D. Dunn. In lieu of such examination a certificate of the clerk of the proper court as to these matters should be attached to the abstract.

Subject only to the foregoing qualifications, I am of the opinion that the state of Ohio has under said deed acquired a good and sufficient title to said premises in fee simple.

When the suggestions herein made have been complied with, I shall advise the auditor of state to accept said deed and pay the purchase money therefor.

The abstract is herewith returned to you.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

555.

A CONTRACT FOR THE CONSTRUCTION OF A ROAD AT THE LIMA STATE HOSPITAL MAY BE AWARDED TO THE LOWEST RESPONSIBLE BIDDER ALTHOUGH HIS BID IS SOMEWHAT IRREGULAR IN FORM.

A bid was submitted for the construction of a road at the Lima State Hospital, and was the lowest responsible bid submitted but was somewhat irregular in form. The board may award the contract to this party and require him to give proper bond for the performance of the contract as required by law.

COLUMBUS, OHIO, October 16, 1913.

DR. M. F. HUSSEY, *Superintendent Lima State Hospital, Lima, Ohio.*

DEAR SIR:—I am in receipt, under date of October 11th, of a communication from Hon. S. A. Hoskins, president of the Lima state hospital commission, who requests that the answer be addressed to you. Mr. Hoskins states:

"The Lima hospital commission on October 10th received bids for certain grading on the road way and around part of the buildings on the hospital

grounds. We received three bids, which we herewith enclose you, marked A. B and C. You will note that bid marked 'A' is regular in form and is accompanied by the contract bond, which is ordinarily used in state work and which seems to comply with the code.

"The paper marked 'B' is sufficient in form, giving statement of labor and material, although somewhat informal in other respects. A check is attached to bid 'B' which was intended to be a guarantee on the part of the bidder that he would later enter into bond, etc.

"The commission expects to eliminate two items from these bids, and when these items are eliminated, the bid marked 'B' will be about $1,000.00 less than the bid marked 'A.' The commission regards both these bidders as responsible and able to do the work. The question we desired answered is—'Can the commission accept the bid marked "B," when the same was not accompanied by bidder's bond?' "

It is provided by section 1968, General Code, that the Lima state hospital commission

"shall be governed in all things by the provisions of law relating to the erection of public buildings, but shall not enter into any contract for the erection of any building until the money therefor has been appropriated by the general assembly."

The giving of bonds for the erection, alteration or improvement of state institutions or buildings, is governed by section 2318 of the General Code, which provides as follows:

"On the day named in the notice, such officer, board or other authority shall open the proposals and award the contract to the lowest bidder. No proposals shall be considered unless accompanied by a bond of the bidder with sufficient sureties, conditioned that, if accepted, the bidder will enter into and faithfully perform a proper contract in accordance with the proposal, plans, specifications and descriptions which shall be made a part thereof. The contract shall not be binding on the state until submitted to the attorney general and he certifies thereon that he finds it to be in accordance with the provisions of this chapter."

The check for $5,000 accompanying bid "B" is duly certified and has a condition written on the back thereof and signed by the bidder, which is as follows:

"Payable to the order of the board of commissioners of the Lima state hospital in case I fail to enter into a contract for work bid on this 10th day of October, 1913, and to be returned to the undersigned upon execution of a bond in the sum of 50 per cent. of this bid.

"[Signed] F. R. Stone."

It is clear from a reading of section 2318, that it was the intention of the legislature to require a bidder on public work of this character, to furnish a bond with sufficient sureties, conditioned that if his bid is accepted, the bidder will enter into and faithfully perform the contract. Manifestly, the purpose of this requirement was to furnish a sufficient *guarantee* with the objects of the statute would be complied with. The certified check is another form of guarantee than that provided by the statute and the question is whether this is such a variance from the terms of the statute as would justify a rejection of the bid.

The general rule on this subject is stated in 36 Cyc. in a note at the bottom of page 875, as follows:

> "Purpose and sufficiency of the bond. It is sometimes provided that every bidder shall accompany his bid with a bond conditioned upon his undertaking and performing the contract if awarded to him. The object of this requirement is to secure good faith on the part of bidders, and the statutory provisions must be at least substantially complied with, but such compliance as will accomplish the object of the requirement is sufficient."

In the case of people ex rel., Lyon vs. McDonough et al., 173 N. Y. Rep., 181, the court held:

> "Where a statute or ordinance requires the performance by public officers of a certain specified act, or that it shall be performed in a certain specific manner, they must at least substantially comply with these requirements to render their acts valid. But such a statute or ordinance is not required to be literally performed in unessential particulars, where there has been a substantial compliance which answers the purpose or intent of the statutory requirements."

The certified check is in effect a cash bond and it seems to me that the state is as fully protected and the object of the statute as effectually secured thereby as though a bond were furnished in strict compliance with the statute. Furthermore, bid "B" is the lowest bid and as it is the policy of the statutes to award contracts to the lowest bidder, I am of the opinion that your board may, in its discretion, award the contract to the person who submitted said bid, and require him to give the proper bond for the faithful performance of the contract, as required by law.

The copy of advertisement, the bids and check enclosed in your letter, are herewith returned.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the Superintendent of Institution for Feeble Minded)

216.

HABEAS CORPUS—RELEASE OF GIRL IRREGULARLY COMMITTED TO STATE INSTITUTION FOR FEEBLE MINDED—KEEPING OF CHILD OVER AGE.

When compliance is not made with section 1903, of the General Code, providing that a probate judge shall state upon application for admission of a person into an institution for the feeble minded, whether or not such person has sufficient means, or relatives able to pay for his support, confinement in such institution by the probate court is illegal and habeas corpus proceedings are available when the parents of said child are willing to support and maintain it.

The statutes pertaining to this institution do not provide for release of inmates when they reach majority.

In accordance, therefore, with section 1894, General Code, specifying the object of the institution to be the training and educating of those received so as to render them fit to care for and support themselves, inmates may be retained beyond their majority, if such proceeding is necessary to obtain the object stated.

COLUMBUS, OHIO, April 23, 1913.

HON. E. J. EMERICK, *Superintendent Institution for Feeble Minded, Columbus, Ohio.*

DEAR SIR:—Your communication of recent date in which you enclose papers in the case of Edith Krangel, now confined in your institution. from Cuyahoga county, and requesting my opinion as to whether or not said girl was legally committed, was duly received.

In reply I desire to say that I have gone over the papers very carefully and find that they are not in conformity to law, and for that reason I am of the opinion that should habeas corpus proceedings be instituted by one of the parents of this girl that the court would hold in favor of said applicant.

Section 1903 of the General Code provides that:

> "In approving an application for the admission of a person to the institution, the probate judge shall state whether or not such person has an estate of sufficient value, or a parent or parents of sufficient financial ability to defray the expense, in whole or in part, of supporting such person in the institution, and if there be means of support in part only, the amount per month which the parent, or legal guardian, may be able to pay. The person who makes the application for such admission shall therein make statement, under oath, as to such means of support."

Section 1904 of the General Code provides that the trustees shall fix the amount, if any be paid, for such support according to the ability of his parents and the value of his estate.

Upon investigation I find that the orders on hearing, being signed by the deputy clerk of the probate judge, do not contain the fact that the parent or parents have or have not sufficient property to support in whole or in part said child, and in my opinion for that reason the question as to whether or not this child is legally committed is properly solved. For if the parent or parents of said child are willing to support and maintain it then in that event I think they would be entitled to the custody of said child, and particularly in view of the fact that the commitment papers do not contain all the matters of law required to be therein set forth under oath.

In the same letter you request my opinion upon the following matter:

"In case of a child under age committed to the institution whether you have the right to retain him after he becomes of age."

In reply to your second inquiry I desire to say that section 1901 of the General Code provides as follows:

"The trustees shall receive as inmates of the custodial department, *feeble minded children, residents of this state, under the age of fifteen years, who are incapable of receiving instruction* in the common schools of the state," etc.

Section 1894 of the General Code specifies the object of the institution to be:

"To train and educate those received, so as to render them more comfortable, happy and better fitted to care for and support themselves."

There is nowhere in the laws of this state any provision made for the discharge of any inmate of your institution committed under the provisions of section 1901 of the General Code above quoted; therefore in arriving at the proper legal conclusion *as to your right to retain any such inmate after he attains his majority,* we must look to the purpose and object of the state in fostering and maintaining said institution, and taking that as a basis of my conclusion, I am of the opinion that any inmate of your institution committed under the provisions of section 1901 of the General Code may be retained by you after attaining his majority if in the opinion of the board of administration and the superintendent the discharge of such inmate would be incompatible with his ability to care for and support himself.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

(To the State Sanatorium)

345.

NONE BUT CITIZENS OF OHIO MAY BE ADMITTED TO OHIO STATE SANATORIUM.

Under section 2065, General Code, none but citizens of this state of more than seven years of age are authorized to be admitted to the Ohio state sanatorium.

COLUMBUS, OHIO, June 13, 1913.

S. A. DOUGLAS, M. D., *Superintendent Ohio State Sanatorium, Mt. Vernon, Ohio.*

DEAR SIR:—In your letter of May 22, 1913, you say:

> "We have had some correspondence with the Pennsylvania society for the prevention of tuberculosis, regarding the admission of aliens to this institution, and they bring up a point which we have discussed pro and con without being able to satisfactorily answer. Therefore we refer the matter to you for ruling by which we may be governed."

You also enclose letter from the Pennsylvania society, which is as follows:

> "In your letter of April 29th, about the admission of aliens to the Ohio state sanatorium, you say that the law limits you to the acceptance of citizens of the state of more than seven years of age. The pamphlet containing the rules and information for patients says that the law requires that the patients be residents of Ohio. Does *resident* in this connection mean citizen?"

The law governing this state sanatorium is embraced in a short chapter of the General Code, being sections 2052 to 2072, inclusive.

There is absolutely no provision in the law for the admission to this institution of either *aliens or non-residents.*

It is true, that section 2054, General Code, says: "Such sanatorium shall be known and designated as the Ohio state sanatorium, for the treatment of persons residents of this state, * * * etc." But this is only description of the *title of the institution*; and when the law comes to define just what class of persons may be admitted, we must look to section 2065, General Code, which says: *"Any citizen of this state of more than seven years of age,* suffering from pulmonary tuberculosis in the incipient or early stage, as determined by the superintendent, may be admitted to the sanatorium." This is the only place in the law which *specifically* defines the qualification of those eligible to admission to this institution.

In my opinion, the words *resident* and *citizen,* as applied to persons admissible to this institution, should be construed intelligently together.

The century dictionary defines resident as follows:

> "Residing; having a seat of dwelling; *dwelling or having an abode for a continuance of time*; fixed; firm; one who or that which resides in a place permanently or for a considerable time."

The same author in defining residence says:

> "A dwelling, a habitation; the place where a man's habitation is fixed without any present intention of removing therefrom; domicile; an established abode, fixed for a considerable time."

The same author defines citizen, as follows:

> "A member of a state or nation; one bound to the state by reciprocal obligations of allegience on the one hand and protection on the other; *practically, as a general rule, citizenship in a state consists of citizenship of the United States, plus a domicile (that is, a fixed abode) in the state. The right to vote or hold office is not a test of citizenship, for minors and women are commonly citizens without these rights.*"

Therefore, in view of the above definitions, children, wives and permanent members of a family, are both residents and citizens of Ohio, if the head of the family is such. Guardians of minors, or other dependent persons, in this state, whose residence is fixed, and who are citizens, fix the residence and citizenship of their wards by permanency of abode.

Therefore, I conclude, that no aliens, or more temporary residents, are eligible to admission to this institution. This must be so in order to prevent an influx of foreigners or non-residents from crowding this institution to the exclusion of bona fide residents and citizens. Good judgment in testing the qualifications of applicants, under the foregoing rules, will work out a practical solution of the question. Each case should be carefully viewed from the standpoint of the law and the facts, thereby guaranteeing relief in proper cases, and exclusion in improper ones.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Sailors' and Soldiers' Home)

105.

CONTRACT—ORDER BY RETAIL COMPANY TO OHIO SAILORS' AND SOLDIERS' ORPHANS' HOME TO PAY VOUCHERS FOR COAL TO WHOLESALE COMPANY MAY BE REVOKED IN ABSENCE OF CONTRACTUAL RELATIONS.

The P. J. H. Company agreed to furnish coal to the Ohio Sailors' and Soldiers' Home and issued an order to the home requiring the latter to pay the C. G. B. Coal and Coke Company, from whom the first company received its coal, all vouchers due the first company, held: when the first company defaulted upon its contract and failed to send coal, and ordered the home to cease paying vouchers to the second company, the home should retain all funds due for coal received until it could be ascertained whether or not contractual relations prevented the order for payment of vouchers from being revoked.

COLUMBUS, OHIO, March 3, 1913.

HON. D. Q. MORROW, *President Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR:—In answer to your inquiry of February 16, 1913, in which you inquire:

"On the 17th day of August, 1912, the trustees of this institution entered into a contract with Paul J. Hawes & Company to furnish coal from September 1, 1912, to September 1, 1913, and said Paul J. Hawes & Company, to secure the performance of said contract, entered into a bond in the sum of $5,000 with the Southern Surety Company as surety.

"The coal to be furnished by said Paul J. Hawes & Company was obtained by them from The C. G. Blake Coal & Coke Company, and to protect the Blake Company, an order was given of which the following is a copy:

"XENIA, OHIO, September 27, 1912.

"MR. WILLIAM LUTZ, *Financial Officer, O. S. & S. O. Home, Xenia, Ohio.*

"DEAR SIR:—We hereby authorize you to send the coal vouchers to the C. G. Blake Coal & Coke Company, 114 First National Bank Building, Cincinnati, Ohio. PAUL J. HAWES COMPANY."

"We delivered the vouchers under this order to the C. G. Blake Coal & Coke Company from time to time, but previous to January 16, 1913, differences having arisen between the Paul J. Hawes & Company and The C. G. Blake Coal & Coke Company, on the said January 16, 1913, the said Paul J. Hawes & Company served upon us the following order:"

"XENIA, OHIO, January 16, 1913.

"MR. WILLIAM LUTZ, *Financial Officer, O. S. & S. O. Home, Xenia, Ohio.*

"DEAR SIR:—This will notify you that I hereby cancel order heretofore given you notifying you to pay moneys due the Paul J. Hawes Coal Company on a certain contract between yourselves and said Company, dated on or about the 1st day of September, 1912, to the C. G. Blake Company. All moneys now due and payable the Paul J. Hawes Company under said contract, or that may become due said company under said contract you are notified to pay to the Paul J. Hawes Company. Yours very truly,

PAUL J. HAWES COMPANY."

"Paul J. Hawes & Company, since the said 16th day of January, 1913, have defaulted in their contract with us and have failed to deliver us coal in pursuance of same, by reason of which, we have called upon their surety to make good their failure."

In the absence of information as to the character of the contract between the Paul J. Hawes Company and The C. G. Blake Coal & Coke Company, under which said coal was furnished, a positive answer may not be given, but construing the paper writing of September 27, 1912, as it reads and not as the result of an agreement between the two companies, I am of the opinion that it is revocable, and is revoked by the notice of January 16, 1913.

However, the Paul J. Hawes Company has defaulted, and you have called upon its surety to make good for which reason my advice to you is to decline to issue vouchers to either The C. G. Blake Coal & Coke Company or The Paul J. Hawes Company, upon the ground, as to the former that the direction to send vouchers had been revoked, and the latter for the reason it had defaulted and the balance was being held to apply on loss on account thereof.

If it should develop that under the contract of purchase of the coal the Hawes Company agreed to have vouchers issued to the Blake Company for coal delivered there would be no power of revocation on the part of the Hawes Company, but in that event I would still retain the balance due on the contract until fully assured as to who should have it.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

303.

ABSTRACT OF TITLE—PROPERTY SITUATED IN TOWNSHIP OF XENIA, OHIO.

COLUMBUS, OHIO, June 5, 1913.

HON. JOSEPH P. ELTON, *Superintendent Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR:—On June 4th you personally delivered to this office for examination and approval abstract of the title to and unexecuted deed from John Sullivan and wife to the state of Ohio for the following described real estate upon which the trustees of your institution have an option and which they desire to purchase:

"Situated in the county of Greene, township of Xenia and state of Ohio, being part of military survey No. 2242, bounded and described as follows:

"Beginning at a stone in the center of the New Burlington Pike, corner to Henry Sanborn, T. U. Nichols and the O. S. and S. O. home grounds; thence with the center of said pike and the line of said Sanborn, also T. B. James, north 12 degrees, 32″ east, 88.42 poles, to an iron stake in center of said pike in the line of said James, southwest corner to Hartley and Fulton Lake View Park addition; thence with the south line of said addition south 81 degrees, east 118 poles to a stone corner to said addition in the west line of the said home grounds; thence with the line of said grounds, south 12 degrees, 5″ west,

89.72 poles to a stone corner to said grounds; thence again with said grounds, north 80 degrees, 20′ west, 118.84 poles to the place of beginning, containing 65.83 acres of land, be the same more or less."

The certificate of the abstractor is incomplete in that it fails to set forth the existence or non-existence of pending suits or judgments in any of the courts of record in Greene county, Ohio, whether there are any unpaid taxes or assessments, mechanics' liens, executions foreign or domestic outstanding against said property, and should be amended in the foregoing respects.

The deed from John Sullivan and wife upon the execution and delivery thereof will, in my opinion, be sufficient to convey to the state of Ohio a good and marketable title in fee simple.

The abstract, deed and option are herewith enclosed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

318.

ABSTRACT OF TITLE—PROPERTY SITUATED IN XENIA, OHIO.

COLUMBUS, OHIO, June 11, 1913.

HON. JOSEPH P. ELTON, *Superintendent Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR:—You have re-submitted to me abstract of title to certain real estate which your institution is about to acquire. I have carefully examined the same and from such examination I find that the suggestions made in my opinion of June 6th have been fully carried out. The title therefore is approved and I advise that you accept the deed for said premises upon the payment of taxes and assessments now a lien thereon.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

(To the Perry's Victory Centennial)

57.

COUNTY CENTENNIAL—COUNTY COMMISSIONERS MAY APPROPRIATE $2,500.00 FOR CENTENNIAL CELEBRATION OF FOUNDING OF COUNTY ONLY.

The provisions of section 2927, General Code, enabling county commissioners to appropriate from the county funds any sum not to exceed $2,500.00 for defraying the expenses of a county centennial celebration, must be construed to mean only such centennial celebration, within the county, as is held in honor of the one hundredth anniversary of the formation of the county. To hold otherwise would enable the county commissioners, under the broad authorization of the statute, to hold celebrations as many times each year as they deem fit in honor of any event of importance affecting the county.

COLUMBUS, OHIO, December 31, 1912.

HON. WEBSTER P. HUNTINGTON, *Secretary General Perry's Victory Centennial, Federal Building, Cleveland, Ohio.*

DEAR SIR:—In your letter of September 25, 1912, you make the following request for my opinion:

> "The commissioners of the Perry's victory centennial and the county commissioners of Ottawa county are interested in the interpretation of the statute of 101 Ohio Laws, page 288, relative to centennial celebrations by counties in this state.
>
> "The question arises as to whether the county commissioners may appropriate, or the people of the county may vote, a sum of money in accordance with the statute, for the centennial observance of an event which occurred before the county was erected. * * *
>
> "In Ottawa county, the battle of Lake Erie was unquestionably the event which subsequently permitted the county to be organized as a part of the state of Ohio, and history records it as the most important event occurring within the county. The county commissioners are favorable to a celebration under the statute, and inquiry indicates that such celebration would receive very general, popular support. The commissioners, however, desire an opinion from you before proceeding in the matter, and have asked me to obtain it for them.
>
> "The form of the ballot prescribed by the statute indicates to those of us who have considered the subject that the celebration to be voted for or against is clearly a celebration of any one hundredth anniversary of special interest to the county, and we do not find anything to conflict with this view in the remainder of the statute. But, on the contrary, some very prudent persons might urge that the statute only contemplates a centennial celebration involving a period during all of which the county as now constituted was actually a county of this state."

The act to which you refer, found in Ohio 101 Ohio Laws, page 288, now appears as sections 2927, 2928 and 2929 of the General Code. These sections are as follows:

> "Section 2927. The county commissioners may appropriate from the county fund any sum not to exceed twenty-five hundred dollars towards defraying the expense of a county centennial celebration, but the appropriation

of any sum exceeding twenty-five hundred dollars and not to exceed fifteen thousand, five hundred dollars shall be upon the ratification thereof by a majority of votes cast at the November election. At such election the question of such ratification shall be submitted by the proper board or authority in the usual method or form of submitting questions for submission to the voters of a county. The ballot therefor shall contain the following:

For the county centennial celebration of_____Yes.

For the county centennial celebration of_____No.

"At such election, each township may select by ballot, in a separate box provided therefor, two managers, who shall be those receiving the largest number of votes therefor.

"Section 2928. The two persons so selected from each township shall constitute a board of centennial managers for such celebration. Such managers shall serve in all capacities connected with such board without compensation or salary. The money approriated by the county commissioners shall be paid only to the order of such board of centennial managers upon vouchers duly authenticated by the president and secretary or by the executive committee of such board and such vouchers shall show the date and purpose of such expenditure and the name of the person to whom payable.

"Section 2929. Any portion of such fund not appropriated and used for the purpose of such celebration shall remain in and belong to the county fund and shall not be expended otherwise than moneys in such fund."

This act is a splendid example of the loose legislation which nearly always results in a necessary appeal to the courts to have determined what the legislature meant by the act. The only language used to specify the purpose for which a large amount of public money may be spent is, "a county centennial celebration."

A "centennial" as defined in the century dictionary, is:

"The commemoration or celebration of an event which occurred a hundred years before; as, the *centennial* of American independence."

Now what is meant by a "county" centennial celebration? Does it mean the celebration of the one hundredth anniversary of the formation of the county; or the one hundredth anniversary of some event that occurred within the boundaries of the county; or does it mean the celebration, by the county, of the one hundredth anniversary of any great event, whether occurring within the boundaries of the county or not?

Unless the meaning is held to be the celebration of the formation of thecounty, then there is nothing to limit the purpose for which expenditure can be made except that it must be a centennial celebration, and it could be a celebration of any event which occurred within or without the boundaries of the county. Until the legislature specifies just what is meant by the language used, as the act involves the possible expenditure of a large amount of money by every county in the state (for there is no county but that has in its history some event the centennial of which is worthy of celebration, especially if the cost of the celebration is to be paid out of the public treasury) I am constrained to give this act a strict, instead of a liberal, construction, and to hold that the centennial celebration contemplated by this act is the one hundredth anniversary of the formation of the county, and no other event would come under its terms. I am more strongly persuaded in this view for the reason that if the other construction should be adopted, and it should be held that the act applied to the centennial celebration of an event other than the formation of the county, then it would be possible for any county in this state to spend fifteen thousand, five hundred dollars annually in centennial celebrations, or rather, there would be no limit at all, and cel-

ebrations could be held and fifteen thousand, five hundred dollars could be expended just so often as ratification of the action of the commissioners was made; and a celebration could be held and the sum of twenty-five hundred dollars expended just so often as the commissioners were willing and there was sufficient money in the county fund. A construction of the act that would make this condition possible, it seems to me, would be most vicious. The construction I have given limits the expenditure to once in each one hundred years, and to my mind, in most of the counties of the state, is sufficient.

I do not wish to be understood as in any way depreciating the celebration by Ottawa county of the centenary of the battle of Lake Erie. That is unquestionably an event of which all Americans are proud, and which not only Ottawa county, but the people of the whole state and nation should celebrate. If the act related to this event alone, nothing could be said against it, and I wish it were possible, because I think it so eminently fitting that this event should be celebrated by Ottawa county, I could hold otherwise, but for the reason pointed out I feel that the construction I have placed upon the act is the only one possible.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

374.

PRIZE FIGHTING FORBIDDEN IN OHIO—DUTY OF SHERIFF TO PREVENT PRIZE FIGHT.

The matter of prize fighting as well as sparring exhibitions is completely covered by the sections of the general Code. Sparring matches, either with or without gloves cannot be held without the consent of the sheriff of the county in which the exhibition is to be held, nor in a municipality without the consent of the mayor.

Prize fighting has been held to be a nuisance and a perpetual injunction will be granted against persons proposing to engage in prize fighting.

In consideration of the solemnity connected with the celebration of Perry's Victory Centennial, a prize fight would be a public nuisance, and it is the duty of the sheriff of Ottawa county and the village authorities of Put-In-Bay to co-operate to see that the proposed fight does not take place.

COLUMBUS, OHIO, June 30, 1913.

HON. WEBSTER P. HUNTINGTON, *Secretary General, Perry's Victory Centennial, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 24, 1913, which is as follows:

> "I enclose a newspaper clipping of this date indicating an intention on the part of certain persons to hold a prize fight or sparring exhibition at Put-in-Bay Island on the 4th of July. For some time we have understood that events of this character had been scheduled by private individuals at the Island during the entire summer, and we are apprehensive not only as to the character of the events but as to their effect upon the public mind in connection with the Perry's victory centennial. In particular we regret to see the national holiday employed as an occasion for an exhibition of this nature at Put-in-Bay, not only on general principles, but because on that day the corner stone of the Perry memorial will be laid with solemn Masonic rites, and there will be religious and patriotic exercises in connection therewith.

"We are aware that our authority on Put-in-Bay Island is limited to the memorial reservation of fourteen acres, and are in doubt as to how to proceed in order to extend it so as to prevent abuses elsewhere. As the legal adviser of the Perry's victory centennial commission of Ohio, we respectfully invite your attention to the subject and request your co-operation in suppressing the prize fight evil in case it should threaten to manifest itself at Put-in-Bay during the centennial period."

The following sections of the General Code of Ohio completely cover the matter of prize fighting, as well as the subterfuge frequently resorted to and commonly called "sparring exhibitions."

"Section 12800. Whoever engages as principal in a prize fight shall be imprisoned in the penitentiary not less than one year nor more than ten years."

"Section 12801. Whoever aids, assists or attends a prize fight as backer, trainer, second, umpire, assistant or reporter, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than three months.

"Section 12802. Whoever agrees to fight and willfully fights or boxes at fisticuffs or engages in a public sparring or boxing exhibition without gloves or with gloves, or aids, assists or attends such boxing exhibition or glove fight, or being an owner or lessee of grounds, or a lot, building, hall or structure, permits it to be used for such exhibition purpose, shall be fined not more than two hundred and fifty dollars or imprisoned not more than three months, or both."

"Section 12803. The next preceding section shall not apply to a public gymnasium or athletic club, or any of the exercises therein, if written permission for the specific purpose has been obtained from the sheriff of the county, or, if the exercises or exhibition are within the limits of a municipal corporation, from the mayor of such corporation."

It will be noted from section 12803 that sparring or boxing exhibitions, with or without gloves, cannot be held without the written permission obtained from the sheriff of the county, or if the exercises or exhibition are within the limits of a municipal corporation, from the mayor of such corporation.

The sections above quoted are specific and have been upheld by our courts; and the supreme court has declared that the purpose of these statutes is to suppress all prize fighting. Not only do the above quoted sections make prize fighting a crime and provide for its punishment, but the following sections provide an effectual method for preventing contemplated prize fights:

"Section 13474. When a sheriff, constable, marshal or other police officer has reason to believe that a person in his jurisdiction is about to engage as principal or second in a premediated fight or contention, commonly called a prize-fight, or is in training or preparation to engage as principal therein, he shall forthwith arrest such person and take him before a judge of the court of common pleas, justice of the peace, mayor or police judge and give notice to the prosecuting attorney, who shall forthwith attend before such officer, and upon proper affidavit filed, prosecute the complaint.

"Section 13475. Such officer, as provided in the next preceding section, shall hear the witnesses on oath, and if he finds the complaint true, order the accused to enter into a recognizance, with sufficient sureties, in a sum not less than five hundred dollars nor more than ten thousand dollars, that he will not

engage in such a fight or contention within one year thereafter in this state or elsewhere. In default of such recognizance, the officer shall commit the accused to jail there to remain until the order is complied with."

"Section 13476. After the expiration of one month of confinement, if the accused is unable to give the recognizance named in the next preceding section, a judge of the court of common pleas or probate judge may discharge him upon his own recognizance in a like amount and with like conditions, upon proof of his own affidavit and other evidence, that he will never engage in such a fight or contention.

"Section 13477. When a sheriff has reason to believe that a fight or contention, as is described in section 13474, is about to take place in his county, he shall forthwith summon sufficient citizens of the county, suppress such fight or contention and arrest all persons found thereat violating the law and take them before a judge of the court of common pleas or a magistrate, to be dealt with as provided by law."

Under the last four quoted sections it is made the duty of the sheriff, constable, marshal or other police officer who has reason to believe that a prize fight is to be held within his jurisdiction to arrest the principals; and it is also made the duty of the sheriff, when he has reason to believe that a prize fight is about to take place in his county to summon sufficient citizens of the county to suppress such fight and arrest all persons found thereat.

Under the sections above quoted it seems to me there should be no difficulty if the matter is called to the attention of the sheriff and prosecuting attorney of Ottawa county to prevent all attempts at prize fighting, and I feel quite sure that the officials of Put-in-Bay would co-operate with the county officials should it be attempted to hold a prize fight within that village.

The courts have also held that a prize fight is a public nuisance and that a perpetual injunction will be granted against the persons proposing the same upon the petition of the state on the relation of the attorney general. See the case of State of Ohio ex rel. Attorney General vs. Hobart, et al., 8 Nisi Prius, 246.

In this case an injunction was issued by the court against a so-called athletic club of Cincinnati from holding a prize fight, under the guise of a "boxing contest" between the "heavy weight champion of the world" and an aspirant for that coveted honor. The court granted the injunction on the ground that the so-called "boxing exhibition" would be a public nuisance. The governor of the state of Ohio at that time, Hon. George K. Nash, intimated in no uncertain terms, prior to the granting of the injunction, that if the attempt was made to give said prize fight he would suppress the same with the state militia if necessary.

It seems to me that in view of the solemnity connected with the celebration on Put-in-Bay Island on July 4th, a prize fight would undoubtedly be a public nuisance. I suggest, therefore, that you immediately call this matter to the attention of the prosecuting attorney and the sheriff of Ottawa county and also the village authorities of Put-in-Bay, and if they will co-operate with you a prize fight on the island is an impossibility for the necessary laws are now in the Code to prevent the same and all that is needed is courageous officials to enforce them. If, however, on account of some unforeseen contingency, the local officials are not in a situation to act, then an injunction can be sought against the persons proposing to carry on this affair, and if necessary an appeal can be made to the governor.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(To the Judicial Officials)

(To the Probate Judge)

62.

PROBATE JUDGE—ANNUAL AND OFFICIAL YEAR ARE IDENTICAL—ENTITLED TO FULL SALARY FOR TIME SERVED.

Inasmuch as section 1580, General Code, provides that a probate judge shall hold office for a term of four years, commencing on the 9th day of February, and section 2989, General Code, provides that the judge shall receive an annual salary, in accordance with section 2996, General Code, the official and calendar year of such judge's term is identical and he will receive full salary for the full time served.

COLUMBUS, OHIO, January 16, 1913.

HON. DUDLEY E. THORNTON, *Probate Judge, Marysville, Ohio.*

DEAR SIR:—I am in receipt of your letter post-marked January 15, 1913, wherein you state as follows:

> "I see the sheriffs were not allowed pay for the six days they held into January. Now what is your holding on the probate judges. Will they get pay for the eight days they hold in February?"

Section 1580, General Code, provides the term of the probate judge and reads as follows:

> "Quadrennially, one probate judge shall be elected in each county, who shall hold his office for a term of four years, commencing on the ninth day of February next following his election."

Section 2989, General Code, reads as follows:

> "Each county officer herein named shall receive out of the general county fund the annual salary hereinafter provided, payable monthly upon warrant of the county auditor."

Section 2992, General Code, provides for the annual salary that is to be received by each probate judge, which salary is determined by the population of the county as shown by the last federal census last preceding his election.

Section 2996, General Code, provides as follows:

> "Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

Under the provisions of section 1580, General Code, above quoted, it is to be seen that the term of the probate judge is for four years, commencing on the 9th day of February next following his election. In other words, his *official* year and the calendar year are identical, and under the provisions of section 2989, General Code, the salary set out in section 2992, General Code, is an *annual* salary payable monthly upon war-

rant of the county auditor, and section 2996, General Code, provides that the annual salary so received shall be in lieu of all fees, costs, etc., and provides further that the annual salary shall not exceed six thousand dollars.

It is my opinion that the probate judge is entitled to the salary not to exceed six thousand dollars, as is set forth in section 2992, General Code, which under section 2989, General Code, is to be considered an annual salary. Since in the case of the probate judge the calendar year and the official year are of the same duration a probate judge is entitled to receive the full annual salary under section 2992, General Code, as restricted by section 2996, General Code, for each and every year that he served and no more.

I am enclosing copy of an opinion rendered by the Hon. E. C. Turner, prosecuting attorney of Franklin county, to the Hon. F. M. Sayre, county auditor, under date of December 26, 1912, and approved and thereby made the official opinion of this department by the attorney general January 2, 1913.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

180.

PROBATE COURT—CORRECTNESS OF ENTRY PROVIDING FOR REDUCTION OF FEES WHEN EARNINGS EXCEED 10% OF REQUIRED SALARIES—FEES FOR MARRIAGE LICENSE AND RECORDING CERTIFICATE—FEE FOR RECORDING AND INDEXING CERTIFICATES OF A BAN MARRIAGE AND FOR MINISTER'S LICENSE.

Under section 1603-1, General Code, when an aggregate amount of fees and allowances collected by the probate judge in any year exceeds by more than 10% the amount necessary to pay the salaries in the offices, a proportionate reduction may be made in the fees and allowances charged for services in said court. This section authorizes the same proportionate reduction for services comprised within the terms of section 1603, General Code, which provides that the probate judge shall be allowed for other services not enumerated in the preceding sections, the same fees as clerks of common pleas courts are allowed for similar services.

Since section 1601, General Code, providing $1.00 as a fee for a marriage license, was enacted subsequent to section 11192, providing seventy-five cents as such a fee, the later statute should be permitted to control. Since the statutes relating to the probate court do not fix a specified fee for the filing, recording and indexing of a certificate of marriage solemnized upon publication of bans, the probate judge should be allowed fees for such services under section 1603, General Code, providing for the same fees as are allowed the clerks of courts of common pleas for similar services.

Under sections 2900 and 2901, General Code, therefor, a probate judge may charge five cents for filing a certificate of such marriage; ten cents per hundred words, or fraction thereof, for recording the same, and five cents for indexing. For issuing a license to a minister for solemnizing marriages, the same arguments apply, and the probate judge shall be allowed the sum fixed by section 2901, General Code, to a clerk of court of common pleas for issuing a license, to wit: fifty cents.

COLUMBUS, OHIO, December 28, 1912.

HON. WILLIAM B. LUEDERS, *Probate Judge, Cincinnati, Ohio.*

DEAR SIR:—Your favor of December 19, 1912, is received in which you state as follows:

"*First.* Enclosed herein please find copy of entry I propose entering on the journal of the Hamilton county probate court, in pursuance to authority given under section 1603-1, General Code.

"The figures given in the entry are approximate; the exact figures will be put in the entry at the close of the calendar year's business, December 31, 1912.

"Sections 1601-1602-1603 fix the fees to be charged and collected. The above section 1603-1 referred to, permits a reduction if the aggregate amount exceeds by more than ten per cent. the amount necessary to pay salaries.

"Query. Does copy of entry herein enclosed fully and specifically cover the entire matter?

"*Second.* Section 1601 of the General Code, on page 594, Page and Adams Annotated General Code, eight lines from the bottom of the page, fixes the fee to be charged for marriage licenses at one dollar, section 11192, fixes the fee for granting marriage license and recording certificate at the sum of seventy-five cents.

"Query. Which statute shall I follow, the one fixing the fee at one dollar or the one fixing the fee at seventy-five cents?

"*Third.* When I became probate judge in 1909, I found that the customary charges for recording certificate of ban marriages was twenty-five cents, which custom I have followed up to the present day. Recently I carefully searched the statutes to find authority for such charge, but I fail to find any statute giving me authority to make any charge for recording and indexing certificates of a ban marriage? While the statute does not fix a charge for this work, I believe this office should be paid something for this work, to wit; the recording and indexing of the same.

"Query. Under the circumstances would you advise a continuance of the charge of twenty-five cents for recording and indexing, or should the same be done without charge?

"*Fourth.* Another custom in vogue in this office for many years last past, I am informed, and continued by me, is the charge of seventy-five cents for a minister's license, authorizing him to solemnize marriages under section 11183 of the General Code. In this case also I fail to find any authority for the charge. In this case as in the matter of the ban marriage we record the license number and index the same and do work for which the county should be paid.

"Query. Under the circumstances should I continue the charge of seventy-five cents as heretofore, or should no charge be made for this work."

The prosecuting attorney of Hamilton county also joins with you in the request for an opinion upon the foregoing.

The entry which you submit is as follows:

"Whereas, sections 1601-1602-1603, General Code of Ohio, provide, enumerate, fix and specify the various fees and allowances to be charged and collected by the probate judge, and

"Whereas, section 1603-1, provides as follows:

"When the aggregate amount of fees and allowances collected by the probate judge in any calendar year, exceeds by more than ten per centum the amount necessary to pay salaries of said probate judge, deputies, assistants, clerks, bookkeepers and other employes of his office, including court constables, for the same calendar year, such probate judge, may by an order entered on his journal, provide for a reduction or discount of all the fees and allowances required to be charged and collected by him for the use of the county, by fixing a stated percentage of discount which shall be applied to

all the earnings of said office, for the whole of the ensuing year and shall constitute the legal fees of said office for said year; provided, that such order shall in no wise be allowed to affect the aggregate amount of fees and allowances of said office, as the same may be used as a basis of arriving at a limitation on clerk hire of said office, as the same is required to be fixed by county commissioners, under section 2980 of the General Code.

"Whereas, the aggregate amount of fees and allowances collected by the probate judge of this, Hamilton county, Ohio, in the calendar year 1912, the same being from January 1st to December 31st, thereof, exceeds by more than ten per centum the amount necessary to pay salaries of said probate, judge, deputies, assistants, clerks, bookkeepers and other employes of this, the probate court of Hamilton county, Ohio, including court constables for the calender year, 1912, as shown by the following figures, to wit:

"Aggregate amount of fees and allowances collected during calendar year, 1912, January 1st to December 31st, thereof, $47,500.00.

"Aggregate amount necessary to pay the salaries of the probate judge, deputies, assistants, clerks, bookkeepers and other employes of said office, including court constables, for the same calendar year, 1912, from January 1st to December 31st, thereof, the sum of $33,270.00.

"Leaving a balance of $14,230.00 in the county treasury and which said balance for said calendar year of 1912 exceeds by more than ten per centum, to wit, the sum of $10,903.00, the amount necessary to pay the salaries aforesaid, and

"Whereas, under these financial conditions, the probate judge may by an order entered on his journal, provide for a reduction or discount of all fees and allowances required to be charged and collected by him for the use of the county, by fixing a stated percentage of discount, which shall be applied to all earnings of said office for the whole of the ensuing year, to wit; the year 1913, and shall constitute the legal fees of said office for said year, 1913.

"Therefore, upon due consideration by the court, it is decreed and adjudged, pursuant to said section 1603-1 of the General Code, that all fees and allowances to be charged and collected by the probate judge *under sections 1601-1602-1603* be reduced twenty per cent., beginning on January 1, 1913, continuing during said calendar year, 1913, to December 31st, thereof.

"It is further ordered that said twenty per cent. reduction when applied to all fees to be charged under section 1601-1602 and 1603 of the General Code, the fees shall be as follows:

"For appointment of administrator, executor, guardian for minor, except guardian ad litem, assignee or trustee, four dollars and forty cents; for copy of will for executor or administrator with the will annexed, per one hundred words, eight cents; for appointment of guardian of drunkard, idiot, imbecile or lunatic, six dollars and forty cents; for injunction proceedings, two dollars; for inventory when there is no appraisement, one dollar and twenty cents; for inventory with appraisement, three dollars and twenty cents; for public sale bill, two dollars; for petition to sell personal property at private sale, and sale bill, two dollars and forty cents; for petition for sale of real estate, nine dollars and sixty cents; for each account, three dollars and sixty cents; for account of final distribution, one dollar and sixty cents; for statement in lieu of final account, one dollar and sixty cents; for petition for removal of administrator, executor, guardian, assignee or trustee, four dollars; for application for administrator, or executor for allowance of claim, two dollars; probating will, four dollars; for election of widow, or widower, one dollar and sixty cents; and for appointment of commissioner to take election, one dollar and sixty cents additional; for deposit of will, eighty cents; for marriage license, eighty

cents; for execution, forty cents; for petition for adoption of child, two dollars and eighty cents; for petition to change name, two dollars and forty cents; petition to lease and improve real estate, application and settlement of claim by wrongful death, application and order to complete contract, application to lease for oil, gas, clay or mineral, application to invest in productive real estate, application to borrow money and mortgage real estate, each four dollars; for application and order to loan unclaimed money, one dollar and sixty cents; for application of new or additional bond, eighty cents; for application and order for release of any surety or reduction of bond, one dollar and sixty cents; for application and order to record receipts, one dollar and sixty cents; for application, order and report of distribution of assets in kind, one dollar and sixty cents; for application for record of foreign will one dollar and twenty cents; for application to compound, sell or dispose of desperate claims, and report thereon, two dollars; for appointment of commissioners to take depositions of witnesses to wills or election of widow, one dollar and twenty cents; for recording physicians certificates, forty cents; for hearing in ditch cases, four dollars per day; for record in excess of fifteen hundred words, in the following matters at the rate of eight cents per hundred words; inventory, sale bill, account, will and petition to sell real estate or personal property; when a contest of appointment is instituted or exceptions filed in any of the proceedings named in this section, for additional services made necessary thereby, the same fees as are provided for the clerk of court of common pleas for like services, with a twenty per cent. discount.

"Provided, however, that in estates, the assets of which do not exceed two hundred dollars in value, the total fees of the probate judge chargeable against such estate shall not exceed eight dollars.

"Section 1602. The fees enumerated in this section shall be paid to the probate judge out of the county treasury upon the warrant of the county auditor, which shall issue upon the certificate of the probate judge and shall be in full for all services rendered in the respective proceedings; for each inquest of lunacy when the person is committed to a state hospital or to relatives, six dollars and forty cents; when the person is discharged, four dollars; for the return of an insane person, to a state hospital or removal therefrom, eighty cents; for each inquest of epilepsy, when a person is committed, six dollars and forty cents; when application is not granted, four dollars; for return of an epileptic insane person to a state hospital or removal therefrom, eighty cents; for proceedings for committing a person to the institution for feeble minded, six dollars and forty cents; for proceedings for sending or committing a person to the state school for the deaf or blind, four dollars; for proceedings against a juvenile disorderly person, under the provision of section 7774, when commitment is made, four dollars; when child is discharged or judgment suspended, two dollars and forty cents; for holding an examining court under section 13531, when defendant is held to be insane or idiotic, six dollars and forty cents for proceedings on habeas corpus when a person is confined under color of proceedings in a criminal case and is discharged, four dollars; when acting as a judge of the juvenile court, for each case filed against a delinquent, dependent or neglected child, two dollars; for proceedings to take child from parent or other person, having control thereof, two dollars; for appointment of examiners of the county treasury, two dollars and forty cents; for appointment of each county school examiner, one dollar and sixty cents; for appointment of each member of board of county visitors, eighty cents; for appointment of each blind relief commissioner, one dollar and sixty cents for the report of judicial statistics to the secretary of state the same fees as are allowed to the clerk of courts, with twenty per cent. reduction. Upon the

certificate of the probate judge and the warrant of the county auditor the probate judge shall receive from the county treasury to be credited to his fee fund his legal fees for services in criminal cases wherein the state fails to convict or the defendant proves insolvent, but not more than three hundred dollars shall be allowed for services rendered in any one year of his term.

"Section 1603. For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services (with a twenty per cent. reduction).

"Provided, that such order shall in no wise be held to affect the aggregate amount of fees and allowances of said office as the same may be used as a basis of arriving at a limitation of clerk hire of said office as the same is required to be fixed by county commissioners under section 2980 of the General Code."

The foregoing entry is prepared by authority of section 1603-1, General Code, which provides:

"When the aggregate amount of fees and allowances collected by the probate judge in any calendar year exceeds by more than ten per centum the amount necessary to pay the salaries of said probate judge, deputies, assistants, clerks, bookkeepers and other employes of his office, including court constables, for the same calendar year, such probate judge may, by an order entered on his journal, provide for a reduction or discount of all the fees and allowances required to be charged and collected by him for the use of the county by fixing a stated percentage of discount which shall be applied to all the earnings of said office for the whole of the ensuing year and shall constitute the legal fees of said office for said year. Provided that such order shall in no wise be held to affect the aggregate amount of fees and allowances of said office as the same may be used as a basis of arriving at a limitation on clerk hire of said office as the same is required to be fixed by county commissioners under section 2980 of the General Code."

In your county the fees collected by the probate court exceed by more than ten per centum the amount necessary to pay the salaries of the probate judge and of all the deputies, clerks and other employes therein; and therefore, the probate judge is authorized to make a reduction in all of said fees and allowances to be collected by him.

The entry submitted follows the words of the statutes and enumerates the fees as they will be when reduced.

Section 1601, General Code, provides:

"The fees enumerated in this section shall be charged and collected by the probate judge and shall be in full for all services rendered in the respective proceedings: For appointment of administrator, executor, guardian for minor, except guardian ad litem, assignee or trustee, five dollars and fifty cents; for copy of will for executor or administrator with the will annexed, per hundred words. ten cents; for appointment of guardian of drunkard, idiot, imbecile or lunatic, eight dollars; for injunction proceedings, two dollars and fifty cents; for inventory when there is no appraisement, one dollar and fifty cents; for inventory with appraisement, four dollars; for public sale bill, two dollars and fifty cents; for petition to sell personal property at private sale, and sale bill, three dollars; for petition for sale of real estate, twelve dollars; for each account, four dollars and fifty cents; for account of final distribution, two dol-

lars; for statement in lieu of final account, two dollars; for petition for removal of administrator, executor, guardian, assignee or trustee, five dollars; for application for administrator or executor for allowance of claim, two dollars and fifty cents; probating will, five dollars; for election of widow, or widower, two dollars; and for appointment of commissioner to take election, two dollars additional; for deposit of will, one dollar; for marriage license, one dollar; for execution, fifty cents; for petition for adoption of child, three dollars and fifty cents; for petition to change name, three dollars; petition to lease and improve real estate, application and settlement of claim by wrongful death, application and order to complete contract, application and order to complete contract, application to lease for oil, gas, clay or mineral, application to invest in productive real estate, application to borrow money and mortgage real estate, each five dollars; for application and order to loan unclaimed money, two dollars; for application of new or additional bond, one dollar; for application and order for release of any surety or reduction of bond, two dollars; for application and order to record receipts, two dollars, for application, order and report of distribution of assets in kind, two dollars; for application for record of foreign will, one dollar and fifty cents; for application to compound, sell or dispose of desperate claims and report thereon, two dollars and fifty cents; for appointment of commissioners to take deposition of witnesses to wills or election of widow, one dollar and fifty cents; for recording physician certificates, fifty cents; for hearing in ditch cases, five dollars per day; for record in excess of fifteen hundred words in the following matters at the rate of ten cents per hundred words: inventory, sale bill, account, will and petition to sell real or personal property; when a contest of appointment is instituted or exceptions filed in any of the proceedings named in this section, for additional services made necessary thereby, the same fees as are provided for the clerk of the court of common pleas for like services."

Section 1602, General Code, provides:

"The fees enumerated in this section shall be paid to the probate judge out of the county treasury upon the warrant of the county auditor, which shall issue upon the certificate of the probate judge and shall be in full for all services rendered in the respective proceedings: for each inquest of lunacy when the person is committed to a state hospital or to relatives, eight dollars; when the person is discharged, five dollars; for the return of an insane person to a state hospital or removal therefrom, one dollar; for each inquest of epilepsy, when a person is committed, eight dollars; when application is not granted, five dollars; for return of an epileptic insane person to a state hospital or removal therefrom, one dollar; for proceedings for committing a person to the institution for feeble-minded, eight dollars; for proceedings for sending or committing a person to the state school for the deaf or blind, five dollars; for proceedings against a juvenile disorderly person under the provision of section 7774, when commitment is made, five dollars; when child is discharged or judgment suspended, three dollars; for holding an examining court under section 13531, when defendant is held to be insane or idiotic, eight dollars; for proceedings on habeas corpus when a person is confined under color of proceedings in a criminal case and is discharged, five dollars; when acting as a judge of the juvenile court, for each case filed against a delinquent, dependent or neglected child, two dollars and fifty cents; for proceedings to take child from parent or other person, having control thereof, two dollars and fifty cents; for appointment of examiners of the county treasury, three dollars; for appointment of each county school examiner, two dollars; for appointment of each

member of the board of county visitors, one dollar; for appointment of each blind relief commissioner, two dollars; for the report of judicial statistics to the secretary of state the same fees as are allowed to the clerk of courts. Upon the certificate of the probate judge and the warrant of the county auditor the probate judge shall receive from the county treasury to be credited to his fee fund his legal fees for services in criminal cases wherein the state fails to convict or the defendant proves insolvent, but not more than three hundred dollars shall be allowed for services rendered in any one year of his term."

Section 1603, General Code, provides:

"For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

The fees set forth in the entry have been compared with those set forth in the above sections and it is found that the proper reductions have been made as to such fees.

The entry as submitted did not provide for a reduction in the fees which are authorized to be charged by virtue of section 1603 of the General Code. Whether or not there should be a reduction in these fees, as in the others, is the question, as I understood, which you propounded to me verbally. After most careful consideration of all the provisions herein, of concern, this department is of opinion that the reduction provided for in section 1603-1 relates as well to section 1603 as to sections 1601 and 1602. I have, therefore, added to the entry, after the word "services," in the paragraph noted, "section 1603," the words "with a reduction of twenty per cent." With the change suggested and entered the entry is approved by this department.

Your second inquiry applies to the fee to be charged for issuing a marriage license.

Section 1601, General Code, supra, provides the fee for a marriage license in these words:

"for marriage license, one dollar;"

This section was amended in 102 O. L. 277. This amendment made a complete change in the method of charging fees in the probate court.

Section 11192, General Code, provides:

"The judge shall be entitled to receive as his fee for administering the oath and granting a license, with the seal affixed thereto, recording the certificate of marriage, and filing the necessary papers, the sum of seventy-five cents."

This section has not been amended since first inserted in the General Code.

In section 1601, General Code, as carried into the General Code, as adopted in 1910, it was provided:

"Administering an oath when necessary, and issuing a marriage license and filing and recording the certificate of marriage, seventy-five cents;"

When section 1601, General Code, was amended, it is evident that the provisions of section 11192, General Code, were overlooked.

The fee fixed in section 1601, General Code, as amended in 102 Ohio Laws, 277, is the later enactment and must govern.

The probate judge, therefore, is authorized to charge one dollar for issuing and recording a marriage license.

Your third inquiry is in reference to the fee to be charged for filing and recording a certificate of marriage when the marriage is solemized after publication of bans in a congregation.

Section 11186, General Code, provides:

"Previous to persons being joined in marriage, notice thereof shall be published in the presence of the congregation on two different days of public worship; the first publication to be at least ten days before such marriage, within the county where the female resides; or, a license must be obtained for that purpose from the probate judge in the county where such female resides."

Section 11195, General Code, provides:

"A certificate of every marriage solemnized, whether authorized by publication of bans in the congregation, or by license issued by the probate judge, shall forthwith be transmitted to the probate judge in the county where the marriage license was issued, or of the congregation wherein such bans were published is situated, or where the marriage was celebrated. All such certificates of marriage filed with the probate judge, shall be consecutively numbered and be recorded in the order in which they are received."

The probate judge is required to file such certificates and to record the same. Section 1585, General Code, provides:

"All pleadings, accounts, vouchers and other papers in each estate, trust, assignment, guardianship, or other proceeding, ex-parte or adversary, which are filed in the probate court shall be kept together, and upon the final termination or settlement of such case, cause or proceeding shall be preserved for future reference and examination. Such papers shall be properly jacketed, and otherwise tied, fastened or held together numbered, lettered or otherwise marked in such manner that they may be readily found by reference to proper memoranda upon the docket, record or index entries thereof, which memoranda shall be made or caused to be made by the probate judge. Certificates of marriage, reports of births and deaths and similar papers not part of a case or proceeding, shall be arranged and preserved separately in the order of their dates or in which they were filed. The words "case or cause" herein used shall include all proceedings in the settlement of any estate, guardianship or assignment."

Section 1594, General Code, reads in part:

"The following books shall be kept by the probate court:

"*10.* A marriage record, in which shall be entered licenses, and the names of the parties to whom issued, the name of the person or persons applying therefor, with a brief statement of the facts sworn to by such person, and the returns of the person solemnizing the marriage."

Section 1595, General Code, provides:

"To each record required by the preceding section, an index shall be attached securely bound in the volume. Each index shall be kept up with the entries therein and refer to such entries alphabetically by the names of the parties or persons in which originally entered, indexing the page of the book

where the entry is made. On the order of the probate judge, blank books for such records and indexes shall be furnished by the county commissioners at the expense of the county."

By virtue of these sections the marriage certificate must be filed, recorded and indexed.

Sections 1601 and 1602, General Code, do not fix the fee to be charged for the filing, recording and indexing of a certificate of marriage solemnized upon publication of bans. The fee, if any can be charged, must be governed by section 1603, General Code, supra, which authorizes the probate judge to charge the same fees, for other services, as are allowed the clerk of the court of common pleas for similar services.

The fees to be charged by the clerk of courts are fixed by sections 2900 and 2901, General Code.

Section 2900, General Code, provides:

"For the services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more: For docketing each cause in appearance docket, ten cents; for docketing each execution in execution docket, ten cents; for docketing each transcript of judgment in execution docket, ten cents; for indexing each cause in the execution or appearance docket each plaintiff and each defendant, five cents; for filing each praecipe, pleading, subpoena, cost bill *and other necessary document, five cents*; for noting the filing of same, except subpoena and praecipe therefor, on the appearance docket, each, five cents; for taking each affidavit including certificate and seal, twenty-five cents; for issuing each writ, order or notice, except subpoena, thirty cents; for noting the issue of same on appearance docket, each, five cents; for recording return of same on appearance docket, each, ten cents; for issuing subpoena, each name, five cents; for taking undertaking, bond or recognizance, twenty-five cents; for impaneling and swearing jury, each cause, fifty cents; for swearing each witness, five cents; for entering attendance of each witness, ten cents; for certifying fees of each witness, five cents; for entering each cause on the trial or motion docket and indexing same, each term, ten cents; *for each entry on journal per one hundred words or fraction thereof, ten cents; for indexing same, five cents;* for posting same on appearance docket, ten cents; for entering on the indictment any plea, ten cents; for poling a jury, twenty-five cents."

Section 2901, General Code, reads in part:

"For making cost bill to be taxed but once, forty cents; for making complete record in each cause, ten cents per hundred words; for indexing same, each cause, ten cents; * * * *for issuing any license, fifty cents;* for issuing certificates to receiver or order of reference with oath, seventy cents; for certificates of fact under seal of the court, to be paid by the party demanding same, thirty-five cents; for certificate of deposit on foreign writ, certificate of opening deposition, certificate for attorney's fee, certificate for stenographer's fee, each ten cents."

Section 2900, General Code, supra, contains these provisions:

"for filing each praecipe, pleading, subpoena, cost bill and other necessary document, five cents; * * * for each entry on journal per one hundred words or fraction thereof, ten cents; for indexing same, five cents."

I am of the opinion that the above provisions read in connection with section 1603, General Code, will authorize the probate judge to charge five cents for filing the certificate of a ban marriage; ten cents per hundred words or fraction thereof for recording the same and five cents for indexing. As these certificates are usually less than one hundred words the total charge to be made would be twenty cents.

You further inquire as to the fee to be charged for issuing a minister's license to solemnize marriages.

Section 11183, General Code, provides:

> "A minister of the gospel, upon producing to the probate judge of any county within this state in which he officiates, credentials of his being a regularly ordained or licensed minister of any religious society or congregation, shall be entitled to receive from the court a license, authorizing him to solemnize marriages within this state so long as he continues a regular minister in such society or congregation."

Section 11184, General Code, provides:

> "Each minister, who is licensed to solemnize marriages, must produce to the judge of the probate court in each county, in which he solemnizes a marriage, his license so obtained. The judge thereupon shall enter the name of such minister upon record as a minister of the gospel duly authorized to solemnize marriages within this state, and note the county from which such license issued; for which service no charge shall be made by the judge."

Section 11184, General Code, prevents the probate judge from charging a fee for noting the certificate of a minister from another county, but this exemption from charge does not apply to the issuance of a license as provided in section 11183, General Code. Sections 1601 and 1602, General Code, supra, do not provide for the fee to be charged for issuing such license. It also is governed by section 1603, General Code.

In section 2901, General Code, providing for the fees of the clerk of the court of common pleas is found the following:

> "for issuing any license, fifty cents;"

This provision, read in connection with the provisions of section 1603, General Code, will authorize the probate judge to charge fifty cents for issuing a license to a minister, authorizing such minister to solemnize marriages.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

298.

STATE HOSPITAL FOR INSANE AND EPILEPTICS—POWER OF PROBATE COURT TO COMMIT AND DUTY OF HOSPITAL OFFICIALS TO RECEIVE.

Under sections 1947 to 1983, General Code, providing for state hospital for the insane, and under sections 2035 to 2051, General Code, with reference to the Ohio hospital for epileptics, an insane person who is not an epileptic, should, on being found insane, by the probate court, be committed to the hospital for the insane; and an insane person who is also an epileptic, and also epileptic persons, should when so adjudged by the probate court, be committed to the Gallipolis hospital for epileptics.

No one affected with a contagious or infectious disease or vermin can be admitted to either institution.

The only limitations upon the power of the probate court to commit are the statutory provisions providing for review on error and the restriction as to the full quota allowed to be received from each district. Municipal authorities have no discretion to refuse admission upon commitment by the probate court upon any other grounds.

COLUMBUS, OHIO, May 20, 1913.

HON. SAMUEL L. BLACK, *Probate Judge, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 12, 1913, before me, in which you state that you have a man in the county jail adjudged to be insane, who is also an epileptic and has suicidal intentions; and that the state hospital refuses to accept him because he is an epileptic. You cite another case of a woman remaining in jail thirty days who was insane, epileptic, and had homicidal and suicidal tendencies; and the state hospital refused to accept her beacuse she was an *epileptic*, and the epileptic hospital refused because she was *insane*. Further on in your letter, you speak of a young colored girl, adjudged an epileptic in January last, who is now in the county infirmary, afflicted with a venereal disease, who was refused admission to the epileptic hospital, for the assigned reason of the superintendent, that the hospital was too crowded.

You then ask:

> "whether or not the superintendent of the different institutions occupy the position of a court of review over the probate court, in lunacy and epilepsy cases, and who is to be the judge of what patients will be received into the institutions owned by the state of Ohio?"

The solution of the questions submitted, involves a construction of the various statutes applicable to these state hospitals, and those prescribing the mode of commitment thereto, by the probate court.

The statutes are not as broad and complete as they should be on these matters; and the result is, there is some apparent conflict and doubt existing in their practical application and enforcement.

HOSPITALS FOR THE INSANE.

Section 1948, General Code, gives the board of state charities authority to divide the state into districts for hospitals for the insane, fix the quota of each county on the census basis. The same section authorizes said board to change the boundaries of the districts from time to time as may be necessary. Section 1949, General Code, provides that these regulations as to districts shall not be effective until approved by

the governor. After such approval, said board must notify the various probate judges of any changes in districts or quota.

Section 1951, General Code, requires the medical superintendent of each state hospital to inform the probate judge, monthly, of the quota of patients to which each county is entitled, and the number in the hospital therefrom. This section further provides:

> "The probate judge, at any time, may forward an *acute case* if the quota is not full, and the papers and clothing are in compliance with law."

Section 1952, General Code, says:

> "If at any time any such hospital cannot accommodate the patients of the district to which it is attached, or if the best interests of a patient make his transfer advisable, with the consent and written approval of the superintendent interested, the board of state charities may order the transfer of such patients to the hospital of either of the other districts, which at that time has room for such patients."

By section 1956, General Code, the probate judge, if he is satisfied that the person charged is insane, shall cause a certificate to that effect to be made by two medical witnesses. The next section says that all such medical certificates shall be void in ten days, unless the person named therein is admitted to a state hospital within that time. This requires promptness in committing patients to the various institutions.

Section 1958, General Code, then provides that when the probate judge receives the medical certificate above referred to, he shall *forthwith* apply to the superintendent of the hospital in the resident district of the patient, and transmit, under official seal, copies of the medical certificates and his findings in the case. This section then concludes with the following language:

> "Upon receiving the application and certificate, the superintendent shall *immediately* advise the probate judge whether the patient can be received, and, if so, at what time."

Section 1959, General Code, provides:

> "When advised that the patient will be received, the probate judge shall *forthwith* issue his warrant to the sheriff, commanding him *forthwith* to take charge of and convey such insane person to the hospital."

In section 1961, General Code, there is a provision as follows:

> "Until a certificate is furnished by a medical witness that the patient is *free from all infectious diseases and from vermin*, the probate judge shall refuse to make such application to the superintendent."

The law relative to hospitals for the insane is found in sections 1947 to 1983, General Code, inclusive.

There are seven state hospitals for the insane, enumerated in section 1947, General Code, and they are designated therein as

> "The institutions for the care and treatment of the insane in this state."

Section 1983, supra, in defining terms, says:

"The terms 'insane' and 'lunatic' as used in this chapter, include every species of insanity or mental derangement, etc."

OHIO HOSPITAL FOR EPILEPTICS.

The mode of admission to the above institution, and matters pertaining to that class of the wards of the state, are provided for in sections 2035 to 2051, General Code, inclusive. The only institution in Ohio of this class is designated in General Code, 2035, as follows:

"*The asylum for epileptics and epileptic insane* at Gallipolis, shall be known as the Ohio hospital for epileptics."

The class of patients eligible to this institution is fixed in General Code, 2037, as follows:

"*Insane persons who are also epileptic,* and whose disease has developed during their residence in this state, and *epileptics* who have been residents of the state for one year next preceding application for admission, shall be admissible as inmates of this institution. The number of inmates shall be apportioned among the counties of the state according to population."

By section 2041, General Code, the manager of this institution is required to inform the probate judge of each county, on the 15th day of each month, of the quota of patients to which it is entitled, and the number then in the hospital therefrom.

This chapter provides that the application for admission to said hospital shall be made to the probate judge upon blanks furnished said court by the proper officers of said institution; and the proceedings thereon are the same as in the commitment and care of the insane. A physician's certificate is required that the patient *is admissible under the requirements of said institution and is free from infectious or contagious disease and vermin.*

If the judge is satisfied that the patient is an epileptic, and a suitable person for treatment at the hospital, he shall transmit the application and other papers in the case to the manager of the hospital, who shall advise him whether the patient can be received, and at what time.

If advised that the patient may be received, the judge shall take the same steps for his transmission as are had in the conveyance of patients to the other state hospitals, except if the patient can travel alone, he may issue the warrant of committal to the patient himself.

I have gone extensively into these statutes, in order to compare and construe them with reference to your inquiries.

From the statutes I conclude that *an insane person, who is not an epileptic,* should, on being found insane by the probate court, be committed to a hospital for the insane. *An insane person who is also an epileptic,* and *all epileptic persons,* should, when so adjudged, be committed to the Gallipolis hospital for epileptics.

No one not free from contagious and infectious disease or vermin, can be admitted to either institution.

The man and woman mentioned in your letter should each have been accepted at the Gallipolis institution; and the superintendent had no right to reject her because she was insane, if at the same time she was an epileptic. The unfortunate colored girl, afflicted as she is with a loathsome disease, could not be admitted at all, in any state institution until cured.

The questions

"Whether or not the superintendents of the different institutions occupy the

position of a court of review over the probate court, in lunacy or epilepsy cases,

and

"Who is to be the judge of what patients will be received into the institutions owned by the state of Ohio,"

as propounded by you, raise an interesting proposition for discussion.

There is no authority in these superintendents to review the findings of the probate court in such cases. The probate court is a court of record, and its findings and judgments impart absolute varity. The only means of a *review* is on error, or appeal, to a higher court.

After a full hearing is had, and all statutory steps are followed, in lunacy and epileptic cases by the probate judge, he is the judge of what patients are to be received into these state institutions; and his judgment as to whether said patients are lunatics, epileptics, or both, is final and binding, subject only to review by a higher court, or a release on habeas corpus as provided in section 1976, General Code. In my opinion, when the medical superintendent receives the application from the probate judges, accompanied by the certified copies of medical certificates, and the findings of the court, and the patient is provided with clothing as provided by statute, he shall admit the patient on the warrant of the court, unless such patient has an infectious or contagious disease, or vermin, or the quota for that county is filled, at that particular asylum.

The last part of section 1958 requires the medical superintendent to *immediately* advise the probate judge "whether the patient can be received, and if so, at what time."

The expression quoted above, does not mean that the superintendent can review the case and reject the patient on his own opinions of the matter; but it has reference to the quota allotted to that county, and whether there are accommodations for such patient, and whether he is free from disease and vermin. All other questions of eligibility for admission, are concluded by the judgment of the probate court. That the probate judge is clothed with power in these matters, is shown by section 1958, which provides that an *acute patient* may be forwarded *at any time* by said judge "if the quota is not full and the papers and clothing are in compliance with law."

These great institutions are created and maintained by the state for the reception, care and maintenance of those citizens, from whom the light of reason has fled, and who are helpless and afflicted, by epilepsy, or the mental and physical destroying agencies, which call for restraint and protection. The state is taxed, and carefully gives support to all our unfortunates who are helpless, or dangerous, by reason of mental and physical defects which come to them voluntarily or involuntarily. The protection of society demands their segregation and separation from the public in general, and the highest and best service is required on account of both the applicant and the community.

This being so, there ought to be exercised by the authorities controlling these institutions, the *highest diligence and care*, that no one upon whom the hand of mental or physical affliction falls, shall suffer for lack of a place in these institutions, where he can be cared for comfortably and efficiently. Epileptics and insane can no longer be admitted to infirmaries or other county institutions, where their presence would be detrimental and degenerating to the other inmates; neither should they, except in temporary emergencies, be incarcerated in local jails, where thay may be compelled to await the red tape and the doubt and uncertainties of the law, as to where they shall be taken for care and comfort. Promptness and certainty in rendering relief to our unfortunate wards should obtain; and there should be no arguments or disagree-

ments between the authorities in these cases, which can only prove detrimental to those who most need the protecting power of the state. If an institution is crowded, or the quota of a county therein is full, the state board of charities, and officers of the institutions, should take measures for the transfer of patients to such institutions as *can take care of them.* Furthermore, great care should be taken that too many "pay" patients, or non-residents, or voluntary patients, are not admitted, to the prejudice and exclusion of those who are admitted by the police court, thereby relieving the quota of each county.

With these suggestions and opinion as to the powers of the probate court and duties of the asylum authorities, I believe the problems submitted by you can be solved, and all can work together in harmony and effectively care for the class of patients described by you.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

448.

UNDER THE PROVISIONS OF SECTION 1902, GENERAL CODE, THE SAME PROCEDURE THAT FORMERLY APPLIED TO THE ADMISSION OF ADULTS TO INSTITUTIONS FOR FEEBLE MINDED, NOW APPLIES TO ALL PERSONS.

Feeble minded persons other than adults may be admitted to institutions for feeble minded by pursuing the same course of legal commitment as governs admissions to the state hospital for the insane.

COLUMBUS, OHIO, August 14, 1913.

HON. CHARLES E. CAPPLE, *Probate Judge, Chillicothe, Ohio.*

DEAR SIR:—In your letter of June 7, 1913, you ask my opinion concerning the commitment of persons other than adults to the institution for feeble minded; also as to the fees in such cases, the number of physicians and their fees.

Under the old laws relating to this institution (sections 1891 to 1904, General Code), the matters inquired of by you were extremely indefinite, except as to adults. But the last legislature, in 103 O. L., page 245, amended section 1902, General Code, so as to read as follows:

> "Feeble minded persons of such inoffensive habits as to make them proper subjects for classification and discipline in the institution, may be admitted, on pursuing the same course of legal commitment as governs admission to the state hospital for the insane."

This law became effective August 2, 1913.

This statute, as you will note, is not confined in its provisions to *adults alone,* but uses the word "persons," which is broad enough to include both adults and minors. This amendment was made to solve the difficulties and doubts suggested by you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

494.

PROBATE JUDGE SHALL BE ALLOWED FEES SPECIFIED IN SECTION 2901, FOR RECEIVING ON DEPOSIT THE AMOUNT OF A VERDICT IN APPROPRIATION PROCEEDINGS.

The probate judge, under authority of section 1603, General Code, shall be allowed the fees specified in section 2901, General Code, for receiving on deposit the amount of a verdict in appropriation proceedings, under authority of section 11059, General Code.

COLUMBUS, OHIO, August 8, 1913.

HON. H. C. WILCOX, *Probate Judge, Elyria, Ohio.*

DEAR SIR:—Under favor of July 3, 1913, you inquire as follows:

> "Whether under section 2901, of the General Code, a commission of one per centum upon the first one thousand dollars and one-fourth per centum upon the cases of one thousand dollars, should be taxed as costs in cases where deposit is made with the probate judge of the amount of verdict in appropriation cases as provided in section 11059?"

Sections 2901, 11059 and 1603, of the General Code, are as follows:

> "Section 2901. * * * for receiving and disbursing money other than costs and fees paid to such clerks in pursuance of an order of court or on judgments, and which has not been collected by the sheriff or other proper officer or order of execution to be taxed against the party charged with the payment of such money, a commission of one per centum on the first one thousand dollars and one-fourth of one per centum on all exceeding one thousand dollars; * * *."
>
> "Section 11059. Upon the payment of the party entitled thereto, or deposit with the probate judge of the amount of the verdict, and such costs as lawfully accrued in the case up to the time against the corporation, it will be entitled to take possession of and hold the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition. The judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof.
>
> "Section 1603. For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

Under section 1603, General Code, the probate judge is allowed the same fees as are allowed the clerk of the court of common pleas for services similar to those performed by the probate judge for all work for which a specific fee is not otherwise provided in the statutes. I nowhere find any provision for payment of a fee to a probate judge expressly for receiving and disbursing moneys paid to the court in pursuance of an order of court or on a judgment.

Section 11059 provides the fee which the clerk of the court of common pleas is entitled to receive for receiving such money.

Under authority of section 1603, General Code, therefore, I conclude that the probate judge shall be allowed the fees specified in section 2901 for receiving on deposit the amount of a verdict in appropriation proceedings under authority of section 11059.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

496.

PROBATION OFFICERS MAY CARRY CONCEALED WEAPONS AFTER THEY FILE THE PROPER BOND REQUIRED BY LAW.

Under the provisions of section 12819, General Code, probation officers are specially appointed officers of the juvenile court and when they give the bond required by law, they may carry concealed weapons in the discharge of their duties.

COLUMBUS, OHIO, September 12, 1913.

HON. JOHN W. DAVIS, *Probate Judge, Youngstown, Ohio.*

DEAR SIR:—In your letter of August 27, 1913, you say:

> "As judge of the juvenile court of Mahoning county, I hereby request of you, at your earliest convenience, a construction of section 12819 of the General Code of Ohio, as amended in 103 Ohio Laws at page 553, as to whether or not taking this section of the Code in connection with section 1663, or *any other section covering police duties*, as to whether or not it will be necessary for my chief probation officer or any of his assistants to give bond to entitle him or them to carry concealed weapons, or is he or they exempt from being required to give bond."

Section 12819, General Code (103 O. L., 555), provides that sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided in sections 2833, 4373, 10070, 10108 and 12857 of the General Code, may go armed when on duty. Your probation officers do not fall within any of the above sections, provisions or enumerations; *and cannot carry concealed weapons thereunder.* This section 12819, however, further provides that deputy sheriffs **and *specially appointed police officers*** (except those appointed or called into service under the five sections above quoted), may go armed, if they first give bond of $1,000.00 to the state, approved by the clerk of the court of common pleas, conditioned according to law.

If your probation officers can carry concealed weapons at all, the authority so to do must be found in the above provision. Probation officers are special officers of the juvenile court, under section 1662, General Code. That they possess the powers of sheriffs and police officers in serving processes and making arrests, and calling other officers to aid them, is manifest from the last part of section 1663, General Code, which reads as follows:

> "* * * He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs. He may make arrests without warrant upon reasonable information or upon view of the violation of any of the provisions of this chapter, detain the person so arrested pending the issuance of a warrant, and perform such other duties, incident to their offices, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals and police officers shall render assistance to probation officers in the performance of their duties, when requested so to do."

This clearly constitutes probation officers, specially appointed officers of the juvenile court, and when they give the bond required by law, they can carry concealed weapons while in the discharge of their duties. Very truly yours,

TIMOTHY S. HOGAN,
Attorney General.

588.

WHERE PROCEEDINGS IN THE SALE OF REAL ESTATE ARE STARTED AND NOT FINISHED, THE FEES FOR SUCH WORK SHOULD BE CHARGED AS IN MISCELLANEOUS CASES.

Where proceedings for the sale of real estate are instituted and were dismissed before the sales were completed the flat rate of twelve dollars should not be charged, but the charge should be made as a miscellaneous case.

COLUMBUS, OHIO, October 8, 1913.

HON. HOMER O. DORSEY, *Probate Judge, Findlay, Ohio.*

DEAR SIR:—I have your letter of September 11, 1913, in which you inquire:

> "Please inform us how to charge in cases where the proceeding is started but not finished; for instance, we now have a couple of sales of real estate that were dismissed before they were completed. Shall we charge the flat rate of $12.00, even though no record is made, or figure the costs just the same as any other miscellaneous case?"

Section 1601, General Code, in so far as applicable to your question reads: "For petition for sale of real estate twelve dollars," and your inquiry goes to the question whether once a petition is filed you should charge the twelve dollars in every case, or when a petition is filed and for some reason the cause is dismissed or discontinued, you should only tax and collect the fees chargeable for the work done.

Inasmuch as different cases furnish very different amounts of labor for a probate judge, I take it that the legislature attempted to fix a flat rate of twelve dollars, as being enough in excess of the fees in one and below another to make a fair average compensation in all. However, that does not satisfy me that it was intended that the legislature intended a flat charge of twelve dollars in each case where a petition was filed, and I am of opinion that when a petition to sell real estate is filed and disposed of prior to making an order of sale, and selling, that fees should be charged as in miscellaneous cases.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

649.

IT IS PURELY DISCRETIONARY ON THE PART OF THE JUVENILE COURT AS TO WHETHER THEY SHALL GIVE NOTICE TO THE BOARD OF COUNTY VISITORS OF THE HOLDING OF COURT—COUNTY VISITORS ARE NOT REQUIRED TO ATTEND THIS COURT UNLESS THEY RECEIVE NOTICE TO DO SO.

The matter of giving notice to the board of county visitors is purely discretionary on the part of the juvenile court. The said board of county visitors has no statutory authority to recommend to the juvenile court what its action should be in any case. The board is not required to attend juvenile court unless the said court sees fit to notify them. Any attendance of such board without notice from the court is purely discretionary on the part of the individual members thereof.

COLUMBUS, OHIO, November 19, 1913.

HON. C. E. CAPPLE, *Probate Judge, Chillicothe, Ohio.*

DEAR SIR:—In your letter of October 4, 1913, you say:

> "I should be much pleased to have an opinion from your office as to whether or not Senate Bill No. 18 as shown on pages 864, etc., of volume 103 of Laws of Ohio, repeals and does away with sections 2975 and 7782 of the General Code of Ohio, requiring notice to the board of county visitors of proceedings in actions to commit to boys' and girls' homes, etc.
>
> "Also, if there is any law at all at the present time that gives boards of county visitors any authority at all in the way of recommending to the juvenile court as to what its action should be in any case, and any law at all requiring that said board or its members should have any notice as to any proceedings in juvenile court, or in any way be recognized by said court in juvenile matters."

Former section 2975, General Code, provided that in proceedings to commit a child under sixteen years to the boys' industrial school, or girls' industrial home, notice *shall* be given to the board of county visitors of such proceedings; and that it should be the duty of such board to attend as a body, or committee, and protect the interests of such child.

Former section 7782, General Code, provided that in every case of complaint against a child involving commitment to a children's home or a juvenile reformatory, the board of county visitors *shall* be notified and *must* attend; and the record was required to show such notice and attendance.

On April 28, 1913, section 2975, General Code, was amended, so as to read that notice *may* be given of such proceedings to the board of county visitors. (103 O. L., p. 888.)

On the same date, section 7782, General Code, was amended so as to read that the board of county visitors *may* be notified; and if so notified, said board *shall* attend. The order of commitment *may* show such notice and attendance. (103 O. L., p. 905.)

The present statutes on the subject, leave the matter of *notice* to the board of county visitors purely *discretionary* on the part of the juvenile court. The said board of county visitors has no statutory authority to recommend to the juvenile court what its action should be in any case.

If the juvenile court sees fit not to notify the said board of visitors, they are not required to attend. The board is not, as a matter of law, entitled to any notice from the said court of its proceedings in such cases.

Any attendance of such board, without notice from the said court, would be purely voluntary on the part of the individual members thereof; and they would have no more rights than any other citizens who might volunteer their presence or advice.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Common Pleas Judge)

655.

A COMMON PLEAS JUDGE HAS AUTHORITY TO MAKE ALLOWANCE OF FEES TO COMMITTEE APPOINTED TO INVESTIGATE CHARGES FILED AGAINST A MEMBER OF THE BAR—SUCH EXPENSES MAY BE PAID FROM COUNTY TREASURY WITHOUT FIRST BEING PRESENTED TO THE COUNTY COMMISSIONERS.

The judge of the common pleas court has a right under section 1710, General Code, to make an allowance of fees to members of a committee appointed by the court to investigate certain charges filed against a member of the bar within his jurisdiction, and to make an order for reimbursement of their expenses incurred under such appointment, and the bill may be paid from the county treasury without first being presented to the county commissioners.

COLUMBUS, OHIO, November 18, 1913.

HON. JOHN M. BRODERICK, *Judge, Court of Common Pleas, Marysville, Ohio.*

DEAR SIR:—I have your inquiry of November 14, 1913, in regard to allowance of a fee to members of a committee, by you appointed, to investigate certain charges filed against a member of the bar within your jurisdiction, and to make an order for reimbursement to them of their expenses incurred under your appointment.

Section 1710, General Code, reads:

> "The court in which such charges or written motion is filed, shall allow to the person or persons appointed to file and prosecute the charges, or to resist the modification of any decrees for their services in either case, such sum as by the court may be deemed reasonable, not exceeding one hundred dollars to each person, together with the costs and expenses incurred by them in such proceedings. The amounts so allowed shall be paid from the county treasury of the county wherein such proceedings are had, upon the warrant of the county auditor. If such charges or motion are filed in the supreme court, such allowances shall be paid from the state treasury."

To my mind the appointment to investigate and report to the court comes within the scope of "person or persons appointed to file and prosecute the charges;" that you have full power under this section to make allowances, and that they may be paid from the county treasury without being first presented to the commissioners.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

(To the Prosecuting Attorneys)

3.

PROSECUTING ATTORNEY—ANNUAL SALARY PAYABLE ACCORDING TO OFFICIAL, NOT CALENDAR YEAR—NOT ENTITLED TO EXCESS COMPENSATION FOR PERIOD OF SERVICE EXTENDING BEYOND CALENDAR YEAR.

Section 3002, General Code, providing for the annual salary of the prosecuting attorney, contemplates such payment for the official and not for the calendar year. The prosecuting attorney, therefore, is not entitled to compensation in excess of the annual salary provided for, for services intervening the end of the calendar year and the first Monday in January when he forsakes office.

COLUMBUS, OHIO, January 2, 1913.

HON. JAMES W. GALBRAITH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Under date of December 31, 1912, you advise me that you entered upon your second term as prosecuting attorney on January 2, 1911, and that your successor takes office January 6, 1913. You desire my opinion as to whether you would be legally entitled to a portion of the monthly salary for January, 1913, i. e., from the 1st to 5th, inclusive.

Section 2909, General Code, provides:

> "There shall be elected biennially, in each county, a prosecuting attorney, who shall hold his office for two years, beginning on the first Monday of January after his election."

Section 3003, General Code, provides:

> "Each prosecuting attorney shall receive an annual salary, not to exceed sixty dollars for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election; fifty dollars for each full one thousand of the second fifteen thousand of such population of the county; sixty dollars for each full one thousand of the third fifteen thousand of such population of the county; forty dollars per thousand for each full thousand of the fourth fifteen thousand of such population of the county; thirty dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county; ten dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county; ten dollars per thousand for each full one thousand of such population of the county in excess of ninety thousand.
>
> "No prosecuting attorney shall receive a salary in excess of five thousand five hundred dollars. Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

On a consideration of section 2909, General Code, *supra*, it will be seen that the prosecuting attorney is to hold his office for *two years*, beginning on the first Monday of January next after his election. As I view the wording of this section the year referred to therein is what might be considered as the *official* year of the prosecuting attorney;

that is to say, the year running from the first Monday of January of one year to the first Monday of January of the next succeeding year and does not refer at all to the calendar year.

This same construction is to be given to section 3003, General Code, *supra*, which fixes the salary of the prosecuting attorney, and provides that he shall receive "an annual salary," and that "such salary shall be paid in equal monthly installments." In other words, as I interpret the statutes, they mean that the salary of the prosecuting attorney, as fixed under section 3003, is to be paid for each full *offiical year* whether the same contain more or less days than the calendar year. In the instance cited by you your official year began on January 2, 1911, to wit: the first Monday of January of that year, and continued until January 1, 1912, and your second *official year* in this term began on January 1, 1912, and continues until January 6, 1913. For each of the two official years so set forth you are entitled to the amount of compensation due you on an annual basis as fixed in section 3003, General Code, and no more.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

5.

INFIRMARY SUPERINTENDENT—COUNTY COMMISSIONERS—POWERS AND DUTIES OF, AS TO INVESTIGATION OF SUBJECTS FOR RELIEF—INITIAL INVESTIGATION MADE BY OFFICERS OF TOWNSHIP AND MUNICIPALITY—POWERS OF COUNTY COMMISSIONERS TO EMPLOY HELP FOR INVESTIGATION—TRAVELING EXPENSES OF COUNTY COMMISSIONERS AND HELP.

Under sections 3481, 3482, 3484, General Code, all initial investigations of cases entitled to relief in the county infirmary, whether found within or outside of the county, must be made by the township trustees or by the proper officers of the municipality, enumerated in section 3481, General Code, residing within the township in which the subject for relief is found.

Under section 2544, General Code, providing that the superintendent of the infirmary shall be satisfied that the subject for relief, found within the county and certified to him by the officers enumerated in section 3481, General Code, is entitled to be received within the infirmary and under section 2526, General Code, providing that such superintendent shall have full authority to discharge inmates from the infirmary, the superintendent of the infirmary is impliedly given power to make such investigation as may be reasonably necessary to satisfy his judgment as to the validity of receiving the subject into the infirmary.

The county commissioners themselves are given no duties with reference to investigations of any character.

Under section 2522, General Code, providing that the county commissioners shall make all contracts necessary for the county infirmary and prescribe rules and regulations for its good government, the commissioners may employ help to assist the superintendent in making necessary investigations, or under section 2533, they may order the superintendent himself to make the same. Under the same statutes they may provide for the payment of traveling expenses incurred by such help or by the superintendent in making such investigation.

Inasmuch as section 3002, General Code, providing for compensation of the county commissioners, formerly provided for the allowance of traveling expenses and for their certification and approval by the prosecuting attorney and the probate judge, and as such provisions have been done away with, the legislative intent is apparent that the county commissioners can in no event be allowed for traveling expenses in the performance of any duties incumbent upon them.

COLUMBUS, OHIO, January 7, 1913.

HON. RALPH A. BEARD, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Under date of December 4th, you submit for my opinion thereon, the following questions:

> "*First*: Under the law abolishing the office of infirmary directors and providing for the commissioners taking over their duties, are the county commissioners allowed expenses for investigating cases of *outside relief* or for going into another county or state to investigate applicants for relief who properly belong in this county?
>
> "*Second*: Are the county commissioners allowed to hire whatever help is necessary for the investigation of such cases where complaint is made or are they supposed under the law to investigate them themselves?
>
> "*Third*: Are the county commissioners allowed their expenses when

traveling throughout their county or adjoining counties when in the performance of their ordinary duties and in the joint county ditch cases?

"*Fourth*: Whose duty under the law is it to investigate the different complaints of the poor and needy *of the county* under the above law, the superintendent of the infirmary, the township trustees, or the county commissioners; if the county commissioners what remuneration or expense if any, are they allowed for investigating the different complaints throughout the county?

"*Fifth*: Can the county commissioners employ an additional clerk to investigate reported cases of applicants for relief under the infirmary law, and can his expense be allowed for investigating said cases?

"*Sixth*: Are the county commissioners allowed expenses when five counties are jointly building a tuberculosis hospital, in traveling back and forth in the different counties to the necessary meetings?

"These questions have arisen under the new law taking over the duties of the infirmary directors by the commissioners and the forming of a tuberculosis hospital by five adjoining counties."

For convenience, your questions may be resolved into the following:

First: What are the powers and duties of the county commissioners and others under the new law with reference to the investigation of the complaints of the poor and needy within the county, both as to cases of outside relief and as to cases to be cared for within the infirmary?

Second: What are the powers and duties of the county commissioners with reference to the investigation of cases of persons who are found outside of the county, but entitled to relief therein?

Third: What are the powers of the commissioners as regards the hiring of help necessary for the investigation of cases within the county?

Fourth: What are their powers as regards the employment of help in the investigation of cases outside of this county?

Fifth: What powers have they to allow expenses for such help incurred in such investigations?

Sixth: Are county commissioners allowed expenses when engaged in the investigation necessary within the range of their duties pertaining to the county infirmary?

Seventh: What expenses may the county commissioners be allowed in the performance of their general duties, in joint county ditch cases and when attending meetings in various counties, made necessary by the work of jointly building a tuberculosis hospital?

Answering the first of these questions, sections 3481, 2544 and 2526, provide as follows:

"Section 3481. When complaint is made *to the township trustees or the proper officers of a municipal corporation that a person therein* requires public relief or support, *one or more of such officers, or some other duly authorized person,* shall visit the person needing relief, forthwith, to ascertain his name, age, sex, color, nativity, length of residence in the county, previous habits and present condition, and in what township and county in this state he is legally settled. The information so ascertained shall be transmitted to the township clerk, or proper officer of the municipal corporation, and recorded on the proper records. *No relief or support shall be given to a person without such visitation and investigation, except that in cities, where there is maintained a public charity, organization, or other benevolent association,* which investigates and keeps a record of the facts relating to persons who receive or apply

for relief, the infirmary *directors, trustees, or officers of such city shall accept such investigation and information and may grant relief* upon the approval and recommendation of such organization.

"Section 2544. In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, *they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, (they) shall forthwith receive and provide for him in such institution,* or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees.

"Section 2526. The superintendent of the infirmary shall receive therein any person who *produces to him an order or voucher required by law,* and shall require all persons therein to perform such reasonable and moderate labor as is suited to their age and bodily strength. The superintendent shall sell all products of the infirmary farm not necessary for its use, and pay all moneys arising therefrom into the county treasury to the credit of the poor fund, to be paid out by the board of county commissioners as exigency requires. The superintendent of the infirmary shall have full *authority to discharge inmates* from the infirmary."

Section 3481, General Code, provides that when complaint is made to the township trustees or to the proper officers of a municipal corporation, one or more of such officers or some duly authorized person shall make investigation; and further provides *that no relief or support shall be given without such visitation and investigation,* except that the cities where is maintained a public charity, organization or benevolent association, which investigates and keeps a record of the facts relating to persons who receive or apply for relief, the infirmary directors shall accept *such investigation and information* and grant relief upon the approval and recommendation of such organization.

In section 2544, General Code, the word "they" enclosed in parenthesis, as set out, has no antecedent other than the term superintendent of the infirmary. This word "they" should therefore read "he," and it undoubtedly appears as it does, as a result of a neglect to properly conform this pronoun to the change made in the statute. This section provides that when the trustees of a township, after making due inquiry, have transmitted a statement of the facts to the superintendent of the infirmary, the subject of the complaint shall be received into the infirmary or provided for otherwise by the superintendent, *if it appears that he is a proper subject for the jurisdiction of the county;* and if, furthermore, the superintendent of the infirmary is *satisfied that he shall become a county charge.*

Section 2526, General Code, provides that the superintendent shall receive any person *who produces to him on order or voucher required by law;* and further provides that the superintendent shall have full authority to discharge inmates from the infirmary.

It is clear that under section 3481, General Code, the duties of investigation in the first instance, rest entirely upon the officers enumerated in that section, to wit: township trustees, the proper officers of a municipal corporation, some other duly authorized person, or the proper officers of a benevolent charity association in a city. Neither the county commissioners nor the superintendent of the infirmary have any duties or any express powers as regards *initial* investigations.

It is furthermore clear that under section 2544, General Code, the discretion of admitting persons certified by the officers enumerated in section 3481, General Code, into the county infirmary, is vested, not in the county commissioners, but in the su-

perintendent of the infirmary, to whom it must appear, under section 2544, that the person seeking relief is properly under the jurisdiction of the county and who must be satisfied that such person should become a county charge.

These statutes, insofar as duties of investigation are concerned, apply equally to cases of relief cared for outside the infirmary, as to cases cared for within the infirmary. They are the only authorities which I am able to find with reference to the investigation of cases calling for relief within the county, and I am, therefore, of the opinion that the county commissioners have no duties of themselves to make any investigations, but that under section 2544, the superintendent of the infirmary is impliedly given power to make such investigation as is necessary to satisfy himself as to the legal settlement and the general condition of the party seeking relief, after investigation and certification by the officers enumerated in section 3481, General Code.

Section 2526, provides that the superintendent of the infirmary shall receive therein any person who *produces to him* an order or voucher required by law, and I am of the opinion that this statute, which is carried into the present law from the old law, which provided that none should be received into the infirmary except upon the order or warrant of the trustees of the proper township, does not deprive the infirmary superintendent of the discretion which is clearly vested in him by section 2544, as to the receiving of inmates, inasmuch as the same statute confers upon the infirmary superintendent full authority to discharge inmates from the infirmary.

The first stipulation, that he shall receive therein any person who produces to him an order, etc., should be regarded as directory and not mandatory, and in fact merely declaratory of the very power that is set our in section 2544, General Code.

Answering question two, sections 3482, 3483 and 3484, provide as follows:

"Section 3482. When it has been *so ascertained* that a person requiring relief has a legal settlement in some other county of the state, *such trustees or officers shall immediately notify the infirmary directors of the county in which the person is found, who, if his health permits, shall immediately remove the person to the infirmary of the county of his legal settlement* If such person refuses to be removed, on the complaint being made by one of the infirmary directors, the probate judge of the county in which the person is found shall issue a warrant for such removal, and the county wherein the legal settlement of the person is, shall *pay all expenses of such removal and the necessary charges for relief, and in case of death the expense of burial if a written notice* is given infirmary directors thereof within twenty days after such legal settlement has been ascertained."

"Section 3483. Upon refusal or failure to pay such expenses, such infirmary directors may be compelled so to do by a civil action against them by the board of infirmary directors of the county from which such person is removed, in the court of common pleas of the county to which such removal is made. If such notice is not given within twenty days after such directors ascertain such person's residence, and within ninety days after such relief has been afforded, the directors of the infirmary where such person belongs shall not be liable for charges or expenditures accruing prior to such notice.

"Section 3484. When the trustees of a township in a county in the state in which there is no county infirmary ascertain that any person in such township, has a legal settlement in another county of the state, they *shall immediately notify the infirmary directors thereof to remove such person to the infirmary of such county. Should his health permit, such infirmary directors shall immediately remove such person to their infirmary, and, if within twenty days after such legal settlement is ascertained,* a written notice is given to them, pay all expenses theretofore, incurred for his relief in the township in which such person is found. Upon their refusal or failure to so remove such person,

the trustees of such township may furnish him the necessary relief and collect the amount thereof from such infirmary directors by civil action, in the name of such township trustees, in the court of common pleas of the county in which such infirmary is situated."

These statutes present the difficulty of not having been conformed to the law abolishing infirmary directors. There should be no difficulty, however, in reading the words "county commissioners" where words "infirmary directors" now stand. Under these statutes, as in the statutes cited in answer to question one, the initial investigation must be made by the officers enumerated in section 3481, General Code.

Under section 3482, General Code, when the county wherein the person requiring relief is found, has an infirmary, a statement of facts must be submitted by the officers making the investigation, as provided by section 3481, to the infirmary directors (now county commissioners), *of their own county* who shall *immediately* remove such person to the infirmary of the legal settlement.

Section 3484, General Code, provides for cases found in counties having no infirmary, in which the subject has legal settlement in an outside county, in which there has been established an infirmary. A statement of facts must be submitted by the township trustees to the infirmary directors (county commissioners) *of the county of legal settlement,* who shall *immediately remove the subject* to their own infirmary. There is nothing in these expressly requiring the county commissioners or anybody else to review the statements of facts submitted by the proper officers, nor is there any requirements akin to that of section 2544 (which applies only to cases within the county), providing that the superintendent of the infirmary *shall be satisfied* as to the legal settlement and general qualifications of the subject for relief. On the contrary, the statutes provide that the respective authorities shall immediately remove the subject to the respective infirmaries, upon receipt of the statement of facts. These provisions would seem to vest the officers making initial investigations with full power to determine the legal settlement and general rights to relief on the parts of the subjects.

In view, however, of the power vested in the superintendent, by section 2526, above quoted, to discharge inmates from the infirmary, the determination of those officers in this respect, cannot be deemed absolutely conclusive. The power to discharge, comprehends the power to refuse admission and the superintendent is thereby given impliedly the power to use the utmost economical and efficient means to determine the right of the contemplated inmate to relief, and I am therefore of the opinion that if a superintendent has reasonable doubt on this point and the necessary facts cannot be ascertained without investigation, he may make such investigation as is necessary to enable him to form his judgment.

In direct answer to question two, therefore, the county commissioners are given no duties to make investigations with reference to cases found outside of the county. The duties of making initial investigations rest upon the officers of the locality in which the subject is found, as provided by section 3481, General Code.

The superintendent of the infirmary may make only such investigaton as is necessary to determine the correctness of the statement of facts submitted by the aforesaid officers.

Questions three and four may be answered together. Sections 2522 and 2523 provide as follows:

"Section 2522. The board of county commissioners shall make *all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates.* The commissioners shall keep a separate book in which the clerk, or if there is no com-

missioner's clerk, the county auditor, shall keep a separate record of their transactions respecting the county infirmary, which book shall at all times be open to public inspection.

"Section 2523. The county commissioners shall appoint a superintendent, who shall reside in some apartments of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. The superintendent *shall perform such duties as the commissioners impose upon him, and be governed in all respects by their rules and regulations.* He shall not be removed by them except for good and sufficient cause. The commissioners shall not appoint one of their number superintendent, nor shall any commissioner be eligible to any office in the infirmary or receive any compensation as physician, or otherwise, directly or indirectly wherein the appointing power is vested in such board."

Sections 2535 and 2537, providing for the report of the superintendent of the infirmary and the publication of accounts by the county commissioners, expressly provide for a statement of wages paid employes.

Section 2522, therefore, gives the county commissioners power to make any contracts and purchases nesessary for the county infirmary and to make rules and regulations as deemed proper for its management and good government, and confers upon the county commissioners power to employ such help as is necessary for the proper administration of the infirmary. Section 2523 compels the superintendent to perform such duties as the commissioners impose upon him.

Under these statutes, the commissioners may, if necessary, employ help for the purpose of making such investigation as may be essential for the superintendent to form his judgment in the exercise of the discretion vested in him by sections 2544 and 2526, General Code, with reference to the admission of inmates found within or outside of the county; or they may order the superintendent to make such investigation himself.

In answer to question five, I am of the opinion that under section 2522, General Code, the county commissioners may fix a compensation for employes, and if they deem necessary, may provide payment for necessary expenses incurred in the performance of their duties, or under section 2523, General Code, they may, in fixing the compensation of the superintendent of the infirmary, provide for the allowance of the expense incurred by that official when the investigations are made by him in person.

Questions six and seven may be answered together. Under date of November 26, 1912, in an opinion to the bureau of inspection and supervision of public offices, which I am herewith enclosing, I held that section 3002, General Code, providing for compensation and traveling expenses of infirmary directors, does not apply to county commissioners.

As to payment of expenses incurred in the performance generally, of the duties of the county commissioners, permit me to quote the following:

"A public official in performing the duties of his office may incur miscellaneous expenses which are a proper charge upon public funds, and this is especially true where the expense was one incurred in the *performance of a duty* in which the public corporation has a direct and beneficial interest, or one which rests upon it as a duty or as an agency of the sovereign. For such disbursements a public officer is clearly entitled as a matter of right to a reimbursement.

(Abbott on Municipal Corporations, vol. 2, page 1652).

The payment of such expenses, however, has largely become a subject of stautory provision. Thus, in 11 Cyc., page 386, the following is stated:

"In some states members of a county board in counties of a certain class are allowed a gross sum as an annual salary in full payment for all services rendered and travel performed by them in discharge of their duties. So in some jurisdictions it is provided that in counties of a certain class, the pay of members of the board for their services, including regular and special sessions shall not exceed a specified sum to each commissioner in any one year; and in one jurisdiction this is the rule in respect to counties of all classes."

And on page 387, the following language is used:

"In a number of jurisdictions, in addition to compensation, provisions are made for the allowance to members of the board of certain items of reasonable and necessary expenses incurred in the performance of their duties, as for instance, traveling expenses, expenses incurred in the sale of goods manufactured in the county house of correction, or any other reasonable and necessary expense in addition to compensation and mileage incurred when necessarily traveling on official business outside of the county."

The question of allowance of expenses to county commissioners in Ohio, therefore, becomes a question of the intent of the statutes.

Section 3001, General Code, provides as follows:

"The annual compensation of each county commissioner shall be determined as follows:

" 'In each county in which on the twentieth day of December, 1911, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be nine hundred dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent. of the compensation paid to each county commissioner for the year 1911. In counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each commissioner shall receive three dollars for each day of time he is actually employed in ditch work; the total amount so received for such ditch work not to exceed three hundred dollars in any one year. *Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed four thousand dollars per annum.* Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

A study of the history of this statute discloses the fact that formerly the legislature saw fit to expressly provide for traveling expenses and other expenses of the county commissioners, and that wherever such expenses were allowed, it was required that they be certified to by the prosecuting attorney and approved by the probate judge. It has furthermore been a custom of the Ohio legislature to expressly provide for expenses when they are incidental to the office.

In view of these facts, therefore, I am of the opinion that when the legislature, in the statute, as it now appears, omitted the provision, formerly made, for expenses, and also did away with the requirement for their certification by the prosecuting attorney and their approval by the probate judge, it was the intent that the salary allowed should cover the same and be in full payment of all services and all expenses incurred.

In direct answer to questions six and seven, the county commissioners can in no event be reimbursed for expenses incurred by them in any duties performed by them.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

10.

TAXES AND TAXATION—POLL AND LABOR TAX—CONSTITUTIONAL AMENDMENT.

By virtue of the amendment of proposal 2 of the constitutional amendment, providing that no services may be required which may be commuted in money or other thing of value, sections 3375 to 3384, General Code, providing for certain labor on highways or the commuting of the same by the payment of $3.00 in lieu thereof, have been repealed.

COLUMBUS, OHIO, January 4, 1912.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 21, 1912, in which you inquire:

> "Is it not a fact that sections 3375 to 3384, inclusive, of the General Code of Ohio, are repealed by the adoption of proposition 32 of the constitutional amendments recently voted upon, and especially by section 1 of article XII?"

Section 1 of article XII of the constitution of 1851 reads:

> "The levying of taxes by the poll is grievous and oppressive; therefore the general assembly shall never levy a poll tax for county or state purposes."

Proposal No. 32 changes this so that it reads:

> "No poll tax shall ever be levied in this state, or service required which may be commuted in money or other thing of value."

Under the constitution of 1851, the supreme court of this state held that,

> "Section 4717 of the Revised Statutes, which provides for two days' labor on the public highways of this state is not in conflict with the constitution and is a valid law." (Dennis vs. Simon, 51 O. S., 233, syl.)

The decision of this case is found in a per curiam and reasons are not given for the conclusion reached. However, we encounter the added sentence "or service required which may be commuted in money or other thing of value" which clearly inhibits the doing of that which is expressly provided by section 3376 of the General Code.

The serious question presented, however, is whether the provision for commutation found in section 3376 has the effect of nullifying the provisions of section 3375.

Section 3375 is found as section 4 of the act of April 2, 1906; 3376, as section 5; 3377 as section 8; and all present the appearance of being parts of a scheme by which certain persons were required to perform two days' labor on the public highways, pay three dollars in lieu thereof, or be subject to a suit for collection.

That they are dependent sections seems apparent, and that the inhibition of a poll tax, and also the requirement of service which may be commuted in money, will prevent the legislature doing that which was permissible under the constitution of 1851, must necessarily follow.

I am, therefore, of the opinion that the amendment of section 1 of article XII of the constitution prevents the enforcement of the sections of the statute to which you call attention, and calls for their repeal.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

19.

BOARD OF EDUCATION—COMPENSATION FOR ATTENDANCE AT INSTITUTE MUST BE ALLOWED TO BOTH A TEACHER EMPLOYED AT TIME OF INSTITUTE AND TO ONE EMPLOYED WITHIN THREE MONTHS SUBSEQUENT THERETO.

Under the decisions interpreting the same, it is comprehended by section 7870, General Code, that teachers should be allowed payment for attendance at the teachers' institute (1) when such teacher is employed at the time of attendance at such institute, (2) when a teacher, though not employed at such time, is employed within three months subsequent thereto. Therefore, when a board of education of a township school district, prior to the teachers' institute of 1912, hired a teacher then holding a temporary certificate to teach school, and was obliged to dismiss said teacher upon the termination of said certificate, and employ another in the place, under section 7870, General Code, both of said teachers should be allowed compensation therein provided, in addition to their regular salary for attendance at such teachers' institute.

COLUMBUS, OHIO, January 2, 1913.

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your inquiry under date of December 5th, 1912, which is as follows:

> "The board of education of a township school district in this county prior to the teachers' institute of 1912, hired a teacher then holding a temporary certificate as provided in section 7826 of the General Code of Ohio, to teach school. This teacher was to teach the school during the life of the temporary certificate, and for the remainder of the school term providing said teacher duly passed the required examination. This teacher taught the first month of school but failed to pass the teachers' examination.
>
> "The board of education employed another teacher to begin at the close of the first month of school and finish the term, which would have been taught by the first teacher had this first teacher received a certificate. The first teacher was employed at the time of the teachers' institute and the second teacher commenced teaching within three months after the institute closed. Both teachers had attended institute and were properly certified by the officers thereof.
>
> "Both teachers have handed their bill and certificate to the same board of education for institute pay, as provided by law. Which of these two teachers should the board of education pay for attendance at the teachers' institute? Should they pay both persons for such attendance?"

In reply to your inquiry I desire to say that section 7870 of the General Code provides for the payment of teachers while attending institutes as follows:

"Section 7870. The boards of education of all school districts are required to pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the president and secretary of such institute. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual attendance as certified by the president and secretary of such institute, for not less than four nor more than six days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. *In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent if the term of employment begins within three months after the institute closes.*"

Construing said section the court in the case of Reid vs. Board of Education, 16 O. D., 414, held as follows:

"A teacher in the public schools may, under favor of the provisions of Revised Statutes 4091 (Lan. 6683), recover compensation from the board of education for attending a teacher's institute, although the same was held during the summer vacation, if such teacher was actually engaged in teaching at the time or began teaching within three months after the institute closed."

On page 420 of the opinion the court says:

"In my judgment the legislature intended to provide for two very simple and proper conditions:

"*First.* Pay for the teacher who is actually engaged in teaching when the time to attend this institute arrived.

"*Second.* Pay for all other teachers, subject, however to the limitation that they must begin teaching some public school in this state within three months after the institute closes."

In the case of Beverstock, a taxpayer vs. Board of Education et al., 75 O. S., 144, the court in construing said section held:

"When a board of education has employed teachers for the public schools of the district for the school year ensuing thereafter, and such teachers, during vacation and after their employment, attend the county institute during the week it is held in the same county said board is authorized by the provisions of section 4091, Revised Statutes, to pay them for the institute week as an addition to their first month's salary as fixed by the terms of their employment, and at the same rate on presentation of the certificates prescribed by said section."

On page 150 of the opinion the court said:

"Boards of education are required to pay the teachers their regular salary for the week upon presentation of the proper certificate of their attend-

ance at the institute. In other words, the salaries continue during that week. Then it is said: 'The same to be paid as an addition to the first month's salary after said institute by the board of education by which said teacher is then employed, or, in case he is unemployed at the time of the institute, then by the board of education next employing said teacher, provided the term of said employment begins within three months after said institute closes.' 'The same to be paid'—that is, salary at the same rate, is to be paid for the institute week to the teachers *who then are under employment for the ensuing school year*, that they will receive after service under such employment begins, and this rate of salary is to be paid as an addition to the first month's salary after the institute closes. Or, put it in other words, the teacher shall be paid for the week spent at the institute on the basis of the salary agreed upon for teaching in the schools thereafter, and this shall be paid as an addition to the first month's salary earned after said institute."

In construing said section the court says at page 152 of the opinion that,

"The same construction of language will control cases where a teacher is not under employment at the time the institute is held. In this case, he is to be paid by the board next employing him after such institute, providing the term of said employment begins within three months after such institute closes. When he becomes so employed, his rate of compensation is fixed, and on presentation of the proper certificate, showing that he had attended the preceding institute for a week, his compensation for that week is ascertainable and his right to receive it complete, if his term of employment begins within three months after said institute closes."

Therefore, in view of the language used in said statute and the decisions cited, I am of the opinion that both teachers are entitled to be paid for attending the teachers' institute. The first teacher because he was employed at the time of the teachers' institute, and the second teacher because the term of his employment began within three months after the institute closed. In other words, both teachers come within the provisions of said section 7870 of the General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

33.

DITCHES—COUNTY COMMISSIONERS MUST COMPLY WITH MUNICIPAL REGULATIONS PERTAINING TO CONNECTION WITH SEWERS AND MUST INVESTIGATE WHETHER THE PRELIMINARY STEPS HAVE BEEN COMPLIED WITH BY COUNCIL IN FILING PETITION FOR DITCH.

Phe power given to construct and tile a ditch, implies the power to do whatever is necessary to accomplish such ends and when council has provided certain regulations pertaining to connection with its sewers, the county commissioners may comply with such regulations when the ditch constructed by them has an outlet in a city sewer.

Before the county commissioners may proceed upon a petition filed by a municipal corporation for a ditch, in accordance with section 6494, General Code, it is incumbent upon them to determine whether or not the preliminary requirements of such petition have been complied with by the council of the municipal corporation.

COLUMBUS, OHIO, December 19, 1912.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of December 5, 1912, you requested the opinion of this department as follows:

> "A petition has been filed with the county commissioners asking for the construction of a certain county ditch under the terms and provisions of section 644 and sections following, said ditch lying wholly within the municipal corporation of Eaton. The mayor of the village has signed such petition, as provided in section 6494, General Code.
>
> "The village of Eaton has a sewerage system and the proposed outlet of the ditch is in a storm sewer of the village. The village by ordinance has established certain requirements for the connection with its sewers, such as cementing the joints of tile ditches draining into such sewers. Assuming that the commissioners find the ditch to be conducive to the public health, convenience and welfare, as required by section 6443, General Code, can they locate and establish the ditch and comply with the requirements of the village in connecting with the sewer?"

Sections 6443 and 6494 of the General Code provide as follows:

> "Section 6443. The board of county commissioners, at a regular or called session, *when necessary* to drain any lot, lands, public or corporate road or railroad, *and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed or tiled,* a ditch, drain or watercourse, or box or tile part thereof, or cause the channel of a river, creek or run, or part thereof, within such county to be improved by straightening, widening, deepening or changing it, or by removing from adjacent lands, timber, brush, trees or other substance liable to obstruct it. The commissioners may change either terminus of a ditch before its final location, if the object of the improvement will be better accomplished thereby.
>
> "Section 6494. The council of a municipal corporation, by resolution, may authorize the mayor to present a petition, *signed by him officially, and a bond, to the county commissioners,* to locate and construct a ditch described in the resolution, or authorize the mayor to *sign officially a petition and bond*

for a ditch, to be presented by parties interested whose lands are without the limits of the corporation, whenever the improvement will be conducive to the public health, convenience or welfare of the whole or any portion of the inhabitants of the corporation. In such case, the commissioners shall count the municipal corporation as an individual petitioner, and may direct the surveyor or engineer to locate the improvement in accordance with the petition, whether wholly within or wholly without, or partly within and partly without the limits of the corporation. The surveyor or engineer, in making his schedule of lots and lands benefited, may enumerate such lots and lands within or without the corporate limits as are specially benefited, and also the municipal corporations which will receive benefits to the health and welfare of their inhabitants."

There can be no question of the power of a municipality to make reasonable regulations, such as the requirement referred to, with reference to connections with its sewers. Under the statutes above set out the county commissioners are given the power to construct and tile a ditch within a municipal corporation when the conditions of the chapter are complied with. The power to construct and tile a ditch comprehends the power to do whatever is essentially necessary to accomplish that end; and when council has made regulations regarding the connection stated, I am of the opinion that such connections constitute a necessary part of the work of constructing and tiling a ditch which requires an outlet into a city sewer. If the regulation is a reasonable and just one there is no reason why work done by the county commissioners should be exempted from these requirements. To hold otherwise would greatly impair the power of council to regulate its sewer construction and would also seriously hinder the ability of a municipal corporation to take advantage of these statutes providing for the construction of a county ditch within or partly within the limits of a municipality.

I, therefore, conclude that when the preliminary requirements have been complied with, the commissioners may construct and tile a ditch upon petition of the mayor of a municipal corporation as provided by section 6494, General Code, and in so doing should comply with the regulation of council providing certain requirements for connections with its sewers.

You next inquire:

> "Upon the filing of the petition, signed by the mayor, can the commissioners assume that the preliminary steps required by section 6494, General Code, have been complied with by the council, or would they be compelled to find whether or not such preliminary steps had been taken?"

I assume that the preliminary steps to which you refer are a proper resolution of council, authorizing the mayor to act, and the bond required by section 6494, General Code. The prudence and caution which it is incumbent upon every public officer to exercise in the performance of his duties, would compel the county commissioners to ascertain whether or not such conditions precedent have been fulfilled, as would be essential to give them jurisdiction to perform their work, and I am of the opinion that it is their duty to ascertain whether the preliminary requirements have been complied with.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

34.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS MAY APPOINT TOWNSHIP TRUSTEES, SUPERINTENDENTS OF ROADS AND MAY PAY THEM COMPENSATION THEREFOR.

By virtue of sections 7445, 7447 and 7458, General Code, the county commissioners are constituted a board of turnpike directors to manage and control all roads within the county, and they may appoint suitable persons, superintendent of repair on such roads, and may compensate them for such work. Since the duties of the township trustees are not incompatible with the duties of such superintendents, they may be engaged by the county commissioners to perform such duties and may be compensated by them at a rate not to exceed $2.50 per day, in accordance with section 7458.

COLUMBUS, OHIO, December 18, 1912.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 13th, wherein you state:

> "On October 21st, I submitted to you the following question:
> "I desire to ask your opinion as to whether or not the township trustees can be appointed and paid the sum of $2.00 per day as superintendent of roads on which state aid money raised prior to 1911 is used. You understand that the county commissioners are issuing money in the various townships and have authorized the township trustees in their respective townships to superintend or inspect the repairing of the roads that are being repaired with state aid money. We now have several bills filed by the township trustees and we are holding up the payment of these bills pending the receipt of your opinion?
> "On November 11th, you gave it as your opinion that under section 1218 this sum could not be paid to the township trustees when they were acting as superintendents in the repair of roads, the funds of which were raised through what is known as the state aid. Since the receipt of your answer of the above date, I have gone over our proceedings and I find that we are acting under section 7407 of the General Code, up to and including 7463. We have complied with these sections, as our record will show, and that is the way we have used the state aid money for 1909 and 1910.
> "I also find in section 7458 of the General Code, which provides that the superintendent shall receive not to exceed $2.50 for time actually employed, and under this section our board of county commissioners acting as a board of turnpike directors, employed the trustees of the various townships to superintend the work in their respective townships, and it is under that agreement, and having in mind section 7458 of the General Code, that the trustees were employed as such superintendents, and under which section, the commissioners as a board of turnpike directors had expected to pay them.
> "Kindly let me know by return mail whether or not you agree with us in the way we have expended this money, and also whether or not, being advised of all the facts you desire to amend your opinion of November 11th."

I have examined the opinion of November 11th to which you refer, and upon the facts before me at that time I am satisfied of the correctness of the conclusion therein reached. I interpreted the language used in your communication of October 21st to mean that the county commissioners of your county had paid state aid money to the

township trustees in their official capacity, and that the latter disbursed the same instead of the county commissioners acting as a board of turnpike directors. Inasmuch as it seemed to be the duty of the township trustees to disburse said funds under section 1218, General Code, and as no compensation was provided by statute for such service, I hold that it was to be regarded as gratuitous, or as compensated by the other fees accruing to the township trustees by virtue of their office. The additional facts supplied by your second letter raise an entirely different question, and I have concluded to consider the matter *de novo* in the light of said additional facts.

Sections 7407 to 7463 inclusive, of the General Code, which you cite comprise the chapter relating to road repairs.

Sections 7422, provides as follows:

> "The county commissioners shall cause all necessary repairs to be made for the proper maintenance of all improved roads in the county. For such purpose they may levy a tax upon the grand duplicate of the county, not exceeding three-tenths of one mill in any one year upon each dollar of the valuation of taxable property in such county. Such levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force."

Section 7445, provides as follows:

> "In each county, the county commissioners are constituted a board of turnpike directors, in which the management and control of all such roads therein shall be exclusively vested."

Section 7447, provides as follows:

> "The directors may appoint suitable persons to superintend the work of repairs on the several roads, who shall give bond and security to the satisfaction of the directors for the faithful performance of their duties, and take and subscribe an oath, which shall be endorsed on the back of the bond and filed in the auditor's office of the county."

Section 7458, provides as follows:

> "The compensation for services of superintendent shall be subject to the agreement of the board of directors, not to exceed two dollars and fifty cents per day for the time actually employed and shall be paid out of the turnpike fund."

It will be observed that county commissioners, acting as a board of turnpike directors, are charged with the duty of repairing all improved roads in the county.

Section 7447 authorizes the county commissioners to employ suitable persons to superintend the repair of such roads in the respective townships and the persons so appointed are entitled to such compensation as the commissioners may allow, not to exceed $2.50 per day for the time necessarily consumed in such work. The only limitation in the statute as to the class of persons who may be appointed to superintend the repair of improved roads is that such persons be "suitable." Said work is not a part of the official duty of township trustees; they are not expressly prohibited by statute from accepting such employment, nor is the same inconsistent in any way with their official duty. Such compensation, however, must be wholly paid out of the turnpike fund as provided by section 7458, supra.

I am, therefore, of the opinion that township trustees may legally be appointed by the county commissioners, acting as a board of turnpike directors, to superintend the repair of improved roads at such compensation, not to exceed $2.50 per day, as may be fixed by the county commissioners.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

51.

BOARD OF EDUCATION—CENTRALIZATION OF SCHOOLS—PUPILS RESIDING IN PROPERTY ATTACHED TO TOWNSHIP SCHOOL DISTRICT UPON ABOLITION OF JOINT SUB-DISTRICTS ARE ENTITLED TO CONVEYANCE TO CENTRALIZED SCHOOL.

By virtue of sections 4723 and 4724, General Code, joint sub-districts are abolished and the territory of such districts situated in the township in which the school house of the joint sub-district is not located, is attached for school purposes to the township school district in which said school house is located and shall constitute a part of said township school district.

Pupils of such attached territory, therefore, are entitled to conveyance to the centralized school, when the board abolishes sub-districts; the expense thereof to be paid out of the funds of the township district.

Under the terms of section 7730, General Code, providing such pupils live more than one and one-half miles from such school in accordance with section 7731, General Code, the fact that said officials have failed to make a map of attached territory which is to be made a part of the records of the board of education and a copy of which is to be filed with the auditor of the county in which the territory is situated, as provided by section 4724, General Code, does not operate to prevent the territory included in the joint sub-district and outside of the township becoming a part of the township school district as provided by section 4723, General Code.

COLUMBUS, OHIO, November 27, 1912.

HON. C. A. LEIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of inquiry of the date of October 1, 1912, wherein you inquire as follows:

> "The board of education of Jackson township, Pickaway county, Ohio, want your opinion on the following: 'Jackson township, within the past year voted to, and have centralized their schools. They now have a single centralized school house in the center of the township, and have provided conveyances for the pupils of the township by township lines. Prior to the adoption of the school code there was a joint subdistrict comprising part of Jackson and Monroe townships. The school house was located in Jackson township, which sub-district, since the codification of the school laws, was under the control of Jackson township board of education, and was abolished with the centralized schools of Jackson township. The pupils living in this sub-district were enrolled in Jackson township, and state fund drawn by Jackson township. When the school code went into effect section 4724, of the General Code, had never been complied with, so that the part of the joint sub-district situate in Monroe township was never taxed in Jackson township

for school purposes. The board of education of Jackson township now refuse to convey the scholars living in Monroe township, but within the territory of this sub-district, claimimg that after centralization they had nothing further to do with that part of the territory. Jackson township board sold the school house within the sub-district.'

" 'The scholars living in the disputed territory live more than one and one-half miles away from the centralized schools. Monroe township has not centralized its schools. Under this state of facts, and under the law, is that part of Monroe township comprised within what was formerly this joint sub-district still a part of the Jackson township schools? Can the scholars living within the disputed territory attend the Jackson township schools, and must the board of education of Jackson township furnish conveyances for these pupils living within the disputed territory, same as other pupils living within Jackson township, proper. The board of education have agreed to abide by your decision in this matter, and as the scholars living within the disputed territory are now without school privileges, and are not attending school, a very early opinion is requested. I refer you to sections 4683, 4723, 4724, 4725 and 7730, General Code.' "

In reply thereto I desire to say that joint sub-districts of the townships were originally established under the authority of sections 3928 and 3929 of Bate's Revised Statutes (1902 edition); section 3928 provided as follows:

"Section 3928. (Township Boards May Establish By Mutual Agreement). When the better accommodation of scholars makes it desirable to form a joint sub-district, or joint township high school district composed of parts, or all of two or more townships, the board of education of the townships interested, may, by mutual agreement, at a joint meeting held for the purpose, establish the same, and fix the boundaries thereof;

"(School Building). If there is no suitable school house within such boundaries, or if there is one, but it is not suitably located, the board shall designate a site whereon to erect such buiilding; but if there is a suitable school house within such boundaries, properly located, the school shall be held therein;

"(Organization of Meeting). A chairman and secretary shall be chosen at such meeting, and the secretary shall make a memorandum of the proceedings had thereat;

"(Copies of Memorandum of Proceedings to be Transmitted by Secretary). A copy of such memorandum, signed by the chairman and secretary shall be transmitted to the clerk of each of the boards, who shall record the same in his record of proceedings of the board; and the secretary shall transmit a like copy of the proceedings to the auditor of each county having territory embraced in the joint sub-district, or township, or joint high school district."

and said section 3929 provided as follows:

"Section 3929. (Control of School in Joint Sub-Districts or Joint Township High School District). The school in a joint sub-district, or joint township high school district, shall be under the control of the board of education in the township in which the school house is situate, of which board the director of the joint sub-district, or joint township high school district, shall be a member, or members;

"(Support of Same). But such school shall be supported from the

school funds of the townships having territory in the joint sub-district, or joint township high school district, in proportion to the enumeration of youth, as provided in sections thirty-nine hundred and sixty-one and thirty-nine hundred and sixty-two and thirty-nine hundred and sixty-three, as amended by this act."

Section 3930 of Bates' Revised Statutes (1902 edition), made additional provision for the establishment of joint sub-districts in the townships, as follows:

"Section 3930. (Further Provisions for Establishment). Joint sub-district may be established also in the manner provided in succeeding sections of this chapter."

Section 3931, Bates' Revised Statutes (1902 edition), provides as follows:

"Section 3931. (May Be Established on Petition). Three or more qualified electors, resident of the territory sought to be included therein, may apply, in writing, to the board of education of any township wherein any part of the territory is situate. for the creation thereof."

Sections 3932 to 3941, inclusive, Bates' Revised Statutes (1902 edition), provided the procedure to be followed in establishing joint sub-districts under sections 3930 and 3931, as above quoted.

Section 3941a, Bates' Revised Statutes (1902 edition), provided as follows:

"Section 3941a. (Estimate For Site and School House; Report to County Auditor; Making of Levy and Collection of Money). When in a joint sub-district established by proceedings in the probate court, a site has been designated for a school house, the board of education of the township in which such site is designated, shall make the necessary estimate to purchase such school house site, and erect and furnish a suitable school house thereon; and said board shall report such estimate and levy to the county auditor; said levy shall be made and the money collected in like manner as the funds are levied and collected for other joint sub-districts."

Section 3944, Bates' Revised Statutes (1902 edition), provided as follows:

"Section 3944. (Report and Judgment for Sub-District). If the report be in favor of the establishment of a joint sub-district, the judge shall make an entry confirming the same; and a certified copy of the report, including the plat and his order shall be delivered to the clerk of the board of education of each township interested therein, and thereafter such joint sub-district shall be fully established, and shall be governed and controlled in the same manner as joint sub-districts otherwise established."

I cite the above sections for the purpose of setting forth the two methods that could be pursued in establishing joint sub-districts prior to their repeal by the adoption of the school code as passed April 25, 1904, and found in the 97 Ohio Laws, page 334.

I assume that the joint sub-district referred to in your inquiry was established by one of the two methods set forth in the statutes above quoted, that is, either by the mutual agreement of the school boards of Jackson and Monroe townships, as provided in section 3928, Bates' Revised Statutes, above quoted, or by petition on the part of three or more qualified electors of the territory sought to be included in said joint sub-district as provided by sections 3931 to 3944, inclusive, Bates' Revised Statutes (1902 edition).

The school house of said joint sub-district being located in Jackson township, placed the control of the school in the board of education of that township.

Section 3923, Bates' Revised Statutes, as enacted by the legislature April 25, 1904, abolished all joint sub-districts, and at the same time attached the territory of such districts situated in the township in which the school house was not located to the township school district in which the school house was located for school purposes, as follows:

> "Section 3923. Joint sub-districts are hereby abolished and the territory of such districts, situated in the township in which the schoolhouse of the joint sub-district is not located shall be attached for school purposes to the township school district in which said school house is located, and shall constitute a part of said township school district, and the title of all school property located in said joint sub-district, is hereby vested in the board of education of the township to which the territory is attached. A map of such attached territory shall be prepared under the direction of the board of education of the township district to which such territory is attached and shall be made a part of the records of said board and a copy of the same shall be filed with the auditor of the county in which said territory is situated, or if the territory be in two or more counties, said map shall be filed with the auditor of each county."

Said section 3923, Bates' Revised Statutes (now sections 4723 and 4724, of the General Code), was amended April 14, 1908, to read as follows:

> "Joint sub-districts are hereby abolished and the territory of such districts, situated in the township in which the school house of the joint sub-district is not located, shall be attached for school purposes to the township school district in which said school house is located, and shall constitute a part of said township school district, and the title of all school property located in said joint sub-district, is hereby vested in the board of education of the township to which the territory is attached. A map of such attached territory shall be prepared under the direction of the board of education of the township district to which such territory is attached and shall be made a part of the records of said board and a copy of the same shall be filed with the auditor of the county in which said territory is situated, or if the territory be in two or more counties, said map shall be filed with the auditor of each county. Provided, further, that when such sub-district is a part of townships, both of which have centralized schools, and no school is maintained in said sub-district, then the boundaries of the civil township so situated shall form the boundaries of the township school districts, and each township shall have entire control of the territory of such sub-district lying within its boundaries."

Furthermore, section 4683, of the General Code, defines a township school district as follows:

> "Section 4683. Each civil township, together with the territory attached to it for school purposes, and excluding the territory within its established limits detached for school purposes, shall constitute a township school district."

Section 7730 of the General Code provides that when the board of education of any township school district suspends the school in any or all sub-districts in the town-

ship school district, such board must provide for the conveyance of the pupils residing in such sub-districts to a public school in the township district as follows:

> "Section 7730. The board of education of any township school district may suspend the schools in any or all sub-districts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such sub-district or sub-districts to a public school in the township district or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. Or, the board may abolish all the sub-districts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district. No sub-district school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the propostition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

Regardless of whether or not the said joint sub-district referred to in your inquiry was established by the first or second method, as provided in sections 3928 to 3944 inclusive, of Bates' Revised Statutes, referred to above, the board of education of Jackson township was bound thereby to recognize the said joint sub-district, composed partly of territory in Jackson township and partly of territory in Monroe township, and, as a matter of fact, the board of education of Jackson township did so recognize said joint sub-district, and while section 4725 of the General Code abolished joint sub-districts, yet, said section, in substance attaches for school purposes the territory of the township in all such joint sub-districts theretofore established, in which the school house is not located, to the township in which the school house is located, by providing "that the territory of such districts situated in the township in which the school house of the joint sub-district is not located shall be attached for school purposes to the township school district in which such school house is located."

Furthermore, section 4683 of the General Code clearly intended that territory attached to the township, as in the case about which you inquire, constituted a part of the township school district.

It is my view, therefore, that the portion of said joint sub-district within the boundaries of Monroe township, and which said territory was attached to Jackson township for school purposes under the old school code, is still attached to said Jackson township for school purposes and still constitutes a part of the Jackson township school district, even though the board of education failed in its duty to have a map of such attached territory prepared and made a part of the record of such board, and failed to have a copy made of such map and filed with the auditor of the county in which such territory is situated, as required by section 4724 of the General Code, above quoted. Said section says "a map *shall* be prepared, etc." and it was, therefore, mandatory upon said Jackson township school board to perform that duty, and official neglect or failure to perform such duty on the part of said board does not operate to set aside or abrogate the plain and clear provisions of said section; in other words, said section 4724 of the General Code controls, official failure to follow its plain provisions by the Jackson township school board, to the contrary notwithstanding.

Inasmuch as said joint sub-district referred to in your inquiry constitutes a part of the Jackson township school district, as defined by section 4683 of the General Code, above quoted, it follows that the board of education of Jackson township is subject to and governed by section 7730 of the General Code, and said board is legally bound to provide conveyance for all the pupils living in said former joint sub-district, in-

cluding those living in that portion of said former joint sub-district which is within the boundaries of said Monroe township who have the undoubted statutory right to attend the Jackson township schools.

This situation will continue to exist until such time as both townships establish centralized schools, and then the boundaries of the civil townships will form the boundaries of the civil townships will form the boundaries of the said respective township school districts, and each of said townships will have control of the territory of such former joint sub-district as lies within its boundaries.

Section 7731 of the General Code, which provides, in substance, "that transportation for pupils living less than one and one-half miles by the most direct public highway from the school house shall be optional "with the board of education," does not apply for the reason that the said pupils living in that portion of the said former joint sub-district lying within Monroe township live more than one and one-half miles from the centralized schools.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

61.

BONDS ADVERTISED AND AWARDED PRIOR TO JANUARY 1, 1913, BUT DELIVERED SUBSEQUENT TO THAT DATE ARE NOT OUTSTANDING AT THE TIME OF THE PASSAGE OF THE CONSTITUTIONAL AMENDMENT—THEREFORE TAXABLE.

COLUMBUS, OHIO, January 8, 1913.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Under date of December 16, 1912, you inquire:

> "Whether bonds advertised for sale and awarded prior to January 1, 1913, but delivered subsequent to that date, will be taxable."

In answer thereto permit me to say the language of section 2 of article 12 of the constitution as amended, exempts bonds "at present outstanding," which means outstanding on January 1, 1913, and I am of opinion that a bond cannot be considered as outstanding until it has been delivered, and, consequently bonds offered for sale and awarded prior to January 1, 1913, but not delivered until after that date are taxable, as not coming within the exemption.

Respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

64.

BRIDGES—ELECTION ON QUESTION OF BRIDGE IMPROVEMENT COSTING OVER $18,000.00 APPLIES TO ONLY ONE BRIDGE.

Section 5638, General Code, prescribes that when the building of a county bridge will cost more than $18,000.00 the question of making such improvement shall be submitted to the voters of the county. This requirement applies only when the cost of a single bridge exceeds such sum; and the election is clearly not necessary when the combined cost of two or more bridges necessary to a single improvement exceeds that sum, when any one of such bridges does not require an expenditure of that amount.

COLUMBUS, OHIO, January 31, 1913.

HON. W. V. WRIGHT, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Under date of January 23, 1913, you inquire of this department as follows:

> "The county commissioners desire to remove the Bolivar bridge over the Tuscarawas river from its present location to a point about 1,000 feet north. The placing of the bridge at the last point will require an addition to the old bridge, new abutments, etc., and the building of a bridge over the Ohio canal, about 500 feet distant from the river, to complete the roadway into Bolivar.
>
> "The river bridge without the canal bridge would be useless.
>
> "The combined cost of the two bridges will exceed the $18,000.00 limit under section 5638, General Code, but the separate cost of each bridge will be much less than this amount.
>
> "*Question:* Will the building of the two bridges be considered as one expenditure, or can the commissioners treat the two bridges as separate expenditures and proceed to build them without first submitting the question as to the policy of making such expenditure to the voters of the county?"

Section 5638, General Code, to which you refer, provides:

> "The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $10,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county the question as to the policy of making such expenditure."

This statute fixes a limitation upon the amount to be expended by the county commissioners "for building a county bridge," without first submitting the question to a vote of the electors. The word "bridge" is used in the singular and means one bridge. The limitation of $18,000.00 applies to the cost of one bridge and not to the combined cost of two or more bridges.

In the case you submit there are two streams which must be spanned by a bridge. One is a natural stream and the other is an artificial stream. These streams are distinct from each other and it appears that there is a strip of land between them of a width of five hundred feet. I take it that the road in question will be built over this strip of

land and the strip will not be bridged. In that event there will be two bridges, each complete in itself. There are two separate streams and two bridges are required.

The limitation in section 5638, General Code, will apply to the cost of each bridge and not to the cost of the two bridges combined.

As the expenditure for neither bridge by itself will amount to $18,000.00, the limitation in section 5638, General Code, will not apply, and the county commissioners may construct the two bridges without first submitting the question to the voters.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

65.

OFFICES INCOMPATIBLE—CLERK OF COUNTY COMMISSIONERS APPOINTED IN PLACE OF COUNTY AUDITOR MAY NOT SERVE AS DEPUTY COUNTY AUDITOR.

Section 2409, General Code, authorizes the commissioners to appoint a clerk in place of the county auditor, only when it is necessary for such clerk to devote his entire time to the discharge of the duties of such position. As this is the only authority empowering the commissioners to appoint a clerk and as such clerk is obliged thereby to devote his entire time to the duties of such position, he may not at the same time act as deputy county auditor.

COLUMBUS, OHIO, January 25, 1914.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Under favor of January 16th, you request my opinion as follows:

> "The board of county commissioners of Van Wert County, Ohio, have appointed as their clerk, one of the auditor's deputies, for this appointment he is to receive compensation and to give his full time to the position. Has he authority to exercise or perform any of the duties of a deputy county auditor, and can he still remain deputy county auditor and perform any of such duties, even though he does the same without compensation?"

Sections 2566, 9 and 2409, General Code, provide as follows:

> "Section 2566. *By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law.* When so requested, he shall aid them in the performance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."
>
> "Section 9. A deputy, when duly qualified, *may perform all and singular the duties of his principal.* A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk."
>
> "Section 2409. If such board finds *it necessary for the clerk to devote his entire time to the discharge* of the duties of such position, it may appoint

a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

Notwithstanding the language of section 9, General Code, that deputies may perform all and singular the duties of his principal, and the language of section 2566, General Code, that the county auditor shall, by virtue of his office, be secretary to the county commissioners, I am of the opinion, that it was not the intention of these statutes to impose upon the auditor's department such a duty of performing the clerical work of the county commissioners. I reach this conclusion in view of section 2409, General Code, which provides that when the clerk of the county commissioners shall be obliged *to devote his entire time* to the discharge of the duties of such position, the county commissioners may appoint a clerk *in place of the county auditor.*

In view of this provision, it is clear that it was not the object of the above statutes to join the work of the two departments, nor to impose upon the entire auditor's force, as such a duty of conducting the clerical work of the county commissioners. On the contrary, the intention was to provide, for the sake of the consequent economy, that the clerical work of the county commissioners may be performed by the county auditor himself, when the duties of each department are so light as to permit this practice.

In direct answer to your question, therefore, the only authority permitting county commissioners to appoint a clerk, is section 2409, General Code, and this section authorizes the appointment of such clerk *only* when it is necessary for the clerk to devote *his entire time* to the discharge of his duties as such clerk; and under the terms of this statute, when such appointment is made, the clerk must serve *in place of the county auditor.* Inasmuch as the clerk is obliged to devote his entire time to the duties of such position, he cannot in contemplation of this statute, also serve as deputy county auditor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

68.

OFFICES INCOMPATIBLE—TOWNSHIP CLERK AND TEACHER IN TOWNSHIP DISTRICT.

Inasmuch as by the provision of section 7786, a clerk of the township board of education is obliged to pass on reports of teachers before an order may be drawn by said clerk for the payment of their salaries, the office of said clerk constitutes a check upon the position of teacher, and, therefore, both positions may not be held at the same time by the same individual.

COLUMBUS, OHIO, January 30, 1913.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Under date of January 6th, you submitted for my opinion the question of whether a township clerk who has qualified not only as township clerk but as clerk of the township school district can be employed as a sub-district teacher in said township district by the board of education thereof.

You inquire further whether such township clerk when he qualifies as clerk of the township school district under section 4747, General Code, is a member of the board of education as contemplated under section 4757, General Code.

Section 4757 of the General Code provides in part as follows:

> "* * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. * * *"

I assume from your inquiry that there is no question as to the said clerk being a member of the board of education duly elected, but that he is simply by virtue of his qualification under section 4747 clerk of the board; such being the case I do not believe he comes within the purview of section 4757, General Code.

I can find no statute which expressly prohibits a clerk of a board of education from being employed as teacher by the board of which he is clerk. Unless there is a conflict between the duties of the two positions, it is apparent they are not inconsistent.

Section 7786, General Code, provides in part as follows:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the state commissioner of common schools and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught."

Under the above provisions it is made the duty of the clerk of the board of education to require teachers employed by the board to make the reports therein enumerated before an order may be drawn by the clerk for the payment of their salaries. The clerk is the sole judge of the performance of such duty. It would be within his power to draw an order for the payment of his own salary without having made such report and thereby violate the plain provisions of section 7786, *supra*. I am clearly of the opinion, therefore, that one person may not be clerk of the board and teacher at the same time, and, therefore, the county commissioners could not under section 7610, General Code, issue an order for the payment of the salary of such teacher.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

70.

VILLAGES—LOT OWNED BY VILLAGE AND USED BY LIBRARY TRUSTEES IS SUBJECT TO CONTROL OF FORMER.

Under the general powers granted to municipal corporations to maintain and regulate free public libraries, a village may submit to a board of library trustees the use of a building owned by said village for library purposes. It is the intention of section 4004 and follow- to confer upon the board of library trustees the control and management of such physical property only as is owned by them.

When a village, therefore, permits them the use of a building, held in its own right, the control of such building remains vested in the village and the library trustees must be considered merely tenants at sufferance thereof.

COLUMBUS, OHIO, December 16, 1912.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of December 6th, you wrote in part as follows:

"The village is the owner (with title in the village) of a lot, upon which is situate two buildings. The up-stairs of one of these buildings is used for library purposes; the down-stairs being used for board of education and board of public affairs. The other building is used to store street working machinery. The village has a board of library trustees.

"The question is, who has control of the property—the village council, or the board of trustees?"

Among the provisions granting general powers to municipal corporations, section 3620, General Code, provides as follows:

"To establish, maintain and regulate free public band concerts, free public libraries, and reading rooms, to purchase books, papers, maps and manuscripts therefor, to receive donations and bequests of money or property therefor, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose."

Section 3677, General Code, provides as follows:

"Municipal corporations shall have special power to appropriate, enter upon and hold, real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter. * * * *For libraries, university sites and grounds therefor*; * * *

Section 3939, specifying purposes for which council may issue bonds, in subhead 15, provides "for establishing free public libraries and reading rooms, and free recreation centers."

Section 4356, pertaining to villages, provides as follows:

"The council shall provide by resolution or *ordinance for the care, supervision and management of all public parks, baths, libraries*, market houses, crematories, sewage disposal plants, houses of refuge and correction, workhouses, infirmaries, hospitals, pest houses, or any of such institutions owned, maintained or established by the village, when the council determines to plat any of the streets as authorized by law, it shall provide for the platting thereof."

Statutory provisions, however, which confer general powers are to be restricted to those of like character which are granted specifically, if such construction can be given, in accordance with the apparent intention of the legislature. At Wellsville vs. O'Connor, 1 O. C. C., N. S., 253, special statutes, referring to the control and management of libraries in municipal corporations, provide for a board of library trustees. Sections 4004 and 4005 of these statutes are as follows:

"Section 4004. The erection and equipment, and the custody, *control* and administration of free public libraries established by municipal corporation, shall be vested in six trustees, not more than three of whom shall belong to the same political party, and not more than three of whom shall be women. Such trustees shall be appointed by the mayor, to serve without compensation, for a term of four years and until their successors are appointed and

qualified. In the first instance, three of such trustees shall be appointed for a term of two years, and three for a term of four years. Vacancies shall be filled by like appointment for the unexpired term."

"Section 4005. Such trustees shall employ the librarians and necessary assistants, fix their compensation, adopt the necessary by-laws and regulations for the protection and government of the libraries *and all property belonging thereto, and exercise* all the powers and duties connected with and incident to the government, operation and maintenance thereof. Four trustees shall constitute a quorum, and four votes shall be necessary to pass any measure to authorize any act, which votes shall be taken by the yeas and nays and entered on the record of their proceedings. In the making of contracts, the trustees shall be governed by the provisions of law applicable thereto."

Under the rule of Wellsville vs. O'Connor, above stated, the power of control and management of the library must be permitted to the village, except insofar as it is restricted in these special statutes. *It will be noted* that under these statutes, the custody, control and administration of free public libraries is unquestionably vested in the library trustees. There is nothing in these statutes, however, upon which could be founded a holding that the library trustees are given absolute control and management of all *physical property,* which the corporation may have permitted them the use of.

Section 4004, General Code, above quoted, provides that the erection and equipment of such public libraries shall be vested in such trustees.

Section 4007, General Code, provides that the trustees may issue bonds to provide buildings for the public libraries in their charge and to furnish them and to provide the costs thereof.

Section 4005, General Code, provides that such trustees may adopt the necessary by-laws and regulations for the protection and government of the libraries and all property *belonging* thereto.

In am of the opinion, therefore, that these special statutes give control to the trustees only of such property as they may have acquired the ownership of, and, that property properly owned by the corporation itself, may, by virtue of the general powers above set out, be permitted by the council to be used by the library trustees without surrendering to them all control and management thereof.

I, therefore, conclude that the control of the building referred to remains in the village corporation and that the library trustees are mere tenants thereof, subject to the sufferance of the village council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

72.

ROADS AND HIGHWAYS—NAMES MAY BE WITHDRAWN FROM PETITION FOR VACANCY OF COUNTY ROAD AT ANY TIME PRIOR TO TIME COMMISSIONERS ACQUIRED JURISDICTION.

When a petition is signed by more than twelve freeholders for the vacancy of a county road, as required by section 6861, General Code, but before the meeting at which the petition was to be presented, enough of the petitioners, by separate papers signed by them, withdrew their names to make the number of petitioners less than twelve, held: That under the general rule of law to the effect that names may be withdrawn from the petition at any time before the board has taken such action as to acquire jurisdiction of a subject matter, the commissioners would lose jurisdiction by virtue of the withdrawal of such names.

COLUMBUS, OHIO, February 11, 1913.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 21st, wherein you state:

> "I wish your opinion upon the following question:
> "A petition had been filed with the board of county commissioners of this county for the vacation of a county road. This petition, on its face, was signed by more than twelve freeholders as required by section 6861 of the General Code, but, before the meeting at which the petition was to be presented, as provided by section 6865 of the General Code, enough of the petitioners, by separate paper signed by them, withdrew their names to make the number of petitioners less than twelve. These persons withdrew, by the paper filed by them, after the original petition for vacation of the road had been filed with the commissioners under section 6861, but before the meeting of the commissioners, specified therein under section 6865. Have the commissioners authority to appoint viewers on the petition to vacate such road after the number of signers has been reduced below twelve by withdrawals in the manner above set forth? In other words, can persons withdraw their names from a petition for the vacation of a road after such petition has been filed, and before a hearing has been had thereon?"

Sections 6861 and 6865 of the General Code are a part of the general chapter thereof relating to county roads, and provide as follows:

> "Section 6861. Applications for laying out, altering, changing the width of, or vacating a county road shall be by petition to the county commissioners, signed by at least twelve freeholders of the county residing in the vicinity of the road to be laid out, viewed or reviewed, altered or vacated. One or more of the signers to such petition shall enter into bond with sufficient surety, payable to the state for the use of the county, conditioned that the persons making such application shall pay into the treasury of the county the amount of all costs and expenses accruing thereon in case the application fails.
> "Section 6865. Notice of the presentation of such petition must be given by advertisement set up at the auditor's office, and in three public places in each township through which any part of the road is to be laid out, altered, or vacated, at least thirty days prior to the meeting of the commissioners at which the petition shall be presented, stating the time when such petition is to be presented."

Section 6866 is also pertinent to your inquiry and is as follows:

"The substance of such notice shall be published for four consecutive weeks, before its presentation, in a newspaper published in the county in which the road sought to be established, altered, or vacated, is situated."

The general rule is that when petitions are presented to a body clothed with jurisdiction to grant the prayer thereof, petitioners may withdraw their names at any time before final action is taken thereon.

In the case of Hays et al. vs. Jones et al., 27 O. S., 218, the court held:

"The board of county commissioners, under the act passed March 29, 1867 (64 O. L., 80), as amended March 31, 1868 (S. and S., 673), and again amended May 9, 1869 (S. and S. 675-6), to 'authorize county commissioners to construct roads on the petition of a majority of the resident landowners along and adjacent to the line of said roads,' are not authorized to grant a final order for making such road improvement, except upon the petition of 'a majority of the resident landholders whose lands are reported benefited' by, 'and ought to be assessed' for the costs of the improvement." (1st Syl.)

"The jurisdiction of the board of county commissioners to make the final order for the improvement, under these statutes, is special, and conditioned upon the consent, at the time the final order is to be made, of a majority of the resident landholders, who are to be charged with the costs of the improvement. (2nd Syl.)

"Resident landholders, who have subscribed a petition praying for such road improvement, may, at any time before such improvement is finally ordered to be made by the board of county commissioners, withdraw their assent by remonstrance, or having their names stricken from the petition, and after withdrawal of consent, such persons can no longer be counted as petitioning for the improvement. (3d Syl.)

In Dutton vs. Village of Hanover, 42 O. S., 215, the court held:

"Upon the presentation of a petition to the council for such an election, it is the duty of the council, before taking action thereon, to satisfy itself that it contains the requisite number of qualified petitioners, and for that purpose may refer the same to a committee to make the necessary examination. (2nd Syl.)

"While such petition is under consideration and before action thereon by the council, signers thereof may withdraw their names from such petition, and if thereby the number of names is reduced below the requisite number, it is the duty of the council to refuse to order such election. (3rd Syl.)

In Grinnell et al. vs. Adams et al., 34 O. S., 44, it was held:

"After the jurisdiction of county commissioners, in the matter of laying out or altering a county road, has attached by the filing of a proper petition, etc., such jurisdiction cannot be defeated by any number of the petitioners afterward becoming remonstrants against the granting of the prayer of the petition." (Syllabus.)

An examination of the facts upon which the decision in the last cited case was based discloses that the attempted withdrawal of certain petitioners was made after the county commissioners had acquired jurisdiction of the petition, had appointed

viewers of the proposed improvement, and after the report of the latter, favorable to such improvement, had been made. In both of the other cases the withdrawal was made prior to final action by the county commissioners and village council, respectively. The facts presented by your inquiry come within the decisions in the 27th Ohio state report and the 42nd Ohio state report rather than within the decision in the 34th Ohio state report, because the petitioners for the vacation of said road had withdrawn their names before any action was taken by the board of county commissioners on the petition.

County commissioners cannot acquire jurisdiction to order the opening, alteration or vacation of a county road until the requirements of sections 6866 and 6866 of the General Code have been complied with, and it is my opinion that petitioners can withdraw their names at any time before action is taken by the county commissioners. If, pending the completion of publication, as required by sections 6865 and 6866, and before any action is taken by the county commissioners, enough of the original petitioners withdraw their names from the petition to leave the number remaining on the petition less than twelve, the commissioners are, in my judgment, without authority to appoint viewers or to take any proceedings to vacate said road.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

77.

INTOXICATING LIQUORS—FINES—ASSESSMENT FOR VIOLATION OF ROSE LAW PAID INTO COUNTY TREASURY, NOT TO LAW LIBRARY ASSOCIATION.

Section 13247, General Code, providing that fines collected under the subdivision of the chapter of the General Code in which this section is found, shall be paid into the county treasury, if enforced in a county court and into the municipal treasury if enforced in a municipal court, makes special provision as to the disposition of such fines. This statute must, therefore, be construed as an exception to section 3056, General Code, which provides that a certain percentage of fines and penalties assessed by the common pleas and probate court shall be paid to the law library association.

Such fine, therefore, must be paid into the county treasury when assessed by the probate court.

COLUMBUS, OHIO, February 11, 1913.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Under date of January 15th, you submit for my opinion the request which follows in part:

> "As prosecuting attorney of Madison County, I would like an opinion as to the disposition of a fine of $500.00 now in the hands of the probate judge, the same having been collected for the violation of the Rose law. * * *
>
> As we have a library association in this county, the question presented is whether this money should be paid into the county treasury or to the trustees of the library association."

The sections of the General Code bearing upon your inquiry are 12378, 3056 and 13247.

"Section 12378. Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

"Section 3056. All fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court in state cases shall be retained by the clerk and be paid by him quarterly to the trustees of such law library associations, but the sum so retained and paid by the clerk of said police court to the trustees of such law library association shall in no quarter be less than 15 per cent. of the fines and penalties collected in that quarter without deducting the amount of the allowances of the county commissioners to said judges, clerk and prosecutor. *In all counties the fines and penalties assessed and collected by the common pleas court and probate court for offenses and misdemeanors prosecuted in the name of the state, shall be retained and paid quarterly by the clerk of such courts to the trustees of such library association,* but the sum so paid from the fines and penalties assessed and collected by the common pleas and probate courts *shall not exceed five hundred per annum.* The moneys so paid shall be expended in the purchase of law books and the maintenance of such association."

"Section 13247. Fines and forfeited bonds collected under this subdivision of this chapter, except as provided in section thirteen thousand two hundred and thirty-one, if enforced in the county court, shall be paid into the county treasury, and, if enforced in municipal courts, shall be paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct."

The fine referred to by you was assessed under the Rose law and comes within the terms of section 13247, General Code, above quoted. This fine was assessed for an offense prosecuted in the name of the state, and were it not otherwise provided for, the same would have come within the terms of section 3056, General Code. Section 13247, however, is a special statute and must be allowed to control. There can be no doubt as to the intention of the legislature to make special provision for the disposition of fines assessed under the Rose law, when it is noted that council is given entire control over such fines, when assessed by a municipal court, under the provisions of section 13247, General Code.

I am of the opinion that the special requirement of this same section, that such fine when assessed by county courts *shall be paid into the county treasury,* shall be given equal force as a special provision with the requirement that fines assessed by municipal courts shall be paid into the municipal treasury. A fine assessed, therefore, cannot be paid to the law library association, under section 3056, General Code, but must be paid into the county treasury, as provided by section 13247, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

78.

ROADS AND HIGHWAYS—SECTIONS 6903 TO 6914, GENERAL CODE, NOT REPEALED BY SECTIONS 6956-1 TO 6956-16, GENERAL CODE.

Sections 6903 to 6914, General Code, provide for road improvements by the county commissioners only upon a petition signed by the owners of at least a majority of the foot frontage of the lands abutting on the county road or part thereof sought to be improved; and the cost and expense of the improvement may be assessed against the taxable property abutting the improvement, according to the foot frontage or benefits.

Under section 6956-2, such improvement can be made upon the petition of a majority of the owners of real estate who reside within the county and who own lands lying within one mile of the road or part thereof to be improved, and the assessment of the cost and expense is to be made payable partly from a levy on the general duplicate of the county and partly from the general duplicate of the township and partly from assessments.

These statutes, therefore, respectively authorize distinct and different modes of procedure and one cannot, therefore, be construed to supercede the other. The former statutes, therefore, cannot be held to have been repealed by the passage of the latter.

COLUMBUS, OHIO, January 27, 1913.

HON. HARRY T. NOLAN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 11th, as follows:

> "In view of the decisions of the supreme court in the case of Groff et al. vs. Gates et al., commissioners, and Gates et al. commissioners vs. Granger, 87 O. S., —- (published in Ohio Law Bulletin, January 6th, 1913) are sections 6903 to 6914 of the General Code repealed by the act of May 10, 1910, now designated as sections 6956-1 to 6956-15 of the General Code?"

The second and third syllabi of the decisions of the supreme court in the cases to which you refer are as follows:

> "2. Section 2 of the act of the general assembly, passed May, 1910, entitled: "An act to provide for the laying out, construction, repair, or improvement of any public road or any part thereof, and for the straightening, widening, or altering and draining of the same by the county commissioners," is in direct conflict with section 6926, General Code, and therefore repeals said section of the General Code by implication.
>
> "3. The act of the general assembly, of May 10, 1910, completely revises the whole subject matter covered by sections 6926 to 6956, General Code, inclusive, and is evidently intended as a substitute for those sections and therefore repeals the same by implication."

The following sections of the Code are pertinent to your inquiry:

> "Section 6903. On a petition therefor signed by the owners of at least a majority of the foot frontage on a county road or part thereof, the county commissioners may do any one or more of the following acts or things:
>
> "1. Cause the county surveyor to establish a grade along it, or part thereof, subject to their approval;
>
> "2. Cause it or part thereof to be widened, altered or established or established to a greater width than sixty feet and not more than one hundred feet, to be determined by the viewers as provided in this chapter;

"3. Drain, grade, curb, pave and improve it or part thereof.

"Section 6904. The county commissioners may assess the damages on account of the widening, altering or establishing of such road, or part thereof, and the costs and expenses of any or all of the improvement or such part of said damages, costs and expenses as they deem equitable under the circumstances, upon the taxable property abutting upon the road or part thereof, either according to the foot frontage or according to the benefits. The commissioners shall be an assessing board for the purpose of assessing the damages, costs and expenses, as herein set forth, upon the abutting property as aforesaid.

"Section 6956-2. When a majority of the owners of real estate who reside within the county and who own lands lying and being within one mile in any direction from either side, end or terminus of the road or part thereof to be laid out, constructed or improved shall present a petition to the commissioners of any county in the state asking for the laying out, construction, repair, improvement or alteration of any public road or part thereof and upon the filing of a bond in such an amount and with such security as the county commissioners shall deem sufficient, conditioned for the payment of the cost and expense of the preliminary survey, the county commissioners shall go upon the line of said road or part thereof or such proposed road, and if in the opinion of the county commissioners it seems that the public utility and convenience require such road to be laid out, constructed, repaired, improved, altered, straightened, or widened as petitioned for, the commissioners shall determine the route and termini of such road, if the petition is for the laying out of a new road, the kind and extent of the improvement or repairs and what alterations in the line or change of grade of said road, if any, should be made, and at the same time the commissioners shall appoint the county surveyor as engineer to go upon the line of such road or proposed road, and make such surveys, plats, profiles, estimates and specifications as the commissioners shall order; provided that in locating such road and road improvements within the territorial limits of any municipality the county commissioners shall be confin d to the platted streets of such municipality.

"Section 6956-10. When the improvement is wholly within one county, the cost and expense of said improvement including all damages and compensation awarded shall be apportioned by the commissioners as follows: Not less than thirty-five per cent. (35%) nor more than fifty per cent. (50%) thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of all the taxable property of the county, or out of any funds available therefor, as provided in section 6956-14 of this act; not less than twenty-five per cent. (25%) nor more than forty per cent. (40%) thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county levied upon the taxable property of any township or townships in which said improvement may be situated in whole or in part, as provided in section 6956-14 of this act; and the balance, which shall not be less than twenty per cent. (20%) nor more than thirty-five per cent. (35%) thereof shall be assessed upon and collected from the owners of real estate lying and being within one mile from either side, end or terminus of the improvement and assessed according to benefits derived from the improvement as determined by the commissioners. Such assessment shall be in addition to all other assessments authorized by law notwithstanding any limitations upon the aggregate amount of assessments on such property.

"Section 6956-11. When any part of the improvement is in more than one county or along the line between two or more counties, the cost and expense of the entire improvement including all damages and compensation awarded, shall be divided between the counties in which such improvement may be in

the proportion the distance in such county bears to the whole distance improved and the amount of expense so falling upon the several counties shall be assessed by the commissioners of said counties separately in the same manner and form as though the improvement was wholly in one and the same county, and in the proportion provided in the preceding section."

You will note that the several improvements contemplated by section 6903 can be made by the county commissioners only upon a petition signed by the owners of at least a majority of the *foot frontage of the lands abutting* on the county road or part thereof sought to be improved, and such part or all of the cost and expense of such improvement and the amount awarded as damages, as may be deemed equitable by the commissioners, may be assessed against the taxable property abutting such improvement according to the foot frontage or benefits. The improvement authorized by section 6956-2 can be made only upon the petition of "a majority of the owners of real estate who reside within the county and who own lands lying and being within *one mile in any direction from either side, end or terminus* of the road or part thereof to be laid out," etc., and the assessment of the cost and expense of such improvement is to be made in the manner prescribed by section 6956-10, supra.

It will be observed that while both of the statutes from which I have quoted constitute a scheme of legislation on the subject of county road improvements, each complete in itself, yet they are different from each other. The act of May 10, 1910, being now sections 6956-1 to 6956-16 of the General Code, provides a method of building county roads similar to that outlined in sections 6926 to 6956 and on the same subject matter, to wit: one mile assessment pikes. The act of May 10, 1910, being later in point of enactment than sections 6926 to 6956 and covering the subject matter embraced in those sections, it was held by the court that said act, being in direct conflict with said sections, repealed the same by implication. The decisions of the supreme court in these cases, however, are not, in my judgment, broad enough to justify the view that sections 6903 to 6914 are repealed by implication by the act of 1910.

As before stated, the method prescribed for improvement under sections 6903 to 6914 is different from that prescribed by sections 6956-1 to 6956-16, and for this reason I am constrained to hold that sections 6903 to 6914 of the General Code are not repealed by implication by the act of May 10, 1910, but on the contrary are in full force and effect.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

79.

ROADS AND HIGHWAYS—GARRETT LAW REPEALED BY IMPLICATION—CONCRETE ROADWAY WITH TAR TOP NOT AUTHORIZED BY STATUTE PROVIDING FOR IMPROVEMENT BY "GRADING, MACADAMIZING OR GRAVELING, DRAINING, CULVERTING AND BRIDGING."

In accordance with the decision of Goff vs. Gates, et al. Commissioners, the Garrett law has been repealed by implication, through the enactment of sections 6956-1 to 6956-15.

In accordance with the maxim, the expression of one thing excludes others, section 7033, authorizing the improvement of public ways of the township by "grading, macadamizing or graveling, draining, culverting and bridging," does not authorize the construction of a concrete road with a tar top.

COLUMBUS, OHIO, January 7, 1913.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 19, 1912 which is in part as follows:

> "1. I desire to inquire whether the language in section 6926, General Code, 'stone, gravel or brick, any or all * * *' may be so construed as to authorize the construction of a concrete roadway with tar top?"
>
> "2. May the language of the township improvement law, being sections 7033 and 7045, be so construed as to authorize a concrete road with tar top?"
>
> "3. In determining the assessment district and the majority of resident owners under section 6926, are the lands within the mile circle from the end of the road, or part thereof, to be improved, to be included?"

Your first and third questions involve a construction of the so-called "Garrett law," sections 6926 to 6956 inclusive, of the General Code. The supreme court in the cases of Goff vs. Gates et al., commissioners of Morrow County, No. 13376, and Gates et. al., commissioners of Morrow County vs. Granger, No. 13375, on November 26, 1912, held that the "Garrett law" was repealed by implication by the act of May 10, 1910, 101 O. L., 247, sections 6956-1 to 6956-15 inclusive, of the General Code, and perpetually enjoined the commissioners of said county in case No. 13376 from levying any assessment under said law.

In view of these facts, I assume that no answer is desired to your first and third questions.

Coming now to your second question, sections 7033 and 7045 of the General Code provide as follows:

> "Section 7033. The board of trustees of a township, when in their opinion, it is expedient and necessary, and for the public convenience and welfare, to improve the public ways of the township, in whole or in part, by grading, macadamizing or graveling, draining, culverting, and bridging, by resolution, may create the township into a road district for the purpose of improving the public ways therein, or any number of them. If in the township, there is a municipal corporation or corporations, such trustees by resolution, may erect the portion or portions of the township not included within the corporate limits of a municipal corporation, into such road district. In like manner the trustees may erect an election precinct, or part thereof, in the township, into such road district."

"Section 7045. Thereupon the trustees shall determine the order and manner in which the public ways shall be improved, beginning, so far as practicable, with the main roads. In improving such public ways the macadamized or graveled portion shall be located, when practicable, so as to leave sufficient space for a dirt road at its side. The graveled or macadamized portion shall be not less than eight nor more than fourteen feet in width, and the gravel or macadam shall be not less than twelve inches in depth in the center, and eight inches in depth at each outer side."

These sections are incorporated in the sub-division of the chapter of the code relating to township roads which sub-division in entitled "Township or precinct a road district." The two sections above quoted are the only ones in which mention is made of the kind of material to be used in building roads under said sub-division. There is no mention of any other kind of material any where else in these statutes, nor do they contain any language which could be construed, to allow township trustees any wider lattitude in the selection of road-building material than what is clearly and expressly provided by the statutes themselves. Doubtless a road built of concrete with tar top would be as satisfactory at least as one built of any material enumerated in the statutes, but it is not a question of what would be satisfactory or desirable but rather what is permitted by the statutes. It is a well established principle of law embodied in the maxim, *expressio unius exclusio alterius est*, that the expression of one thing is the exclusion of another. The statutes in question prescribe the character of material to be used in building roads, and that material is exclusive. Since no provision is made for building roads of concrete with tar top, I am of the opinion that the same may not be done under these statutes as they now stand.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

80.

SHERIFF'S RESIDENCE—COMMISSIONERS NOT REQUIRED TO PAY FOR FUEL THEREFOR.

The statutes do not authorize the county commissioners to furnish coal for the sheriff's residence. The county commissioners are authorized, however, to provide light and heat in the county jail.

When the commissioners enter into a contract, therefore, the contractors are not obliged to ascertain the use to which said fuel is to be put by the former, and the county commissioners are not relieved of their obligation to pay for such coal, on the ground that the same was illegally used for furnishing light and heat for the sheriff, when the latter's residence was provided within the county jail. The cost of lighting the sheriff's residence should be computed and the sheriff required to pay the same, however.

COLUMBUS, OHIO, February 11, 1913.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter dated December 6, 1912 wherein you inquire as follows:

"In Fulton county the sheriff's residence is in connection with the county jail and both buildings are heated by one large furnace, the said residence be-

longs to the county and the rent has always been free to the sheriff, the electric current for lighting both structures is measured through one meter. Must the commissioners pay for the coal so used and light so furnished, from county funds?"

In reply thereto I desire to say that section 3177 of the General Code, provides for suitable means for warming the jail and its cells and apartments, etc., as follows:

"Section 3177. The county commissioners, at the expense of the county, shall provide suitable means for warming the jail, and its cells and apartments, frames and sacks for beds, night buckets, fuel, bed, clothing, washing, nursing when required, and such fixtures and repairs as are required by the court. They may appoint a physician for the jail, at such salary as is reasonable to be paid from the county treasury. Such physician, or any physician or surgeon employed in the jail, shall make a report in writing whenever required by the commissioners, the grand jury or the court. The sheriff shall make a report to the commissioners annually, or oftener if they so require, of the property of the county in the jail, and the condition thereof."

It is the duty of the county commissioners to provide county buildings and provide the same with heat and light, and if such heat and light has been furnished to the county commissioners by contract, properly entered into in accordance with the provisions of the statute, then it is the duty of the commissioners to pay for the coal so used and the light so furnished. It is no part of the legal duty of the party furnishing such heat and light to see to it that the heat and light sold to the county commissioners is not illegally used, after, as above stated, the contract has been entered into in strict accordance with the statutory provisions. The duty of seeing to it that the heat and light is used for authorized purposes devolves upon the county commissioners.

I am of the opinion that there is no statutory provision authorizing county commissioners to provide the sheriff's residence with heat and light. I base my opinion in this regard upon the decision in the case of State of Ohio vs. Toan, Auditor, 13 O. C. C., (n. s.) 276.

The cost of lighting the sheriff's residence should be determined by the county commissioners, and the sheriff required to pay it and a separate meter should be installed for measuring the light furnished in lighting the sheriff's residence, likewise the cost of the coal used in heating the sheriff's residence should be determined by the commissioners and the sheriff required to pay it. There should be an understanding between the county commissioners and the sheriff in advance as to the amount to be paid by the sheriff in heating his residence, when the jail and sheriff's residence are heated by one furnace as in the case stated in your inquiry.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

81.

TAXES AND TAXATION—INHERITANCE TAX—TAX ON PRIVILEGE OF RECEIVING, NOT ON PROPERTY—DEDUCTION OF $200.00 FOR EACH PORTION RECEIVED BY DEVISEE.

It is the object of the collateral inheritance tax to place an assessment upon the privilege of receiving and not upon the property devised. The legislature intended the value to be taxed, to be measured by the value of the thing inherited and not by the value of the thing devised.

Under section 5331, General Code, therefore, which provides that property which passes by will or by intestate laws of this state to other than certain designated relatives, shall be liable to a tax of 5% of its value above the sum of $200.00, the sum of $200.00 so designated shall be deducted from the amount which the taxable heir is entitled to, after all expenses and debts of the estate devised have been substracted.

COLUMBUS, OHIO, February 5, 1913.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of December 19th, requesting my opinion upon a certain question to the administration of the collateral inheritance tax law of this state, and apologize for my delay in answering it which has been due to the extraordinary pressure of business arising out of the legislative session.

I quote the question as you state it in your letter:

> "A party died intestate in this county, possessed of a small amount of personal property, together with real estate worth about $6,000.00. The real estate was sold for the payment of debts and there remained for distribution approximately $5,000.00. This money will be distributed to first cousins of the descendants of such. The share of none of the distributees will exceed $200.00. Is this property, which will be distributed as above, subject to the collateral inheritance tax under the provisions of 5331 of the General Code?"

I enclose herewith a copy of an opinion addressed to Hon. Harry P. Black, prosecuting attorney, Tiffin, Ohio, relating to another phase of the application of this law. Some of the discussion therein, however, is applicable to the question which you state.

Section 5331, General Code, provides in the abstract as follows:

> "All property within the jurisdiction of this state, and any interests therein * * * which passes by will or by the intestate laws of this state * * * to a person * * * other than to or for the use of (certain enumerated relatives of the decedent) shall be liable to a tax of five per cent. of its value above the sum of two hundred dollars."

Resolved into its ultimate terms, your question is as to whether or not the phrase "above the sum of two hundred dollars" is to be understood as applicable to the entire estate of the decedent, the entire amount or value thereof which passes to collateral relatives, or to the separate interests of each collateral relative. As will be apparent from a perusal of the other opinion herewith, different provisions of the succeeding sections relating to the same subject-matter seem to give rise to perhaps more doubt than is suggested by the primary meaning of the sentence just quoted. Thus section 5333 provides that when a prior estate is bequeathed or devised to a lineal relative,

and the remainder to a collateral relative or stranger to the blood, the value of the prior estate shall be appraised and deducted together with the sum of $200.00 from the appraised value of the property.

Again, section 5334 provides that when a bequest or devise which would otherwise be liable to the tax is made in lieu of the compensation of the legatee or devisee as executor or trustee, the excess only of the value of the estate bequeathed or devised over the reasonable compensation of the legatee or devisee as such executor or trustee shall be liable to the tax.

These two sections seem to indicate that the separate interests are separately liable for the inheritance tax from which it would logically follow that the deduction of $200.00 is to be made from the value of each separate interest. Of similar import, so far as this question is concerned, are the provisions of sections 5336 to 5339, inclusive. The confusion arises by reason of the provisions of section 5340, from which it appears that the value of the thing to be taxed is to be ascertained from the inventory of the estate filed in the probate court. From this it might be argued that the estate, or at least so much of it as is subject to the tax, is to be valued as a whole, and if this is the case, any deductions should be made from the whole value so ascertained.

In the other opinion which is enclosed herewith, I held, citing Hagerty vs. State, ex rel., 55 O. S., 613, State, ex rel., vs. Ferris, 53 O. S., 314, and State, ex rel., vs. Guilbert, 70 O. S., 229, that the thing taxed under the collateral and direct inheritance tax laws of this state (the latter of which has since been repealed), is the privilege of succeeding to or receiving property by operation of law, either through the medium of a will or deed of gift, to take effect at the death of the donor or through the medium of the statutes of descent and distribution. It is the privilege, and not the estate, which is taxed; if it were not so, these laws would constitute a species of property taxation repugnant to the uniform rule enjoined by article XII, section 2 of the constitution, and would therefore have to be held unconstitutional.

This fact, being established, becomes the keynote of the entire law. If the real subject of taxation is the right to inherit, succeed to or receive, then it must be presumed that the legislature intended the value of the right in each instance to be measured by the value of the thing inherited, succeeded to or received and not by the value of the thing *transmitted, devised or bequeathed.*

Therefore, in spite of the use of the inventory in the machinery of assessment, I have reached the conclusion, as will be observed by reading the other opinion enclosed herewith, that debts of the decedent and costs of administration of his estate must be deducted from the face value thereof as shown by the inventory, and proportionately from the face value of so much of the estate as passes to collateral relatives and strangers to the blood.

Having reached the conclusion just stated, it seems to me quite logical to advance a step further for the purpose of answering the question submitted by you and to hold that, when the value of so much of the estate as is transmitted to and received by collateral relatives and strangers to the blood is ascertained in bulk by making the necessary deductions or when the debts and costs chargeable against particular devises and bequests have been properly deducted from the value thereof, that portion of the entire estate which is subject to the collateral inheritance tax should be separated into the various interests, portions, devises or bequests receivable by different persons under the statute or the will or deed of gift and the tax assessed separately against each one of them. This is consistent with the provisions of sections 5333, 5334, 5336 and similar sections. If the tax is to be so separately assessed, it follows as a matter of course, that the deduction of $200.00 must be made from the ascertained value of each separate share or interest.

I am of the opinion, therefore, that in a case where any property of an intestate decedent is so divided by the operation of the statutes of descent and distribution

as that no single distributive share exceeds two hundred dollars in value, no collateral inheritance tax can be assessed against the estate as a whole or against any of such separate distributive shares.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

82.

OFFICERS—APPOINTING POWER CANNOT APPOINT BEYOND TERM—COUNTY COMMISSIONERS—TAX MAP DRAUGHTSMAN.

Under the laws of this state an appointee holds subject to the will of and only for the term of the appointing officer. An officer may appoint and empower to hold beyond his own term, only when such appointment is made for a reasonable time, and made necessary by public exigency. An appointment, therefore, by a retiring board of county commissioners of a tax map draughtsman for two years after the term of said commissioners expires, may be awarded by the succeeding board and a new appointment made by it.

COLUMBUS, OHIO, February 1, 1913.

HON. L. E. KERLIN, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your predecessor in office, Hon. John F. Maher, under date of November 29, 1912, submitted to this office a request for an opinion upon the following:

> "On June 21, 1911, surveyor C. S. S. of this county was appointed tax map draughtsman under the provisions of section 5551, General Code, for the period expiring on the first Monday of September, 1911, at a salary of $1,500.00 a year, payable monthly. (Com. Journal 31, P. 110-111.)
>
> "On September 2, 1911, the retiring board of county commissioners (none succeeding themselves) again employed said surveyor S. as such tax map draughtsman for a period of two years, beginning September 4, 1911, and ending the first Monday of September, 1913, at $1,500.00 per year, payable monthly.
>
> "Said resolution also fixes the salary of one assistant tax map draughtsman at $840.00 per year. (Com. J., page 353 and 354.)
>
> "Have the county commissioners the right to make a contract terminating practically two years beyond their term of office? And if so has the party (C. S. S.) a right to draw per diem as county engineer ($5.00 per day), and drawing practically for each working day in the year, and also draw his $1,500.00 per year or $125.00 per month as tax map draughtsman. His assistant tax map draughtsman is his wife, drawing $840.00 per year or $70.00 per month, making $2,340.00 per year for services rendered as tax map draughtsman."

The appointment of the county surveyor as tax map draughtsman is provided for by sections 5551 and 5552 of the General Code, as follows:

> "Section 5551. The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions, and allotments thereof,

with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equilization and the auditor, and be kept in the office of the county auditor."

"Section 5552. The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

You will observe that the foregoing empowers the county commissioners to appoint the county surveyor as tax map draughtsman and determine the number of assistant tax map draughtsmen not exceeding four, whose salaries shall be fixed by the county commissioners, that of the draughtsman not to exceed $2,000.00 per year and of his assistants not to exceed $1,500.00 per year. The statute does not fix any definite term either for the tax map draughtsman or his assistants, nor is there any provision protecting them from summary dismissal at any time.

The general rule of law is, that when the statutes authorize the employment of anyone to render services to the public, and no definite term is fixed, such persons hold their positions only during the will of the appointing officer or board.

In the case of Brady vs. French, 6 N. P., 122, it was held:

"The employment of a collector by the treasurer for a period of two years does not bind the successor of the treasurer making the appointment, but the appointment expires necessarily with the power that gave it. The appointee assumes the peril of the death of the treasurer appointing him, and the law affords him no remedy."

The court on page 126 of the opinion say:

"Having determined that the collector is a deputy treasurer, the question remains to what extent may one treasurer contract for the employment of a deputy so that such contract shall be binding upon his successor. The answer is found in the language of section 9, which declares that 'a deputy or clerk appointed in pursuance of law shall hold the appointment during the pleasure of the officer appointing him;' but an officer can have no legal or official 'pleasure' after his term has expired, because with the expiration of his term of office he is functus officio and a private citizen. His appointments expire necessarily with the power which gave them life."

And in Commissioners vs. Ranck, 9 C. C. Rep., 301, held:

"A contract for the employment of janitors by a board of county commissioners, for a period of time extending beyond the time when a change is certain to occur in the persons composing the board, unless made in good faith, in the interest of the public and for a time reasonable under the circumstances, is against public policy, and void."

An examination of the facts in this case as related in the court's opinion discloses that the board of county commissioners of Franklin county on January 5, 1895, appointed Ranck as janitor of the court house of said county for the term of one year next ensuing. The term of office of one member of the board making this appointment expired the next day. His successor was duly qualified and entered upon his duties, and immediately thereafter the new board of county commissioners adopted a resolution rescinding the action of its predecessor in authorizing such employment. Commenting on these facts the court, on page 308 of the opinion, use this language:

> "We fully concur in what was said in State ex rel. Attorney General vs. Thompson, 9 O. C. C. 161, and believe that in the absence of some necessity or special circumstances, showing that the public good required it, such a contract, as the one under consideration, made by an expiring board, and which has the effect to forstall the action of its successor for a year, is not only evidence of unseemly conduct on the part of the members of the board, but in its object, operation and tendency, is calculated to be prejudicial to the public interests, and is against public policy, and void.
>
> "The maxim, omnia praesumuntur rite esse acta, rests largely on the ground of public policy, so that in a case of this character, where the contract prima facie has a bad tendency, the maxim does not apply, and a court might well refuse to enforce the contract in the absence of a showing that it was made in good faith, and in the interests of the public, even though it might hold that the question of the necessity for the employment was one of discretion and not of jurisdiction. This contract was made on Saturday, the last working day of the board. On the following Monday, the new board came into existence. No necessity of an employment for a year is shown. Indeed, it is conceded by the pleadings that the employment was unnecessary, and a contract made under such circumstances and for such length of time, is strong evidence, to say the least, that the only object in making the contract was to forestall the action of the new board. We, therefore, hold that the contract is void, as against public policy."

A general review of the decisions of courts in other jurisdictions is given by the circuit court in the Ranck case, from which it appears to be the general holding that a board or officer vested with the power to appoint can not, prior to retiring from office, forestall the action of their successors by making an appointment, the term of which is to extend beyond their own term.

I am of the opinion that the county surveyor when acting in the capacity of tax map draughtsman and his assistants in such capacity, are merely employes and not officers. They have no definite statutory term and accordingly their services can be dispensed with by the county commissioners at any time by the adoption of a resolution declaring the continuance of such services to be unnecessary, after which the tax map draughtsman and his assistants are not entitled to compensation from the county treasury.

The language used by Mr. Maher in his letter indicates that in the event it should be held by this department that the present board of county commissioners is bound by the act of its predecessor in employing the county surveyor as tax map draughtsman and can not of its own motion terminate such employment, no answer to the second question contained in his letter is desired; and inasmuch as it has been held in answer to his first question that the present board of commissioners may terminate the employment of the tax map draughtsman and his assistant I have not answered the second question.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

83.

CONSTITUTIONAL AMENDMENT—INITIATIVE AND REFERENDUM SELF EXECUTING—NO TIME LIMIT AS TO PRESENTING OF PETITION AFTER SIGNATURE PLACED THEREON—POWER OF LEGISLATURE TO PROVIDE FURTHER REGULATIONS.

By express provision of section 1-g of article 2, such section providing for the signing of petition for initiative and referendum purposes, is self executing. The legislature is empowered should it see fit to enact such supplemental legislation to the right of initiative and referendum as will protect it from abuse, and further regulate its procedures so long as they do not curtail the right or place any undue burden upon its exercise.

Under the present statutes and constitutional provision, there is nothing requiring a signature secured to an initiative petition to be placed thereon at any definite period prior to the time of presenting of the petition. The signatures, therefore, secured during the years 1913 or 1914 will be valid to a petition filed during the year 1914.

COLUMBUS, OHIO, January 10, 1913.

HON. G. P. GILMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your favor of December 23, 1912, is received in which you inquire:

> "I am in receipt of a letter from Mrs. Harriett Taylor Upton, treasurer of the Ohio Woman's Suffrage Association with request for an opinion from your office on the following question:
>
> "The I. & R. amendment to the constitution, adopted September 3rd seems to provide that the percentage of votes necessary to initiative legislation shall be 10 per cent. of the total vote cast in the recent gubernatorial election if the proposed legislation is to be acted upon in 1913 or 1914, that is, before another election for governor. The question she makes is whether there is any time limit within which signatures may be secured for this purpose, or to be more exact, if signatures are obtained during 1913 and 1914, would they be within the requirement for legislation to be submitted in 1914."

The ten per cent. requirement of the initiative and referendum provision of the new constitution of Ohio applies to proposed amendments to the constitution when they are proposed by means of the initiative. I assume, therefore, that the petitions about to be circulated are in reference to a proposed constitutional amendment.

Section 1 of article 2, the initiative and referendum provision in the new constitution, reads:

> "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

Section 1-a of article 2 of said constitution reads:

"The first aforesaid power reserved by the people is designated the initiative, and signatures of ten per centum. of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions above described shall have printed across the top thereof: 'Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors.' "

Section 1-b of said article 2 pertains to the initiation of laws. Section 1-c refers to the referendum, and sections 1-d and 1-e of said article 2 make certain limitations upon the power to use the initiative and referendum. Section 1-f reserves the power to the people of municipalities.

Section 1-g of said article 2 reads:

"Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state in addition to the name of such municipality the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petition shall be written in ink, each signer for himself. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of the signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed the same on the date stated opposite his name; and no other affidavit thereto shall be required. The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution,

together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session, then by the governor. The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and shall mail or otherwise distribute a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative and supplemental petition shall be: 'Be in Enacted by the People of the State of Ohio.' *The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."*

The first question to be determined is whether or not the initiative and referendum amendment to the constitution is self-executing.

In section 1g of article II, it is provided that:

"The foregoing provisions of this section shall be self-executing, except as herein otherwise provided."

This provision is apparently limited to the provisions of that particular section.

The initiative and referendum provision of the Oregon constitution has been held to be self-executing.

In case of Stevens vs. Benson, 91 Pac., 577 (Sup. court of Oregon), it is held:

"Const. art. 4, sec. 1, as amended in 1902, reserving to the people initiative and referendum powers, and providing for the submission of legislation to the voters of the state or other political subdivision, is self-executing.

"Laws 1907, p. 399, providing the procedure to facilitate the enforcement of the initiative and referendum powers reserved to the people by const. art. 4, sec. 1, as amended in 1902, was a proper exercise of legislative powers, though the constitutional provision was self-executing.

"Laws 1907, p. 399, providing for the carrying into effect of the initiative and referendum powers reserved to the people, provided (section 1) a form of petition, which was required to be substantially followed. The form

contained a warning clause that it was a felony for any one to sign any such petition with any name other than his own, or to knowingly sign such petition when he was not a legal voter; and section 2 declared that the form given was not mandatory, and if substantially followed in any petition it should be sufficient, regardless of clerical or mere technical errors. Held, that the form, in so far as it contained the warning clause, was merely directory and that a referendum petition omitting such clause was not thereby fatally defective.

Eakin, J., says at page 578:

"But, when a provision of the constitution is self-executing, legislation may be desirable for the better protection of the right secured and to provide a more specific and convenient remedy for carrying out such provision, and it is plain that the statute in question was intended for that purpose, and reduces to a system and simplifies the proceeding, makes every step definite, as well as placing safeguards around it to protect it from abuse, without curtailing the right or placing any undue burdens upon its exercise. As said by Judge Cooley in his work on constitutional limitations (page 122), a constitutional provision that is self-executing may admit of supplementary legislation in particulars where in itself it is not as complete as may be desirable.

The initiative and referendum provision of the Ohio constitution is very similar to that of the Oregon constitution, as to the features which determine whether or not it is self-executing.

On page 753, volume 8 of Cyc., it is said:

"A self-executing provision then is one which supplies the rule or means by which the right given may be enforced or protected or by which a duty enjoined may be performed."

Also, on page 756 of volume 8 of Cyc., it is further said:

"Constitutional provisions conferring privileges and imposing liabilities are held to be self-executing in cases where the language used is positive and independent of legislative action. But such provisions will be held to be inoperative in cases where the object sought to be accomplished by them is made to depend in whole or in part upon subsequent legislation."

The initiative and referendum provision of the Ohio constitution is a right or privilege which the people have reserved in themselves. The means by which this right may be exercised is contained in the provision itself. Petition sare provided for the number of signatures required, the vote upon which the percentage of voters is to be based is stated, the general nature of the ballots is prescribed, and the time of the election is also provided for. The very nature of the reservation shows that it was not to depend upon the will or caprice of the legislature in order that it might become operative.

It is therefore my opinion that the initiative and referendum provisions of the Ohio constitution, as to the initiative and referendum of state laws and as to initiating proposed amendments to the constitution are self-executing.

Your specific inquiry is as to the time in which petitions must be signed in order to be valid.

The constitution does not place any time limit upon signatures to petitions.

In section 1g of article II, it is provided:

"The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor."

This provision determines upon what vote the ten per cent. required for a petition to propose an amendment to the constitution shall be based.

The constitution does not provide a time limit as to the signatures, although the date of the signature is required. The legislature has not acted in this matter, and from the decision in Stevens vs. Banson, supra, it is apparent that the legislature may enact such supplemental legislation to the right of initiative and referendum as will protect it from abuse, "without curtailing the right or placing any undue burdens 1914 will be valid to a upon its exercise."

What the legislature will do is mere conjecture, but in the present status of the constitutional provision, I am of the opinion, that signatures secured to an initiative petition for a proposed constitutional amendment during the years 1913 or 1914 will be valid to a petition filed during the year 1914.

Neither the people, in their sovereign power, nor the legislature have limited the time in which signatures may be secured and it is not within the province of an executive or judicial officer to make a definite limitation.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

91.

PROSECUTING ATTORNEY NOT LEGAL ADVISER OF HUMANE SOCIETY NOR TOWNSHIP ROAD SUPERINTENDENT—MAY BE EMPLOYED AS PRIVATE ATTORNEY.

Section 13440, General Code, empowers a humane society to employ private attorneys in its prosecutions. A prosecuting attorney is presumed, therefore, not to be a legal adviser for such society and may, therefore, be employed by them as attorney.

A road superintendent of township trustees is not a township officer within the meaning of section 2917, General Code, and a prosecuting attorney is, therefore, not a legal adviser to such. A prosecuting attorney may not receive compensation for acting as legal adviser for the road superintendent of the trustees in the absence of an order made and entered on their journal by the latter officials, directing the employment and fixing the compensation.

COLUMBUS, OHIO, December 18, 1912.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—In your letter of December 12, 1912, you inquire:

"1. Can the prosecuting attorney, under the authority of section 13440, General Code, as an attorney-at-law, properly charge and collect of the county. attorney fees for services rendered a duly organized humane society; such services being rendered in his private capacity as an attorney and at the special instance and request of the society, or its agents, in the trial and prosecution of a case before a justice of the peace for cruelty to animals?"

You also ask:

"2. What is the duty of the prosecuting attorney in reference to representing a township road superintendent in an action to collect a poll tax?

Under sections 3377-3385 of the General Code, by necessity an action of this sort must be instituted by the road superintendent before a justice of the peace, and is it the duty of the prosecuting attorney to take charge of and prosecute such an action to final judgment, or would the road superintendent or other township officer, at his request, be authorized and empowered to employ an attorney for that purpose, and if so, would they have a right to employ the prosecuting attorney in his private capacity as an attorney, and pay him for such services from the township funds?"

Section 13440 reads:

"A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his services out of the county treasury in such sum as the judge of the court of common pleas or the probate judge of such county or the county commissioners thereof may approve as just and reasonable:

"1. Violations of law relating to the prevention of cruelty to animals or children;

"2. Violations of law relating to the abandoment, non-support or ill-treatment of a child by its parent;

"3. Violations of law relating to the employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals or which cause or permit such child to suffer unnecessary physical or mental pain;

"4. Violations of law relating to neglect or refusal of adult to support destitute parent."

Under authority of this section the humane society or its agent may employ an attorney to prosecute—1, violations of the law in relation to prevention of cruelty to animals and children.

This covers the employment mentioned in your question, and in the absence of a statute prohibiting the employment of the prosecuting attorney, and I can find none, I would regard such employment as being entirely lawful.

In answer to your second question, I can find no authority granted to the road superintendent or township trustees to employ attorneys for collection of the poll tax. Neither can I find that it is the duty of the prosecuting attorney to prosecute such cases.

Section 2917, General Code, reads:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section 2412. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

A road superintendent is hired by the trustees. Section 3370, General Code. He

is, therefore, not a township officer for whom the prosecuting attorney is the legal adviser, and as your statement does not come within the provisions of section 2917, my answer is:

1. It is not part of the duty of the prosecuting attorney as part of his official duties to prosecute suits brought by a road superintendent to collect poll tax.

2. No order of the trustees having been made and entered on their journal, directing the employment and fixing the compensation, there can be no payment from the township treasury to the attorney whether he be prosecuting attorney or not. In State ex rel. vs. Delany vs. Commissioners of Franklin county, 21 O. S., 648, it is held:

> "A board of county commissioners has no power under the constitution and laws of Ohio to employ an attorney to prosecute criminal complaints before the examining magistrates of the county, except in cases in which the county in its *quasi* corporate capacity, has a direct interest. Nor can the board of commissioners be compelled, by mandamus, to pay for such services out of the county treasury."

While this is not directly in point and is a percuriam in the words given above, yet it must rest upon the fact that in the absence of legal authority to do so a board cannot employ counsel except there is a *direct interest* to protect. But this is outside of your inquiry and might be pertinent only in the event of a contract made by the trustees under section 2917 being brought in question.

To summarize—My answer to your first question is, Yes; and to the second, No.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

92.

COUNTY COMMISSIONERS MAY EMPLOY CLERK TO SUPERINTENDENT OF INFIRMARY AND COMPENSATE HIM FROM INFIRMARY FUNDS—COUNTY AUDITOR OR CLERK OF COUNTY COMMISSIONERS MUST ACT AS CLERK WITH RESPECT TO DUTY OF COMMISSIONERS PERTAINING TO COUNTY INFIRMARY.

Under section 2566, General Code, a county auditor is "ex officio" secretary to the board of county commissioners. Under section 2409, General Code, the board may appoint a clerk in place of the county auditor, when it is necessary for such clerk to devote his entire time to the discharge of the duties of such position.

Under section 2522, General Code, the board of county commissioners can make all purchases and contracts necessary for the county infirmary and pay for the same out of the infirmary funds, provided for by sections 2529 and 2530, General Code.

Under these statutes, therefore, when it is necessary to appoint a clerk to the superintendent of the infirmary, the county commissioners may employ such, under section 2522, General Code. All clerical duties pertaining to the work of the county commissioners as such must be performed by the county auditor or the clerk appointed in his place, under sections 2566 and 2409, General Code, aforesaid.

COLUMBUS, OHIO, January 18, 1913.

HON. R. M. KNEPPER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—In your favor of January 11th, you request my opinion as follows:

"The county commissioners of Seneca county desire to employ an infirmary clerk. Under section 2409 of the General Code I understand they can employ a clerk for the commissioners, and I understand that the clerk employed under said section would take the place of the county auditor, as far as the commissioners' work is concerned. The query is: Have they a right to employ a clerk or secretary to the infirmary or to the superintendent of the infirmary, and would he be paid out of the infirmary funds, or out of the county salary fund?"

Sections 2409 and 2566 of the General Code provide as follows:

"Section 2409. If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

"Section 2566. By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

The word "secretary" as used in section 2566, General Code, is to be regarded as synonymous, in legal effect, with the word "clerk," as that official is referred to in section 2409, General Code. (State vs. Godfrey 13 O. D. [N. P.] 535.)

The clerk referred to in section 2409, General Code, therefore, is properly the secretary to the commissioners, and is employed as their assistant in the performance of their general duties.

Section 2522, General Code, provides as follows:

"The board of county commissioners shall make all contracts and purchases necessary for the county infirmary, and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates. The commissioners shall keep a separate book in which the clerk, or if there is no commissioner's clerk, the county auditor, shall keep a separate record of their transactions respecting the county infirmary, which book shall at all times be open to public inspection."

From the import of your inquiry it seems clear that the clerk referred to by you is to reside at the infirmary, and his duties shall pertain altogether to work of the superintendent of that institution. Such an assistant is, in my opinion, not comprehended by section 2409 above quoted, and he must be appointed under the provisions of section 2522, General Code, requiring the county commissioners to make all contracts for the county infirmary and to prescribe such rules and regulations as they deem proper for its management and good government.

Sections 2529 and 2530, General Code, provide as follows:

"Section 2529. On the first Monday of March in each year, the board of county commissioners shall certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year, including all needful repairs thereof. The county auditor shall place the

amount so certified on the tax duplicate of the county, and the county commissioners shall have full control of the poor fund and shall be held responsible therefor."

"Section 2530. When in any county the funds applicable for the support of the poor are insufficient, the county commissioners may levy for such purpose, in addition to those otherwise authorized, any rate not exceeding six-tenths of a mill on the dollar of valuation."

I am of the opinion that the compensation paid the clerk of the superintendent of the infirmary is an expense needed for the "support of the infirmary," and should be paid from the poor fund provided for in sections 2529 and 2530, General Code.

In conclusion, therefore, I am of the opinion that the auditor, or the clerk serving in his place, as provided in section 2409, General Code, shall perform all clerical duties connected with the work of the county commissioners pertaining to the county infirmary, as provided by section 2522, General Code, and a clerk serving as assistant to the superintendent of the infirmary alone should be appointed by the county commissioners, and his compensation paid from the fund provided for the support of the infirmary.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

93.

FENCE, LINE—OWNER OF UNENCLOSED LANDS MAY NOT BE COMPELLED TO PAY PORTION OF COST OF LINE FENCE FOR EXCLUSIVE BENEFIT OF NEIGHBOR.

The provisions of the constitution forbid the taking of private property, or the laying of an imposition upon it for the sole benefit of another. In accordance with the Alma Coal Company vs. Cozad, 79 O. S. 348, a person owning unenclosed lands may not be assessed for a portion of a fence erected for the benefit of a neighbor, the provision of section 5908-10, etc., notwithstanding.

COLUMBUS, OHIO, February 11, 1913.

HON. FRED. W. CROWE, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Under date of February 1, 1913, you submit the following to this department for opinion.

"Mr. Z. M. and Mr. E. Mc. are both residents of Meigs county, Ohio, and own adjoining farms in Bedford township in said county and state. Mr. M. desires to have a partition fence constructed on the line between his farm and that of Mr. Mc., but Mr. Mc. refuses to build his portion of the same. Mr. M. has complained according to law to the trustees of Bedford township and the trustees of said township have duly assigned according to section 5910 of the General Code, to M. and Mc. equal shares of said partition fence to be constructed. Mr. Mc. refuses to either build the portion of fence assigned him by the trustees of said township to be constructed or to pay for the construction of same. It furthermore appears that Mr. Mc's farm is unenclosed, a portion of his farm consists of woods and the remainder of same is used exclusively for farming purposes and not used for grazing.

"In case Mr. Mc will not build the portion of the partition fence assigned him by the trustees of said township to be built, can the trustees of Bedford township sell the contract as provided by section 5913, of the General Code, and have the costs certified to the auditor of Meigs county for collection against the land of Mr. Mc., and the same be collected? In other words if Mr. Mc. will not build the portion of the partition fence assigned him by the trustees of said township to be built, nor pay for the construction of the same, can the costs of same be legally placed on the tax duplicate of Meigs county and his land be sold to pay same?"

Section 5908, General Code, provides:

"The owners of adjoining lands shall build, keep up and maintain in good repair in equal shares all partition fences between them, unless otherwise agreed upon by them in writing and witnessed by two persons. This chapter shall not apply to the enclosure of lots in municipal corporations or of lands laid out into lots outside of municipal corporations or affect any provision of law relating to fences required to be constructed by persons or corporations owning, controlling or managing a railroad.

Section 5910, General Code, provides:

"When a person neglects to build or repair a partition fence, or the portion thereof which he is required to build or maintain, the aggrieved person may complain to the trustees of the township in which such land or fence is located. Such trustees, after not less than ten days' written notice to all adjoining land owners of the time and place of meeting, shall view the fence or premises where such fence is to be built, and assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him so as to be good and substantial."

The following sections and those to which you refer provide the manner in which this duty to construct partition fences may be enforced.

This act in reference to partition fences was passed upon by the supreme court in case of The Alma Coal Co. vs. Cozad, Treasurer, 79 Ohio St., 348, in which it is held:

"The provisions of the constitution forbid not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another.

"The act of April 18, 1904 (97 O. L., 138), may not be so construed and administered as to charge an owner of lands which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor."

It appears that the lands in question of Mr. Mc. are to remain unenclosed and this makes your case fall clearly within the rule of Alma Coal Co. vs. Cozad, Treasurer, supra.

In the case cited it appears that the plaintiff alleged that none of its lands were used for cultivation while in the case submitted by you a part of the unenclosed farm is cultivated. The court, however, in laying down the rule in the syllabi and also in its opinion do not make this fact a condition of the rule. The decision is based upon the fact that the lands which are sought to be assessed for a part of the cost of the partition fence are unenclosed.

The partition fence in your case would be for the sole benefit of Mr. M. and Mr. Mc. cannot be required to pay a part of the cost of the same.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

100.

HUMANE OFFICER—MAY BE APPOINTED AND REMOVED BY HUMANE SOCIETY, PROBATE JUDGE AND MAYOR.

It is a general rule of law that where it is not otherwise specified, an appointee may be removed from office at the will of the appointing power and where confirmation of appointment is required, the consent of the confirming power is equally necessary to removal.

Since, therefore, a humane officer is appointed by a humane society, upon the approval of the mayor or of the probate judge, such humane officer may be removed at will by the society, with the consent of the mayor or the probate judge, upon whose approval the appointment was made.

COLUMBUS, OHIO, February 28, 1913.

HON. GEORGE D. KLEIN, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of February 20th, which is in part as follows:

> "The humane society of our county, when it was first organized, appointed an agent who is known as the humne officer, under section 10070 of the General Code. Recently thay called a meeting at which the humane officer was not invited to be present. The next day he recived a letter asking him to resign not later than March 1, 1913.
>
> "The humane officer, then consulted me as to whether or not the society had the right to remove him. I have examined the statutes and I find nowhere, where the statutes provide for the removal of such an officer.
>
> "I desire your opinion as to whether or not such humane officer can be removed."

The appointment of agents for humane societies is governed by sections 10070 and 10071 of the General Code, as follows:

> "Section 10070. Such societies may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."
>
> "Section 10071. All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, ap-

pointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments."

Section 10072 makes it the duty of council to provide reasonable compensation for agents in municipalities, and of county commissioners to provide compensation for county agents. The statutes nowhere fix a term of office for agents of humane societies, nor is there any provision protecting such agents from summary dismissal at any time.

The general rule of law is, that when the statutes authorize the employment of persons to render services in a public capacity, and no definite term is fixed, such persons hold their positions only during the pleasure of the appointing power.

On this subject it is said by Mechem in his work on public officers, section 445:

> "The question whether the power of removal from appointive offices is one which is incident to the power to appoint, is an important one in respect of which much difference of opinion has prevailed. Offices, even though appointive, are usually created to be held for a definite time, as for a given number of years, or during life or good behavior. In some cases, however, no such tenure is fixed by law, and the officer must then hold, either expressly or implied, at the will or pleasure of the appointing power, or his tenure must be indefinite, and subject to no will but his own—a construction which is entirely inconsistent with the spirit of our institutions.
>
> "Where, therefore, the tenure of the office is not fixed by law, and no other provision is made for removals, either by the constitution or by statute, it is said to be "a sound and necessary rule to consider the power of removal as incident to the power of appointment."
>
> "But this power of arbitrary removal is to be limited to these circumstances, and if the tenure is fixed by law, or if the officer is appointed to hold during the pleasure of some other officer or board than that appointing him, the appointing power cannot arbitrarily remove him."

and in section 449, the same author says:

> "Except where the constitution or other paramount authority confers the power upon the executive alone, it is competent to require the consent of the senate, common council or other body to the removal as it is, in many cases, required for his appointment, and where such consent is required, a removal attempted without it is ineffectual. Where the authority of removal is vested in the "appointing power" and the appointing power is vested in the governor by and with the advice and consent of the senate, the consent of the latter body is necessary to a removal."

In support of the statement made in the last quoted section, the author cites the sase of People vs. Freese, 73 Cal., 633, 18 Pac. Rep., 812.

An examination of the facts of that case discloses that, at the time the decision was rendered, there was a statute of the State of California which vested in the governor of the state, by and with the advice and consent of the senate, the power to appoint pilot commissioners for certain ports specifically named in the statute, which commissioners were to hold office during the pleasure of the *appointing power*, not exceeding four years.

The defendant, Freese, was appointed to the office of pilot commissioner by the governor and confirmed by the senate, in January, 1887. He duly qualified and entered upon his duties, and continued to act under said appointment until, on the 28th

day of September, 1887, the then governor, while the senate was not in session, issued to the relator, Travers, a commission appointing him pilot commissioner in place of said Freese. It appears that no notice was given Freese of such action on the part of the governor. The other members of the board, including the defendant, refused to recognize the relator as pilot commissioner, or to let him take his office as such, whereupon the relator commenced a proceeding in quo warranto, to oust the defendant. The court held that, inasmuch as the statute provided for the appointment by the governor, with the consent of the senate, the governor alone was not the appointing power, and, therefore, could not remove the defendant from office except by the consent of the senate.

Section 10071 of our Code requires that appointments of humane officers must have the approval of the city or village for which they are made, and if the humane society appointing them exists outside of the city or village, the approval of the probate judge is necessary and a record must be kept of such appointment thereof, by the mayor or probate judge, or both, as the case may be.

It will be observed that the humane society is not the sole appointing power and following the decision in the California case, I am of the opinion that a humane society acting alone, cannot remove a humane officer. Such removal can be accomplished only by the joint action of the appointing power; that is, the humane society, probate judge and mayor.

As to whether or not it is necessary, before removing a humane officer from office to prefer charges, give notice and accord him a hearing, I direct your attention to section 354 of Throop on public officers, where it is said:

> "The general rule is, that where a definite term of office is not fixed by law, the officer or officers, by whom a person was appointed to a particular office, may remove him at pleasure, and without notice, charges, or reasons assigned."

In a foot note to this section, the author cites numerous cases in support of the text. I have examined all of these authorities, and they are practically unanimous in holding that in a case where no definite term is fixed by statute for an officer he may be removed at any time by the appointing power without notice or trial.

I have not succeeded in finding any Ohio authorities directly in point, but in all of the decisions of our supreme court that I have been able to discover on the question of the removal of public officers, the officers involved had a definite term, or were, by express provision of statute, protected from summary removal.

I am therefore of the opinion that a humane officer may be removed by the power appointing him, without notice, preference of charges or trial. The appointing power is the humane society, probate judge and mayor.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

104.

REHEARING—APPLICATION FOR, IN CIRCUIT COURT, WILL NOT PREVENT OBTAINING OF PAPERS FROM FILE IN PROCEEDINGS ON ERROR TO SUPREME COURT.

A new trial is a statutory proceeding and a rehearing rests solely upon the favor of the court. A motion for a rehearing, therefore, is an unknown quantity in statutory procedure, and the filing of the same in the circuit court after judgment will not prevent a party from obtaining a copy of the court records, for the purpose of proceeding to the supreme court on error.

COLUMBUS, OHIO, March 5, 1913.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I have your letter of February 27, 1913, in which you inquire:

"In a case pending in the circuit court of this county, on the 14th day of last November, entitled J. W. Campbell, plaintiff in error, vs. C. M. Campbell, defendant in error, the judgment of the common pleas court, against J. W. Campbell was affirmed. On November 15, 1912, J. W. Campbell filed a motion for a rehearing of the case because of certain matters not considered by the circuit court. The clerk did not know whether this motion could be properly filed, so he wrote to the judge of the circuit court, M. A. Norris (presiding judge) and asked his advice in the matter. He replied that he saw no objection to retaining the case on the docket for the hearing of the motion, and that the clerk might do so. So the case is now on the circuit court docket, or the docket of the court of appeals, pending on this motion. J. W. Campbell, the plaintiff in error, has signified to the clerk his intention to file this case in the supreme court on error, and has made a demand for the papers and especially the bill of exceptions, so that he may have the record printed. The attorney for the defendant in error objects to the bill of exceptions being taken out of the jurisdiction of the court, in which it now is, claiming that the case is still pending on the plaintiff in error's motion. The court of appeals does not meet or hold court in this county until some time in April, and by that time, the four months from the time of the rendition of the decision of the circuit court, will have elapsed, probably preventing the filing of the case in the supreme court.

"This case involves several thousand dollars, and the clerk is at a loss as to what to do in the matter, and does not wish to prevent any one from having proper remedy in the higher court, and has asked my advise or opinion as to what he should do; whether he should surrender up the bill of exceptions to the plaintiff in error, J. W. Campbell, for filing in the supreme court, or whether he should hold it until the motion for rehearing is had in the court of appeals. Neither the plaintiff in error nor the defendant in error seem to care whether the case is heard in the court of appeals or not. It is my opinion that the plaintiff in error should have his motion disposed of, at once, if he desires his case to go to the supreme court, by either withdrawing his motion or by making arrangements to meet the court of appeals where in session and have his motion submitted and disposed of by said court.

"Now, I would like to have your written opinion as to what is the proper thing for the clerk of courts to do, that is, whether or not he should surrender the papers including the bill of exceptions without said motion being disposed of as I have indicated in my opinion."

The real question for determination is, whether the motion for a rehearing is such a pleading as requires the cause kept on the docket for its determination. If I understand the statement it is that a cause was tried in the common pleas court, motion for new trial was overruled, bill of exceptions taken. Petition in error filed in the circuit court, hearing had, judgment affirmed, and later a motion was filed in the circuit court for a rehearing, which motion was pending on January 1, 1913.

Section 11575, General Code, reads:

> "A new trial is a reexamination in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision by the court."

A motion for a rehearing, if statutory, must fall within the above section, which your question does not.

I have always been of opinion that, the distinction between a motion for a new trial and for a rehearing, lay in the fact that the former was a statutory mode of securing a review by the court of an issue of fact, while the latter was an application to the court for a reconsideration of all questions presented in the record, and rested upon the favor of the court and not upon the statutes. Such being the case, the supreme court has adopted Rule XX as follows:

> "No motion can be made or heard for a rehearing. Applications for a rehearing must be made at the same term at which the decision is announced, and within thirty days after such announcement. The application must be typewritten, and six copies thereof sent to the chief justice, and must be confined strictly to reasons for a rehearing. No reargument of the cause on such application will be considered." (Vol. 82, p. lxxiii.)

Taking the statute as it reads and this rule, a motion for a rehearing is an unknown quantity in the practice, and the filing of the same in the case you mention carried no effect with it whatever, and did not toll the statute of limitations.

I am therefore of the opinion that it is the duty of the clerk to permit the papers to be filed in the supreme court, for a review of the affirmance of November 14, 1912, and that he should not insist upon their retention in his office for the purposes of that motion. Of course he should be careful to see that the papers get from his possession to that of the clerk of the supreme court.

Respectfully yours,
TIMOTHY S. HOGAN,
Attorney General.

106.

TAXES AND TAXATION—TOWNSHIP TRUSTEES NOT AUTHORIZED TO ISSUE BONDS IN EXCESS OF $100,000 FOR ROAD IMPROVEMENT.

Township trustees have no authority to improve roads by general taxation and to issue bonds for that purpose without a vote of the people upon the question of such improvement by general taxation. Such a vote is authorized by section 6976, General Code.

Where such election has been held, restriction of section 7005, General Code, which prevents the trustees from issuing bonds in excess of $100,000, controls.

Sections 3939, 3925 and 3941, General Code, do not authorize the township trustees to issue bonds for the purposes enumerated in section 3939, General Code, but only for such purposes as are expressly authorized to the township trustees.

COLUMBUS, OHIO, February 25, 1913.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 7th, requesting my opinion upon the following question:

> "Are the township trustees of any township in Ohio authorized, either by a majority vote of the people or otherwise, to issue bonds in excess of the sum of $100,000 for the improvement of roads within the township?"

You cite section 7005, General Code, which limits the amount of bonds which may be outstanding at any one time under authority of related sections to $100,000, and state that it is claimed that by the joint operation of sections 3295, 3939 and 3941 the trustees may issue bonds for road improvement purposes to an amount limited only by a percentage of the total tax duplicate as set forth in section 3939 et seq.

I enclose herewith copy of an opinion to Hon. Lewis P. Metzger, prosecuting attorney of Columbiana county, in which I hold, as you will observe, that section 3925, General Code, does not authorize a township to issue bonds for any and all of the purposes mentioned in section 3939, General Code, but only for such purposes, among those enumerated in the latter section, as for which a township as such may lawfully expend money. That is to say, a township certainly may not borrow money for the purpose of constructing a waterworks plant and system nor for any of the other purposes named in section 3939 which pertain exclusively to municipal corporations as such. In other words, section 3939 et seq., authorizes the borrowing of money only and does not authorize the making of any particular kind of improvement. Authority to make improvements must be sought in other sections of the General Code.

In the opinion to Mr. Metzger, I have endeavored to cover by discussion such provisions of the General Code as seem in any way to authorize township trustees to improve the roads of the township by general taxation. I came to the conclusion at that time, and am still of the opinion, that no board of township trustees has any authority to embark upon the policy of improving roads by general taxation, and to issue bonds for that purpose without a vote of the people on the question of improving roads by general taxation. Such a vote is authorized by section 6976 et seq., General Code, one of which sections is that cited by you, viz.: section 7005.

Your letter does not state whether or not any election has been held in the township concerning which you inquire upon the policy of improving roads by general taxation. If no such election has been held, then I am of the opinion that the trustees are without authority to improve roads in this manner. If such an election has been held then I am of the opinion that section 7005, being special, controls to the exclusion of the general provisions found in section 3939, General Code, and that no greater

amount of bonds issued for such purpose and under such authority, may at any one time be outstanding than $100,000.

It is possible that I have overlooked some provision of law authorizing township trustees to improve roads by general taxation, I would be glad to have you call m attention to any such provision, as a question quite different from that which I havy discussed would be presented by such statute.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

108.

COUNTY COMMISSIONERS—POWER TO BORROW MONEY FOR COUNTY INFIRMARY—CONSTITUTIONAL LAW—PROVISION FOR LEVYING AND COLLECTING.

Section 5649-3d, of the Smith one per cent. law, providing that expenditures for a given period of time shall be made from and within the appropriations required by the section, limits the power of the commissioners to expend current revenues only and does not restrain the expenditure of borrowed money. Under section 2434, General Code, provided that this section has not been invalidated by section 11, article 12, of the new constitution, the county commissioners may borrow money for the relief or support of the poor, and may expend the same regardless of said section 5649-3d, of the Smith one per cent. law.

Article 12, section 11, of the new constitution, however, provides that no bonded indebtedness of any political subdivision shall be incurred unless the legislation, under which such indebtedness is incurred, provides for the annual levying and collecting, by taxation, of an amount sufficient to retire said bonds and pay interest thereon. Opinion is withheld as to whether this constitutional provision invalidated section 2434, General Code.

COLUMBUS, OHIO, February 28, 1913.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—In your letter of January 23rd, you request my opinion upon the following question:

> "May the county commissioners borrow money for the purpose of supporting the county infirmary when the funds raised by taxation for that purpose are exhausted?"

You cite section 2434, General Code, which provides in part as follows:

> "* * * for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary * * * and issue the bonds of the county to secure the payment of the principal and interest thereof."

The Smith one per cent. law, section 5649-3d provides that, all expenditures for a given period of time shall be made from and within the appropriations required by the section.

I have in other opinions held that this section imposes an absolute limitation upon the amount which may be expended by the county commissioners for any purpose other than one for which money may be borrowed. That is to say, it has been, and

still is my opinion that if the county commissioners are authorized to borrow money for a particular purpose they may, through the exercise of the borrowing power, expend more money in a given half yearly period than is permitted to be expended by section 5649-3d. Stating it still in another way, section 5649-3d limits the power of the commissioners to expend current revenues only and does not restrain the expenditure of borrowed money.

I am, therefore of the opinion that so far as the Smith one per cent. law is concerned money borrowed under section 2434, "for the relief or support of the poor" may be expended, without reference to any appropriation made by the county commissioners.

Section 2434, as I have quoted it, contains ample authority for the borrowing of money to meet the situation described in your letter.

I am of the opinion, therefore that as far as the sections of the General Code are concerned, the commissioners of Clermont county are authorized to meet the indebtedness incurred for the support of the poor by borrowing money and issuing bonds under section 2434.

I cannot at this time, however, return an unqualified answer to a question like the one which you present. All such questions are complicated by the adoption of section 11 of article XII of the constitution, which was one of the amendments recently incorporated in it. This section provides as follows:

> "No bonded indebtedness of the state, or any political sub-division thereof, shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay interest on said bonds and to provide a sinking fund for their final redemption at maturity."

I have not yet determined in my own mind what this provision means. It seems reasonable to suppose, however, that it may mean that unless the statutes authorize the proper authorities to levy a tax at the time the borrowing power is exerted by the issuance of *bonds*, and to make the levy continuous during the life of the bonds and sufficient to meet all accruing principal and interest, no bonds can be issued. I am not aware of any provision of law authorizing county commissioners, for the purposes specified in section 2434 to levy such a co-incidental tax. In fact all of our levying sections at the present time, with probably a few exceptions, provide for annual levies for such interest and sinking fund purposes. I cite sections 2439, 2440 and 2609 to 2614 inclusive of the General Code, as indicating the present policy of our statutes respecting the manner of providing for the payment of a county's funded debt.

I have the question, which I have myself suggested in connection with your inquiry, under consideration, and, at an early day will render a separate opinion thereon, unless in the meantime the question is properly raised in litigation.

The point last discussed, of course, has no application to the simple borrowing of money on notes of the board of commissioners but only to the issuance of bonds.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

112.

CEMETERY—TOWNSHIP TRUSTEES EXECUTE DEEDS—ABOLITION OF BOARD OF DIRECTORS DISCRETIONARY.

Under sections 3448 and 3451, General Code, the titles to cemetery lands are vested in the township trustees, and they alone are given power to execute deeds for such lands. Under section 3464, General Code, the appointment of directors for any cemetery and their abolition rests upon the voluntary discretion of the township trustees. The abolition of such board should affirmatively appear in the township trustees' records, as such officers will continue until successors are elected and qualified, unless their abolition is made evident.

COLUMBUS, OHIO, February 11, 1913.

HON. JAMES A. TOBIN, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—In your letter of January 29, 1913, you say:

> "I am requested to submit the following propositions to you for solution: (Under section 3464, General Code.)
>
> "First: When the township trustees have appointed directors to take charge of a township cemetery, can such directors sign deeds for the conveyance of lots therein, or should such deeds be signed by the township trustees?
>
> "Second: When the appointment of such directors has once been made, and the appointees have accepted and are acting as such, when the term of appointees expire, can the township trustees refuse to appoint others to succeed them, or can they abolish the board of directors so appointed at their pleasure?"

The answers to your questions depend upon the language of the statutes in reference to township cemeteries.

The law relating to township cemeteries is found in title XI, div. III, chap. 6, being sections 3441 to 3475 inclusive, of the General Code.

Section 3448, General Code, says:

> "Upon application, the township trustees shall sell at a reasonable price such number of lots as the public wants demand for burial purposes. Upon complying with the terms of sale, purchasers of lots shall be entitled to receive a deed or deeds therefor *which the trustees shall execute,* etc."

The latter part of the same section says "the trustees shall make a deed to the head of a family without charge, if the circumstances of said family are such as to make payment therefor oppressive."

Section 3451, General Code, provides that "the title to all such public grave yards and burial grounds shall be vested in the township trustees."

In view of these two sections, there can be no question that the township trustees are the *only persons* who are authorized to *sign deeds* for lots in a township cemetery.

In answer to your second question, it will be observed that the appointment of directors of township cemeteries is not *mandatory,* but *directory.*

Section 3464 of the General Code says:

> "The township trustees *may* appoint three directors to take charge of any cemetery in the township, the control of which is vested in such trustees."

This section further says "that the first appointments shall be for one, two and

three years, respectively, and they shall serve until their successors are appointed and qualified. Each year one director shall be appointed to serve three years from the second Monday in May."

It will be noted that these directors are "to take charge" of the cemetery for which they are selected. The last part of section 3464 says:

> "Such directors shall be governed in the discharge of their duties by the laws so far as applicable relating to township trustees in the control of cemeteries in the township."

Nothing further is said as to these directors in any other part of this chaper. No provision is made as to oath of office, bond, or compensation of these directors. Their appointment, in the first place, is *optional* on the part of the trustees. They have no *general jurisdiction over all the cemeteries*; for the statute in this same section says:

> "the order appointing a director shall designate, by name, the cemetery or cemeteries over which he shall have supervision."

These directors are *local in their jurisdiction*, compared to a *designated* burial ground; and their powers are limited to the rights and duties in control and management of the *particular cemetery to which they are assigned.*

They are to relieve the trustees in their duties, and assist them in the care and supervision of certain assigned burial grounds. There may be no need for their services for a second term. The trustees may conclude at any time to take charge of all of the cemeteries of the township. They may deem it expedient not to reappoint or continue the board of directors and thereby abolish the said board. I think that inasmuch as it is only *directory*, in the first instance, to create the *board of directors*, the township trustees may discontinue such board by not appointing any successors, thereby abolishing the board, such discontinuance and abolition should affirmatively appear in the township trustees' records.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

117.

DISTRICT CHILDREN'S HOME—JOINT BOARD OF COUNTY COMMISSIONERS—EACH COUNTY MAY EXPEND $15,000 WITHOUT VOTE OF PEOPLE—HOW MONEY BORROWED.

Under section 3119, General Code, when a district children's home is built by joint board of county commissioners, the cost of the same is to be borne by the respective counties in proportion to the taxable property of such counties, and each county raises the sum incumbent upon it for itself.

Section 5638, General Code, which prohibits county commissioners from levying a tax, appropriating money or issuing bonds for county buildings, to the sum of $15,000, without a vote of the people, places the limitation solely upon each individual board engaged in the construction of such district home, and not upon the joint board as such. Each county, therefore, without a vote of the people may contribute to the extent of $15,000, without the authorization of a popular election.

The county commissioners of each county constituting a district are authorized to borrow money necessary to meet the proportionate share of such county, under the provisions of either section 2434 or of section 3079.

COLUMBUS, OHIO, March 5, 1913.

HON. WILLIAM H. VODREY, *Prosecuting Attorney, Lisbon, Ohio.*

HON. HUBERT C. PONTIUS, *Prosecuting Attorney, Canton, Ohio.*

GENTLEMEN:—Your joint inquiry of February 6, 1913, is received, in which you state:

> "The counties of Stark and Columbiana some years ago established a district children's home, which is located at Alliance, Ohio. The joint board of commissioners of the two counties has determined that it is necessary to erect an additional building to provide for the wants of the home. In fact this action of the joint board is due to an order of the chief inspector of workshops and factories, ordering the trustees of the home to provide more room for the children, because of the present overcrowded condition in both the girls' and the boys' cottage.
>
> "We desire an opinion from you in regard to this matter on the following propositions:
>
> "*First*: Does section 5638 of the General Code apply to the amount that can be expended by each of the counties for the above purpose, and if so, can the joint board expend only $15,000.00 without a vote of the people, or may each county expend $15,000.00 without a vote of the people?
>
> "*Second*: How can the respective boards of commissioners of the counties provide the necessary money for the purpose of erecting an additional building?"

Section 3109, General Code, provides for the organization of a district for the purpose of establishing a joint children's home, as follows:

> "In accordance with the purposes, provisions, and regulations relating to county children's homes, when in their opinion the public good so demands, the commissioners of two or more adjoining counties, not to exceed four

may form themselves into a joint board, and proceed to organize a district for the establishment and support of a children's home, and provide for the purchase of a site, and the erection of necessary buildings thereon."

Section 3126, General Code, provides:

"All provisions of this chapter relating to county children's homes so far as applicable, shall be in full force and effect in the organization, support, and management of district children's homes."

By virtue of this latter section the provisions of the statutes pertaining to a county children's home will apply to the district children's home, so far as the same may be applicable.

Section 3119, General Code, provides:

"The first cost of the home, and the cost of all betterments and additions thereto, shall be paid by the counties comprising the district, in proportion to the taxable property of each county, as shown by their respective duplicates. The current expense of maintaining the home and the cost of ordinary repairs thereto, shall be paid by each such county in proportion to the number of children therefrom maintained in the home during the year."

By virtue of this section, the first cost of such children's home and all betterments and additions thereto shall be paid by the respective counties in proportion to the taxable property of such counties, as shown by the duplicates. The taxes are not levied upon the joint district as a taxation district, but each county is to separately provide for its proportion of the cost.

Section 3078, General Code, which is in the part of the chapter which pertains to county children's homes, provides:

"If at such election a majority of electors voting on the proposition are in favor of establishing such home, the commissioners of the county, or of any adjoining counties in such district, having so voted in favor thereof, shall provide for the purchase of a suitable site and the erection of the necessary buildings and provide means by taxation for such purchase and the support thereof."

Section 3079, General Code, provides:

"In anticipation of the collection of taxes levied or to be levied for the purchase of such site and erection of such buildings, or for the purchase of a suitable site and buildings already erected thereon, the commissioners of any county may issue the notes or bonds of the county, to bear interest not to exceed six per cent. per annum, payable semi-annually, which shall not be sold for less than their par value."

It appears from the several sections herein quoted that the children's homes are supported by the county. If it is a county home that county maintains it. If it is a district home each county of the district pays its proportionate share. The share of each county is raised by taxation on the property of such county and not by taxation upon the whole district. The county commissioners levy the tax for their respective counties.

Section 5638, General Code, provides:

"The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

The limitations prescribed in this section are limitations upon the powers of the county commissioners of a single county. There is no provision in the sections pertaining to the organization and maintenance of a district children's home, which makes the limitations of section 5638, General Code, applicable to the joint board of county commissioners, who have charge of such district home.

Each county could maintain its own children's home and in such case the commissioners of the county could expend $15000.00 for the erection of a building for such home without first submitting the same to a vote of the people.

Where districts are formed of two or more counties it would appear that each board of county commissioners should have the power to make the same expenditure for a district home that it would have if such county maintained a county home.

If the limitations of section 5638, General Code, were to apply to the powers of the joint board of commissioners, the limitation would be $7,500.00 on each county where two counties are joined and a limitation of $3,750.00 on each county when four counties constitute the district. The statute will not permit of such a construction.

I am of the opinion, therefore, that where two or more counties have formed a district for the maintenance of a children's home, the limitations provided in section 5638, General Code, apply to the powers of each board of county commissioners and not to the powers of the joint board of commissioners provided for by section 3109, General Code.

Your next inquiry covers the manner in which the county commissioners may secure the necessary funds.

Section 2434, General Code, provides:

"For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six percent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof.

"Provided, that if the judge designated to transact the business arising under the jurisdiction provided for in section 1639 of the General Code of the state of Ohio, shall advise and recommend in writing to the county commissioners of any county the purchase of land for and the erection of a place to be known as a detention home, or additional land for an infirmary or county children's home, the commissioners without first submitting the question to the vote of the county may levy a tax for either or both of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property on the tax duplicate of said county.

This section gives general power to the county commissioners to borrow money

for the purposes therein enumerated and to issue bonds of the county as security. Bonds may be issued under this section for securing additional land for a county children's home and for enlarging and repairing the same.

Section 3079, General Code, supra, also authorizes the county commissioners to issue notes or bonds of the county in anticipation of the collection of taxes levied or to be levied for the purchase of a site and the erection of a building for a children's home. This section applies to a county children's home as well as to a district children's home.

I am of the opinion, therefore, that the county commissioners of each county constituting the district may borrow the money necessary to meet the proportionate share of such county, for the erection of the building in question, within the limitations fixed by section 5638, General Code, under the provisions of either section 2434, General Code, or of section 3079, General Code.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

120.

TAXES AND TAXATION—BOARD OF EDUCATION—SURPLUS IN SINKING FUND MAY NOT BE TRANSFERRED TO CONTINGENT FUND UNTIL WHOLE OF ISSUE AND INTEREST HAS BEEN RETIRED, NOR DOES IT REVERT TO GENERAL FUND.

Under section 7614, General Code, it is the mandatory duty of a board of education having a funded debt, to levy for the retirement of the bond and payment of interest, and to create a sinking fund commission, and even though such commission be not created, a levy specifically made for the payment of bonds and interest must be credited to the sinking and separated from other funds of the district.

The purpose of the sinking fund cannot be considered to have been accomplished until the bonds for which it is intended to provide, have been fully paid, and there is never a surplus in the sinking fund until all bonds and interest outstanding are paid and discharged.

For this reason moneys in the sinking fund may not be appropriated to any other purpose, under section 5649-3e, General Code, which section authorizes balances remaining over after the fixed charges shall have been terminated, to revert to the general fund. Any surplus remaining after all bonds and interest have been paid may be transferred to the contingent fund under section 5655, General Code.

COLUMBUS, OHIO, March 14, 1913.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 6th, requesting my opinion upon the following facts:

> "A village board of education has issued bonds and has provided a levy for the purpose of meeting the installments of principal and interest as they become due. During the last year the amount of money produced by such levy was more than sufficient to meet the obligations of that year. The board of education undertook to and did, under section 5655, General Code, treat the excess as a "surplus" and transfer one thousand dollars to the contingent fund of the district at the meeting at which the annual tax levy was considered.
>
> "It is now desired to transfer the remainder of such surplus to the con-

tingent fund at an ordinary regular meeting. The provisions of section 5649-3-e are relied upon as authority for such transfer."

The question submitted is as to the authority of the board of education to transfer the remainder of the excess of the amount produced by the levy for the last year over the amount necessary to be used from the proceeds of that levy to retire bonds and interest falling due in that year from the sinking fund to the contingent fund.

In considering this question I have assumed a fact which seems to be reasonably apparent from your letter, but is not explicitly stated therein, viz: that the bonds issued by the district have sometime yet to run; that is, such bonds will not all be retired for a number of years.

In my opinion the question presented cannot be accurately considered or answered without taking into account the provisions of the sections relating to the manner of levying taxes by a board of education for the extinguishment of a funded debt. I quote some of these provisions:

"Section 7587. Such levy shall be divided by the board of education into four funds: First, tuition fund; second, building fund; third, contingent fund; fourth, bonds, interest and sinking fund. A separate levy must be made for each fund.

"Section 7613. In any school district having a bonded indebtedness, for the payment of which, with interest, no provision has been made by a special tax levy for that particular purpose, the board of education of such district annually, on or before the thirty-first day of August, shall set aside from its revenue a sum equal to not less than one-fortieth of such indebtedness together with a sum sufficient to pay the annual interest thereon.

"Section 7614. The board of education of every district shall provide a sinking fund for the extinguishment of all its bonded indebtedness, which fund shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of .....' (inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that, in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district. Such commissioners shall serve without compensation and give such bond as the board of education requires and approves. Any surety company authorized to sign such bonds may be accepted by such board of education as surety. The cost thereof, together with all necessary expenses of such commissioners shall be paid by them out of the funds under their control.

"Section 7615. The board of commissioners of the sinking fund shall invest that fund in bonds of the United States, of the state of Ohio, of any municipal corporation, county, township or school district of any state or in bonds of its own issue. All interest received from such investments shall be deposited as other funds of such sinking fund, and reinvested in like manner. For the extinguishment of any bonded indebtedness included in such fund, the board of commissioners may sell or use any of the securities or money of such fund.

"Section 7618. The board of education shall appropriate to the use of such sinking fund any taxes levied for the payment of interest on its bonded indebtedness, together with the sum provided for in sections 7613 and 7614.

Sums so appropriated shall be applied to no other purpose than the payment of such bonds, interest thereon and necessary expenses of such sinking fund commission."

The joint effect of these sections may be described as follows:

It is the mandatory duty of a district having a funded debt to levy for the payment of the bonds and interest. The district must create a "sinking fund" as such. It is also the duty of the board of education to provide for the creation of a board of commissioners of such sinking fund. When the board of commissioners is created that board is entitled to the exclusive management of the fund, which for this purpose is withdrawn from the control of the board of education as such. (State ex rel. vs. Board of Education, 3 N. P. n. s. 401.)

I am of the opinion that the proceeds of a levy specifically made for the payment of bonds and interest should be credited to the sinking fund, and as such separated from the remaining funds of the district for the purpose of management and control, even though the board of education has not discharged its duty under section 7614 by securing the creation of the board of commissioners of the sinking fund.

I am further of the opinion that by reason of this consideration section 5655 must be construed as not applicable to the transfer of moneys from the sinking fund, so long as the purpose of the sinking fund is not fully accomplished. Another way of stating the same thing would be that there is never a "surplus" in the sinking fund within the contemplation of section 5655 until all the bonds and interest outstanding are paid and discharged. If this were not the case there would be no purpose in providing for the investment of funds by the commissioners of the sinking fund as is done by section 7615. Again, such conclusion is the only one which is consistent with the last sentence of section 7618 above quoted.

For similar reasons the provisions of section 5649-3-e, General Code, must be construed as not authorizing the appropriation of moneys in the sinking fund to any other purpose. This section, one of the provisions of the so-called Smith one per cent law, provides that,

"* * * balances remaining over at any time after a fixed charge shall have been terminated * * *, shall revert to the general fund, and shall then be subject to other authorized uses."

The "fixed charge" to which this section refers would never be "terminated" in the case of a sinking fund until the whole bond issue and interest thereon had been retired.

I might add in this connection that in a former opinion I have held that the phrase "revert to the general fund" is equivalent in meaning to "revert to the funds from which they were appropriated." So that this portion of section 5649-3-e is insufficient in itself to authorize the use of money in a specific fund for purposes other than those pertaining to that fund.

For all the reasons above suggested I am of the opinion not only that the proposed transfer of funds cannot be made, but also that the board of education was without authority to transfer the sum transferred by it at the meeting at which the annual tax levy was considered to the contingent fund. In short, all moneys levied for sinking fund purposes must be devoted to the payment of bonds and interest and to no other purpose until all the outstanding bonds have been paid, with interest. Any surplus then remaining, however, may be transferred.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

122.

PROBATE JUDGE—MAY NOT PRACTICE LAW SUBSEQUENT TO HIS ELECTION EXCEPT AS TO BUSINESS COMMENCED PRIOR TO ELECTION AND NOT CONNECTED WITH HIS OFFICE.

Under sections 12854 and 12856, General Code, a judge elected to the probate court cannot practice law, or be associated with another in the practice of law, except as to business commenced by him prior to his election or appointment, provided it is not connected with his official duties.

COLUMBUS, OHIO, March 4, 1913.

HON. FRANK X. FREBIS, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—I haye vour letter of February 17, 1913, in which you inquire:

> "Has the probate judge the right, after assuming his office, to practice law to the extent of finishing business pending at the time he assumes his office, which business is in other courts and in no way connected with or affecting his official duties?"

An answer to this question involves a consideration of sections 1706, 12854 and 12856 of the General Code.

Section 1706, General Code, so far as material to this question reads:

> "No person shall practice as an attorney and counsellor at law in any court in this state * * * who holds a commission as judge of a court of record * * * Nothing herein contained shall prevent a judge of any court of this state from finishing business by him undertaken in the district, circuit or supreme court of the United States prior to his election as judge. * * * "

Section 12854 of the General Code reads:

> "Whoever, being the judge of a probate court or his deputy clerk or engaged in the business of such court as clerk thereof, practices law or is associated with another as partner in the practice of law, in a court or tribunal of this state, or prepares a petition or answer or makes out an account required for the settlement of an estate committed to the care or management of an executor, administrator, guardian or other person, or appears as counsel or attorney before a justice of the peace, court or judicial tribunal, shall be fined not more than fifty dollars and removed from office."

Section 12856 of the General Code reads as follows:

> "Section twelve thousand eight hundred and fifty-four shall not prevem a probate judge or deputy clerk from finishing business commenced by him prior to his election or appointment provided it is not connected with his official duty."

Section 563, which was construed in 61 O. S., 549, is now section 1706 of the General Code. The language in this section 1706, holding a commission as judge will have to be construed as was section 563 in the Savage-Hidy case, but there seems to be

quite a distinction between the Hidy case and the question you present. To re-state them: The question presented in the Hidy case was whether a common pleas judge-elect to whom a commission has been issued might practice law after receipt of the commission and prior to the commencement of his term of office, while the question you propound is—whether a probate judge, may after his induction into office complete unfinished business which was commenced after his election and prior to the commencement of his term.

This question depends upon construction of section 12854 and section 12856 and not on section 1706. The latter provides who may practice law while the two former, provide what class of business a probate judge, who, prior to his induction into office was practicing law, might close up.

Section 12854, General Code, provides:

> "Whoever, being a judge of a probate court * * * practices law, or is associated with another as partner in the practice of law or * * * shall be fined not more than fifty dollars and removed from office."

This section is clear and unequivocal, and standing alone precludes a probate judge from engaging in the practice at all under penalty of fine and removal from office.

Section 12856, General Code, however, must be read as an exception to this section, as follows:

> "Section 12854 shall not prevent a probate judge from finishing business commenced by him *prior* to his election.

It is not for me to determine why the legislature drew the line at business commenced prior to election, nor the wisdom of the provision, and I can only answer your question by saying that I do not consider sections 1706, 12854 and 12856 in pari materia, and while of the opinion that the Hidy case should govern as to section 1706, I do not think it controlling nor in point as to the other sections, and therefore, a probate judge may only finish business not connected with his office and commenced prior to his election.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

124.

COUNTY COMMISSIONERS MAY NOT EMPLOY ASSISTANT ENGINEER OR ARCHITECT TO PREPARE PLANS FOR BRIDGE WITHOUT REQUEST OF COUNTY SURVEYOR—BIDS UNNECESSARY.

Professional work is not contemplated by the terms of sections 2343 and 2344, General Code, requiring bids to be submitted for labor and material in bridge construction. Bids for the works of preparing plans and specifications are not required.

Under section 2792, General Code, it is the duty of the county surveyor to prepare all plans and specifications necessary for bridge improvements, and assistants for such work may not be employed except upon the request of the county surveyor in accordance with section 3411, General Code.

COLUMBUS, OHIO, March 14, 1913.

HON. H. F. CASTLE, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Under date of January 11th, you inquired of me as follows:

"1. Can county commissioners employ engineer or architect under sections 2343 and 2344 to prepare plans and specifications for bridge without first submitting to competitive bidders?

"2. Can commissioners for the purposes of the above employ engineer or architect under section 2411; if so, should compensation of architect or engineer be from fund contemplated by sections 2343 and 2344?"

Sections 2343, 2344 and 2411 of the General Code provide:

"Section 2343. When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: Full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.

"Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor.

"Section 2344. When it becomes necessary to erect a bridge, the county commissioners shall determine the length and width of the superstructure, whether it shall be single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. In their discretion, the commissioners may cause to be prepared, plans, descriptions, and specifications for such superstructure, which shall be kept on file in the auditors' office for inspection by bidders and persons interested, and invite bids or proposals in accordance therewith.

"Section 2411. When the services of an engineer are required with respect to roads, turnpike ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

Sections 2343 and 2344 are incorporated in the general chapter of the Code relating to building regulations. Sections 2352, 2353 and 2354 of the same chapter prescribe when bids in connection with the construction of a public building, bridge, bridge substructure, or for making an addition, alteration or repair thereof, must be advertised for by county commissioners and the manner of making such advertisement. These sections read as follows:

"Section 2352. When plans, drawings, representations, bills of material, specifications and estimates are so made and approved, the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such building, bridge or bridge substructure, or addition to or alteration thereof, and a contract based on such proposals will be awarded. If there is only one paper published in the county, it shall be published in such paper. The notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract, and state when and where such plan or plans, descriptions, bills and specifications can be seen. They shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract."

"Section 2353. When the estimated cost of a public building, bridge or bridge substructure or of making an addition to or repair thereof does not exceed one thousand dollars, it shall be let as heretofore provided, but notice of the letting need be given for only fifteen days, by posting on a bulletin board or by writing on a blackboard in a conspicuous place in the county commissioners or auditor's office, showing the nature of the letting and when and where proposals in writing will be received. Plans or specifications, or both as hereinbefore provided shall be kept on file during the fifteen days and open to public inspection."

"Section 2354. When the estimated cost of a public building, bridge or bridge substructure or of making an addition thereto or repair thereof does not exceed two hundred dollars, it may be let at private contract without publication or notice."

It will be observed that it is necessary to advertise for bids only for the furnishing of *labor and material* for the construction of a public building, bridge, bridge substructure, or an addition, alteration or repair thereof, under section 2343.

The services of an architect or civil engineer are professional and do not come within the provisions of these statutes relating to advertising for bids.

I am therefore of the opinion, in answer to your first question, that county commissioners, when proceeding under section 2343, are not required to advertise for bids for the services of an architect or civil engineer to prepare plans and specifications for the construction of bridges, etc.

Section 2792 of the General Code makes it the duty of the county surveyor, among others to:

"* * * prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements, except buildings, constructed under the authority of any board within and for the county. * * *."

Section 2411 is a general statute empowering county commissioners to:

"employ a competent engineer and as many assistants, etc., as may be needed, when, on account of the amount of work to be done, their services are required with respects to roads, turnpikes, ditches or bridges."

The commissioners, however, cannot employ such engineer and assistants, under section 2411, unless a request therefor is first made in writing, by the county surveyor; nor can they employ an engineer or architect to prepare plans and specifications for bridges, under section 2343, without the requisition of the county surveyor.

When an engineer is employed, pursuant to the provisions of section 2411, I am of the opinion that he may perform the services prescribed by section 2343, as to bridges. His compensation, however, must be paid in the manner set forth in section 2413 and not from any fund contemplated by sections 2343 and 2344.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

133.

PROSECUTING ATTORNEY—NO AUTHORITY TO SUBPOENA WITNESSES FOR PURPOSE OF INVESTIGATING CRIMES.

A prosecuting attorney is not authorized by the statutes to file precipes for witnesses in the clerk's office, directed to the sheriff of the county, to subpoena witnesses to appear before him for the purpose of giving evidence relative to crimes within the county.

COLUMBUS, OHIO, March 28, 1913.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 8, 1913, in which you inquire if the prosecuting attorney may file precipe for witnesses, in the clerk's office, directed to the sheriff of the county, to subpoena witnesses to appear before the prosecuting attorney to give evidence relating to crimes committed within the county; and whether the costs of the officers and witnesses fees would be paid as in other criminal proceedings before a grand jury.

Section 2916, of the General Code, is as follows:

"The prosecuting attorney shall have power to inquire into the commission of crimes within the county and shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party and such other suits, matters and controversies as he is directed by law to, prosecute within or without the county, in the probate court, common pleas court and circuit court. In conjunction with the attorney general he shall also prosecute cases in the supreme court arising in his county. In every case of conviction he shall forthwith cause execution to be issued for the fine and costs,

or costs only, as the case may be, and faithfully urge the collection until it is affected (effected), or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county which come into his possession as fines, forfeitures, costs or otherwise."

This section simply defines the general powers and duties of the prosecuting attorney and gives him power to inquire into the commission of crimes within the county. Under authority of this section he may expend money allowed him by the commissioners under section 3004, and he may pay witnesses who will voluntarily come to his office at his request from this allowance; but there is no authority granted him to file precipes for witnesses, in the clerk's office, directed to the sheriff of the county, as is provided by sections 13495, 13563 and 13662, General Code. These sections are as follows:

"Section 13495. Justices of the peace, police judges and mayors may issue subpoenas and other process to bring witnesses before them. * * *

"Section 13563. When required by the grand jury or the prosecuting attorney, the clerk of the court in which such jury was impaneled, shall issue subpoenas and other process to any county to bring witnesses to testify before such jury. * * *

"Section 13662. In all criminal cases, the clerk of the court of the county, upon a precipe being filed, shall issue writs of subpoena for the witnesses named therein, directed to the sheriff of such county or the county where such witnesses reside or are found, which shall be served and returned as in other cases. * * *"

In the absence of express statutory authority it is my opinion that the prosecuting attorney may not file precipes for witnesses directed to the sheriff of the county, subpoenaing witnesses to appear before him to give evidence relating to crimes committed within the county. The answer to this question makes it unnecessary to answer the remaining questions of your letter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

137.

COUNTY DETECTIVE EMPLOYED BY PROSECUTING ATTORNEY NOT GIVEN POWER OF PEACE OFFICER—NO AUTHORITY TO BREAK INTO A BUILDING IN WHICH GAMBLING IS SUSPECTED—STATUTE PROVIDING FOR APPOINTMENT OF SECRET SERVICE OFFICER BY PROSECUTING ATTORNEY UNCONSTITUTIONAL.

Section 2915, General Code, providing for the appointment by a prosecuting attorney of a secret service officer, having been declared unconstitutional on the ground that the appointing power is too indefinite for execution, the former statute, to wit: section 1541, General Code, as it existed prior to its amendment, providing for a secret service officer for the prosecuting attorney's office or office in the court of common pleas, is still in force. Such officer is not specifically made a peace officer or given police powers, and inasmuch as he is not given such powers, he may not, under settled rules of law, break into a public building in which gambling is reasonably believed to be going on.

COLUMBUS, OHIO, February 18, 1913.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your favor of January 27, 1913, is received, in which you inquire:

> "What powers has a county detective appointed by the court of common pleas or a judge thereof, particularly with reference to arrests made where the crime of gambling is suspected, and where it is deemed necessary by the detective to break into the building in which the gambling is reasonably believed to be going on?"

It will be necessary to determine which statute is now in force in reference to the appointment of a county detective.

Section 2915-1, General Code, as passed in 1902 Ohio Laws, 77, reads:

> "The prosecuting attorney may appoint a secret service officer, whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. The compensation of said officer shall be fixed by the presiding judge of the court of common pleas of the subdivision of that judicial district and shall not be less than one-fourth nor more than one-half of the official salary of the prosecuting attorney per year, payable monthly, out of the county fund, upon the warrant of the county auditor."

In State vs. Sayre, 12 Nisi Prius, N. S., 13, it is held:

> "Section 2915-1 of the General Code, providing for the appointment of a secret service officer by the prosecuting attorney, is inoperative and void for the reason that it is impossible to determine what judge or officer is designated by the statute to fix the compensation of such appointee; and inasmuch as it cannot be supposed the legislature would have repealed the existing act providing for the appointment of such an officer without providing a substitute therefor, and these acts so far as the attempted amendment, supplement or repeal are concerned, relate to a single subject, section 1541 remains in force."

As held herein, section 2915-1, General Code, is void and section 1541, General

Code, as it existed prior to the amendment thereof, in 102 Ohio Laws, 77, is still in force. In said section it is provided:

> "The judge of the court of common pleas of a county, or the judge of such court in a county in joint session, if they deem it advisable, may appoint either or all of the following:
>
> "Third: A secret service officer for the prosecuting attorney's office, who shall aid the prosecuting attorney in the collection and discovery of testimony to be used in the trial of criminal cases and in matters of a criminal nature. Such appointment may be made for such term as the judge or judges deem advisable, subject to termination at any time for cause sufficient within the judgment of the judge or judges of the court. He shall receive such compensation, payable monthly from the county fund upon the warrant of the county auditor, as the judge or judges so appointing shall determine, not exceeding the rate of fifteen hundred dollars for each year."

This section prescribes the duty of such secret service officer, who is commonly known as the county detective, and such duty is to "aid the prosecuting attorney in the collection and discovery of testimony to be used in the trial of criminal cases and in matters of a criminal nature."

Such officer is not specifically given power to make arrests or to execute criminal process.

It does not appear in the case you submit whether the county detective is to act without warrant or with a search warrant in his possession.

Gambling is defined by sections 13058 and 13059, General Code, and said sections prescribe the penalty therefor.

Section 13058, General Code, provides:

> "Whoever plays a game for wager in an ordinary tavern, race-field, booth, arbor, out-house or erection connected therewith, or in a public place, or wagers on those so playing therein, shall be fined not more than one hundred dollars."

Section 13059, General Code, provides:

> "Whoever plays a game for money or other thing of value or makes a wager for money or other thing of value, shall be fined not more than one hundred dollars or imprisoned not less than ten days nor more than six months, or both."

It appears therefore, that gambling is a misdemeanor and is not a felony.

The rule for breaking doors or into a building where a breach of the peace is suspected of occurring is stated in 3 Cyc., at page 893, as follows:

> "After due demand, either a peace officer or a private person may, without a warrant, break open doors for the purpose of apprehending a felon, or for the purpose of preventing the commission of a felony. When the arrest is upon suspicion of felony, it seems that a peace officer may break doors for the purpose of apprehending the suspected party, but that a private person may not. *A peace officer, moreover, may, without a warrant, break into a dwelling or other house for the purpose of suppressing or preventing a disturbance or breach of the peace, and of arresting the offenders, even at night, but a private person may not.*"

In accordance with this rule of law a peace officer would have the right, without warrant, to break doors in order to suppress a breach of the peace, and to arrest the offenders, but a private person would not have such right.

The question arises, is a county detective, or secret service officer, appointed by virtue of section 1541, General Code, a peace officer?

A peace officer is defined in Cyc. at page 1327, where it is said:

> "The sheriff, under sheriff or deputy, or a constable, marshal, police constable or policeman of a city, town or village; the sheriff and his deputy; constable; marshal, constable, and policeman of any incorporated town or city, and any private person especially appointed to execute criminal process."

The duty of a county detective, as prescribed by section 1541, General Code, are to aid the prosecuting attorney in the collection and discovery of testimony. Nothing is said as to his power or duty to make arrests or to serve criminal process.

In case of Penny vs. The New York Central & Hudson River Railroad Co., 34 N. Y. App., 10, it is held:

> "That there is no such settled significance to the term 'detective' as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts, and that in order to establish such authority, it is essential that evidence of such conditions as warrant the inference of its existence shall be given."

This was an action for false imprisonment against the railroad company, and the detective in question was the detective of the company.

Hatch, J., says on page 14:

> "There is no such settled significance attached to the term 'detective' as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts. * * * But it is quite well known that the term 'detective' is applied to persons in the employ of various individuals and corporations whose authority is limited to the collection of evidence and the performance of other acts having sole reference to civil litigation."

In the above definition of a peace officer, sheriffs, constables, marshals and policemen are specifically named. Detectives and secret service officers are not named.

Section 2833, General Code, prescribes the duties of a sheriff and reads:

> "Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other process to him directed by proper and lawful authority. He shall attend upon the common pleas court and the circuit court during their sessions, and, when required, upon the probate court. In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of a county as may be necessary. Under the direction and control of the county commissioners, he shall have charge of the court house."

Section 3340, General Code, prescribes certain duties of a constable, as follows:

"Each constable shall apprehend, or view or warrant, and bring to justice all felons, disturbers and violators of the criminal laws of this state, and suppress all riots, affrays, and unlawful assemblies, which may come to his knowledge, and, generally, keep the peace in his proper county."

Certain duties are given to a policeman by virtue of section 4378, General Code which reads:

"The police shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council by ordinance prescribes. The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision."

Section 4385, General Code, applies to marshals of villages and reads:

"The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, deputy marshals, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance."

Section 4386, General Code, provides:

"He shall suppress all riots, disturbances and breaches of the peace, and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the corporation and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial, and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states."

Each of the foregoing officers are made, by the statutes, peace officers, with power to arrest and execute original process.

The county detective is appointed to aid the prosecuting attorney.

Section 2916, General Code, gives certain powers to the prosecuting attorney, and reads:

"The prosecuting attorney shall have power to inquire into the commission of crimes within the county and shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the probate court, common pleas court and circuit court. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs,

or costs only, as the case may be, and faithfully urge the collection until it is affected (effected), or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county, which come into his possession as fines, forfeitures, costs or otherwise."

The prosecuting attorney is given the power to inquire into the commission of crimes. This does not make him a peace officer, and he is not a peace officer with power to arrest or to execute criminal process.

The duty of the county detective is to aid in the collection and discovery of testimony in criminal cases. There is no authority to break doors in order to collect or discover testimony for a criminal trial. The authority to break doors is to make an arrest or to suppress a breach of the peace.

The office of county detective, or secret service officer, as stated in the statute, is a statutory office, and the duties granted him by the statute do not authorize him to make arrests or to execute criminal process as such officer. He is not, therefore, a peace officer, and his power to break doors to suppress or prevent a breach of the peace is the same as that of any other person who is not a peace officer.

The statutes provide for the issue and service of a search warrant in certain cases. Section 13482, General Code, provides:

"A justice of the peace, mayor or police judge may issue warrants to search a house or place:

"4. For a gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or gain money or other property, and for money or property won by unlawful gaming."

Section 13483, General Code, provides:

"A warrant for search shall not be issued until there is filed with the magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, and the things to be searched for, and alleging substantially the offense in relation thereto, and that affiant believes, and has good cause to believe, that such things are there concealed."

Section 13484, General Code, provides:

"The warrant for a search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the thing to be searched for, the house or place to be searched, and the person to be seized. Such warrant shall command the officer to search such house or place for the property or other things, and, if found, to bring them, together with the person to be seized, before the magistrate or another magistrate of the county having cognizance thereof. The command of the warrant shall be that the search be made in the day time, unless there is urgent necessity for a search in the night, in which case a search in the night may be ordered."

This section does not name the officer, but states that the warrant shall be issued to the "proper officer." A proper officer would be one with power to make arrest, or to execute criminal process.

Section 13504, General Code, provides:

"In executing a warrant for the arrest of a person charged with an offense,

or a search warrant, the officer may break open an outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance. But an officer executing a search warrant shall not enter a house or building not described in the warrant."

This section gives the officer the power to break a door or window in the execution of a warrant. It does not extend that power to a person who is not an officer. The officer contemplated by this section is an officer with power to make arrests and to execute criminal process. It means a peace officer. The county detective, or secret service officer, appointed by virtue of section 1541, General Code, is not such peace officer.

It is my conclusion, therefore, that the secret service officer appointed by virtue of section 1541, General Code, has no authority as such officer to break into a building in which gambling is reasonably believed to be going on.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

139.

SCHOOLS—BOXWELL GRADUATE ENTITLED TO ADMISSION INTO ELEMENTARY SCHOOL.

Under section 7644, General Code, which 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, and under section 7681, which provides that schools of each district shall be free to all youth between six and twenty-one years of age, a pupil of that age who has received a Boxwell diploma and has failed in his studies in the first year of the high school course, is entitled, if he so desires, to re-admission into the elementary school of his district.

Under section 4750, General Code, a board of education is empowered to make such regulations as it deems necessary for the government of its employees and the pupils of the school. Under this section, the board may designate what studies such pupil shall be required to take.

COLUMBUS, OHIO, Februarv 5, 1913.

HON. ARTHUR VAN EPP, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I desire to acknowledge your letter of the date of December 17, 1912, wherein you inquire as follows:

"In Medina township of this county there is a special school district designated as the Weymouth Special school district, and which maintains no high school of any class, the eighth grade being the highest of the school there maintained.

"1. 'A' is a pupil residing in said special district and who attended the school maintained therein and took the full course prescribed by the rules and regulations of the board of education, and fully completed and graduated from said school and then took the Boxwell-Patterson examination, passed and received the diploma provided by that law, and then entered the Medina high school, his tuition being paid by the board of education of the special school district, as provided by law. 'A' failed to pass his examinations at the end of his first year's attendance at the Medina high school, and was therefore

not promoted, and he now seeks to again attend the school maintained in the special school district, and the question arises, is he legally entitled to attend said school.

"2. If the pupil in question were to be permitted to again attend the school who would be charged with the duty designating the studies to be again taken and prescribed for him, and the class to which he might be attached?"

In reply to your first question I desire to say section 7648 of the General Code defines an elementary school as follows:

"An elementary school is one in which instruction and training are given in spelling, reading, writing, arithmetic English language, English grammar and composition, geography, history of the United States, including civil government, physiology and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

Section 7649 of the General Code defines a high school as follows:

"A high school is one of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible. Also such other branches of higher grade than those to be taught in the elementary schools, with such advanced studies and advanced reviews of the common branches as the board of education directs."

From the description of the schools maintained in Medina township, as set forth in your inquiry, it is my conclusion that said school falls within the category of the elementary school, as defined by the above quoted sections.

Section 7644 of the General 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, as follows:

"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 places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

From the facts as stated in your inquiry that the pupil in question finished the course of study provided in the schools of the Weymouth special school district, then attended the Medina high school after passing the Boxwell-Patterson examination, and then failed to pass the examination at the end of his first year in said high school, thereby failing to be promoted, it would seem to follow that said pupil has not satisfactorily completed his elementary education. Said elementary education is to be

furnished free to every youth of school age within the district wherein such youth lives by the board of education, as provided by section 7644, General Code, above quoted.

Furthermore, section 7681, of the General Code, provides that the schools of each respective district shall be free to all youth between six and twenty-one years of age, as follows:

> "The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards, or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district children's home located in such a school district, at the discretion of its board of education, but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

Therefore, in answer to your first question, I am of the opinion that said pupil is legally entitled to attend the schools in the Weymouth special school district.

In answer to your second question, section 4750 of the General Code provides as follows:

> "The board of education shall make such rules and regulations as it deems necessary for its government and the government of its employes and the pupils of the schools. No meeting of a board of education, not provided for by its rules or by law, shall be legal, unless all the members thereof have been notified, as provided in the next section."

In view of the provisions contained in said section and the authority thereby lodged in the board of education it follows that said pupil must pursue such studies of the respective grades as are prescribed and designated by the rules and regulations of the board of education of the said Weymouth special school district.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

140.

SHERIFF PERMITTED EXPENSES OF MAINTAINING AUTOMOBILE.

The provision of section 2997, General Code, permitting a sheriff expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office, comprehends the payment of expenses for the maintenance of an automobile used by him in the performance of his official duties.

COLUMBUS, OHIO, February 18, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of letter of Hon. Charles A. Green, assistant prosecuting attorney, Hamilton county, Ohio, in which he inquires as to whether repairs on automobile maintained by the sheriff and used in the business of the county, may be properly paid by the county commissioners.

Section 2997 of the General Code provides in part as follows:

> "In addition to the compensation and salary herein provided the county commissioners shall make allowances quarterly to each sheriff * * * and all expenses of maintaining horses and *vehicles* necessary to the proper administration of the duties of his office. * * *"

The part of section 2997, General Code, just quoted, was construed in the case of state ex rel. Denormandie vs. Commissioners of Mahoning county, found in 10 C. C. n. s. 398. The court said in part:

> "What, then, is the definition—the ordinary meaning—of the word 'maintaining,' especially when applied to animals and vehicles?
>
> "All lexicographers define maintenance as 'maintaining, supporting, upholding, keeping up, * * *' and the word maintain 'to hold or keep up in any particular state or condition, * * * to keep up.' So that the meaning of the word 'maintaining' as used in this section in reference to horses and *vehicles* means supporting, sustaining, keeping up, supplying with the necessaries of life, and the legislature therefore in this provision only meant and intended that sheriffs should be allowed the necessary expenses incurred in supporting, sustaining and supplying their horses with the necessaries of life, *and in keeping their vehicles in good condition,* and not in the purchase of them."

Section 2997, General Code, prior to 1911, did not authorize the sheriff to expend money for *livery* hire and only allowed expenses for *maintaining* horses and vehicles. So that, if he did not own his own vehicle he was not authorized to hire conveyances, and to meet the situation the legislature amended section 2997, General Code, and gave county commissioners authority to make allowances for *necessary* livery hire for the proper administration of the duties of the office.

It was contended after the amendment that the phrase "livery hire," as used in this statute, did not include the hire of automobiles. This question was raised in the common pleas court of Franklin county, Ohio, in the case of state of Ohio ex rel. Sartain, as sheriff of Franklin county, against Sayre, auditor, et al.

Judge Rathmell held that the sheriff under the amended section authorizing livery hire could hire automobiles.

The court said in part:

> "It is the contention of counsel for defendants that the phrase 'livery hire' as used in the statute does not include the hire of automobiles; and cannot apply to any expenditure for the hiring of horseless vehicles.
>
> "It is not questioned that an automobile is a vehicle which is subject to hire.
>
> "Does the expense account (which was for hire of automobile by the sheriff for use in the performance of the duties of his office) fairly come within the provision for the allowance which may be made for necessary *livery hire*? * * *
>
> "It appears clear that by the intent of the statute that *livery service* necessary for the proper administration of the duties of the sheriff's office may be paid for by the commissioners.
>
> "The word 'livery' is used in a number of senses. * * *
>
> "The standard dictionary defines 'livery' in one of its accepted senses as 'The keeping of horses and vehicles ready for hire.' 'A livery man is one who keeps a "livery stable." ' 'A *livery stable* is a building where horses or

vehicles are kept or let for hire.' (19 A. & E. Enc. of Law 430.) A livery stable 'A place where horses and vehicles are kept for hire.' (Eng. L. Dict.)

"From their definition, it would appear that as 'livery' pertains to the keeping of horses and vehicles ready for hire, or the keeping of horses or vehicles ready for hire, that to constitute 'livery hire' it is not necessary that both horses and vehicles be connected with the letting or transaction; that the hire of a horse from a liveryman can constitute 'livery hire' within the unstrained meaning of the definition; and the hire of a vehicle would likewise constitute 'livery hire.'

"It is not uncommon that liverymen keep and maintain automobiles, in connection with horses and carriages, for hire to their customers. And automobiles are maintained alone in stables or buildings for hire.

"In 28 Cyc. 42 the following definition appears: 'The public garage is the modern substitute for the livery stable and may be defined as a building or inclosure for the care and storage of motor vehicles and in which motor vehicles are kept for hire.'

"General Code 13130, where penalty is provided against hiring certain animals or vehicles with intent to defraud the owner or keeper of a livery stable, 'Automobile' is mentioned as one of the vehicles within the range of such hiring, which lends some support to the claims that an automobile is there recognized as a proper subject of a liveryman's business, and hence a subject of *'livery hire.'*

"An automobile is a vehicle, but to insist that 'vehicle' is the definition of 'livery' is limited in meaning to horse-drawn vehicles, seems hardly warranted in modern usage of the word."

I quote at length from this last decision because it has been contended by some, as before stated, that *vehicles* as used in section 2997, General Code, refers only to buggies and carriages. The Sayre case decides that the automobile is a *vehicle* within the meaning of section 2997, General Code. The sheriff may engage either horse, buggy or automobile under the term "livery hire." So that if the sheriff is the owner of a buggy or an automobile which he uses in the service of the county in connection with the duties of his office and he presents the bills for the repair of automobile they should be allowed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

141.

AUDITOR, COUNTY—WARRANT MAY NOT BE DRAWN TO PAY JUDICIAL AND COURT EXPENSES AFTER APPROPRIATION FOR SUCH EXPENSES HAS BEEN EXHAUSTED.

Section 5649-3d, General Code, requiring that all expenditures by county commissioners within the six months of each fiscal year, shall be made for and within the appropriations made and balances thereof, has modified section 5637, General Code, which provides that the auditor may draw his warrant upon the general or county fund for the payment of judicial and court expenses, when the fund appropriated for the same became inadequate. The latter section can now only be construed to empower the auditor to draw his warrant upon such fund as has been appropriated for the express purpose of caring for all expenditures not covered by special and detailed appropriations.

COLUMBUS, OHIO, March 7, 1913.

HON. JOHN J. WOOLEY, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I beg to apologize for not sooner replying to your letter of December 20th. The unusual pressure of business, due to the legislative session, has occasioned some delay in this department in the answering of correspondence.

You request my opinion upon the following question:

> "May the county auditor, under section 5637 of the General Code of Ohio, draw his warrant upon the county treasurer to pay judicial and court expenses after the amount appropriated for such expenses has been exhausted but where there are funds in the treasury not otherwise appropriated?"

Section 5637, General Code, which you cite, after providing the rates which (prior to the enactment of the Smith one per cent. law, so-called) could be levied for the judicial fund by the county commissioners provides that, "In case such fund should become inadequate to meet the expenses of the courts, the general or county fund shall be drawn upon for the payment of such expenses."

This section was enacted in 1902, 95 O. L., 465. Subsequently, in 1911, the legislature passed the Smith one per cent. law, so-called, which contained the following provision.

> "Section 5649-3d. At the beginning of each fiscal half-year the various boards mentioned in section 5649-3a of this act (including county commissioners) shall make appropriations for each of the several objects for which money has to be provided * * * *and all expenditures within the following six months shall be made from and within such appropriations and balances thereof.*" * * *

In other opinions I have held that the explicit provisions of the section last quoted permit of only one implied exception, namely: the expenditure of moneys acquired by the exercise of the borrowing power. Even this case is seemingly covered by the express language of section 5649-3d, but for reasons which I need not discuss at this time I am satisfied that such expenditures are not within the contemplation of the section.

Section 5637 was passed at a time when there was no such requirement as is at present embodied in section 5649-3d, and its provisions are therefore inconsistent with the latter section. That is to say, when section 5637 was enacted the warrants

of the auditor were drawn upon and made payable directly from the funds in the county treasury. Such is not now the case; the auditor's warrants are now payable, not from the funds as such but from the appropriated funds—out of appropriation accounts, so to speak; except that the borrowing of money for a specific purpose is in itself an appropriation of the proceeds of the loan for that purpose.

The general principle then which governs the question asked by you is that the county auditor no longer has any authority to issue warrants against any fund raised by taxation or otherwise derived from the current revenues of the county, but only against the appropriated parts of such funds.

In my opinion, the utmost effect that can now be given to the above provisions of section 5637, which is certainly so inconsistent with section 5649-3d as to be substantially amended, if not wholly repealed, by implication, by the enactment of the latter section, is to regard it as declaratory of the objects and purposes of the general account of the county. That is to say, if from the "general" or "county" fund, which is the proceeds of a certain levy made by the county commissioners, the commissioners have appropriated a "general" account—that is, an account from which it is intended that all expenditures not covered by the special and detailed appropriations are to be paid. The provision of section 5637, which has been quoted, might be regarded as authorizing the expenditure of such an appropriation after the amounts levied and appropriated for the judicial fund had been exhausted. I believe this to be the intention of the legislature, derivable from its somewhat ambiguous enactments. So that, if in Athens county the commissioners have created such a general appropriation account, they may use it for the purpose of meeting deficiencies in the judicial account. The county auditor may not, however, do precisely what you inquire about, namely: draw warrants for judicial expenses upon *unappropriated* balances in the general county fund.

I anticipate that the answer which I have given to your question may raise in your mind the further question as to the method of paying judicial expenses after a fund for that purpose has become exhausted in the event that there is not a sufficient amount in any general appropriation account to meet the deficiency. In my opinion the only provision which may lawfully be made for such a case is to borrow money to meet the expenses of the courts as they accrue from time to time. Without going into detail, suffice it to say that I am of the opinion that the expenses of the courts are legal charges against the county, regardless of any action of the county commissioners, i. e., are not contractual in their nature and must at all events be paid. That being the case, the commissioners have authority, under section 5656 of the General Code, to borrow money to provide for paying indebtedness so incurred; but they may not under this section anticipate the incurring of indebtedness.

For the sake of accuracy, however, I am constrained to call your attention to section II of article XII of the constitution, as amended in 1912, which seems to cast some doubt upon the power of the commissioners under existing statutes to issue bonds for any purpose. Inasmuch as you do not ask this precise question, and because also I have not fully made up my mind as to the application of this section of the amended constitution, I do not pass upon the question which I have suggested in this connection.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

143.

TERMS OF OFFICE OF COUNTY BOARD OF VISITORS FIXED BY LEGISLATIVE ACT OMITTED FROM CODE BY CODIFYING COMMISSION.

Although the general assembly has provided in section 633-15, revised statutes, for specific terms of office for the board of county visitors, this statute was omitted from the General Code by the codifying commission. Since, however, sections 2971 and 2974, General Code, both recognize the existence of a term of office for such officers, there is sufficient ambiguity in the statutes as they appear in the code to justify resort to the original acts in order to settle the same. The statutes aforesaid, therefore, providing terms of office must be held to control.

COLUMBUS, OHIO, March 28, 1913.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—Your letter of January 9th received. You call my attention to the change made by the codifying commission in sections 2971 to 2976, inclusive, General Code. You state that:

> "The general assembly last acted upon these statutes in 1906, and as they amended they appear in year book 98, pages 27 and 28.
>
> "You will observe that the codifying commission omitted a very essential part of section 2971, when they failed to fix the beginning of the terms of the county board of visitors and also the length of terms.
>
> "The general assembly had provided (supra) that the terms should begin the first of May, and that two should serve for one year, two for two years and two for three years. The codifying commission omitted this entirely. The matter becomes important when considered with section 2973, which fixes a limitation of one hundred dollars for any one year by said board. Our auditor contends that the fiscal year should govern; that is, from September 1st to September 1st; but I can see no reason for that holding. My own opinion is that under the present statute, as mutilated, the terms of the members begin from the day of their appointment, and if the probate judge sees fit, he could appoint a new board each year, even to the extent of an entire new board."

and request my opinion as to the time when the terms of the board of visitors begin and how long they extend.

Section 2971 of the General Code provides as follows:

> "Between the first day of March and the first day of April the judge of the probate court in each county shall appoint six persons, not more than three of whom shall have the same political affiliation, who shall constitute a board of county visitors for the inspection of all charitable and correctional institutions supported in whole or in part from the county or municipal funds. Three of such appointees shall be women. All vacancies in the board shall be filled in the manner provided by the original appointment for the unexpired term only."

This section, before it was codified, was found in 98 Ohio Laws, 28 (Section 633-15, Revised Statutes). It provides as follows:

> "The judge of probate court in all counties shall between the first day of March and the first day of April appoint six persons, three of whom shall be women, and not more than three of whom shall have the same political affiliations, two of whom, as indicated by the appointing judge, upon the fixed appointment, shall serve for one year, two for two years, and two for three years, beginning the first day of May, who shall constitute a board of county visitors for the inspection of all charitable and correctional institutions supported in whole or in part from the county or municipal funds. All vacancies in the board, whether occasioned by the expiration of term, removal or otherwise, shall be filled in the manner that the original appointment is made and, when occurring at any time before the expiration of the term of appointment, shall be for the balance of the term only. * * *"

The general assembly provided by said section that the terms of the board of county visitors should begin on the first day of May; and that two should serve for one year, two for two years, and two for three years; and provided by section 633-17, Revised Statutes (Section 2 of the same act), that the first appointments under that act should be made for such terms or parts of terms as should thereafter cause the terms of two members of said board to expire each year on the first day of March. The codifying commission omitted, in section 2971, General Code, all reference to the length of the terms of the members of the board, and seemingly provided that the members of such board should be appointed for no definite term, and removable at the pleasure of the probate judge, and that he should appoint six members each year.

Section 2971 provides, in the last sentence, that "All vacancies in the board shall be filled in the manner provided by the original appointment for the unexpired term only." Here is, plainly, a reference to a term of office of the members of the county board.

Section 2974, General Code, after reciting the duties of the board of visitors provdes in part as follows:

> "Failure in the performance of these duties on the part of any member of the board for one year shall be sufficient cause for his or her removal by the judge of the probate court."

As before stated, the codifying commission omitted to refer to the terms of the members, or at least makes them annual appointees by the probate judge. Section 2974, just quoted, provides that any failure in the performance of his duties on the part of any member of the board, for one year, shall be sufficient cause for removal by the probate judge. This plainly creates an ambiguity in the statutes, or at least a conflict between sections 2971 and 2974, and also makes their meaning doubtful.

In Rathburn vs. Hamilton, 4 App. Cas. (D. C.) 475, the supreme court of the United States said:

> "The general rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into the prior and contemporaneous acts, the reason which induced the

act in question * * * and the purpose intended to be accomplished by it to determine the proper construction. * * * The whole doctrine applicable to the subject may be summed in the single observation that prior acts may be resorted to to *solve* but not to create an ambiguity."

It is also a well settled rule, and one peculiarly applicable to revisory statutes, that in the revision of statutes neither an alteration in phraseology nor the omission or addition of words in the latter statute shall be held necessarily to alter the construction of the former act. Conger et.al. vs. Barker's Administrator and Heirs, 11 O. S., Page 1.

Referring back to the original act, as to the meaning of section 2971, and supplying the parts omitted by the codifying commission, which is necessary to solve the ambiguity, I am of the opinion that the term of two of the members of the board of county visitors expire each year on the first day of March; that the probate judge shall appoint two members each year, for a period of three years; and the county commissioners shall allow the board and its members, for annual expenses in any one year, the sum of one hundred dollars.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

144.

COUNTY COMMISSIONERS—DISCRETIONARY DUTY TO COMPENSATE PERSON BITTEN BY ANIMAL AFFLICTED WITH RABIES.

Under section 5852, General Code, the allowance of damages to a person bitten by an animal afflicted with rabies, rests with the discretion of the county commissioners, and the commissioners may make such reasonable requirements for the purpose of investigation of the facts as they deem necessary.

COLUMBUS, OHIO, March 31, 1913.

HON. HORACE L. SMALL, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter, dated December 21, 1912, which reads as follows:

> "Sections 5851 and 5852, General Code of Ohio, provide for the payment by the county commissioners of certain expenses incurred by persons who have been bitten by animals afflicted with rabies.
>
> "We have at present pending before the commissioners of this county a very peculiar case. A certain man, a resident of Cincinnati, Ohio, A. J. Conley by name, several months ago, while in this city on business, was bitten one evening, after dark, by a dog which he says gave every appearance of having rabies, such as frothing at the mouth, etc. Mr. Conley proceeded to have his wounds cauterized by a local physician and subsequently took a Pasteur treatment in Cincinnati, for which he rendered a bill, properly signed, to the commissioners of this county.
>
> "This office has refused to approve the bill, on the ground that no proof has been presented that the animal in the case was afflicted with rabies. I desire, however, to be fair in the matter and if, under the provisions of the sections above referred to, Mr. Conley is entitled to be reimbursed to the extent of his expenses I shall be very glad to approve the account. It has, however, been the policy of this office to insist in matters of this sort that the dog's head should be sent to Columbus and an examination and analysis made by the state board of health to determine beyond any reasonable doubt that the animal was so afflicted. In the absence of such proof I have always refused to approve such bills.
>
> "I very much desire the opinion of your office as to what is proper under the circumstances."

In reply thereto I would say that section 5851, General Code, provides as follows:

> "A person bitten or injured by a dog, cat or other animal afflicted with rabies, if such injury has caused him to employ medical or surgical treatment or required the expenditure of money, within four months after such injury and at a regular meeting of the county commissioners of the county where such injury was received, may present an itemized account of the expenses incurred and amount paid by him for medical and surgical attendance, verified by his own affidavit or that of his attending physician; or the administrator or executor of a deceased person may present such claim and make such affidavit. If the person so bitten or injured is a minor such affidavit may be made by his parent or guardian."

Section 5852, General Code, provides as follows:

> "The county commissioners not later than the third regular meeting, after it is so presented, shall examine such account, and, if found in whole or part correct, and just, may order the payment thereof in whole or in part, out of the general fund of the county; but a person shall not receive for one injury a sum exceeding five hundred dollars."

I have made a careful examination of the provisions of the General Code and find no other sections relating to a case such as you recite in your inquiry. Under said sections I am of the opinion that the commissioners, in deciding whether or not an account, presented to them for payment under said sections, is correct and just, may go into the matter in any manner which said board may desire to enlighten them thereon; and if, in the opinion of the board of commissioners, it was necessary to have the dog's head analyzed and examined by the state board of health, or any other person, either a physician or a chemist, for the purpose of assisting said board in determining that the animal was so afflicted with rabies, they would have the right and power so to do.

In any event, the payment of such account, under said sections, is discretionary with the board of commissioners; and, in my opinion, it is the duty of the board of commissioners, in the allowance of any claim under said sections, to be very careful and sure of the facts that are the basis of the claim against the county. But where the board is convinced of the correctness and the justice of the bill, and particularly of the fact that a person has been bitten or injured by a dog which is afflicted with rabies, they should exercise their discretionary powers with reasonableness.

Under section 5852 the commissioners may adopt any rules to compel the claimant to establish the correctness of the fact that said dog was afflicted with rabies, and the fact that his bill is just and correct. The commissioners, in my opinion, should determine that said injury was not received through the neglect or carelessness of the person so bitten.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

147.

DAMAGES—SECTIONS 6563-1, AND FOLLOWING, DO NOT REPEAL EXISTING JOINT COUNTY DITCH LAW.

Since section 6563-1, and following, General Code, provide for the construction of joint county ditches, through a joint procedure on the part of the commissioners of each county, whilst the existing laws provided for substantially a single county activity on the part of each board, since the new law does not cover the entire ground of the existing laws, and since a substantial amendment to the old law was passed, on the same day with the new law, the new law cannot be construed to repeal the old law by implication.

COLUMBUS, OHIO, March 19, 1913.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have at hand your letter of March 8th, wherein you request my opinion as to whether or not section 6563-1, General Code, and following, repealed by implication, sections 6536 to 6563, General Code, including the joint county ditch law found on pages 313 and 314 of 102 Ohio Laws, which was passed on the same day as

sections 6563-1 to 6563-48, General Code, as found on page 578 of 102 Ohio Laws. You call attention to the decision of Goff et al. vs. Gates, et al. Commissioners, decided by the supreme court, and reported in the Ohio Law Reporter, page 76, under date of January 13, 1912.

The syllabus of the case referred to is as follows:

"1. An act of the legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it.

"2. Section 2 of the act of the general assembly, passed May 10, 1910, entitled: 'an act to provide for the laying out, construction, repair or improvement of any public road or any part thereof and for the straightening, widening or altering and draining of the same by the county commissioners,' is in direct conflict with section 6926, General Code, and, therefore, repeals said section of the General Code by implication.

"3. The act of the general assembly of May 10, 1910, completely revises the whole subject-matter covered by sections 6926 to 6956, General Code, inclusive, and is evidently intended as a substitute for these sections, and, therefore, repeals the same by implication."

Of the law upon the question of whose repeal you inquire, permit me to cite sections 6536, 6537, 6540, 6556, 6557, 6558 and 6559, General Code.

"Section 6536. Ditches, drains or watercourses which provide drainage, or, when constructed, will provide *drainage for lands in more than one county*, may be located, constructed, cleaned, repaired, straightened, widened, altered, deepened, boxed or tiled, as provided *in this chapter* and the *laws prescribing for locating, constructing, cleaning, repairing, straightening, widening, altering, deepening, boxing or tiling single county ditches, drains or watercourses.*

"Section 6537. When a ditch or improvement is proposed, *which will require a location in more than one county*, application shall be made to the board of county commissioners of each of such counties, and the surveyor or engineer shall make a report for each county. *Application for damages shall be made, and appeals from the finding of the commissioners, in joint session, locating and establishing such ditch*, and from the assessment of damages or compensation, shall be taken to the *probate court of the county in which the greatest length of such ditch or improvement is located. A majority of the commissioners of each county, when in joint session, shall be competent to locate and establish such ditch or improvement.* No county commissioner shall serve in any case in which he is personally interested; and any two commissioners of their respective counties, may form a quorum for the transaction of business under this chapter.

"Section 6540. When the board of county commissioners of an upper county shall cause to be located, constructed, cleaned, repaired, straightened, widened, altered, deepened, boxed or tiled, a ditch, drain or watercourse, the *water from which flows into an adjoining county*, or into, *or finds an outlet in a ditch, drain or watercourse constructed, or being constructed in an adjoining county*, or when the board of county commissioners of a *lower* county shall cause to be located, constructed, cleaned, repaired, straightened, widened, altered, deepened, boxed or tiled, a ditch, drain or watercourse, *which is, or may be an outlet for a ditch, drain or watercourse of lands of an upper county*, or which, by reason of a proposed improvement thereof, will provide *better*

drainage, or a more sufficient outlet, drain or watercourse for lands of an upper county, or finds it necessary to locate, construct, clean, repair, straighten, widen, alter, deepen, box or tile a ditch, drain or watercourse of a lower county, in order to secure a sufficient and proper outlet for a proposed ditch, drain or watercourse of an upper county, the commissioners of *such upper county shall pay the commissioners of such lower county such sum as is agreed upon by the commissioners of both counties* for the use and benefit of such outlet. The commissioners of such upper county shall apportion such sum to the lands in their county, for whose benefit such ditch was or is constructed.

"Section 6556. Proceedings for the location, construction, cleaning, repairing, straightening, widening, altering, deepening, boxing or tiling either of such ditches in either the upper or lower counties, whether or not they were originally constructed as joint ditches, or whether or not the ditch to be located and constructed might be a joint ditch, may be commenced and conducted in the manner provided in this chapter, and the laws relating to single county ditches.

"Section 6557. In addition to the procedure provided by law for the location, construction, cleaning, repairing, straightening, widening, deepening, boxing or tiling of a ditch which furnishes, or may furnish drainage for more than one county, proceedings shall be commenced and conducted in the manner provided by law for the location and construction of *joint ditches,* when a majority of each board of commissioners of such county so agree.

"Section 6558. When the county commissioners do not agree or determine to proceed under the laws for the construction of joint ditches, and the board of commissioners *of the lower county unanimously agree* that such improvement is necessary or will be conducive to the public health, convenience or welfare, and the line described is the best route, the proceedings in reference thereto shall be conducted as provided in this chapter and the laws for single county ditches. The proceedings shall be conducted by the commissioners of the lower county.

"Section 6559. When a ditch needs to be *cleaned, repaired or enlarged,* which has been located in more than one county, an *owner of* a lot or tract of land, which was assessed for its construction, may make a written *statement to the commissioners of either of said counties, setting forth such necessity.* The commissioners shall forthwith appoint a disinterested freeholder of the county or an engineer, to examine such ditch, whose compensation shall be as in other cases, and who shall be sworn to go upon the line thereof, carefully make such examination, make an estimate of the amount of work to be done and the amount of money required therefor and fix the portion thereof that the owner of each lot or tract of land, and each corporation, county or township assessed for the construction thereof or that may be benefited by such cleaning, repairing or enlarging, should be assessed for such improvement."

These sections represent the foundation points of the old laws providing for the improvement of joint county ditches.

Under section 6536, General Code, it is provided that ditches, drains or watercourses which provide drainage or when constructed will provide drainage for lands in more than one county, may be improved as provided in this chapter, and *the laws prescribing for improvement of single county ditches, drains or watercourses.* Under this statute, such procedure as is necessary in the construction of a joint county ditch, which is not found provided for in this chapter relating to joint county ditches, must find its directions *in the chapter relating to single county ditches.*

Under section 6537, General Code, application for a joint county ditch improve-

ment must be made to the board of county commissioners of *each* county, and the surveyor or engineer shall make a report for each county. In the case of Chesbrough vs. Commissioners, 37 Ohio State, page 514, the court said, in construing this section:

> *"The joint action consists in the finding that the provisions of law, preliminary to the consideration of the petition on its merits, have been complied with, a finding that the proposed ditch is conducive to the public health, convenience or welfare, the location of the same, if they so find, and the apportionment of the costs and work of construction.* If *damages* are claimed, the application therefor must be made to the commissioners of the county where the land is situated. *The joint-session has nothing to do with the assessment of damages for property appropriated. It locates and establishes the ditch, and apportions the cost of its location and construction, and damages, if any, to the persons owning lands through, or in the vicinity of which, the proposed ditch is to be constructed.* As the ditch is an entirety and lies in more than one county, the statute requires the concurrent action of each *county to locate and establish it, and to apportion among land owners its aggregate cost.* A majority of each board, in joint session, and not a majority of the joint board, is required. Hence each board acts as an *integral* part of the joint body. The *assumption* that the *commissioners of either county are acting and exercising authority over the internal affairs of the other county,* is therefore not well founded."

Under the plan herewith provided, therefore, it is contemplated that the county commissioners of each county shall assume control and direction of practically all procedures within their respective counties. The allowance of damages, letting of contracts, and sending of notices and publications, must be cared for by the officials of the county in which the respective part of the ditch is constructed. The work of the boards, when assembled, jointly, consists solely in locating and establishing the ditch and apportioning the costs and assessments to the respective counties; and even in these joint matters, a majority of the commissioners of each county is necessary for valid action.

Under section 6539, General Code, when the county commissioners in joint sessions find in favor of the improvement, but are unable to agree upon the apportionment of the costs, of such location and construction which shall be made to each of the counties, action may be brought in the *common pleas court,* whereby such court may appoint three disinterested free holders to make the apportionment. After final determination of these free holders, report of the findings are made to the commissioners of each county, and each board is then required to proceed *as in the case of single county ditches.*

These statutes, to wit, sections 6536 to 6539, inclusive, represent the original law, providing for the improvement of joint county ditches.

Owing no doubt to the fact that it was found in the attempted application of this law that necessity or public convenience often required the improvement or construction of joint county ditches, when an agreement therefor could not be obtained between the commissioners of the counties, this law was supplemented by an act appearing first in 86 Ohio Laws, page 123. This supplemental law provided for improvement of joint county ditches, without agreement of the different counties, and presented a procedure by which a county benefited by a ditch, constructed in another county, may be compelled to contribute for the benefit thereby received. This law has been several times amended and now appears in the General Code as sections 6540 to 6558, inclusive.

Section 6540, above quoted, provides in general, that when a ditch is constructed or improved in one county which will work consequent benefit to another county, the county benefited shall pay to the county in which such improvement is constructed, such sum as the commissioners of both counties agree upon for the use and benefit;

and in the following sections it is provided that when the county commissioners of a county so benefited, upon notice, refuse to take action toward any such agreement, procedure may be had for the appointment of free holders by the *probate courts* of each county, which free holders shall be required to estimate and report the amount which should justly be paid by the upper county to the lower county for the benefit received from such improvement.

Under these statutes as under the first statutes, the procedure, beyond that of the mere agreement of compensation between the two counties and the compulsion of such compensation through the probate court, *is substantially a single county ditch procedure.*

Under sections 6556 to 6558 of these later statutes, provision is made whereby in the constructing of a ditch in one county which will afford benefit to another county, procedure may be had by agreement of the county commissioners of each county, through the common pleas court, as provided by section 6539, instead of through the probate court as provided by section 6543 (see Commissioners vs. Commissioners, 10 O. C. C., N. S., page 25); and that if the county commissioners do not agree procedure must be had through the probate court as provided by the latter statute.

Section 6559, and following, above quoted, provide for a method of cleaning, enlarging or repairing joint county ditches under the somewhat similar procedure to that in construction as herein outlined.

Having thus briefly outlined the procedure set out in the old law for joint county ditches, attention may be had to the later law appearing in 102 Ohio Laws, page 575, and in the General Code, as section 6563-1, which it is suggested may have repealed the old law.

Sections 6563-1 to 6563-8, inclusive, General Code, which are as follows, present an index as to the general nature of the plan contemplated by the new law.

"Section 6563-1. When it is proposed to construct or improve a ditch or to improve or straighten a natural watercourse which will *require location in two or more counties, or which will cut off any of the water which flows into one county from one or more counties*, such improvement *may be* made according to the following provisions: A petition for such improvement shall be filed by fifty or more persons interested therein with the auditor of one of said several counties.

"Section 6563-2. Any ditch constructed under the provisions of this act may be so constructed that it will take the water out of its natural course and cause the same to flow through said ditch in a different direction and find its outlet at a different place than it would naturally.

"Section 6563-3, Said petition shall set forth the general character of the proposed improvement together with the route and termini thereof and the different counties affected thereby, together with the prayer for the location thereof, and shall contain a statement of the time at which it is desired that the commissioners shall meet for the consideration thereof.

"Section 6563-4. Said petitioners shall file with said petition a bond with sufficient sureties to the satisfaction of the auditor with whom said petition is filed, payable to the state of Ohio, conditioned that the petitioners will pay all costs and expenses made and incurred on account of the filling of said petition in case the joint board shall not cause surveyors to be appointed as herein provided.

"Section 6563-5. Upon the filing of said petition, the auditor of the county in which the same is filed shall give notice to the auditors of the other counties affected by said ditch improvement of the filing thereof and each of said auditors shall give notice to the commissioners of his county of the filing thereof, and

the *time set for the hearing* of the same, and it shall be the *duty of the commissioners of said several counties to meet* at the office of the commissioners of the county having the largest population at the time named in said petition.

"Section 6563-6. When said commissioners so meet they shall *constitute a joint board* of county commissioners and the chairman of the board of commissioners of the county in which the petition was filed shall be the *temporary* chairman of said joint board. Said board shall organize by electing one of their number permanent chairman and by choosing the *auditor of one* of said counties to be the secretary of said joint board and shall determine the place at which the meeting of said joint board shall be held. And the next meeting of said joint board shall be held not earlier than twenty days nor later than thirty days after said meeting at which said joint board shall organize.

"Section 6563-7. A majority of the members of said joint board shall decide *all* questions before said joint board, and all votes shall be 'yea' and 'nay' and recorded on the record, and if a majority of the members of said joint board find that said ditch or improvement is necessary and will be conducive to the public health, convenience and welfare, then said ditch or improvement *shall be* constructed as prayed for in said petition or in substantial compliance therewith, as may be ordered and directed by said joint board, and *said joint board* shall have the power to change the route of said proposed ditch, keeping the general course named in the petition, and said joint board shall have the power to adjourn from time to time as the business thereof may be required.

"Section 6563-8. After having determined the place at which the *future meetings* of said board shall be held the secretary of said joint board appointed shall notify the auditors of the several counties of the place at which the meetings of said joint board shall be held and of the next meeting thereof, as provided in section 5 (General Code, section 6563-5), and it shall be the duty of the auditor of each county to cause notice of the filing of said petition and the prayer thereof and the fact that the prayer of said petition will be considered by said joint board at said meeting giving the date and place thereof to be published in two newspapers of opposite politics published and having general circulation in his county. Said notice shall be published one week and shall be evidenced by the certificate of the auditor copied upon the record."

Under this new law, a petition signed by fifty persons shall be filed with the auditor of one of said several counties. The petition must state the date upon which the commissioners are expected to meet. The auditor is required to notify the auditors of the other counties of the time set for the hearing of the petition, and the commissioners are required to meet at said time in the largest county. All further proceedings of the statutes provide for joint action of said board in all proceedings.

Under section 6563-9, General Code, the joint board order the county surveyor of each county to go over the line of the improvement, to make plans, specifications and profiles and to estimate the cost together with a map to show all the lands in each county which will be affected.

Under section 6563-11, General Code, said surveyors shall constitute a joint board of surveyors and shall act jointly.

Under section 6563-13, General Code, reports of said surveyors shall be made to the joint board and hearing shall be conducted by said joint board.

The joint board, under section 6563-22, shall hear claims for compensation and damages and under section 6563-26, the joint board shall determine and apportion the cost and expense of the ditch improvement. Under section 6563-39, such board sells the work of construction and sections 6563-42 and 6563-43 provide payment of compensation and damages by a joint arrangement between the counties.

This brief consideration is sufficient to make it clear that the procedures outlined under the respective laws, with respect to which the question of conflict arises, are totally and substantially different. The first provides for a clean cut jurisdiction over the ditch construction in each county by a board of county commissioners of that county, and for the compulsion for compensation for an improvement made in only one county, by another county benefited thereby; the second act provides clearlyfor the improvement of joint county ditches by a clean cut joint procedure in which the county commissioners of each county take part and whereby a majority of the joint board controls.

A second distinction between the two laws is clearly presented in the matters covered by each; thus, the first law, under sections 6536 and 6537, comprises ditches, drains or watercourses which provide drainage or when constructed will provide drainage for lands in more than one county, or which will require location in more than one county. Under section 6540, this old law further provides for the improvement of ditches, first, "the water from which flows into an adjoining county, or into, or finds an outlet in a ditch, drain or watercourse constructed or being constructed in an adjoining county;" second, a ditch constructed or improved by a lower county which is or may be an outlet for a ditch, drain or watercourse, of lands of an upper county; third, a ditch improved by a lower county which will provide better drainage or a more sufficient outlet for drains of an upper county; fourth, a ditch constructed by a lower county made necessary in order to secure a sufficient and proper outlet for a proposed ditch, drain or water course of an upper county.

The ditches which are authorized to be improved under the new law, under section 6563-1, General Code, are merely those which will require location in two or more counties or which will cut off any of the water which flows into one county from one or more counties.

It is clear that the second law does not always include a ditch constructed or improved by the county commissioners of the lower county, which is or may be an outlet for a ditch drain or watercourse for lands in an upper county, or which by reason of its construction or improvement will provide better drainage or a more sufficient outlet, drain or watercourse for lands of an upper county. In short, the second law does not include the improvement by a lower county which acts as a benefit to the upper county without requiring ditch construction or improvement in the upper county. The second law, therefore, does not fully cover the ground of the former law.

It is held by this department that the first laws do not provide improvement of living streams and in all probabilities the second law was passed to make provisions for such. The fact that the second law also permits, under the procedure therefor outlined, the improvement of ditches, drains or watercourses, appear to present about the only element of similarity between the two laws.

Having thus briefly reviewed the provisions of both laws, permit me to cite the following in Sutherland Statutory Construction, on page 465:

> "In Winslow vs. Morton the court sums up the general principles touching implied repeals in the form of rules which it formulates as follows:
>
> " '(1) That the law does not favor a repeal of an older statute by a later one by mere implication.'
>
> " '(2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, when such seems to have been the legislative purpose. A law will not be

deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the legislature as a substitute.

" '(3) Where the later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by necessary implication.'

"Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative."

and on page 511:

"If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the latter one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable."

In connection furthermore with your own statement to the effect that an amendment to the old law appears in 102 Ohio Laws, on pages 313 and 314, which was passed on the same day as were section 6563-1 and following, page 513 of the same authority presents the following:

"Acts passed at same session—Provisions in same act.—The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or, if such change had occured, that the legislature would express it in a different act without an express repeal of the first. 'Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session.' The presumption is that different acts passed at the same session of the legislature are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy another, unless so expressed. Where two acts are passed or go into effect on the same day it is strong evidence that they were intended to stand together. So where the later law was the first to be introduced."

In conclusion, therefore, in view of the express language of the decisions of the supreme court referred to by you and of the authority of Sutherland, above stated, since entirely different procedures are contemplated by the respective laws, the first providing for single county activities, very largely, and the latter for joint county action exclusively; since the second act does not cover the same ground as the first act and since, furthermore, the legislature at the same session and on the very same

day, as it passed the new law, also passed a very substantial amendment to the old law, I am of the opinion that both laws must be recognized and that the later act can in no sense be held to have repealed the former.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

148.

COUNTY SURVEYOR MAY NOT BE ALLOWED EXPENSES AND PER DIEM FOR ATTENDANCE AT GOOD ROADS CONGRESS.

Inasmuch as such services are not imposed by the statutes, nor their compensation authorized, a county surveyor may not be permitted an allowance by the county commissioners of per diem and expenses, whilst attending the good roads congress held outside of his own county.

COLUMBUS, OHIO, March 22, 1913.

HON. EDWARD C. TURNER, *Prosecuting Attorney of Franklin County, Columbus, Ohio.*
DEAR SIR:—

ATTENTION OF MR. SHERMAN.

I am in receipt of your letter of January 16, 1913, wherein you inquire as follows:

> "I have a letter from the board of county commissioners of Franklin county, Ohio, enclosing two bills submitted by Hugh K. Lindsay, county surveyor, one in the sum of $13.60, for expenses in attendance at the good roads congress held in Cincinnati, December 3rd and 4th, 1912, the other in the sum of $110.00 for per diem as surveyor of Franklin county during the month of December, 1912, including the dates December 3rd and 4th, while in attendance at said congress. Said board of commissioners have requested an opinion as to the legal right or authority of said board to allow the expense account of $13.60; also the per diem for the days in December 3rd and 4th, 1912."

In reply to your inquiry as to the legal right or authority of the county commissioners to allow to the county surveyor the expense account of $13.60 for attending a good roads congress in Cincinnati on December 3rd and 4th, 1912, I desire to say that section 2786 of the General Code provides that the county commissioners shall provide fixtures and equipment for the office of the county surveyor, and also certain expenses of the county surveyor and his deputies in the performance of their official duties as follows:

> "The county surveyor shall keep his office at the county seat in such room or rooms as are provided by the county commissioners, which shall be furnished with all necessary cases and other suitable articles, at the expense of the county. Such office shall also be furnished with all tools, instruments, books, blanks and stationery necessary for the proper discharge of the official duties of the county surveyor. The cost and expense of such equipment shall be allowed and paid from the general fund of the county upon the approval of the county commissioners. The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

I am unable to find any other statute providing for the payment of expenses of

the county surveyor by the county commissioners, except as provided in section 2801 and section 2802 of the General Code, which sections are as follows:

> "Section 2801. When so directed by the county commissioners of his county, the county surveyor shall procure from the general land office, or any office in this state where they may be procured, a certified plat, together with the field-notes of the corners and bearing trees to each section, quarter section, lot or original survey in his county, and cause it to be preserved in a book by him provided for that purpose, which shall be deposited in the surveyor's office for the use of the land-holders in such county. A certified copy from such book by the surveyor shall be received as prima facia evidence, when the original would be received.
>
> "Section 2802. The expenses incurred by reason of the preceding section shall be paid from the county treasury on the warrant of the auditor. For making and recording or for transcribing plats, or maps, the surveyor shall receive such reasonable compensation as the commissioners order, not exceeding the amount allowed by law for similar services, and for indexing, the same fees as are allowed to recorders."

It follows that under sections 2801 and 2802 expenses can be allowed by the county commissioners when the latter direct the county surveyor to procure from the general land office or any office in this state where they may be procured, a certified plat, together with field-notes of corners and bearing trees to each section, quarter section, lot or original survey in this county; said sections do not cover the question involved in your inquiry, however.

Reverting again to section 2786 of the General Code, supra, it is to be noted that said section specifically provides that the county *surveyor shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties.* It cannot be said that attending a good roads congress in Cincinnati is a part of the official duties of such surveyor, and such expense not being provided for by the statutes, this department is constrained to hold that said item of $13.60 cannot be allowed legally by the county commissioners.

In answer to the other branch of your inquiry as to the legal right or authority of the board of county commissioners to allow the county surveyor his per diem for the days December 3rd and 4th, 1912, while so attending said good roads congress in Cincinnati, I desire to say that section 2822 of the General Code provides that the county surveyor when employed by the day shall receive five dollars for each day and his necessary actual expenses. The term "salary" means annual or periodical payment for services. (Thompson vs. Phillips, 12 O. S., 617). Employment by the day at the rate of five dollars per day comes within the term "compensation" rather than salary. (See Gobrecht vs. Cincinnati, 51 O. S., 73). An allowance by the day or per diem comes within the term "wages" (See Cowden vs. Huff, 10 Ind., 85). A per diem as provided in section 2822 being an allowance rather than a salary, it follows therefore that such surveyor is only entitled to five dollars for each day that he spends in the actual service of the county. It can hardly be said that the two days spent by the surveyor in attending the good roads congress at Cincinnati were spent in the actual service of the county.

This department, for the foregoing reasons, is constrained to hold that said surveyor is not entitled to the per diem allowance for said dates, December 3rd and 4th, 1912.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

151.

JOINT COUNTY DITCHES—PROCEDURE FOR IMPROVEMENT OF NATURAL WATERCOURSE—POWERS OF JOINT COUNTY BOARD.

Inasmuch as the procedure outlined in section 6536, and following, General Code, provide for the improvement only of ditches, drains or watercourses, in accordance with the general use of these terms in the statutes, these provisions do not authorize the improvement of rivers, creeks or runs.

Section 6563-1, General Code, and following, however, provide for the improvement of ditches and natural watercourses, and in accordance with the use of the term natural watercourse in the statutes generally, these sections authorize the improvement of living streams, such as rivers, creeks and runs.

COLUMBUS, OHIO, February 21, 1913.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion, Ohio.*
and
HON. CHAS. F. CLOSE, *Prosecuting Attorney, Upper Sandusky, Ohio.*

GENTLEMEN:—I have at hand your communications requesting my opinion upon the powers of a joint board of county commissioners to construct an improvement along a natural water course.

The material portion of the communication of Mr. Johnson, prosecuting attorney at Marion, Ohio, which follows herewith, substantially sets forth the question:

> "As per copy of ditch petition hereto attached the joint board of county commissioners of Wyandotte and Marion counties are considering the construction of an improvement some six miles in length and about four miles of which is in the channel of Tymochtee creek, a part of the four miles being in each of the aforesaid counties. * * * *
>
> "1. Has a joint board of county commissioners authority to improve channels of rivers, creeks and runs?
>
> "2. Has a joint board of county commissioners authority to improve the channel of a river, creek or run other than that laid down in section 6563-1, Vol. 102, pp 5., et seq. O. L.
>
> "3. Has a joint board of county commissioners authority to convert a river, creek or run into a drain, ditch or water-course?
>
> "4. Does the term 'natural water-course' as used in section 6563-1, Vol. 102, pp. 575-, Ohio Laws, mean 'river, creek and run, or does it mean drain, ditch or water-course?'
>
> "5. Has the joint board of county commissioners jurisdiction or power to grant the improvement asked in the ditch petition appended hereto?"

Section 6536, General Code, which follows, sets out generally the powers of joint board of county commissioners to construct a ditch improvement:

> "Section 6536. *Ditches, drains or water courses which provide drainage,* or when constructed, will provide drainage for lands in more than one county, may be located, constructed, cleaned, repaired, strightened, widened, altered, deepened, boxed or tiled, as *provided in this chapter and the laws prescribing for* locating, constructing, cleaning, repairing, *straightening, widening, altering, deepening, boxing, or tiling single county ditches, drains or water courses.*"

It will be observed that this statute provides that *ditches, drains or water courses* may be improved or constructed as provided in this chapter, and also as provided by

the law for constructing and improving *single county ditches, drains or water courses.* The chapter in which this statute is considered speaks solely of *ditches, drains or water courses,* until we come to section 6563-1, of this chapter, where for the first time we find provisions made for the improvement or straightening of a *natural water course* by a joint board of county commissioners.

Section 6563-1, General Code, is as follows:

> "When it is proposed to construct or improve a *ditch or to improve or straighten a natural water course which* will require *location in two or more counties,* or which will cut off any of the water which flows into one county from one or more counties, such improvement *may* be made according to the following provisions: A petition for such improvement shall be filed by *fifty or more persons* interested therein with the auditor of one of said several counties."

To obtain a proper understanding of the meanings of the terms *water courses* and *natural water courses,* attention must be had to the provisions for single county ditches. Section 6445, General Code, of these provisions is as follows:

> "The board of county commissioners, at a regular or called session, when necessary to drain any lots, lands, public or corporate road or railroad, and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed,straightened, widened, altered, boxed or tiled, a *ditch, drain or water course,* or box or tile part thereof, or *cause the channel of a river, creek or run, or part thereof,* to be improved by straightening, widening, deepening, or changing it, or by removing from adjacent lands timber, brush, trees, or other substance liable to obstruct it. The commisssioners may change either terminus of a *ditch* before its final location, if the object of the improvement will be better accomplished thereby."

This section gives the board of county commissioners power to construct and improve, and as therein provided, (1) A ditch, drain, or water course, and (2) The channel of a river, creek or run.

The use of the term water course, herein, in connection with ditches or drains, and the alternative use, in this connection, of the words river, creek or run, discloses the intention to distinguish a water course from a living stream. Furthermore, section 6442, General Code, has this provision, "the word ditch used in this chapter shall include a drain or water course." Decisions construing these sections clearly show that the term water course is intended to be used synonymously with drain or ditch, whilst the term natural water course is applicable only to living streams, such as rivers, creeks or runs.

Thus, the syllabus of Commissioners vs. Harbine, 74 O. S. 318, is as follows:

> "The word 'water course' as used in the county ditch law, title 6, ch. 1, Revised Statutes, is synonymous with the word 'drain', and the county commissioners are without authority to convert a *living stream of water* into a ditch by proceedings for the locating and constructing of a *ditch.*"

and also in the case of Gease vs. Carlisle, 15 Ohio Decisions, N. P. 436: the court recognized this distinction in construing section 6443, General Code. The syllabus of this case is as follows:

> "County commissioners are authorized by Lan. R. L. 7629 (R. S. 4448) (6443 G. C.), to change the terminal of ditches, drains and *artificial* water courses, if the object of an improvement will be better accomplished thereby; but as to the termini of rivers, creeks, runs and *natural* water courses, they have no such power."

also see case of Abel et al. vs. Board of County Commissioners of Hardin county, 6, O. N. P. 349. This use of the term natural water course is also borne out by the passage of section 6444, providing for the improvement of *living streams or natural water courses* in municipal corporations, which statute undoubtedly passed in view of the decision of Pleasant Hill vs. Commissioners 71, O. S. 133, which held that county commissioners could not make ditch improvements within a municipal corporation, except in strict compliance with the statutes pertaining to such corporations in ditch matters; the former statutes in this respect providing only for the improvement of ditches within municipal corporations and not dealing with *living streams.*

I am of the opinion, that in the light of these decisions, and the use of these terms in the statutes, there can be no doubt that when the legislature speaks only of ditches, drains or water courses, as it does in section 6536, General Code, such language can clearly not be interpreted to in any way apply to living streams, such as rivers, creeks or runs.

I, therefore, conclude that section 6536, General Code, and the provisions following up to section 6563-1, do not give joint boards of county commissioners power to improve living streams, such as a river, stream or run.

Coming now to section 6563-1 of the General Code, this statute extends the power of such joint board to the improvement or straightening of a natural water course. In the light of the foregoing, I am of the opinion, that in accordance with this section and the statutes following, such joint board may improve a river, creek or run, which will require location in two or more counties, or which will cut off any water which flows into one county from one or more counties.

I have not reached this conclusion without carefully considering the authorities and the arguments contended for by those who have seen fit to take the opposite view of this matter. The basis of their contention, as it has been presented to me, is stated in the principle that where it is necessary to enlarge or improve a natural water course or living stream, in order to obtain an outlet for a ditch, drain or water course, such natural water course may be so enlarged under the proceedings provided for the improvement of drains and water courses, upon the theory that such a power is necessary and incidental to the accomplishment of the purpose contemplated by the statutes.

In view of the clean-cut distinction throughout the statutes in the use of the terms *water course* and *natural water course*; in view furthermore of the fact that under the later statutes, to-wit: sections 6563-1, General Code, and following, express provision is made for the improvement of a natural water course, under added restrictions and safe guards, I am convinced that the contention of the contrary view cannot be given prevalence. I might further cite the fact that in the statutes providing for interstate county ditches, sections 6590 and 6593, General Code, make express provision for the improvement of an outlet in another state, or in this state when the same becomes necessary for the proper construction of *ditches, drains and water courses,* which this chapter otherwise only provides for. A very plausible reason for the policy adopted by the legislature in this connection, in providing a more cautious procedure and added safe-guards and regulations, as it does in section 6563-1, and following, when it authorizes the improvement of living streams, is suggested by a consideration of sections 6540 to 6557, General Code, of the chapter relating to county ditches, which statutes empower the county commissioners of one county to compel improvements in another county by an action in probate court, when the county commissioners of both or several counties fail to agree and determine to proceed under the laws for the construction

of joint ditches. That the legislature should see fit to impose a different procedure, in which the boards act jointly throughout, in the case of living streams, is not surprising.

To summarize, therefore, since the legislature in the chapters relating to single county ditches, joint county ditches and interstate county ditches, everywhere distinguishes between *water course* and *natural water course*, and since no mention is made of natural water course in section 6536, General Code, whilst express mention and provision is made for the same in section 6563-1, General Code, and since furthermore in the case of interstate county ditches, express provision has been made for the improvement of an outlet when the same is deemed necessary, I am of the opinion that no rule of reasoning would justify the strained construction which would be necessary to imply the power to improve a natural water course, under section 6536, General Code, upon the assumption that the same was necessary for the purpose of providing an outlet.

Answering your questions specifically:

1. In answer to question one, a joint board of county commissioners has no authority to improve channels of rivers, creeks or runs, except in accordance with the provisions of section 6563-1, General Code.

2. The answer to question one includes the answer to question two.

3. In answer to question three, I am of the opinion that if, in the improvement of a natural water course or river, a joint board of county commissioners sees fit to convert the same into a drain, ditch or water course, the provisions of section 6563-1, General Code, are sufficiently broad to enable them so to do, by complying with the statutory regulations imposed; under no other provisions of the statutes would they have such power.

4. I am of the opinion that the term natural water course as used in section 6563-1, General Code, means river, creek or run and does not mean drain, ditch or water course.

5. The ditch petition to which you have referred and the copy of which you enclose is signed by five petitioners only; the provisions of 6563-1, General Code, require that such petition shall be filed by fifty or more persons interested therein. I am of the opinion that this provision is mandatory and jurisdictional, and since the petition herein does not comply with the same, I have no hesitancy in concluding that such petition does not give a joint board of county commissioners jurisdiction or power to grant the improvement of the living stream, known as Tymochtee Creek, as asked for in the petition.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

153.

TAXES AND TAXATION—CHURCH NOT AN INSTITUTION OF PURELY PUBLIC CHARITY NOR FOR EXCLUSIVELY PUBLIC PURPOSES SO AS TO BE EXEMPT FROM COLLATERAL INHERITANCE TAX.

Under the provisions of the collateral inheritance tax law, it was formerly provided, that institutions for purposes of purely public charity or other exclusively public purposes should be exempt from the tax. The codifying commission changed the language so as to read institution for purposes only of public charity and other exclusively public purposes, and under settled rules of construction, the changed language should be read in the light of the language in the original law.

It is well settled, under the decisions of this state, that a church is not an institution of purely public charity.

Under the rule of ejusdom generis, the term "or exclusively public purposes" as used in this exemption clause should be confined to public purposes of the nature of those enumerated in connection with this clause. Inasmuch as all of these enumerations apply solely to such public purposes as are governmental in their character and whose operations tend pro tanto to reduce the burden of taxation, a church cannot be construed to come within the exemption of an institution for exclusively public purposes.

COLUMBUS, OHIO, February 25, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of a letter under date of December 6th, 1912, from Hon. Charles A. Groom, assistant prosecuting attorney, and beg to apologize for my delay in answering, which has been due wholly to an unprecedented pressure of business in this department growing principally out of the session of the legislature. The letter requests my opinion upon the following questions:

> "1. Is a bequest of money in a sum exceeding two hundred dollars to a church, without limitation as to the manner of its use, subject to the collateral inheritance tax?
>
> "2. Is a bequest to a church, in excess of two hundred dollars, to be used for the support of the gospel therein subject to the collateral inheritance tax?"

For reasons which will hereinafter appear I shall discuss the two questions together, and in so doing shall assume that the word "church," as used in the letter means a society, incorporated or unincorporated, located in all respects within this state, so that the question passed upon in Humphreys vs. State, 70 O. S. 69 may be obviated.

The statute, the construction of which is involved, is what is at present known as section 5332, General Code, the second section of the group which provides for the levying and collection of the collateral inheritance tax and is in part as follows:

> "The provisions of the next preceding section shall not apply to property or interests in property transmitted to * * * or for the use of an institution in this state for purposes only of public charity or other exclusively public purposes."

The phraseology of this section was changed to a slight extent on the codification of 1910. Formerly it read in part:

"To or for the use of any institution in said state for purposes of *purely public charity* or other exclusively public purposes."

Relying upon the well established rule that verbal changes of the kind here exemplified are presumed to have been made without any intention of changing the substance of the law, I shall discuss the meaning of the phrase "purposes only of public charity" as equivalent to that of the phrase "purposes of public purely charity."

The question which is suggested by Mr. Groom's letter resolves itself into two parts, viz.:

1. Is a bequest to a church, or for the disemination of the gospel one "to an institution for purposes of purely public charity" or one "to an institution for purposes only of public charity?"

2. Is such a bequest one to "an institution for exclusively public purposes other than the purpose of purely public charity?"

The first question above suggested has not been passed upon by the courts of this state. The statute itself was under consideration in Humphreys vs. State, *supra*, and in Re Estate of Brown, 13 O. D. N. P. 168, but in each of these cases a point collateral to the question now under discussion became the ground of the court's decision. I am of the opinion, however, that if the phrase "institution of purely public charity" can be ascertained to have received a definite construction under the property tax laws of the state, it may with propriety be assumed that the legislature intended to use the phrase, or one which is substantially like it, as found in the statute now under consideration, in the same sense.

Under former section 2732, Revised Statutes, and under that portion of it which is now found in section 5353, General Code, both of which sections relate to exemptions from general property taxation made under favor of constitutional authority found in Article XII, section 2 of the constitution of 1851, the supreme court of this state has held that a church being an institution, the principal purpose of which is the teaching and extension of doctrines and practices of religion, is not "an institution of purely public charity." Gerke vs. Purcell, 25 O. S. 229; Watterson vs. Halliday 77 O. S. 150-179.

Without further discussion I may state as my opinion that the bequests concerning which Mr. Groom inquires cannot be regarded as having been made "to or for the use of an institution in this state for purposes only of public charity," for the reason that a church is not such an institution, and for the further reason that the support of the gospel is not such a purpose.

The second question above suggested is more difficult of solution. The decisions just cited do not afford a direct answer to it. That is to say, admitting that a bequest to a church for its general purposes or the spread of the gospel is not one "to an institution in this state for purposes only of public charity," it does not necessarily follow that such a bequest is not one "to an institution in this state for other exclusively public purposes." What then is the meaning of the phrase "other exclusively public purposes?" The general taxation statutes of the state contain no such language. We have, therefore, no precedents either direct or analogous by the application of which this clause may be given a definite meaning. Decisions under statutes of other states are not helpful here.

In Dos Passos on Inheritance Tax Law, 2nd Ed., Sec. 34, will be found an abstract of the exemptions found in the laws of the various states. Without enumerating these various exemptions it may be said that in all cases churches and religious institutions are either expressly exempted or else exemption from the inheritance tax is extended to bequests and institutions which are themselves exempted under the general tax laws of the state, The Ohio statute, therefore, stands alone in its use of the indefinite residuary clause now under consideration.

Some assistance can be derived from the application of the general principles of statutory construction. Under what is known as the rule of *ejusdem generis.* It is held that where an enumeration of specific things to which a principle of law, embodied in the statute, is to apply is followed by a general phrase modified by the word "other," the meaning of the general phrase so modified will be limited so as to include such things only as are like the specifically enumerated things in character. That is to say, when the statute says that bequests to institutions "for other exclusively public purposes" shall be exempted, the intention of the legislature must be deemed to be to limit the institutions thus exempted to those of the same kind as have been previously enumerated.

Before the rule of construction just referred to can be accurately applied to the statute under consideration the extent to which the relative operation of the word "other," as used therein, goes must be determined. That is to say, the whole provision is that bequests to (1) the state of Ohio, (2) a municipal corporation or other political sub-division for exclusively public purposes, (3) public institutions of learning, (4) to institutions for purposes only of public charity, and (5) to institutions for other exclusively public purposes. Seemingly, the phrase "exclusively public purposes" follows the word "for" and therefore modifies the word "institutions." So that in one sense there are only two kinds of bequests mentioned in the grammatical clause in which the phrase now under discussion is found, viz.: "institutions for purposes only of public charity" and "institutions for other exclusively public purposes." So that it is not sufficient that the bequest be "for exclusively public purposes" but it must be made to "an institution." This is consistent with the language of the entire section as in each instance the legal or beneficial taker of the estate to be exempted is specifically designated as well as the purpose for which the bequest is made. This point is not of great importance in connection with the question submitted because it may be conceded that a church is an "institution." In Re Brown estate, *supra,* and Watterson vs. Halliday, *supra.*

The question which I have now in mind is as to whether or not in determining the modifying effect of the word "other" all of the enumerated exemptions may be taken into consideration or only that of "institutions of purely public charity." This question is not free from doubt, but upon careful consideration I have reached the conclusion that all of the exemptions are to be taken into consideration. I do not know that this conclusion is decisive of the question as perhaps the same ultimate conclusion may be reached by confining the comparison now about to be made to so much of the section as follows the phrase "an institution in this state only."

Coming now to the application of the conclusion just reached it is to be observed that the enumerated takers of exempted bequests, and perhaps less clearly, the purposes for which they are to be used, all relate either directly or indirectly to the discharge of the functions of government. The first taker is the state, and presumably any use to which the state could put money bequeathed to it would be a governmental one. The second taker, or kind of taker mentioned is a municipality or other political sub-division, and the use is limited to exclusively public purposes. Clearly the legislature here had in mind that a bequest in order to be entitled to exemption under this language should be made for the purpose of discharging some governmental function. So also with the phrase "public institution of learning;" because education is a function of the state. So also with "institutions of purely public charity" or bequests made to "institutions for the purpose of purely public charity," the support of the poor having been regarded from time immemorial as a true and proper function of government. A single idea then is found to run through all these exemptions. The reason for that idea, when the same is reduced to its last analysis, appears to be that bequests which enable the government to discharge its ordinary functions tend *pro tanto* to reduce the burdens of general taxation, and may, therefore, with propriety be exempted from taxation.

Mr. Groom refers in his letter to my opinion in the matter of the Western Methodist Book Concern. In that opinion will be found citations to a line of authorities—the more liberal one of which I did not follow—in which this philosophical reason for exemption from taxation is expressly affirmed and fully discussed. In fact all authorities agree that the theory of exemption just laid down is and ought to be the fundamental principle in such cases.

Having regard, then, to the manifest intention of the legislature as disclosed by what precedes the word "other" in section 5332, I am of the opinion that the phrase "exclusively public purposes" as therein used must be held *to mean exclusively public purposes which constitute or relate to the usual and proper functions of government.* In fact the fundamental rule just discussed could be relied upon to give this meaning to the phrase even if the operation of the rule *ejusdem generis* were ignored.

How is it then with the support of the gospel and the dissemination of religious principles; do these matters constitute proper functions of government? It is true that our government is founded to a certain extent upon an acknowledgement of the existence of Almighty God and the eternal verity of the fundamental principles of religion. (See preamble to constitution of 1851.) I think, however, that it will be universally conceded that the principle of the separation of church and state, and that of the liberty of conscience in religious matters are both firmly established in the policy of our constitution and laws. Thus section 7 of article I of the constitution of 1851 provides:

> "All men have a natural and indefeasable right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Now it must be acknowledged that it is also the policy of the state to permit the exemption of some property used for religious purposes from general taxation. Article XII, section 2 of the constitution of 1851 provided that "*Houses* used exclusively for public worship may be exempted from taxation." This exemption is reasonable and in line with the provisions of section 7 of the Bill of Rights, requiring the general assembly to "protect every religious denomination in the peaceable enjoyment of its own mode of public worship." But the exemption herein authorized is a *limited* one. It does not extend further than to the *houses* used by a religious society. Watterson vs. Halliday, *supra.* It does not comprise *the funds* applied by such a society. So that there is nothing in article XII, section 2, inconsistent with the idea of the complete separation of church and state, and with the conclusion that the support of the gospel and the dissemination of principles of religion as such are not governmental purposes or functions. Money contributed for the support of religion does not directly relieve the burden of taxation; therefore, upon the principles above laid down the phrase "other exclusively public purpose" cannot be held to include the purpose of propagating the gospel.

I have reached this conclusion, as will be apparent, without considering the meaning of the word "public." I would not have it understood that I regard this word itself

as synonomous with "governmental;" for such is not the case. If there were in section 5332 any indication of any purpose to extend the exemption to bequests made for purposes other than those which are essentially govermental, I should have had no difficulty in reaching the conclusion that a church and its purposes might be included within the meaning of the phrase which has been discussed. I believe that a church is a "public institution" and that its purposes are "public purposes," but I am of the opinion that such purposes are not included in the *"other exclusively public purposes"* mentioned in section 5332. Furthermore, I do not wish to be understood as holding that there is any constitutional objection to exempting bequests to churches or for religious purposes. In citing article I, section 7 of the constitution I had another idea in mind, as will appear from my discussion of this section.

My conclusion is simply that in order that bequests to churches and for religious purposes may be exempted from the collateral inheritance tax, such bequests must be expressly mentioned in the statute if the other provisions of section 5332 are to remain as they are at present drawn.

I am of the opinion, for the reasons above stated that a bequest to a church is subject to the collateral inheritance tax if it exceeds two hundred dollars in amount, and also that a bequest to a church, exceeding such sum, to be used for the support of the gospel therein is subject to such tax.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

161.

ROADS AND HIGHWAYS—TOWNSHIP—ACT PROVIDING FOR IMPROVEMENT OF ROADS BY GENERAL TAXATION—$100,000 LIMITATION ON BONDS WHICH MAY BE AT ANY TIME OUTSTANDING NOT A LIMITATION UPON TOTAL ISSUE.

From the language of section 25 of the act providing for the improvement of roads in a township by general taxation upon the authorization of electors, which section provides that not to exceed five miles shall be improved in any one year, and that bonds shall not be issued for a greater sum than is required to pay the cost of a current year; and from section 18 of said act, which provides for an annual levy until all roads shall be improved, it is clear that the $100,000 limitation upon bond issues, comprised in section 17 of said act, is intended to limit the amount of bonds which may be at any time outstanding, and not to place a limitation upon the total amount of bonds which may be issued for the purpose of making such roads and improvements.

The special provisions of this act must be allowed to control over the general provisions providing for limitations upon township bond issues comprised within the terms of the so-called Longworth act, to wit: section 7939, and following, General Code.

COLUMBUS, OHIO, April 4, 1913.

HON. RUSSELL M. KNEPPER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 8th, requesting my opinion upon the following question:

> "In May, 1906, the electors of a certain township in Seneca county voted affirmatively upon the policy of improving roads therein by general taxation, as provided by the act of April 16, 1900, 94 O. L. 284, at present found in

sections 6976 et seq., General Code. Bonds have been issued from time to time under authority of this election and retired from year to year, there being outstanding at no one time an aggregate bonded indebtedness on this account exceeding fifty thousand dollars; but the total amount of bonds issued under this authority has exceeded that sum.

"Are the trustees of the township authorized to continue to issue bonds indefinitely under said act, at no time, however, exceeding the $50,000 limit at one time, and keeping in mind also the tax limit; or is it necessary for them to hold an election under the present statute in order to continue to issue bonds for road improvements?"

The limitation upon the issue of bonds provided by the related statutes operate upon the total amount of bonds which may be issued or upon the amount which may be outstanding at any time. The act to which you refer has been amended frequently since its original enactment. See 97 Ohio Laws, 550; 98 Ohio Laws, 284; 99 Ohio Laws, 468. The scheme of the law, however, has never been materially changed. The act as a whole originally provided and still provides for a vote upon petition of the tax payers as to the question of the policy of road improvement by general taxation, as opposed to that of improvement by assessment of specially benefited property. Upon a favorable vote three commissioners are to be appointed for the purpose of supervising the making of the improvements; the commissioners are to cause a plan of improvement to be prepared and are to submit, from time to time, to the trustees of the township their recommendations for the improvement of specific roads or parts of roads. The trustees are to let the contracts and to provide the money for making the improvements. For this purpose they are authorized by section 17 of the original act to issue bonds and to levy a tax for their redemption and the payment of the interest thereon. Sections 17 and 18 of the act may well be quoted in connection with the question. They are, in part:

"Section 17. For the purpose of providing the money necessary to meet the expenses of improving such roads the trustees of any such township may * * * issue the bonds of the township * * * The aggregate amount of the bonds of any such township at any one time outstanding shall not exceed fifty thousand dollars * * *

"Section 18. * * * In order to provide for the payment of such improvement and to provide a fund for the redemption of any bonds issued by them * * * together with the interest thereon, they (the trustees) shall * * levy annually upon each dollar of valuation of all the taxable property of such township * * * and shall continue such levy from year to year *until all the roads by said commissioners designated for improvement have been improved, as herein provided,* and the bonds issued for that purpose, together with the interest thereon, have been paid."

Section 25 of the act imposes another limitation, indirectly, upon the power to issue bonds. It is as follows:

"Not to exceed five miles of roads shall be improved in any one year and * * * in no event shall the bonds herein authorized be issued for a sum greater than is required to pay the cost of the improvement of roads for the current year."

Having regard to the entire scheme, it is apparent that the plan of the act is to provide a comprehensive method of improvement of all the roads of the township. The purpose of the act could not, in practice and under the limitation of section 25,

above quoted, be worked out in any short period of years. That is to say, it would probably take some time for the plan of improvement submitted by the commissioners to be completed. This seems to be contemplated by the act as a whole. That is, it is not intended that not more than fifty thousand dollars shall be expended under the act; it is rather the purpose that as much as may be necessary to improve all the roads of the township be expended, but that the expenditure be gradual, so that not more than five miles shall be improved in any one year, and not more than fifty thousand dollars worth of bonds shall be outstanding at any one time.

The subsequent amendments to the act have changed the law in its application to your specific question. Sections 7004 and 7005, General Code, contain the present substance of section 17, as amended, 99 O. L. 102. The amendment which is found in present section 7005 relates to the limitation upon the amount which may be outstanding at any one time, which has been increased to one hundred thousand dollars in place of fifty thousand dollars.

The amendments made in 97 Ohio Laws, 554, provide a method of authorizing additional levies; and also the amendment in 98 Ohio Laws, 284, provides a method of discontinuing the policy, by availing themselves of which the electors of the township may, if the policy proves burdensome, do away with the township levies, and stop the making of the improvements already mapped out. I call attention to these provisions because you seem to have overlooked them in your study of the question. Undoubtedly, the amendment made in 99 Ohio Laws enlarges the powers of the trustees under the election already held, there being no constitutional inhibition which would restrain the legislature from enacting such a law.

The Smith One Per Cent. Law, so-called, to which you refer in your letter, has no direct bearing upon the power to issue the bonds. To be sure, it restrains the township trustees in a practical way, because, although the bonds are issued under the authority of a vote of the people, yet, levies to provide for their retirement must come within some of the limitations of the Smith law; so that this fact would have to be taken into consideration in making up the annual budget.

I am of the opinion, therefore, that the limitation of one hundred thousand dollars (not fifty thousand dollars) is upon the amount of bonds which may be outstanding at any one time, and not upon the bonds which may be issued by the township trustees under authority of the act which you mention.

Perhaps a more difficult question is presented by the joint operation of sections 3295 and 3939, General Code, which impose what are known as the Longworth act limitations upon the power of township trustees to borrow money and issue bonds. Without quoting these sections, suffice it to say that I am of the opinion that the special provisions of sections 7004 and 7005, General Code, control, and that bonds issued under their authority are not within the Longworth act limitations. This must necessarily follow, because the limitations of section 7005 are measured in terms of money directly, while those of section 3939 and succeeding sections are measured by a percentage of the tax duplicate.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

162.

ROADS AND HIGHWAYS—STATE AID NOT APPLICABLE TO HIGHWAYS WITHIN LIMITS OF MUNICIPALITY.

By the terms of section 1186, General Code, provisions for highways included within the limits of any municipality are expressly excluded from state aid provisions.

COLUMBUS, OHIO, March 3, 1913.

HON. WILLIAM C. HUDSON, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—I have your letter of February 11th, wherein you inquire as follows:

> "Under the statutes creating the state highway department, is it possible for an incorporated village in any way to secure state aid for public highways within its limits?"

Section 1186 of the General Code provides:

> "Each application for state aid in the construction, improvement, maintenance or repair of highways shall be accompanied by a proper certified resolution of the county commissioners or township trustees having jurisdiction of the road to be constructed, improved, maintained or repaired, stating that the public interest demands the improvement of the highway therein described; that the description does not include any portion of the highway in the limits of any municipailty. Provided, also, that when all the inter-county highways within a county have been improved to the standard specified by the state highway commissioner, then the appropriation may be used, in the construction, improvement, maintenance or repair of any road within such county. Each application for state aid shall also contain an agreement on the part of the county commissioners or township trustees, having jurisdiction over the road, to pay one-half of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said road."

It is evident from the foregoing that state money cannot be obtained by a municipality for road improvements since it is expressly stated therein that the application of county commissioners or township trustees must show that the description of the road, improvement of which is sought, "does not include any portion of the highway in the limits of any municipality."

The state highway law makes no provision for applications by other officials than county commissioners and township trustees. If the legislature had intended to permit the use of state money by municipalities it would have made some provision to that effect or at least would have used the language of limitation found in section 1186.

I am clearly of the opinion that municipal corporations are not entitled to receive any portion of state money for the improvement of highways within their limits.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

166.

ROADS AND HIGHWAYS—AGREEMENT BY COUNTY COMMISSIONERS AND VILLAGE COUNCIL IN CONSTRUCTION OF JOINT VILLAGE AND COUNTY ROADS.

The terms of section 6905, General Code, authorize the construction of a road lying upon the boundary line of a village and a township, by agreement between the council of the village and the county commissioners.

COLUMBUS, OHIO, March 27, 1913.

HON. C. F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Under date of February 5th, you submitted, for an opinion, the following:

> "In the village of Wellington, Ohio, a municipal corporation is a certain county road which requires improvement. The township line divides the road, fifteen feet of the road being within the township and thirty-five feet of the road being within the village.
>
> "Can the board of county commissioners under section 6905 of the General Code enter into an agreement with the trustees of the township and the council of the village in relation to said improvement?"

Section 6905 of the General Code provides:

> "The board of county commissioners may enter into an agreement with the board of trustees of any township or the council of any village, or both, into or through which a state or county road improvement is contemplated, whereby said board of trustees or council may assume and pay such a proportion of the costs and expenses of such improvement not assessed upon abutting land in accordance with section 6904 of the General Code, as may be agreed upon between said board of county commissioners and said board of trustees or council, and such agreement or agreements may be entered into at any time before the contract for said improvement is let."

The facts stated in your letter, in my judgment, are within the purview of section 6905, and I am, therefore, of the opinion that the commissioners of your county may enter into an agreement with the township trustees and the council of the village of Wellington, as to the amount of money said village and township will pay towards said improvement.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

167.

EXPENSES—SHERIFF NOT ALLOWED FOR LABOR OF MAINTAINING OWN HORSE—ALLOWANCE TO SHERIFF'S FAMILY.

Section 2997, General Code, authorizing allowance by county commissioners to the sheriff for expenses of maintaining horses and vehicles, contemplates only recompense to the sheriff for expenditures made by him and does not comprehend payment to such sheriff for labor performed by himself in the care of his horse. Such section does, however, authorize honest and reasonable payment to members of the sheriff's family for labor so performed.

COLUMBUS, OHIO, March 26, 1913.

HON. WILLIAM C. HUDSON, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Your favor of February 11, 1913, received. You state that under section 2997 of the General Code the county commissioners have the authority to allow the sheriff for the expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office, and you inquire, "can he or members of his family collect pay for taking care of his own horses?"

Section 2997, General Code, provides in part as follows:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowance quarterly to each sheriff for * * * all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

You inquire whether the sheriff can collect for taking care of his own horses. I suppose you mean by your inquiry, the actual labor performed by him in keeping the horses in good condition, such as currying and physical care.

In order to answer your question we must look to section 2997 of the General Code which authorizes the county commissioners to make a quarterly allowance for the *expense* of maintaining the horses used by him in the county's business. Expense is defined by the Century dictionary as: "Laying out or expending; the disbursing of money."

Under this section the sheriff has the right to employ some person to take care of his horses and present the bill to the county commissioners for allowance; but I am of the opinion that if the sheriff should take care of his own horses he cannot present a bill for his services in that behalf, because that would not come under the head of "expense" as contemplated by section 2997, General Code.

Under section 2997, General Code, each sheriff shall file, under oath, with his quarterly report, a full and accurate itemized account of all his actual and necessary expenses mentioned and authorized by said section 2997, before they shall be allowed by the commissioners. It is the object of said section 2997 only to make the sheriff whole for money actually expended in performing the duties of his office, and does not authorize any payment for labor performed by himself as that would not be an expense in contemplation of the statute.

You inquire further whether members of the sheriff's family may collect for taking care of his horses.

Section 2997, General Code, above quoted, requires the county commissioners to make allowance for all expenses for maintaining horses necessary to the proper administration of his office. The sheriff is not required under this section to maintain his own horses. He can employ some other person to take care of and maintain his horses and vehicles, and the amount expended by him for that purpose would be a proper ubject of charge against the county. There is no prohibition against members of the

sheriff's own family being employed to take care of and maintain his horses and vehicles, and if he should employ members of his own family to take care of the horses used by him in the county's business, if the bill for the same is reasonable and just, it should be allowed by the county commissioners.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

169.

DEPUTY SEALER OF WEIGHTS AND MEASURES—POWER OF COUNTY COMMISSIONERS TO BORROW MONEY TO PAY SALARY OF—FUNDING INDEBTEDNESS.

Under section 5656, General Code, the county commissioners are empowered to borrow money for the purpose of paying the salary of a deputy state sealer of weights and measures, when the limits of taxation will not permit the payment of the same from existing funds.

COLUMBUS, OHIO, March 24, 1913.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 24th, in which you state that in effect, under the Smith one per cent. law, so-called, Pike county is scarcely able to secure enough revenue to pay its earned expenses and the salaries of its principal county officers. You call my attention to the requirement of section 2622, General Code, as amended, 102 O. L. 426, to the effect that each county sealer of weights and measures shall appoint a deputy who shall receive a salary fixed by the county commissioners. I am of the opinion that a salary fixed in the manner provided in section 2622 would, upon its being earned by the incumbent of the position of deputy sealer of weights and measures, become an obligation of the county, of dignity equal to that of the salary of the prosecuting attorney or one of the county commissioners. If money could not be raised in any year within the tax limit sufficient to pay such salary, it would be necessary for the commissioners to borrow money, under the authority in them vested by section 5656 et seq., General Code, to provide for such indebtedness.

Of course, section 2622 does not fix any minimum salary, and if the needs of the county are such as not to require the whole time of a single person as deputy sealer, the commissioners may in their discretion fix the salary at such an amount as will fairly compensate a competent person for occasional service in this capacity.

I may add that I am fairly satisfied in my own mind that the Smith law is just and must not be repealed. The general taxation laws of the state must be enforced much more rigorously than they have been in the past, in order to enable some counties and subordinate taxing districts in the state to continue to meet their current obligations and to provide for their current needs.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

171.

CONSTABLE—ALLOWANCE OF COST RESTRICTED TO $100 IN ANY ONE YEAR FOR CASES IN WHICH STATE FAILS AND DEFENDANT PROVES INSOLVENT.

The provisions of section 3019, General Code, to the effect that a constable may be allowed expenses by the county commissioners not in excess of $100, for cases in which the state fails and the defendant proves insolvent, may not be evaded. In the allowance of such cost, therefore, the provision of section 3020, General Code, to the effect that such cost may not be allowed until the commissioners are satisfied that precautions as to security for cost have been taken, must be carefully observed.

COLUMBUS, OHIO, March 31, 1913.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your inquiry of March 20, 1913, wherein you inquire as follows:

> Under section 3019, General Code of Ohio, the commissioners make an allowance to the constable for his fees in cases where the defendant is insolvent, but such allowance in the aggregate shall not exceed $100.00 in any one year. Does this mean an official year or a calendar year? One of the constables since the first of January, 1913, has filed three cost bills of $35.86, $33.31 and $48.66 respectively, which in the aggregate exceed the $100.00 limit. These cost bills are large because they are cases where a boarding house keeper has been defrauded and the defendant in each case was apprehended in another county, also, because in this county it is necessary to transport the prisoner to the workhouse at Dayton, Ohio. We feel that we should not let future cases go simply because we cannot pay the constable fees. Should like to have your suggestions as to a way out of this situation, if there is any.

In reply thereto, section 3019, General Code, provides as follows:

> "In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowance to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

From the language used in this section, the intention is clear that the maximum of $100.00 for any one year means a calendar year and not an official year, for the reason that the statute is to be construed in accordance with its ordinary meaning, and, therefore, it follows in the absence of language fixing the date or time when such year begins and ends, that the phrase "in any year" means a calendar year as distinguished from an official year.

You state in your inquiry that the constable about whom you inquire has filed, in accordance with section 3019, General Code, three cost bills, which, in the aggregate, exceed $100.00. In this particular instance, about which you inquire as above, the constable is not entitled to exceed $100.00 for lost costs in any year, by virtue of the provisions of said section 3019, supra.

Furthermore, section 3020 of the General Code, provides that the justice of the

peace, mayor or police judge or police justices must exercise reasonable care in taking security for costs in cases wherein he is authorized to take such security for costs, as follows:

> "Section 3020, General Code. In ascertaining the amount of fees taxed by a justice of the peace, mayor, or police judge or justices, to make such allowance, in cases where such officer was authorized to take security for costs, it must appear that he exercised reasonable care in taking such security. Until satisfied by the certificate of such justice of the peace, police judge or justice, or mayor, or by other proof, to the satisfaction of the commissioners, that the prosecuting witness was indigent and unable to pay the costs or procure security thereof, and that the officer exercised due care in taking such security, such officer's fees in such causes shall not be included in ascertaining the amount so to be allowed."

Section 13499, General Code, authorizes such magistrates to require the giving of security for costs in misdemeanor cases before the issuing of the warrant, as follows:

> "When the offense charged is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers the complainant irresponsible, may require that he procure a person to become liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable and such magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, when in the discharge of his official duty."

It follows that the only way to avoid large bills for lost costs, is for the county commissioners to insist, in accordance with the provisions contained in section 3020, supra, that no portion of the maximum of $100.00 to cover lost costs, —— will be allowed, unless the magistrate exercised reasonable care in taking security for costs, which said security he is authorized to require before issuing a warrant, as provided by section 13499, supra.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

173.

BOARD OF EDUCATION—LABORATORY FEES MAY NOT BE PAID AS TUITION.

Section 7747, General Code, which provides that the tuition of Boxwell graduates residing in township and special districts in which no high school is maintained, must be paid by the board of education of such districts, does not authorize the payment of a laboratory fee charged to such pupils at an institution which they are attending.

COLUMBUS, OHIO, March 24, 1913.

HON. KENT P. JOHNSON, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of January 29, 1913, wherein you inquire as follows:

"The board of education of a township in this county send their Boxwell graduates to the high school in the village of Ada, which has a four year high school course. By arrangements between the citizens of Ada and the trustees of the Ohio Northern University the school board are permitted to send, tuition free, thirty fourth year high school students to the university for their entire course of study. The township pays the school board an agreed tuition for each pupil under section 7767. The village school board maintain no fourth year department. The trustees of the university, demand laboratory fees of $6.00 from the township students coming to them through the Ada high school.

"The board of education desire to know if they are authorized to pay these laboratory fees as a part of the tuition, and have requested an opinion from your department on this question."

In reply to your inquiry I desire to say that section 7747 of the General Code provides that the tuition of pupils holding diplomas and residing in townships of special school districts in which no high school is maintained, shall be paid by the board of education in which they have legal school residence as follows:

"The tuition of pupils holding diplomas and residing in township or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

The term "tuition" as used in said section is defined by the Century dictionary as follows: "The fee for instruction;" and by Webster's Dictionary as follows: "The money paid for instruction; the price or payment for instruction."

According to the above definitions of the term "tuition" it cannot be said that the said term includes the laboratory fees of $6.00 as demanded by the university authorities, under the circumstances as set forth in your letter. There is no statutory provision whereby a township board of education having no high school is legally authorized to pay the laboratory fees of its Boxwell-Patterson graduates. Therefore, in the absence of statutory provision for the payment of such laboratory fees, it is the opinion of this department that the township board of education in question is without authority to pay said laboratory fees as a part of the tuition of its Boxwell-Patterson graduates.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

176.

COMMISSIONERS AUTHORIZED TO PROVIDE SUPPLIES FOR OFFICE OF PROSECUTING ATTORNEY.

Under section 2419, General Code, which provides that county commissioners shall provide offices for county officers of such style, dimension and expenses as the commissioners determine, county commissioners may supply such offices with the necessary text books, stationery, etc.

COLUMBUS, OHIO, April 5, 1913.

HON. C. E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Under date of January 11th, you inquire as follows:

> "The commissioners of this county, and other counties, have, in the past, bought and paid for certain supplies for the office of the prosecuting attorney, such as text books, stationery, etc.
>
> "Examiners of the state from the bureau of inspection and supervision of public offices have approved, at least have not objected, to an expenditure of public money in this way.
>
> "I assume the county commissioners have the right, under the law, to make such purchases but I have been unable to find any statute which gives them such power.
>
> "Therefore, I write to ask you what statute gives them the authority to make the purchases above mentioned?"

There is no specific authority given in the statutes for the furnishing of supplies such as you describe in your letter to the office of the prosecuting attorney.

Section 2419 of the General Code provides that offices for county officers shall be provided by the commissioners when in their judgment any of them are needed and that such offices shall be of such style, dimension and expense as the commissioners determine. By reference to the statutes defining the duties of the prosecuting attorney it will be seen that it is provided therein for assistants, clerks and stenographers, and further that the prosecuting attorney is made the legal adviser for county officers and township officers and is required to prepare in legal form their official bonds, etc. All of these duties which are placed upon the prosecuting attorney and the fact that the county commissioners under section 2419, General Code, are authorized to furnish offices in style, dimensions and expense as determined by the commissioners has been construed as an implied power upon the part of the county commissioners to furnish text books, stationery, etc., as determined by such commissioners. This is the only authority which is to be found in the statutes relative to the subject, but the bureau of inspection and supervision of public offices has always deemed it sufficient authority for the expenditure of public moneys for such purpose. Said text books, stationery, etc., belong to the office of the prosecuting attorney and remain the property of the county.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

182.

POOR RELIEF—POWER OF COUNTY COMMISSIONERS AND SUPERINTENDENT OF INFIRMARY TO PROVIDE FOR POOR FAMILY OUTSIDE OF INFIRMARY AND TO CARE FOR POOR CHILDREN.

Under section 2544, General Code, the superintendent of the infirmary is empowered to care for poor outside of the infirmary, when by reason of special facts or circumstances, he finds such method the most feasible one.

Under section 3092, General Code, children under the age of sixteen years may not be maintained at the county infirmary, but under the restrictions of section 3089, General Code, they must be provided for by the county commissioners, either in a children's home of the county, if the county has such, or in such home in another county, or in a private home by contract agreement or otherwise as the county commissioners deem best.

Under section 3476, General Code, trustees of a township are empowered to afford relief to persons within the township who require it and the township trustees, may, therefore, agree with the county commissioners to assist in providing for the maintenance of children of a poor widow by making a certain allowance to her.

COLUMBUS, OHIO, January 27, 1913.

HON. ALLEN THURMAN WILLIAMSON, *Prosecuting Attorney, Washington County, Ohio*:

DEAR SIR:—Under date of January 17th, you submit for my opinion a communication, the material portion of which is herewith set out:

> "Under section 2544, General Code, is it lawful for the commissioners, in a county having an infirmary as Washington county, to furnish aid outside of the infirmary to persons whom the superintendent of the infirmary is satisfied should become county charges? On the other hand do the words 'or otherwise' authorize such expenditure generally or should they be limited to the giving of relief where by reason of sickness or other physical disability it is impossible to move the indigent person to the infirmary?"

I submit two specific cases as follows:

> "(a) A man totally disabled having a legal settlement in the county requires the services of a regular attendant and one of his relatives, none of whom are able to support him and none of whom are liable for his support, is willing to care for him at her home if paid by the county $8.00 per month.
>
> "(b) A widow having four children under ten years of age whose husband died six years ago and who owns a little home worth perhaps $300.00. She is well qualified to care for the children and with the aid of about $6.00 a month can keep the family together and out of the children's home, and by working some can manage to make a living for the family. In this case the township trustees in which township the widow resides have been paying the widow $3.00 per month for a few months and are asking that the county contribute another $3.00.
>
> "Heretofore it has been the policy of the infirmary directors to furnish partial support to indigent persons outside of the infirmary in cases such as the above, but since the infirmary has come under the charge of the commissioners we are desirous of having some definite ruling to go by in matters such as the above; and that if such relief is to be discontinued, to do so now."

Section 2544, General Code, formerly provided as follows:

"In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the *infirmary directors*, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the directors are satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, *or otherwise*, and thereupon the liability of the township shall cease. The infirmary directors shall not be liable for any relief furnished, or expenses incurred by the township trustees."

The same section now appears in the General Code, as follows:

"In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, *or otherwise*, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Under the present statute, the superintendent of the infirmary is given the duties formerly resting upon the infirmary directors. I have ruled in a former opinion, that the word "they" as it appears in the present statute should be properly interpreted to read "he," and refers in reality to the superintendent of the infirmary.

Other than to place upon the superintendent of the infirmary the duties formerly resting upon the infirmary directors, there has been no change made in the law contained therein.

In an opinion rendered to Honorable Holland C. Webster, under date of March 31, 1911, the powers of the infirmary directors, under the former statute, as to outside relief, were fully considered. In that opinion I said:

* * * It is manifestly the intention of the law that paupers coming under the charge of the infirmary directors shall be provided for in the county infirmary, and unless there be sufficient cause to justify infirmary directors in providing for a person who is a county charge, outside of the infirmary, it is the duty of the infirmary directors to provide for all paupers, coming under their charge inside the county infirmary. If however, on account of overcrowding, or on account of any *special fact or circumstance*, such as that the person in need of relief is not in a physical condition to be removed, to the county infirmary, or is affected with some contagious disease, *or for other similar reasons*, the infirmary directors would deem it advisable to care for a county charge elsewhere than at the infirmary of the county, they may do so and be within the pale of the law; * * *

The same principles apply under the present statute, except that the superintendent of the infirmary now exercises the duties which at the time that opinion was written, rested upon the infirmary directors. This opinion, I believe, affords a com-

plete answer with respect to the situation presented in the first of the two specific cases set out by you, and in accordance therewith, I am of the opinion that the infirmary superintendent may pay the relatives the $8.00 per month as suggested, if the superintendent of the infirmary, in the exercise of the discretion resting in him, deems it advisable to care for such subject in that manner, rather than at the county infirmary.

With reference to the second specific case set out by you, I beg to refer you to sections 3089 and 3092, General Code, which are as follows:

> "Section 3089. The home (children's home) shall be an asylum for children under the age of sixteen years, of sound mind and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agreed upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them.
>
> "Section 3092. Except such as are imbecile, idiots or insane, *no child or children entitled to admission into a children's home shall be kept or maintained in any county infirmary in this state.* In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for such children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing premises for that purpose, which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes, *but the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children,* and they shall levy an additional tax, which shall be used for that purpose only."

Under the provision of section 3092, General Code, it is clear that children under the age of sixteen years, who properly come within section 3089, General Code, may not be maintained at the county infirmary, but must be provided for in a children's home of the county, if the county has such, or in the home of another county, or in a private home, by contract agreement, or in some premises temporarily leased, or otherwise as provided by section 3092, General Code.

Inasmuch as section 2544, General Code, provides only for such persons as in the opinion of the township trustees are entitled to admission to the county infirmary, that section cannot be considered applicable to the relief of children entitled to admission in children's homes. I am, therefore, of the opinion that the superintendent of the infirmary has no duties, whatever, pertaining to the relief of such children.

Under section 3092, General Code, above quoted, however, "commissioners" may provide for the care and support of such children within their respective counties in the manner deemed best for the interests of such children. Under this provision, I am of the opinion that the county commissioners may, if they so desire, afford the relief contemplated in the second case presented by you, provided, of course, that the subject for relief is properly settled in the county, and other conditions have been complied with, as set out in section 3089, General Code.

Section 3476, General Code, provides as follows:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation

therin, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

There are no specific provisions in the statutes relative to the powers of township trustees as regards care of the poor, with reference to children, and I am of the opinion that the township trustees have the power, under section 3476, General Code, to care for the children in this situation. If the county commissioners and the township trustees desire to make the arrangements referred to, as to the payment of one-half the expenses by each board. I know of no reason, in view of the statutes, why such an agreement may not be entered into.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

189.

CORONER—POWER TO HOLD INQUEST UPON SUSPICION OF POISONING WITHOUT EXHUMING BODY.

Under section 2856, and following, General Code, a coroner may subpoena witnesses and examine into the death of a person whom he has been informed met death by poisoning: and when without exhuming the body, the coroner acts in good faith and subpoenas and examines witnesses, the officers serving subpoenas and the witnesses should be allowed their proper fees.

COLUMBUS, OHIO, April 19, 1913.

HON. CHAS. F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 21, 1913, in which you present the following statement of facts:

> "Information is given the prosecutor to the effect that a child has been poisoned; the prosecutor in turn notifies the coroner. The child has been buried, at this time, a number of weeks. The coroner, without exhuming the body, proceeds to inquire, subpoena and examine witnesses, and, becoming convinced that there is no reason to suspicion death by any criminal agency, concludes the inquest and makes his report without exhuming the body."

and request my opinion as to whether or not the witness and officer serving the subpoenas are entitled to fees and mileage; and if the coroner is entitled to his fees for record and necessary writings.

Section 2856, General Code, provides as follows:

> "When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively

subscribed, except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. * * *"

Section 2857, General Code, provides:

"The coroner shall draw up and subscribe his finding of facts in writing. If he finds that the deceased came to his or her death by force or violence, and by any other person or persons, so charged, and there present, he shall arrest such person or persons, and convey him or them immediately before a proper officer for examination according to law. * * *"

Section 2858, General Code, provides that,

"The coroner may issue any writ required by this chapter, to any constable of the county in which such body is found, or, if in his opinion the emergency so requires, to any discreet person of the county. * * *"

Section 2859, General Code, provides:

"When an inquest is held, as part of his finding the coroner shall give a description of the person over whose body the inquest is held, which description shall specify the name, age, sex, residence, place of nativity, color of the eyes, hair, marks, and all other particulars which may assist in the identification of the person. * * *"

From a reading of the above quoted sections of the General Code it is plainly to be seen that it was the intention of the legislature, in specifying the duties of the coroner, to enjoin upon him the duty of holding an inquest, which inquest was intended to aid in the detection of crimes and in the punishment of those who perpetrated such crimes. Section 2856 specifically provides that the coroner shall, when informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, etc. Section 2859 specifically provides that when an inquest is held, as part of his findings, the coroner shall give a description of the person over whose body the inquest is held, etc. From a reading of said sections it seems to me that a coroner might legally hold an inquest, upon being informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, without an actual view of the body, for he would be able, from the examination of witnesses to get the description of the body of a decedent necessary to be contained in his findings to be filed with the clerk of the courts, as provided by law. I am not inclined to believe that it is absolutely proper procedure for a coroner to hold an inquest weeks after the burial of the body of a person whose death is supposed to have been caused by violence. However, I can see no legal reason why a coroner should not hold an inquest at any time he is informed that the body of a person, whose death is supposed to have been caused by violence, has been found within the county, for the purpose of aiding in the detection of crime or of anybody connected with said death.

In the case referred to in your inquiry, you having informed the coroner of the fact that said child was supposed to have come to its death by being poisoned, there seems to me to be a prima facie case that the coroner acted in the best of faith, and was endeavoring to assist the prosecuting attorney in the detection of crime, if any had been committed. The coroner, acting in good faith, pursued the proper course, in

my opinion, when he proceeded to examine witnesses before ordering the body exhumed; for if the testimony of the witnesses disclosed the fact that the child came to its death through natural causes, it would be a useless expenditure of public money to order the body exhumed for the purpose of holding an autopsy. In the last analysis the purposes for which the law creates the office of coroner and defines his duties have in this case been fully carried into effect; and in my opinion, the coroner having acted in good faith, as above stated, he is entitled to the statutory fees for all actual services performed in his official capacity, in relation to such case, which, in my opinion, includes everything except the statutory fee for viewing the body, the coroner not having performed that service.

I am also of the opinion that, the coroner having the legal right to subpoena witnesses and also to compel any constable of the county or other person to execute certain writs and serve subpoenas upon witnesses, and the same having been done, and the witnesses having obeyed said subpoenas, said witnesses should be paid from the county treasury their fees and mileage; and any and all officers serving subpoenas or other writs under the direction of the coroner should be paid their legal fees fixed by statute for such services.

Very truly yours.
TIMOTHY S. HOGAN,
Attorney General.

193.

SHERIFF—COUNTY COMMISSIONERS TO ALLOW FOR UPKEEP OF AUTOMOBILE.

Under section 2997, General Code, which authorizes county commissioners to make allowance to sheriffs for the maintenance of horses and vehicles, county commissioners must allow the sheriff sufficient to keep in repair an automobile used by the sheriff in the public administration of the necessary duties of his office.

COLUMBUS, OHIO, April 19, 1913.

HON. E. L. SAVAGE, *Prosecuting Attorney, Paulding, Ohio:*

DEAR SIR:—Your letter of February 16th received. You ask my opinion upon the following question:

> "Where a county sheriff owns his own auto should the county pay for the upkeep of such auto while and when used in the discharge of his official duties, and should the depreciation in the value of the machine be included in the expense of the upkeep?"

Section 2997 of the General Code provides in part as follows:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff * * * for all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. * * *"

The answer to your question depends upon the construction of the words "all expenses of maintaining," as used in this section. The circuit court of Mahoning

county, in the case of State vs. Commissioners, 10 C. C. N. S. 398, defined "maintaining," as used in this statute, as applied to vehicles, as follows:

> "Supporting; upholding; keeping up; to hold or keep up in any particular state or condition; to sustain; to keep up."

The court said further that the legislature, in this provision, only meant and intended that sheriffs should be allowed the necessary expense incurred in keeping their vehicles in good condition, and not in the purchase of them.

I have already held, in an opinion addressed to Hon. Thomas L. Pogue, prosecuting attorney of Hamilton county, Ohio, that the sheriff is entitled to repairs on an automobile used in the county business. I enclose herewith a copy of said opinion. I also hold in that opinion that an automobile is a vehicle within the meaning of section 2997.

I am of the opinion, therefore, that the county should pay for the upkeep of the sheriff's auto, which is used by the sheriff exclusively in the discharge of his official duties; that is to say, the county should keep the sheriff's auto, so used, in good condition, and keep up the repairs thereon. But this does not permit the sheriff to present a bill of expenses for depreciation in the value of the machine, as that is not to be included in the expense of the upkeep.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

194.

CLERK OF COURTS—DUTY TO TURN OVER ACCOUNTS AND INTEREST TO SUCCESSOR—RETURN OF EXCESSIVE AMOUNT TO PREDECESSOR.

Since section 3032, General Code, requires a clerk of court to keep a cash book and to turn over the same to the successor in office, it is clear that all funds stated to be on hand in such cash book should be turned over to the clerk's successor, together with such book. If there was an excessive amount of money paid over to the incoming officer, it should be returned to his predecessor just as a deficiency should be made good by the outgoing clerk.

COLUMBUS, OHIO, December 23, 1912.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—The letter of your assistant, Mr. Minsall, under date of December 17, 1912, enclosing a letter to you from Mr. Horner, clerk of courts, dated November 14, 1912, in which two questions are asked has been considered and I desire to say:

The first query states that in handling the funds in the clerk's office all county funds are separately deposited and earn interest which is accounted for to the auditor. Other funds also bear interest and are kept in a separate account, and the inquiry is whether this interest can be turned over to the county auditor, he releasing the clerk and his bondsmen from liability.

The second question goes to the matter of "overage," so-called, that is the money in the hands of the clerk in excess of the amount shown by the cash book.

Section 3032, General Code, reads:

> "Each clerk of a court of record, and the sheriff and prosecuting attorney,

in each county, shall enter in a journal or cash book provided at the expense of the county, an accurate account of all moneys collected or received in his official capacity, on the days of the receipt, and in the order of time so received, with a minute of the date and suit, or other matter, on account of which the money was received. Such cash book shall be a public record of the office, and on the expiration of the term of such officer, be delivered to his successor in office. Each such clerk shall be the receiver of all moneys payable into his office, whether collected by public officers of court or tendered by other persons, and, on request shall pay them to persons entitled thereto."

This section provides for the keeping of a cash book by the clerk and the turning over of the same to his successor in office, and while nothing is said about the turning over of the balances shown to the successor, yet it would destroy the value of such book or the necessity for its being kept if the balances were not turned over with the book.

I am, therefore, of the opinion that the interest fund, assuming that the cash book will furnish data from which the amount may be ascertained, should be turned over to the successor in office, and not to the auditor as the interest mentioned does not come within what is meant by unclaimed costs, as described in sections 3040 to 3045, General Code.

The second question relates to "overage" as termed in Mr. Horner's letter.

I am of the opinion that this money should also be turned over to the successor in office and his receipt therefor taken, which will release the outgoing clerk and his bond and transfer the liability to the incoming officer.

If there was an excessive amount of money paid over to the incoming officer, it should, on discovery be returned to his predecessor, just as a deficiency (on discovery) should be made good by the out-going clerk.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

195.

STREET ASSESSMENTS—ASSESSMENT BY FOOT FRONTAGE AND FOOT FRONT—ASSESSMENTS ON ABUTTING LOTS GENERALLY, FOR ABUTTING PROPERTY NOT ASSESSED BY REASON OF FOOT FRONT RULE ON CORNER LOTS.

Under a former law which required the assessment of abutting property by the "foot front" of the property bounding and abutting upon the improvement, the courts held that a corner lot could be assessed only for such number of feet as constituted the actual number of feet in the actual front of such property. When the law was changed, requiring such assessment by the "foot frontage" of the property bounding and abutting, the court held that the actual number of feet bounding and abutting upon the improvement could be assessed.

Since the law has been again changed so as to permit the assessment of such property by the "foot front" of the property bounding and abutting, under a well settled rule of construction, the interpretation of the courts of this language as it existed in the first law must be construed to be again intended by the legislature, and the former law must be again allowed to prevail.

In accordance with the case of Streiber vs. City of Lima, the cost of the improvement which cannot be assessed against the corner lot, by reason of the foot front rule, may be apportioned against all of the property abutting upon said improvement, which may be assessed therefor.

COLUMBUS, OHIO, March 26, 1913.

HON. CHARLES F. CLOSE, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—Under date of February 15, 1913, you send to this department a letter of inquiry from a member of the council of the village of Carey, Ohio. It appears that this village has no solicitor and you have been requested to secure the opinion of this department upon the question submitted in the enclosed letter.

The letter which you enclose states the facts and question as follows:

> "In levying special assessments in municipalities by the third method named under section 3812, General Code, namely by 'the foot front of the property bounding and abutting on the improvement,' it is a settled construction of the law that a corner lot can only be assessed according to the number of feet in that boundary of such lot which constitutes its 'front.'
>
> "This construction causes the number of assessable feet of frontage on a street improvement to be less than the number of feet of property actually abutting on the improvement, and since the improvement is to be assessed by the foot front of the property abutting the cost per foot is consequently increased.
>
> "The query is: Can this increased cost occasioned by the loss of the frontage on corner lots be thrown back and imposed upon the properties abutting, or should it be borne by the municipality as a whole?"

Section 3812, General Code, provides:

> "Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of an expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves,

docks, retaining walls, sewers, drains, water courses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or water course, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or rip rap protection, bulkheads, culverts, approaches, flood gates, or water ways or drains incidental thereto, which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

"First. By a percentage of the tax value of the property assessed.

"Second. In proportion to the benefits which may result from the improvement, or

"Third. *By the foot front of the property bounding and abutting upon the improvement.*"

This section gives three methods for levying the special assessment. The third method is involved in the present inquiry.

This method of levying special assessments has been construed, in reference to corner lots, in two ways by the supreme court of Ohio. In each of these decisions a different phraseology of the statute was under consideration. Also the legislature changed the phraseology after each of the decisions of the supreme court.

In Haviland vs. City of Columbus, 50 Ohio St., 471, it is held:

"In assessing the cost of a street improvement on abutting property by the front foot, regard must be had to what is the real front of the property. This is a question of fact, to be determined by the manner in which it was laid out, or in which it has been built upon, and used and occupied, by the owner.

"If a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more."

Section 2264, Revised Statutes, was under consideration in this case and the third method of levying special assessments was expressed in said statute as follows, as shown on page 473 of the opinion:

"or (3) by the foot front of the property bounding and abutting upon the *improvement.*"

This section of the statutes was amended by the municipal code of October 22, 1902, as shown at section 50 of 96 Ohio laws 39, wherein the third method of levying special assessments was stated:

"Third. By the *foot frontage* of the property bounding and abutting upon the improvement."

The only change in the language of section 2264, Revised Statutes as amended in section 50 of the municipal code of 1902, is that the words "foot front" were changed to read "foot frontage." This change, however, permitted the supreme court to make a new rule as to levying assessments on corner lots.

In Village of Oakwood vs. Stoecklein, 81 Ohio St., it is held:

"Since the municipal code passed October 22, 1902, (96 Ohio laws, 20), repealed section 2264, Revised Statutes, and defined the following made of assessing the costs and expenses of street improvements, 'by the foot frontage of the property bounding and abutting upon the improvement,' the rule of assessment laid down in Haviland et. al. vs. City of Columbus et. al., 50 Ohio St., 471, is abrogated, and municipalities are authorized to assess upon an entire lengthwise frontage of a lot abutting upon the improvement."

On page 334 of the opinion, Shauck, J., quotes the holding in Haviland vs. the City of Columbus, supra, and then says:

"Whatever may have been thought of the decision in that case as an interpretation of the statute, and however general may have been the belief that it imposed upon interior lots burdens which in justice should be borne by corner lots, the case was reconsidered and adhered to in the City of Toledo vs. Sheill, 53 Ohio St., 447. In one of the opinions in that case it was suggested that the rule should be regarded as established so far as judicial decisions were concerned, and that if it was thought to operate unjustly it should be changed by the general assembly by an act operating prospectively. Accordingly by the uniform municipal code enacted October 22, 1902, (96 Ohio Laws, 20), section 2264, Revised Statutes, was repealed and by section 50 of that act, the third mode of assessing the costs and expenses of street improvements was defined as follows: "By the foot frontage of the property bounding and abutting upon the improvement." Since the general assembly under the circumstances changed the phraseology of the clause and employed language in making the change which indicates very clearly the purpose of the legislature to act upon the suggestion referred to and to change the rule established in the case which appears to have controlled the judgements under review, the judgement must be regarded as erroneous."

It will be observed that the court does not overrule the holding in Haviland vs. city of Columbus, but bases the new rule upon the fact that the legislature changed the phraseology of the provision in question.

The case of village of Oakwood vs. Stoecklein, supra, was decided January 18, 1910, and on April 22, 1910, the general assembly, by act of 101 Ohio Laws 134, amended this provision and placed the phraseology in the same condition it was in when the ruling in Haviland vs. city of Columbus, was given, and which is:

"Third. By the foot front of the property bounding and abutting upon the improvement."

The supreme court in Oakwood vs. Stoecklein, supra, took advantage of the change in the language of the section, to hold that the legislature intended thereby to abrogate the ruling in Haviland vs. city of Columbus, but immediately thereafter, the legislature amended the language and made it the same as it was when passed upon in Haviland vs. city of Columbus.

It is evident, from the reasoning of the court in Oakwood vs. Stoecklein, and from the act of the legislature in 101 Ohio Laws 134, immediately thereafter, that the general assembly desired to have in force, the rule laid down in Haviland vs. city of Columbus, as to assessing corner lots.

This is the holding in the case of Henry vs. Barberton, 12 Ohio Nisi Prius N. S. 364, decided January 19, 1912, wherein it is held:

"When a statute, which has received a settled judicial construction, is repealed and is afterward re-enacted in the same terms and for the same purpose

and object, it will be presumed that the legislative body, so re-enacting it, intended that it should bear the same construction which had been given to the original, unless a different intention is shown.

"The term 'foot front' in section 2264 of the Revised Statutes, having been construed by the courts as meaning, for assessment for the improvement of a street, a frontage equal to the linear measurement of the most prominent and conspicuous side of a property, rather than the side actually abutting in the street on which the improvement is made; and the courts, upon the repeal of this section (96 Ohio Laws 39, section 50), and the substitution of another act providing for an assessment by the 'foot frontage' having construed that substitution as an intention of the general assembly to abrogate the former construction by the courts of the meaning of the term 'foot front;' when the latter act was repealed and in the repealing act an assessment was provided for by the 'foot front' in language identical with old section 2264 (101 Ohio Laws 134), the presumption arises that, by so doing, the general assembly intended the assessment so provided for by the 'front foot' should mean the same that it had theretofore been construed to mean by the courts.

"The act of April 22, 1910, (101 Ohio Laws 134), amending section 3812 of the General Code, requires the third method of assessing property for improvements to be made by the 'foot front,' meaning thereby that if a lot abuts lengthwise on the improvement, the lot should be deemed as fronting breadthwise on the improvement and be assessed for the number of feet on the improvement that it would have in such case, and no more."

I am, therefore, of the opinion that the decision of Haviland vs. city of Columbus, 50 Ohio St., 471, is the settled law of Ohio in reference to the method of levying special assessments upon corner lots by the "foot front."

The question asked is how to apportion the cost of the improvement which is not assessable because of the corner lot rule.

This was passed upon in Steiner vs. city of Lima, 8 Nisi Prius, N. S., 509, where it is held:

> "The burden of bearing that portion of the cost of a street improvement not assessable under the law against corner lots rests upon the abutting owners, notwithstanding in the petition for the improvement they only bound themselves to pay an assessment 'by the front foot for the number of feet set opposite their names, less two per cent. and the cost of the intersections of public alleys and that portion of corner lots exempted by law and not signed for in this petition.'"

This case was decided in May, 1909, before the amendment of section 3812, General Code, in 101 Ohio Laws, 134, and before the decision was rendered in Oakland vs. Stoecklein. The decision was affirmed by the circuit court, but was reversed in 82 Ohio St., 447, without report, under authority of Oakland vs. Stoecklein. As the decision of Oakwood vs. Stoecklein has been abrogated by the legislature in the amendatory act of 101 Ohio Laws, 134, the rule of apportioning the unassessable part of the corner lot must be as set forth in Steiner vs. city of Lima, 8 Nisi Prius, N. S., 509, supra.

I am, therefore, of the opinion that the cost of the improvement which cannot be assessed against the corner lot by reason of the corner lot rule in Haviland vs. city of Columbus, may be apportioned against all the property abutting upon said improvement and which is to be assessed therefor.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

197.

BOARD OF EDUCATION — BOXWELL GRADUATE — CONTRACT FOR TUITION—NO REQUIREMENT OF NOTICE FROM PUPIL LIVING OUTSIDE OF THREE MILES FROM SCHOOL CONTRACTED WITH WHEN PUPIL SELECTS OTHER SCHOOL.

Under section 7744, General Code, a Boxwell diploma entitles the graduate to enter any high school in the state.

Under section 7747, General Code, boards of education having no high school are required to pay the tuition of Boxwell graduates attending other high schools.

Under section 7750, General Code, a board of education, by entering into a contract for the education of such graduates, may be exempted from paying the tuition of pupils residing within three miles of the school designated in the agreement, when such school is located in the same or some adjoining township. Under the same statute, if no such agreement is made, a pupil selecting his own school is entitled to have his tuition paid only upon his giving notice to the board of education of his residence as therein provided. The terms of such statute, however, do not require such notice of pupils residing outside of three miles of the school designated by a contract agreement made by the board of education.

COLUMBUS, OHIO, March 28, 1913.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I herewith acknowledge the receipt of your letter of February 15th, wherein you inquire as follows:

> "Can a Patterson graduate, who lives in a township where no high school is maintained, and who lives more than three miles from a high school located in an adjoining township, which has been selected by his township board to school its Patterson graduates, select a high school of his own choice not located in an adjoining township, and if he can, must he give the written notice required by section 7750 of the General Code before he can compel his school district to pay for his tuition?"

In reply thereto would say that section 7744 of the General Code provides that the diploma granted to a Patterson graduate shall entitle such graduate to enter any high school in the state as follows:

> "The board of county school examiners shall provide for the holding of a county commencement not later than August 15th, at such place as it determines. At this commencement an annual address must be delivered, at the conclusion of which a diploma shall be presented to each successful applicant who has complied with the provisions hereof. Such diploma shall entitle its holder to enter any high school in the state."

Section 7747 of the General Code, provides that the tuition of the pupils holding diplomas and residing in township or special districts in which no high school is maintained, shall be paid by the board of education of the school district in which such pupils have legal residence as follows:

> "The tuition of pupils holding diplomas and residing in townships or special districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part

of the month shall create a liability for the entire month; but a board of education maintaining a high school shall not charge more tuition than it charges for other non-resident pupils."

The board provisions of the above sections are modified and limited by section 7750 of the General Code, which provides that any board of education having no high school, by contracting for the schooling of its high school pupils with one or more boards of education of the same or some adjoining township, may exempt itself from paying the tuition required by section 7747 of the General Code, except as to pupils who live more than three miles from the school designated in such contract, as follows:

"A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended, and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

It is to be noted that the board of education by entering into such contract is not exempt from paying the tuition of pupils living more than three miles from the high school so designated, who attend some high school other than the one designated in such contract. Inasmuch as the provisions of said section 7750 of the General Code do not apply to pupils living more than three miles from the high school designated, and inasmuch as no limitation seems to be placed upon the provisions of sections 7744 and 7747 of the General Code as regards pupils living more than three miles from a designated high school it follows therefore that such pupils can select and enter any high school in the state by virtue of section 7744, supra, and the tuition of such pupils must be paid by the board of education of the township or special school district in which no high school is maintained in accordance with section 7747, supra.

Section 7750 of the General Code in so far as giving notice in writing of the school to be attended by the pupil, provides in substance that if the board of education not having a high school does not provide a high school for its Patterson graduates, a school which said graduates may attend can be selected by the pupils holding the diplomas *provided* due notice in writing is given to the clerk of the board of the name of the school to be attended, and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of the attendance.

It is my judgment that said notice is required only in case the board of education not having a high school fails to enter into an argeement with one or more boards of education maintaining such high school for the schooling of its high school pupils. You state, however, that in this instance the township board of education where no high school is maintained has selected a high school for its high school pupils in accordance with section 7750 of the General Code.

It follows, therefore, that the said Patterson graduate need not give the written notice required by section 7750 of the General Code before he can compel his school district to pay for his tuition.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

200.

ROADS AND HIGHWAYS—POWER OF STATE HIGHWAY COMMISSIONER TO PERMIT MODIFICATION OF CONTRACT WITHOUT RESUBMISSION OF ADVERTISEMENT AND BIDS, WHEN LOCATION OF ROAD IMPROVEMENT IS CHANGED BY VIRTUE OF AN UNFORESEEN RAILROAD CONSTRUCTION.

When the state highway commissioner has entered into a contract by compliance with all statutory provisions and a change in the location of the road improvement is made necessary by a railroad construction, the railroad furnishing bond of indemnity for additional costs, by reason of such change and the contractor consenting thereto, the state highway commissioner may permit such departure from the original terms of the contract as is made necessary by such change, without re-advertising and re-letting of bids.

COLUMBUS, OHIO, April 22, 1913.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 22nd, wherein you state:

> "Sometime during the summer of 1912, a contract was let by the state highway department for the paving and curbing of a road in Mahoning county, Ohio, over a distance of about sixty-four hundred (6400) feet; the contractors proceeded in the performance of their work and improved this road for a distance of about twenty-two hundred (2200) feet when they were stopped by order of the state highway commissioner. This order was made necessary by reason of the fact that a new railroad was being constucted parellel to the highway in question, rendering necessary the shifting of about thirty-five hundred (3500) feet of this road southerly of about the width of itself. The contractors thereupon refused to carry out the contract over the proposed new portion of the road. A petition was filed by the railroad company under section 6895 of the General Code, asking that a change of the road be turned over this portion of about thirty-five hundred feet; the differences between the railroad company and the contractors have been adjusted, and the contractors stand ready and willing to pave the new portion of said road and the commissioners stand ready to grant said new portion and vacate the portion of the old road rendered unnecessary by the establishing of the new portion. The state highway commissioner approves the arrangement as agreed upon by the railroad company and the county commissioners if the same can lawfully be done. The contractors are to furnish a new construction bond covering the change, and the railroad company is to furnish a five year maintenance bond. Insofar as the expense of the improvement to the state is concerned nothing will be added by reason of this change. The railroad company bearing any and all additional expenses and this is covered by a contract entered into between the railroad company and the contractors,"

and submit for my opinion the following question:

> "Can the state highway commissioner notify the contractors that their contract is modified in the respect that they are to make the improvements over the changed portion of the road instead of over the old portion of the road, the contractors, of course, accepting in writing, the order of the state

highway commissioner directing such modification, or will it be necessary to re-advertise and re-let that portion of the improvement over the changed portion?"

In view of the fact that the contract made by the state highway commissioner with the contractors has been duly let and that only by reason of the fact that part of the road in question had to be moved because of the building of a railroad the improving of the new portion of said road could well be considered simply as a modification of the contract, and since the expense of the improvement to the state is not increased by reason of improving the road over the new portion instead of over the old portion, I am of the opinion that the state highway commissioner can notify the contractors for the road that their contract is modified in the respect that they are to make the improvement over the changed portion instead of over the old portion and that it will not be necessary to re-advertise and re-let that portion of the improvement, and furthermore, that the money now in the hands of the state highway commissioner retained by him and based on estimates heretofore furnished by the contractors should be paid to the contractors in the same manner as if the portion of the road had not been changed since the signing of the contract.

You will, of course, see to it that all the necessary legal proceedings in reference to bonds, agreements, etc., to lawfully carry out this change are made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

211.

TAXES AND TAXATION—LAW PROVIDING FOR WORKING OUT OF TAX ASSESSMENT ON PROPERTY FOR ROAD PURPOSES, NOT UNCONSTITUTIONAL.

Section 7488, General Code, which provides for a levy not exceeding one mill on each dollar of the valuation of the taxable property of the township for road purposes, which may be worked out by the taxpayer, the same being a tax upon the property and not levied by the poll, and not requiring the services, but merely permitting when in lieu of the money payment, is not in conflict with article 3, section 1 of the constitution, providing that no poll tax may be levied or services required which may be collected in money or other thing of value. Under section 5649-3a, taxes for this purpose are excluded from the two mill township limitation of Smith one per cent. law.

COLUMBUS, OHIO, April 22, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 18th, from Hon. C. A. Groom, assistant prosecuting attorney, respecting the constitutionality of section 7488 of the General Code, upon which my opinion is asked. This section provides as follows:

"In addition to such levy the township trustees, at any time, if they deem necessary, may levy an amount not exceeding one mill, upon each dollar of valuation of the taxable property of the respective townships, for road purposes, which may be worked out at the rates other work is paid for, of a similar nature. Said amount so levied shall be certified to the township clerks as provided for by section seventy-four hundred and eighty-five."

Section 1 of Article XII of the Constitution, as recently amended, provides:

> "No poll tax shall ever be levied in this state, or service required, which may be commuted in money or other thing of value."

In my opinion the section above quoted is not in conflict with the constitutional provision referred to. The tax is a property tax not levied by the poll but according to the valuation of property. The service which the section contemplates is not a required one—it is the *money*, i. e. the taxes, which are required; and this is done through the exercise of the general taxing power of the state, in a way which is consistent with all of the provisions of the articles of the constitution which refer to taxation. The service is optional. This option is for the benefit of the taxpayers. A provision like this is not merely the reverse of one like that which is found in the old road labor statutes of this state, at which the constitutional provision is palpably aimed. Those statutes required the service of male citizens as such, and permitted the commutation of such service in money. This section requires nothing of citizens as such—it does not even apply to citizens, but does apply to owners of property taxable within the township. I do not believe that the constitutional provision can be used to declare invalid any tax levied upon the duplicate of a taxing district in the regular way, even though the tax be payable in service. I know of no provision of the constitution in any way restraining the legislature from making any commodity, service or thing other than money, receivable in payment of taxes.

Perhaps a more serious difficulty is suggested by the question as to how "the rates other work is paid for of a similar nature" are now to be ascertained, inasmuch as the general road labor statutes must now be regarded as unconstitutional. This question was not asked in Mr. Groom's letter, however, and I do not pass upon it.

Mr. Groom does ask another question which I have so far not touched upon, however. He inquires whether or not the tax authorized by the section above cited is within the limitations of the Smith One Per Cent. law, so-called. I find what seems to me to be a clear answer to his question in the Smith law itself, and particularly in section 5649-3a thereof, which provides in part as follows:

> "Such (interior) limits for * * * township * * * levies shall be exclusive of * * * levies for road taxes that may be worked out by the taxpayers * * * over which the budget commissioners shall have no control."

It is my opinion that this express mention of taxes of this sort has the effect of excluding such levies from the two mill limitation of the entire act, but from none of the other limitations thereof. That is to say, such levies are within the ten mill limitation, the 1910 tax limitation and the fifteen mill limitation of the law. The budget commissioners have no control over such levies; that is to say, they may not reduce the amounts certified or estimated for such purposes. In short, it may perhaps clarify the situation to observe that levies of this sort are to be treated, for the purposes of the budget commission, in precisely the same manner as the state levies are treated.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

219.

COUNTY COMMISSIONERS AND SHERIFF—EXPENSES, TRAVELING.

Section 6563-44, General Code, providing for actual expenses to the county commissioners when performing the duties herein prescribed and section 2997, General Code, providing for allowance to the sheriff of his actual and necessary expenses, authorize the payment of these officials for transportation, lodging and meals when engaged in the duties prescribed.

COLUMBUS, OHIO, April 24, 1913.

HON. THEO. H. TANGEMAN, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Your favor of March 21st received. You inquire whether the members of the board of county commissioners, under favor of section 6563-44 of the General Code, may be paid the amount actually expended by them for transportation, lodging and meals.

Section 6563-44, General Code, insofar as it relates to this matter, provides as follows:

> "shall receive the sum of $3.00 a day and their *actual expenses* while employed under this bill."

The bureau of public accounting has held that the commissioners, while employed under section 6563-44, General Code, are entitled to a per diem of three dollars per day, and their transportation, lodging and meals; and I concur in their holding. This department has uniformly held, under all statutes providing for salary and expenses, that the expenses include transportation, lodging and meals.

I am therefore of the opinion that county commissioners, under favor of section 6563-44, General Code, may be paid the amount actually expended by them for transportation, lodging and meals, while employed under such section.

You also inquire as to the authority of the sheriff to charge for meals and lodging when engaged in pursuing persons accused of crimes.

Section 2997, General Code, provides in part:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff * * * for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses."

I am of the opinion, under favor of this section, that the sheriff has a right to charge for his meals and lodging when engaged in pursuing persons accused of crimes, as the statute expressly authorizes that he may be allowed for his actual and necessary expenses incurred and expended in transporting persons accused or convicted of crimes and offenses.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

222.

TOWNSHIP TRUSTEES MAY NOT CONDEMN STONE QUARRY FOR PURPOSE OF ENGAGING IN STONE BUSINESS.

The terms of section 8283, General Code, would not justify township trustees in condemning an unused stone quarry for the purpose of producing stone therefrom and selling the same to other townships and the public at large.

COLUMBUS, OHIO, March 28, 1913.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I have your letter of March 12th, in which you request my opinion on the following:

> "There is located in Ridge township a stone quarry that is not being used. Have the township trustees a right under the provisions of section 3283 G. C. to condemn the said quarry, and place a man in charge who will equip it with necessary machinery and operate it, and this man will then sell the stone to the township at a reasonable price, and also sell stone to other townships and the public at large at the same price; the price at which the stone shall be sold to be the cost of placing same upon the market and a small profit?"

Section 3283 of the General Code provides:

> "When the trustees are unable to purchase of, or contract upon fair and equitable terms with, the owner of a gravel bank, gravel bed, other deposit of gravel, or of any stone, timber, or other material, in the judgment of the trustees necessary for the construction or repair of any road, improved road or highway within the township, or in case the owner refuses to sell or contract with the trustees, for the sale of such material, upon the trustees agreeing to allow a just and reasonable compensation therefor, they may condemn for public use such material, in such quantities as, in their judgment, the public needs require, allowing the owner thereof a just and equitable compensation. Such authority to contract, sell, agree and condemn shall extend to all townships within the county in which such trustees are elected or appointed in pursuance of law, or within any township of any adjoining county."

The powers of township trustees under the foregoing statute extend no further than to permit them to condemn for public use "a gravel bank, gravel bed, other deposit of gravel, or of any stone, etc.," when in the judgment of the trustees such material is necessary for the construction or repair of any road, etc., within the township. This power to condemn can be exercised only when they are "unable to purchase of, or contract upon fair and equitable terms with, the owner" of such material, "or in case the owner refuses to sell or contract with the trustees for the sale of such material.

The acts enumerated in your question would amount to engaging in the stone business, and this the trustees are not permitted to do under favor of said section 3282.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General

223.

ARMORY—MUNICIPAL CORPORATION MAY NOT PURCHASE CHAIRS FOR AND EQUIP.

Section 3631, General Code, and section 3939, General Code, provide only for the purchase of real estate and the issuing of bonds therefor, by a municipal corporation for the purpose of erecting an armory upon the same, and such sections cannot be construed to empower a corporation to build an armory thereon, nor to equip or purchase chairs for the same.

COLUMBUS, OHIO, March 22, 1913.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of March 8th, you request my opinion as follows:

> "Can the municipality purchase chairs to equip an armory built by the state, on a site donated by popular subscription of such municipality?
>
> "You will notice by section 1 of that section (3939) the council may purchase real estate upon which to build an armory.
>
> "By section 2 council may equip a building authorized by said section, and 'for securing a more complete enjoyment of * * improvement.'"

Section 3939, General Code, sub-divisions one and two, which you cite, are as follows:

> "When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by *resolution* or ordinance, may issue and sell bonds in such amounts and denominations for such period of time, at such rate of interest, not exceeding six per cent., and in the manner as provided by law, for any of the following specific purposes:
>
> "1. For procuring the real estate and right of way for an improvement authorized by this section, or for purchasing real estate with a building or buildings thereon, to be used for public purposes, *or to be donated to the state of Ohio by deed in fee simple as a site for the erection of an armory.*
>
> "2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement *authorized by this section, and for equipping and furnishing it.*"

In your request you speak of this section as conferring upon the municipality the power to purchase real estate, upon which to build any armory. This section, however, simply authorizes the issuing of bonds for that purpose. The general statute containing the power, is section 3631, General Code, which section is as follows:

> "To hold and improve public grounds, parks, park entrances, free recreation centers and boulevards, and to protect and preserve them. To acquire by purchase, lease, or lease with privilege of purchase, gift, devise, condemnation or otherwise and to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, or *to donate the same by deed in fee simple to* the state of Ohio as a site for the erection of an armory."

Statutes conferring powers upon municipal corporations must be strictly construed against the existence of the power, and inasmuch as in these statutes, expression

is made of the purpose of purchasing real estate to be donated "to the state of Ohio by deed in fee simple as a site for the *erection* of an armory," I am of the opinion that these provisions cannot be construed to do more than to authorize the purchase of the real estate itself. They can in no sense be said to extend the power, either of erecting an armory or of equipping and furnishing it.

The provision in subdivision 2, section 3939, General Code, extending power to issue bonds for equipping and furnishing a building, relates only to buildings authorized by this section, and I am of the opinion, for the reason aforesaid, that an armory is not such a building as is authorized by this section.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

226.

POWER OF COUNTY COMMISSIONERS TO REFUND TAXES ERRONEOUSLY ASSESSED AGAINST A RAILROAD BY RETURNING A PORTION OF TRACK WHICH WAS SITUATED IN A TOWNSHIP AS BEING SITUATED IN A MUNICIPAL CORPORATION—LIMITATION TO TAX WITHIN FIVE YEARS OF DISCOVERY OF MISTAKE.

Under section 2588, General Code, a county auditor is empowered to correct clerical errors discovered in the tax list and duplicate, as to description of lands or as to amount of taxes or assessments. When a portion of railroad track, therefore, has been returned as being situated in a municipal corporation, when in reality the same was situated in a township, such a mistake constitutes an error in the description of the lands and the amount of the taxes as contemplated by section 2588, General Code. As the mistake was a mutual mistake of taxes between the taxing authorities and the taxpayer, the fact that payment was voluntarily made does not preclude recovery.

Under the statutes, in compliance with which the assessments in this case were made, the investigation and the assessment was to be made by the board of auditors and not by the railroad company. The latter merely furnishing such information as may be required by the assessing board. There was no element of intentional or successful misrepresentation or culpable negligence, thereby inducing a wrong belief on the part of the taxing authorities, and the doctrine of estoppel, therefore, cannot be applied against the railroad company.

Under sections 2589 and 2590, General Code, refunds may be allowed by the county commissioners for taxes paid by mistake, such as the auditor is permitted to collect under the statutes aforesaid. Such refunds, however, are limited to taxes erroneously collected in the five years next prior to the discovery thereof by the auditor. Taxes paid more than five years prior to such discovery thereof may not be refunded by authority of these statutes.

COLUMBUS, OHIO, April 24, 1913.

HON. W. V. WRIGHT, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 1st, in which you request my opinion upon the following statement of facts:

> "Taxes for the years 1905, 1906 and 1907 were erroneously assessed upon the duplicate of Tuscarawas county against a certain railroad in the following particular: A portion of the main track of the railroad company was returned by the company to the appraising board as being situated in a certain municipal corporation, whereas, as a matter of fact, this portion of the main track was situated in a township.

"The error is perfectly apparent, I take it, and can be discovered by comparing the returns for these three years with the returns for other years made by the same railroad company.

"The aggregate rate of taxes in the municipal corporation during these years was greater than the rate in the township; so that, if the error can be corrected, a further question arises as to the possibility of a refunder for the taxes already paid."

I thank you for your memorandum of authorities, submitted with reference to this question. These authorities have been of material assistance to me in reaching my conclusion, which is based upon them.

The section of the General Code requiring interpretation in this connection is section 2588. It is as follows:

"From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

This section (excepting the phrase "when property exempt from taxation has been charged with tax") has been uniformly construed as applying to the correction of errors which are clerical merely as opposed to fundamental errors or errors of judgment on the part of the taxing authorities. State vs. Commissioners, 31 O. S. 271; Humphries vs. Safe Deposit Company, 29 O. S. 608.

An error is "clerical" within the meaning of this rule when it occurs in the course of the performance of a ministerial act, or when it relates to a matter other than the *valuation* of property as such, i. e., to a matter as to which some taxing officer has discretionary power.

The error apparent in the case submitted by you is one which might be regarded as either in "the description of lands or other property," or "in the amount of such taxes." It is clearly an error in description, because the location of property with respect to the taxing district in which it is located is an essential part of the tax description of the property. It is an error in the amount of taxes, because if the plant were properly described the amount of the tax would have been less than it was. I am, therefore, of the opinion that the error described by you is one which might lawfully be corrected under section 2588, General Code.

Your letter raises the question as to whether or not the circumstances of the occurrence of this error are such as to take it out of the operation of the statute. That is, it is suggested that the corporation itself was responsible for the return and that the auditor (or board of auditors) was in no wise responsible therefor; and that the taxes have been paid without question for the years involved; so that, it is claimed that the payment was voluntary and that the railroad company is estopped from claiming the benefit of the statute.

Considering, first, the question as to whether or not the payment is a voluntary one, I beg to advise that on careful consideration of this question I am of the opinion that the question of voluntary payment does not enter into this case. It is a well established rule of law that a payment voluntarily made under mistake of law may not be recovered; and this principle has been applied to the interpretation of these statutes. (Commissioners vs. Rosche Bros., 50 O. S. 103). However, this principle

cannot be applied to the facts submitted by you because the mistake was not a mistake of law. There was undoubtedly a mutual mistake of fact—an oversight on the part of the taxing authorities and the railroad company, and not an erroneous application of the law by either party. That being the case, I think this feature of the question may be dismissed.

The question of estoppel is a more serious one. The statutes under which these assessments are made are not at present in force. Reference to the revised statutes must be made in order to ascertain their purport. The sections are sections 2770 et seq., Bates' revised statutes. Under these provisions the respective county auditors of the several counties in the state in which any railroad company had its track and roadway, or any part thereof, were constituted a board for the appraisement and assessment of the entire property of the railroad company. These auditors were required to meet at the place where the railroad had its principal office and "proceed to ascertain all the personal property, which shall be held to include road bed * * * and * * * other realty * * * necessary to the daily running operations of the road, moneys and credits of such company," etc. These boards were given power "to require from the president * * * and principal accounting officer of such road a detailed statement, under oath, of all the items and particulars constituting such property, moneys and credits, and the value thereof, 'and' to examine the books and papers of such road * * * touching any matter relating to the same." Having reached a conclusion as to the aggregate value of the property, moneys and credits, the board was to apportion the same among the counties in which the road ran, and among the taxing districts in such manner as to "equalize the relative value of the real estate, structures and stationary personal property * * * therein, in proportion to the whole value of the real estate, structures and stationary personal property of such railroad company in this state; and so that the rolling stock, main track, road bed, supplies, moneys and credits of such company shall be apportioned in the same proportion that the length of such road in such county bears to the entire length thereof in all said counties or county, and to each city, village and district, or any part thereof therein." Special provision was made for branch roads (which I take the particular road inquired about is, from the facts stated by you), but the procedure was not essentially different.

Now, it will be observed that the primary investigation, and, in short, the assessment was to be made by the assessing board or the auditor, as the case may be, and not by the railroad company. The company made no return in the technical sense; it merely furnished such information as might be required by the assessing board. Therefore, whatever may be the law respecting the effect of an erroneous return made by a taxpayer upon his right subsequently to ask for a correction and refund on account of the error which he himself has created, such a principle, even when ascertained could have no application to this case. In order to work an estoppel the party guilty of the misrepresentation must intentionally or through culpable negligence induce his adversary to believe in the existence of certain facts, and the adversary must rely and act upon that belief in such manner as to be prejudiced if a denial of the existence of the facts is permitted.

In this case it is quite evident that the mistake was an innocent one on the part of the railroad company, if its sworn statement contained the foundation for the error. This is true because the motive to make a false statement would scarcely have induced a statement which would result in liability for a greater amount of taxes. On the other hand, the adversary party had no right to rely upon this statement exclusively. It—that is, the board of auditors or county auditor—should have exercised ordinary diligence to ascertain the exact facts respecting the matter concerning which the mistake occurred. These facts, in the particular case, were just as accessible to him, through examination of previous duplicates and the like, as they were to the railroad company itself. In fact, if the railroad company made the mistake, and the auditor, recognizing

the mistake, nevertheless placed the property upon the duplicate as it was placed, upon the theory that if the railroad company was injured it had itself been responsible for its own injury, he was guilty of a culpable act, although not one which would subject him to any technical liability.

Having regard to the machinery of taxation under the statutes in force at the time this assessment was made, and to the general rule respecting estoppel by misrepresentation, I am of the opinion that no such estoppel against the railroad company may be said to have been raised by the facts mentioned by you.

For all the foregoing reasons, I am of the opinion that the error of which you speak is such an error as may be corrected by the auditor under section 2588. By virtue of section 2589, then, such an error may be corrected for previous years as well as upon a current duplicate. That section provides in part:

> "If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged or collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected."

This section must be read in connection with the preceding section, and by so doing the true meaning of the word "erroneous" as used in section 2589 is ascertained. I am of the opinion that so far as section 2589 is concerned, it is the duty of the county auditor, when his attention is directed to the occurrence of an error, such as that described by you, in a previous year or years, to call the same to the attention of the county commissioners; and that if the county commissioners find that the error has occurred it is their duty to order a refund in the principal amount.

But the question as to whether or not a refunder may be ordered in the case you submit is not finally answered by the conclusions which I have already reached. I call your attention to the provisions of section 2590 of the General Code, which must again be read in connection section 2589. It provides in part:

> "No taxes * * * shall be so refunded except as have been so erroneously charged or collected in the five years next prior to the discovery thereof by the auditor."

Under the facts as submitted by you, the auditor "discovered," i. e., had his attention called to these errors on December 15, 1911. Section 2590 is somewhat ambiguous, in that it uses the phrase "charged or collected." It is, of course, true that taxes are not both charged and collected in the same year necessarily; the charge is made prior to the first of October in one year; the first half of the collection is made in December of the same year and the last half thereof in June of the next year. I am disposed to believe that under the peculiar phraseology of the section, if the taxes have actually been collected, then, the five years runs from the time when the collection took place.

You state the taxes are "taxes paid for the years 1905, 1906 and 1907." The technical meaning of the phrase "taxes for the year, etc.," is that which refers to the tax levied in the previous year for the needs and expenditures of the year *designated*; that is, the taxes for the year 1913 were levied in the year 1912. But this technical meaning is so often disregarded and the opposite meaning—i. e. that which implies that the designated year is the year in which the levy and charge are both made—taken, that it is not safe to lay down any general rule. I therefore call your attention to the possibility of confusion and ask you to ascertain just when the last collection of the taxes complained of was made. It is clear that section 2590, above quoted, pre-

cludes the refunder of all the taxes referred to in your letter. Those "for the year 1905," if regularly paid, would, under either interpretation of that phrase, have been paid prior to December 15, 1906, the date when the 1905 year period preceding December 15, 1911, began to run. On the other hand, the taxes "for the year 1906," under one interpretation of that phrase, might have been paid either in full or as to the first half before December 15, 1906; therefore, the necessity for ascertaining the exact facts arises.

My conclusion is that such of the taxes complained of as were paid more than five years prior to December 15, 1911, cannot be refunded; but that it is the duty of the auditor and the commissioners, acting as they are required to act by the provisions quoted, to cause the refunder of taxes paid by the railroad company within the five year period under the mistake described by you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

229.

COUNTY COMMISSIONERS—POWER TO ISSUE BONDS FOR PURPOSE OF BUILDING OR ENLARGING COUNTY CHILDREN'S HOME—PUBLICATION AND CIRCULATION OF HAND BILL UNNECESSARY.

Under the doctrine of ejusdem generis, the words "or other necessary buildings," as employed in section 2434, General Code, authorizes the issuance of bonds for county buildings of any nature whatever, and therefore, said authority extends to county children's homes.

The power extended by said statute for issuing bonds for the purpose of enlarging buildings, also extends to the county children's home.

Under the authority of State ex rel. vs. Auditor, 43 O. S. 311, the erection of a county children's home is not governed by the requirements of section 3044, General Code, with reference to publication. Inasmuch as section 2434, General Code, does not authorize contract for the purpose of enlarging county children's homes, such authorization must be found in the provisions relating to the original erection of such home, to-wit: section 7039.

Inasmuch as this later section does not require publication and the issuance of hand bills, the same are unnecessary in a contract for the enlarging of such home.

COLUMBUS, OHIO, April 22, 1913.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 19th, submitting for my opinion thereon the following questions:

"1. May the county commisioners issue bonds under section 2434, General Code, for the purpose of enlarging the children's home building?

"2. Must the county commissioners, before erecting such an enlargement or addition, publish and circulate hand-bills and publish notice of their intention to do so as required generally by section 2444, General Code, assuming the cost thereof to exceed $1,000.00:

"3. If the notice must be given as required in section 2444, should such notice be published prior to the issuance of bonds:

Section 2434, General Code, in its present form, reads in part as follows:

> "For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home *or other necessary buildings* or bridges, or for the purpose of *enlarging*, repairing, improving, or rebuilding *thereof*, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

I think the first question to be encountered arises out of the grammatical construction of the section. On its face, the statute is quite ambiguous because it is not clear whether the phrase "county children's home" follows or is modified by the preposition "for," or whether, on the other hand, it is to be read in connection with the principal nouns following the main verb, i. e., "court house," "county office," "jail," "county infirmary" and "detention home." If the former is true, then the express and specific authority with reference to county children's home is confined to the purchase of land for this purpose. If the alternative construction be given to the section in this particular, then the question is answered without further discussion.

In my opinion this particular question must be answered by choosing the first of the two alternative constructions. That is to say, I am of the opinion that the phrase "county children's home" follows the preposition "for," so that the whole phrase is, "land for a county children's home."

I reach this conclusion by considering the meaning of section 2434, as codified prior to its amendment in 102 O. L. 54. That section read as follows:

> "For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, or other necessary buildings, or bridge, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof."

It will be observed by comparing the original section with the amended section that the only change in this part of it consists in the insertion of the words "additional land for an infirmary or county children's home." Therefore, it will be presumed that the mind of the legislature which made this amendment was directed to the single proposition of acquiring land.

On the other hand, the conclusion that the phrase "county children's home" follows the preposition "for" next preceding, does not of itself lead to the conclusion that the section does not confer authority to borrow money for the purpose of erecting a county children's home or an addition thereto. In order to reach such a conclusion it becomes necessary to hold also that the phrase "or other necessary buildings" which immediately follows the phrase just under discussion, is also subject to the modifying effect of the next preceding "for." Such a construction is perhaps gramatically correct under the peculiar language of the present section 2434; but such was certainly not the case under original section 2434, wherein this particular phrase was co-ordinate, so to speak, with the enumeration of other buildings for which money might be borrowed, i. e., "court house, county offices, jail and county infirmary." The question then is as to whether or not the legislature in inserting the phrase "or additional land for an infirmary or county children's home" intended to modify or change the meaning and gramatical construction of the succeeding phrase "or other necessary buildings."

Upon careful consideration I have come to the conclusion that the legislature did not intend any such thing. It is true that the general assembly's choice of the position of the inserted phrase was unfortunate, and that in order to make the matter entirely clear, it would have been better to insert the phrase "or additional land for an infirmary or county children's home" later in the section. Consideration of the fact that the same phrase, however, was inserted in section 2433, and regarded for the effect of all the amendments made to the statutes as a whole, leads me to the conclusion that all the legislature sought to do in amending section 2434 was to confer power to borrow money for additional land for infirmary or children't home purposes; not to confer power to acquire additional land in connection with any other class of county buildings than infirmaries or children's homes, and not to limit the meaning of the phrase, "other necessary buildings" beyond what it meant in the statute as it was phrased before the amendment.

This conclusion is strengthened by the consideration of the fact that the word "or" is repeated both before and after the phrase "county children's home." If it had been intended that the phrase "other necessary buildings" should be co-ordinate, so to speak, with the phrase "county children's home" then, instead of the first "or" it would have been proper to use a comma.

Again, the significance of the word "bridges" must be taken into consideration. Under the original section money might be borrowed for the purpose of erecting a bridge, giving to the amended section the alternative meaning which I have rejected this would limit the present borrowing power of the commissioners to the acquisition of land for bridges which could not have been the legislative intent.

I am, therefore, of the opinion that the phrase, "or other necessary buildings" is co-ordinate with the enumeration of buildings for the erection of which money may be borrowed, viz., "court house," "county offices," "jails," "county infirmaries and "detention homes."

Some meaning must be given to the phrase "other necessary buildings." This term means and includes buildings other than court houses, county offices, jails, county infirmaries or detention homes. The use of the word "other" in such a context is limited, of course, by the application of the rule *ejusden generis*. So that it means things of the kind or class indicated by the preceding enumeration. The only single class of buildings which will include all the enumerated buildings above mentioned is the class of county buildings. That is to say, there is no kind or character of buildings which the county is authorized to acquire and maintain which is indicated by the enumerated buildings.

County buildings, in general, might ordinarily be divided into two classes, viz, those which the county commissioners, as such, are authorized originally to construct and to maintain, and those, the administration and maintenance of which are in the hands of some other county authority. At the time this statute was enacted, the court house and county offices were to be built by and controlled and maintained by the county commissioners; the jail was to be built by the county commissioners and controlled and maintained by the sheriff; the county infirmary was to be built by the county commissioners and controlled and maintained by the infirmary directors; the detention home was to be built by the county commissioners and controlled and maintained by the juvenile court. So that the only attribute which all of these buildings have in common is that they are to be built originally under the supervision of the county commissioners; this is tantamount to saying that they are county buildings as, of course, all county buildings of whatsoever kind are originally constructed through the agency of the county commissioners. The phrase "other necessary buildings" then, means, other necessary county buildings.

Then it must necessarily include a county children's home unless it be inferred that such was not the intention because of the express mention of land for county children's home, and the failure to mention county children's home in the other con-

nection. That such an inference is possible cannot be disputed. The argument here could be stated as follows: The general assembly having the entire subject matter before it saw fit expressly to mention the county children's home in connection with the acquisition of land for its purpose; having expressly mentioned the institution once, it must be assumed that failure to mention it again in another connection is indicative of an intention that it should not be embraced within the general phrase.

Persuasive as such an argument is, I am not disposed to yield my assent to its correctness. The obvious reason for a contrary conclusion is found in the legislative history already outlined. It was the purpose of the legislature in 1911, in amending this section, to add to and not subtract from the powers of the county commissioners, and one of the added powers was the acquisition of additional land for county children's home purposes. It cannot, therefore, be supposed that in adding this power the general assembly intended to subtract from the power, which upon the proper construction of section 2434 in its original form, the commissioners already had to borrow money for the purpose of erecting or acquiring a children's home building as an "other necessary building."

Inasmuch as the phrase "for the purpose of enlarging * * * thereof" must be held to refer to the buildings already mentioned, it follows that it being established that under section 2434 the commissioners have power to borrow money for the purpose of erecting a children's home, they have power also to borrow money for the purpose of enlarging a children's home.

Your first question, therefore must be answered in the affirmative.

Section 2444, of the General Code, mentioned in your second question is as follows:

> "Before the county commissioners purchase lands, or erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate handbills, and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time that such purchase, building, or location is made. They shall hear all petitions for, and remonstrances against such proposed purchase, location or improvement."

The question which you ask, has it seems to me been rather conclusively answered by the supreme court in the case of State ex rel. vs. Auditor, 43 O. S. 311. It is pointed out in the decision that original section 877 Revised Statutes, which has become section 2444 of the General Code, was a part of the act providing the procedure for the erection of court houses, jails and county infirmaries, but that the procedure for the purchase of a site and the erection thereon of a county children's home was in an entirely different and separate act, citing the leading case of Allen vs. Russell, 39 O. S. 336, the court per Okey, J., holds that the true meaning of the otherwise ambiguous codification of 1880 was to be ascertained by reference to the pre-existing law.

Upon this theory the conclusion is reached that what is now section 2444 does not apply to proceedings for the construction of a children's home.

Now, in my opinion, the authority to enlarge a children's home is *referable* to the authority to originally construct the same. This authority is found in section 3078, General Code, and is in the form of general authority for the "purchase of a suitable site and the erection of the necessary buildings."

Section 2434 of itself does not authorize contracts to be entered into; it merely authorizes money to be borrowed. Therefore, it is obvious that the authority to enter into the contracts and actually to make the improvement must be found elsewhere. Inasmuch as the authority to make the improvement is found in the chapter

relating to children's home, as such, and inasmuch as proceedings under that chapter have been held not to be subject to the requirements of section 2444, I am of the opinion that the commissioners, before proceeding to erect an addition to the children's home building, need not comply with the requirements of section 2444.

In this connection I might observe that consideration of the decision of State ex rel. vs. Commissioners, *supra*, might seem to create some doubt to the correctness of my conclusion with respect to your first question. That is to say, the children's home statutes, and in particular, section 3079 thereof, original Revised Statutes, section 929, authorize the borrowing of money in anticipation of the collection of taxes levied or to be levied for the purchase of a suitable site and the erection of necessary buildings. This is a special provision for children's homes, and at first blush it might seem that this special provision must govern to the exclusion of the general provision found in section 2434, so as, in effect, to take children's homes out of the general term "other necessary buildings" as found in the last named section.

On careful consideration, however, I have rejected this view. In the first place it is possibly true that original section 3079 (section 929, R. S., then) constituted the only authority for borrowing money for the purposes therein mentioned. At that time section 2434, General Code, did not contain the language "or other necessary buildings" or (to be more accurate) "any necessary buildings," section 93 O. L., 372, when this phrase was inserted in the section.

I have already given my reasons for holding that the phrase "other necessary buildings" as found in section 2434 cannot be given any reasonable interpretation which will exclude children's home buildings.

Now the borrowing power which may be exerted under section 2434 is essentially different from that which may be exerted under section 3079. The former power is one, the execution of which may precede the making of a levy; the latter power must follow the levy and must be limited to the anticipation of the proceedings in such a levy. The former power is general and continuing. The latter might be a strict construction and be limited to the original establishment of the children's home.

Having regard to all these facts and to the legislative history involved, I am of the opinion that even if it be held that section 3079, General Code, confers continuing power upon county commissioners not exhausted at the time of the original establishment of the children's home (a question which I do not find it necessary to pass upon) the power to borrow money for children's home purposes under section 2434 is cumulative thereof.

Therefore, I re-affirm my already expressed conclusion respecting your first question, and in answer to your second question am of the opinion that the commissioners are not bound by section 2444, General Code, in proceeding to enlarge a county children's home building.

This answer to your second question renders unnecessary an answer to your third question. I might state, however, for your information, that it seems to have been held in Franklin vs. Baird, 7 N. P., 571, that compliance with section 2444, in cases in which it applies, is not a jurisdictional step necessary to the issuance of bonds.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

231.

PROSECUTING ATTORNEY—DUTY TO DEFEND TOWNSHIP OFFICER IN SUIT AGAINST OFFICIAL CAPACITY BUT NOT INDIVIDUAL CAPACITY.

Under section 2917, General Code, which requires a prosecuting attorney to be the legal adviser of township officers, that official is required to defend a justice of the peace or road superintendent in a suit brought against either in their official capacity, but not when such suit was brought against them in their individual capacity. Whether or not a person is sued in official capacity and what effect the refusal of an officer to follow the opinion of his legal adviser should be, must be left to the circumstances of each case.

COLUMBUS, OHIO, April 12, 1913.

HON. WILLIAM C. HUDSON, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Under date of February 11, 1913, you inquire as follows:

> "Is the prosecuting attorney required under section 2917 of the General Code, to defend a township officer (justice of the peace or road superintendent for instance) in a suit for damages for failure to do his duty, or for misconduct in office, especially if the township officer has been advised as to his duties by the prosecutor and neglected or refused to follow his counsel?"

Section 2917, General Code, to which you refer, provides:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section 2412. *He shall be the legal adviser for all township officers, and no such officer may employ other council or attorney except on the order of the township trustees duly entered upon their journal, in which the* compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

By virtue of this section the prosecuting attorney is the legal adviser of all township officers. This statute contemplates that the prosecuting attorney shall advise such township officers in their official capacity and not in their personal or individual capacity. When a prosecuting attorney advises an officer he represents the interests of the public.

Whether or not a prosecuting attorney shall represent an officer of a township in a suit against such township officer must depend upon the particular facts in each case. If the interest of the township, that is the public, is involved in such action it would be the duty of the prosecuting attorney to represent the township in such action, through its proper officer or officers, and to protect its interests. If, however, the action involves only the personal liability of an officer, as for misconduct or negligence in office, the prosecuting attorney would not be required to represent such officer in such action.

The prosecuting attorney is required by section 2917, General Code, to represent the township officers in their official capacity and not in their individual capacity. He is not required to represent an officer who is sued in his personal capacity for damages alleged to have been sustained by an official misconduct of such officer.

The difficulty in answering your question categorically arises from the fact that it is not always easy to tell when one is in reality sued in his official capacity. Let us assume that it should develop that an attorney-general or prosecuting attorney were in error in giving legal advise and that the official who disregarded such legal advice were in reality following the law; in that situation the official is entitled to be defended by the attorney general or the prosecuting attorney as the case may be. A justice of the peace might be right in disregarding official advice. True, it is a dangerous thing for an official to do, but if he is acting in good faith and believes that he is right and is undertaking to act officially, I would give him the benefit of the doubt and defend him. But where an official acts arbitrarily and in disregard of advice of the legal department, and without any reasonable ground for his action, and is sued as an individual, he should be left to employ his own counsel.

No hard and fast rule can be laid down. It is the general duty of an official who is entitled to advise from a prosecutor or from the attorney general to follow that advice, and if he does not so follow that advice there is a presumption arising that he is not acting from good motives. The prosecuting attorney will be pursuing safe grounds if he lets each case stand upon its own foundation and follows his own conscience as to what he should do in the premises.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

238.

TAXES AND TAXATION—LIABILITY OF MUTUAL TELEPHONE COMPANY FOR WILLIS TAX.

The Citizens Telephone Company, of Rutland, Ohio, which is a mutual company organized for service among its own members, who are charged $1.80 per year for running expenses, and which company received the sum of $75.00 during the year for messenger service, should be taxed under the Willis tax law provisions upon its entire gross receipts, to wit: the assessments made against each member and the amount received as extra earnings for messenger service.

COLUMBUS, OHIO, April 23, 1913.

HON. FRED. W. CROW, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 15th, in which you inquire as follows:

> "The Citizens Telephone Company of Rutland, Ohio, has asked me to submit to you the following question for your opinion, to-wit:
>
> "The Citizens Telephone Company of Rutland, Ohio, is a mutual company, organized for service among its own members and not for profit to its members or officers, and the said company assesses each member of said company fifteen cents per month, or $1.80 per year for running expenses, which goes to pay switch tenders and other expenses, including property tax of said company. The said company also charges a message fee of ten cents to parties not members of said company, and the said company reported $75.00 as receipts from this source to the Ohio tax commission, and the said Ohio tax commission did not levy one and two-tenths per cent. excise tax on the said receipts amounting to $75.00, but instead thereof did levy the excise tax on $3,900.00 (being the $1.80 per year heretofore referred to, paid by each of the said company's 2,167 members) which made a tax of $46.80.

"The Citizens Telephone Company of Rutland, Ohio, desires to know whether or not the Ohio tax commission erred in levying excise tax of one and two-tenths per cent. on said $3,900.00, instead of the said $75.00, being the true receipts as said company maintains."

The opinion asked for in your letter is covered by statute and is found in the so-called tax commission act of 1911, passed May 31, 1911, and contained in 102 O. L., pages 224-260, inclusive.

Section 5474, of the General Code, provides that all public utilities shall make a statement which shall contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within the state for the year next preceding the first day of May.

Section 5475 provides that the tax commission of Ohio shall, on the first Monday of September, ascertain and determine the entire gross receipts of each telephone company for business done within this state, for the year ending on the 30th day of June, excluding therefrom, only receipts derived wholly from interstate business or business done for the federal government.

Section 5476 provides that the amount so ascertained by the tax commission of Ohio shall be the gross receipts of such telephone company for business done within this state for such year.

Section 5481 provides that on the first Monday of October, the commission shall certify to the auditor of state, the amount of the gross receipts so determined, for the year covered by its annual report to the tax commission of Ohio.

Section 5483 provides that in the month of October, annually, the auditor of state shall charge, for collection from each telephone company, a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the tax commission of Ohio as the gross receipts of such company on its intrastate business for the year covered by its annual report to the tax commission, by taking one and two-tenths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case.

The gross receipts of a corporation are the entire receipts from any source received by a said corporation for the year, and as the dictionary defines the word "gross" as whole; entire; total; and specifically, without deduction; it is clear that the amount paid by the mutual subscribers of the Citizens Telephone Company of Rutland, Ohio, to-wit the sum of $1.80 per year from each subscriber, should be included in the report of the company to the tax commission.

In your letter you state that the tax commission levied upon the amount so received from the members, to-wit, the sum of $3,900.00, but did not levy on the receipts of the company, amounting to $75.00, and ask whether or not the Ohio tax commission erred in levying excise tax on said $3,900.00,instead of the said $75.00, being the true receipts as said company maintains.

I am of the opinion that the tax commision did not err in levying excise tax on said sum of $3,900.00, but it did err in failing to charge an excise tax on the said sum of $75.00, for the total levy should have been on the sum of $3,975.00, which, according to the company's report, is the gross receipts of said telephone company for the year.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

239.

ROADS AND HIGHWAYS—METHOD OF MAKING CONTRACTS FOR MATERIALS AND LABOR FOR IMPROVEMENT OF ROADS UNDER SECTION 7033, GENERAL CODE, AND FOLLOWING.

Under section 7047, General Code, contracts for materials and labor in the improvement of roads under sections 7033, General Code, and following, must be made by sections and in like manner as provided by law for other township improvements, and therefore, part of the labor and materials necessary to such improvement may not be furnished by the trustees by force account under their own supervision without the letting of contracts.

COLUMBUS, OHIO, April 22, 1913.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 1st as follows:

> "From several sources the question has come to me in my short term as prosecuting attorney of Huron county, whether funds of a road district, erected under sections 7033 to 7052, General Code, raised by the sale of bonds of such district, can be used by the township trustees in improving the roads of such district by force account under their own supervision, and not by letting contract. And whether contract can be let for part of the labor and material on such improvement and part of the labor and materials furnished by the trustees, paying therefor from such funds."

Section 7047, General Code, provides:

> "The contracts for furnishing the materials and performing the labor in and about such improvement shall be made by such sections and in like manner as provided by law for other township improvements."

In view of the foregoing provisions of statute, which are so plain as to admit of no doubt, I am of the opinion that township trustees may not legally expend, in whole or in part, money derived from the sale of bonds, under the subdivision of the code embraced within sections 7033 to 7052, inclusive, otherwise than upon contract.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

240.

CONSTITUTIONAL AMENDMENT—PROVISION FOR COMMENT UPON FAILURE OF ACCUSED TO TAKE THE STAND IS SELF EXECUTING.

Under Proposal No. 41, of the constitutional amendments, article 1, section 10, which provides for comment upon the failure of the accused to take the stand, and the consideration of that fact by the court and jury, took effect on January 1, 1913. This amendment is self executing. As to pending cases, however, the former method of procedure is preserved by the language of Proposal No. 41.

COLUMBUS, OHIO, April 29, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of April 24th you call my attention to that part of article I, section 10 of the constitution as recently adopted, which states as follows:

> "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel,"

and request my opinion as to the effect thereof as such provision now stands. In other words, as to whether such provision requires remedial legislation, or was self-executing when the amendment was passed.

Proposal No. 41, which was carried at the election on September 3, 1912, provides as follows:

> "The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in force, not inconsistent therewith shall continue in force until amended or repealed; provided that all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law. Any provision of the amendments passed and submitted by this convention and adopted by the electors, inconsistent with, or in conflict with, any provision of the present constitution shall be held to prevail."

There was no provision in proposal No. 3 in reference to the amendment of article I, section 10 as to when such amendment would go into effect. Therefore, since it was not specifically provided by the schedule attached to proposal No. 3 as to when the same would go into effect such amendment went into effect on the first day of January, 1913.

As I view such amendment it is self-executing when the same went into effect and does not require any further legislation in order to carry it into effect. However, proposal No. 41 provides further that "all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law."

While I am of the opinion that the provision of the constitution permitting the prosecutor to comment upon the fact that the accused does not take the stand is self-executing, yet in view of the provisions of proposal No. 41 such right would not apply to any prosecutions which were pending on the first day of January, 1913.

I am informed that the common pleas court of Franklin county in a criminal case, the indictment for which had been returned subsequent to January 1, 1913, has taken the same view as I have herein expressed.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

243.

THREE-FOURTHS JURY RULE—WHEN ACT BECOMES EFFECTIVE—PENDING CASES NOT EFFECTED.

The amendment to section 11455, General Code, having been filed in the office of the secretary of state, February 13, 1913, the same will not be effective until ninety days thereafter, in accordance with article 2, section 1-c, of the constitution.

Under section 26, General Code, which provides that the repeal or the amendment of a statute shall not affect pending proceedings even when such statute pertains to the remedy and it is not so expressly provided, the three-fourths jury rule, does not maintain as to cases pending when said amendment became effective.

COLUMBUS, OHIO, April 29, 1913.

HON. T. M. POTTER, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Under date of April 25th, you inquire whether senate bill No. 8, amending sections 11455, 11456 and 11457 of the General Code, relative to verdicts in the court of common pleas will apply:

> "*First:* To cases pending at the time the bill was passed.
> "*Second:* To cases filed after the enactment and before the coming into effect of the statute. In other words, before the expiration of the ninety day period required by the constitution."

Section 11455, General Code, provides in part:

> "In all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number."

Said bill was passed on February 6, 1913, approved February 12, 1913, and filed in the office of the secretary of state February 13, 1913.

Section 1-c of article II of the constitution, as amended, provides in part as follows:

> "No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided."

It is to be noted that there is no emergency clause to be found in senate bill No. 8. Therefore, under the provision above quoted said law will not go into effect until ninety days after February 13, 1913.

The law not going into effect until ninety days after February 13, 1913, the question then arises as to whether or not as to cases which are tried after the law so goes into effect will be tried under such senate bill No. 8.

Section 26, General Code, provides as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Such section provides that when an amendment relates to the remedy it shall not affect pending actions unless so expressed. The question, therefore, arises, whether or not the three-fourths jury law relates to the remedy. If it does, then since there is no statement in the bill that it shall affect pending actions, prosecutions or proceedings, it would not so affect actions, prosecutions or proceedings as were pending at the time the law goes into effect.

Prior to the codification of 1880, what is now section 26 of the General Code, and known as section 79, revised statutes, was found in the form as enacted in 63 Ohio Laws, 22, section 2, which reads as follows:

"That whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal; nor causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Based on the statute as it existed as last foregoing set forth the case of Warner vs. Railroad Company, 31 O. S., 265, was decided, the first syllabus of said case reading as follows:

"Where a jury of twelve men was selected and summoned for the trial of a cause before a justice of the peace, under the act of March 30, 1875 (72 Ohio Laws, 159), and before the day set for trial this act was repealed by another (73 Ohio Laws, 14), which provided for a jury of six men for such trials: HELD, That the act in force at the time of the trial governed, and that the justice erred in submitting the cause to a jury of twelve men."

On page 268 Gilmore, J., states as follows:

"It is contended by counsel for plaintiff that the act of February 19, 1866 (S. & S. 1), saved the right of the plaintiff to a trial by a jury of twelve men in this case. The act saves pending actions, prosecutions or proceedings in civil and criminal cases, and *also saves the causes of such actions, prosecutions, or proceedings.* It was intended to preserve *existing* rights, and its provisions do not rebate to the remedies by which such rights may be asserted or obtained. Remedies always have been subject to legislative control, except to the extent which the constitution has limited such control. As has been shown, jury trials before justices of the peace are subject to legislative control. They are simply one of the means by which justice is administered in those courts. They are remedial in their nature, for they may be given or taken away, at the pleasure of the legislature; and while there exists a right to appeal from the judgment of a justice of the peace, to a tribunal, in which a trial by jury of twelve men can be had, no constitutional or legal right is violated by changing the number of men that shall constitute a legal jury for the trial of a cause before a justice.

"In this case, at the time of the trial, the justice had no legal authority to impanel a jury of twelve men, and therefore erred in overruling the motion of the defendant to set aside the jury of that number."

It is to be noted from the above citation that the supreme court distinctly recognized that jury trials were subject to legislative control, and simply one of the means by which justice is administered, and that they are *remedial in their nature.*

In the case of State vs. Caldwell, 50 La. Ann. 166, 41 L. R. A. 718, the court adopts with approval the language of the trial judge, wherein said judge referring to article 116 of the constitution of 1898 required only nine of a jury to find a verdict in a case not capital, states that "It is a mere change in the *remedy,* or mode of procedure, which does not deprive the defendants of any right." In other words, said court distinctly recognizes that a change in the law in reference to the number of the jury necessary to return a verdict was simply a change in the remedy.

Bouvier's law dictionary defines "remedy" as "the means employed to enforce a right or redress an injury." This definition has been endorsed by the supreme court of this state in the case of the Missionary Society of the M. E. Church vs. Ely et al., 56 O. S., 405.

Subsequent to the decision in the case of Warren vs. Railroad Company, *supra,* and at the time of the codification of the statutes of Ohio in 1880, the statute was amended so as to read as follows:

"Whenever a statute is repealed or amended, such repeal or amendment, shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, *it shall not affect pending actions, prosecutions, or proceedings,* unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution or proceedings, existing all the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The statute as above given is identical with present section 26 of the General Code. There having been inserted therein the provision that an amendment relating to the remedy shall not affect pending actions, unless so expressed, and the supreme court in the case of Warren vs. Railroad Co., *supra,* having held that jury trials were *remedial* in their nature, I am of the opinion that there being no provision in senate bill No. 8 applying the provisions thereof to pending actions, prosecutions or proceedings, the said act will not apply to any action, prosecution or proceeding pending at the time the law goes into effect.

Therefore, such act will not apply:

First: To cases pending at the time the bill was passed, nor,

Second: To cases filed after the enactment and before the coming into effect of the statute."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

245.

ROADS AND HIGHWAYS—NO POWER TO IMPROVE TOWNSHIP ROAD WHEN QUESTION IS DEFEATED AT ELECTION.

When under section 6976, General Code, the trustees of a township have submitted to the electors therein, the question of improving a township road and the electors have voted against such improvement, there is no power in the trustees to issue bonds for such improvement under related statutes.

COLUMBUS, OHIO, May 8, 1913.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your letter of February 4th, wherein you state:

"For the benefit of the trustees of Camden township, I desire your construction of section 7004-5-6 of the General Code, the facts are as follows:

"The trustees are desirous of improving a certain township road within Camden township, which matter was submitted to the vote of the people at the last general election, and defeated, and the question now is, can the trustees under these sections issue the bonds of the township for the purpose of macadamizing the road?

"If in your opinion the trustees have not the authority under said sections to issue township bonds, is there any statute under which money can be secured without submitting it to public vote?"

Sections 7004, 7005 and 7006 of the General Code, provide as follows:

"Section 7004. For the purpose of providing the money necessary to meet the expenses of improving such roads and streets the trustees of a township, if advisable in their opinion, may issue the bonds of the township, payable at such times as they determine not exceeding thirty years, in the sum of five hundred dollars each, bearing interest at a rate not to exceed five per cent per annum payable semi-annually."

"Section 7005. Such bonds shall not be sold for less than their par value, and accrued interest, and the aggregate amount of the bonds of a township, at one time outstanding, shall not exceed one hundred thousand dollars. The sale of such bonds shall be advertised for at least thirty days, and they shall be sold to the highest bidder at the office of the trustees of such township.

"Section 7006. When the trustees of such township have determined to improve a road, as herein provided, in order to provide for the payment of such improvement and to provide a fund for the redemption of bonds issued by them under the provisions of the next preceding sections, with interest thereon, in addition to the other road taxes authorized by law, they shall levy annually upon each dollar of valuation of all taxable property of such township an amount not exceeding six mills upon each dollar of such valuation, and shall continue such levy from year to year until the roads and streets, by said commissioners designated for improvement, have been improved, as herein provided, and the bonds issued for that purpose, with interest thereon, have been paid."

These sections are part of the subdivision of the chapter relating to township roads, the title of which subdivision is "Roads Partly Within a Municipality."

Section 6976, General Code, provides:

> "The trustees of a township, when the petition of one hundred or more of the taxpayers of such township is presented to them, praying for the improvement of the public roads within such township and including a road running into or through a village or city, shall submit the question of the improvement of said roads to the qualified electors of the township at the next general election or at a special election, held after the presentation of such petition."

It will be observed that before the trustees can acquire jurisdiction to improve roads under this subdivision, a petition signed by at least one hundred taxpayers of the township must be presented to them praying for the improvement. After this is done the trustees must submit the question of the policy of making the improvement of such roads to the qualified electors of the township at the next general election or at a special election held after presentation of such petition.

Sections 6977, 6978, 6979 and 6980 of the General Code, prescribe the form of ballot to be used at the election and the manner of giving notice thereof, and provide for the appointment of judges and clerks to conduct the same, and as these sections are not necessary to a determination of your questions I forebear to quote them.

Section 6981 of the General Code is in part as follows:

> "At such election if a majority of the votes cast are against the policy of improving the roads by general taxation, the township trustees shall not assess taxes for that purpose; * * *"

The last quoted provision leaves no room for doubt that when the question of the improvement of township roads under these statutes has been legally submitted by the township trustees to the electors of the township, and a majority of the votes cast at the election are against the proposition, the roads cannot be improved by general taxation.

The power of township trustees under these statutes to issue bonds to pay for road improvements, and to levy taxes to meet the obligation created by the issuance of the bonds, is dependent upon the authority given the trustees by virtue of a favorable vote of a majority of the qualified electors of the township, and cannot be exercised otherwise.

You state that the question of the improvement of a certain road in one of the townships of your county was submitted to the electors of the township and defeated. Under this state of facts, I am of the opinion that the township trustees cannot now issue bonds under sections 7004, 7005 and 7006 for the purpose of macadamizing said road.

Your last question was considered and answered in an opinion of this department to Hon. Lewis P. Metzger, under date of July 20th, 1912, a copy of which opinion is herewith enclosed.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

248.

INITIATIVE AND REFERENDUM HAS NO APPLICATION TO BILL WHICH HAS NOT BECOME A LAW.

Since the Potting bill relating to local option election in counties has not passed the senate nor reached the house, and consequently did not become a law, and since section 3, article 2, of the constitution, provides for a referendum solely on laws, such a bill is not included within the initiative and referendum provisions.

COLUMBUS, OHIO, May 9, 1913.

HON. D. F. DUNLAVY, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 30th, wherein you state that you are anxious to inquire whether a referendum can be had on the Potting liquor law.

Upon an examination of the senate journal of Monday, April 28, 1913, which date was the last day on which the senate sat prior to adjournment, I find that Mr. Potting introduced senate bill No. 299, being:

> "A bill to amend section 6116 of the General Code, relating to local option elections in counties and to give independent effect to the vote of municipal corporations at such elections."

It further appears that on motion of Mr. Potting the constitutional rule requiring bills to be fully and distinctly read on three different days was dispensed with and such bill was read the second time and referred to the committee on temperance; that was the last action taken by the last legislature in reference to such bill.

Section 1-c of article II of the constitution as amended provides for the exercise of the power reserved by the people designated as the referendum, and provides for the signature of six per centum of the electors upon petition to order the submission to such electors for their approval or rejection "of any *law*, section of any *law*, or any item in any *law* appropriating money passed by the general assembly." It further provides that no law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as otherwise provided. It further provides that when a petition signed by six per centum of the electors of the state is filed with the secretary of state "within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering such law, section of law or any item in such law appropriating money to be submitted to the electors for their approval or rejection," the secretary of state shall so submit the same at the next regular or general election and "no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same."

It will be observed by an examination of house bill 299 that the same is not a bill which was initiated by the people, but was a bill introduced by a member of the legislature, consequently the question of initiative petition is not in question here.

Section 16 of article II provides that "Every bill passed by the general assembly shall, *before it becomes a law*, be presented to the governor for his approval."

Senate bill No. 299 was simply introduced in the senate and read a second time and referred to the committee on temperance. The bill got no further along in its passage. It was not passed by the senate nor did it at any time reach the house. Consequently, it did not become a *law*, and since section 1-c of article II provides for referendum solely on laws, no referendum could be had on senate bill No. 299 introduced by Mr. Potting.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

250.

DUTIES OF PROSECUTING ATTORNEY AS TO SUITS BEFORE JUSTICES OF THE PEACE FOR COLLECTION OF TAXES.

Under section 2917, General Code, which requires the prosecuting attorney to prosecute and defend all suits and actions which any county officer or board may direct or to which it is a party, that officer may be directed by the county treasurer to institute suits before justices of the peace for collection of delinquent taxes.

The remedy of distraint for taxes given to the county treasurer, under section 2658, General Code, however, is by far the most effective and all such means should be exhausted by the county treasurer before calling upon the prosecuting attorney to conduct litigation. It is within the power of the prosecuting attorney to mandamus the county treasurer and thereby compel him to do his duty, under section 2658, General Code.

COLUMBUS, OHIO, February 17, 1913.

HON. T. J. KRAMER, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I have your letter of January 7, 1913, in which you state that the treasurer and county commissioners are continually asking you to bring suits before justices of the peace for collection of taxes, and asking my opinion as to your duty in the premises.

The general duties of the prosecuting attorney are prescribed by section 2916, of the General Code, as follows:

> "The prosecuting attorney shall have power to inquire into the commission of crimes within the county and shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, common pleas court and circuit court. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and faithfully urge the collection until it is affected (effected) or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county, which come into his possession as fines, forfeitures, costs or otherwise."

This does not include the matter about which you inquire, but section 2917, General Code, would seem to do so, and provides as follows:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. *He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party,* and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

You will observe that while section 5696, as follows, to wit:

> "The commissioners, at each September session, shall cause the list of persons delinquent in the payment on personal property to be publicly read. If they deem it necessary, they may authorize the treasurer to employ collectors to collect such taxes or part thereof, prescribing the compensation of such collectors which shall be paid out of the county treasury. All such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes;"

yet, nevertheless the latter section is a very old one. It was originally enacted in the year 1866, see year book 63, page 43; while section 2917, which authorizes the prosecuting attorney to prosecute and defend all suits and actions which any such officer or board may direct, or to which it is a party, was first enacted in the year 1906 (See year book 98, page 160), section 2917, you will notice, was section 1274 of the Revised Statutes. It is not necessary to pass on this question as to whether or not section 5696 was impliedly repealed for the reason that section 2917 gives the treasurer the power to request the prosecuting attorney to bring the suits in question. However, the treasurer ought not except for the most valid reasons call upon the prosecuting attorney to bring suits before justices of the peace. Recently, Hon. Edward C. Turner, prosecuting attorney of Franklin county, compelled the county treasurer, by proceeding in mandamus, to do his duty under the distress proceedings.

Section 2658, of the General Code, provides as follows:

> "When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall not be less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and costs."

No remedy is more effective than that provided in section 2658, of the General Code, and in my judgment it is one that should be vigorously pursued. Mr. Turner advises me that the results here after the court issued the order of mandamus on the treasurer upon his application were most efficacious, and joins me in the proposition that the treasurer should not except in extreme cases, call upon the prosecutor under section 2917. It is the duty of the treasurer to exhaust all appropriate remedies before making it necessary to litigate. There is a growing tendency on the part of many officers to cast upon the legal department duties that can ordinarily be discharged by the officer himself. If in your judgment your county treasurer is not vigorous in making use of the power given in section 2658, you have the remedy of mandamus at hand. I hope after you confer with him he will see his way clear to proceed, and thus recover promptly into the county treasury moneys which there now belong.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

257.

TAXES AND TAXATION—TAXES DUE AND UNPAID NOT A DEBT TO BE DEDUCTED FROM CREDITS.

Inasmuch as a tax operates invitum and is not an obligation created by the voluntary act of the obligor, arising out of contract by him entered into, it may not be considered a debt so as to be deducible from credits, under section 5327, General Code.

COLUMBUS, OHIO, April 23, 1913.

HON. JAMES A. TOBIN, *Prosecuting Attorney, Fairfield County, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 15th, requesting my opinion upon the following question:

> "Under section 5327, General Code, can taxes due and unpaid be considered a 'Debt' and be legally deducted from 'Credits'? "

The statute, the construction of which is involved in the consideration of this question, is section 5327 of the General Code, which provides, in part, as follows:

> "The term 'credits' * * * means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services * * * including deposits * * * other than such as are held to be money, * * * when added together, * * * over and above the sum of *legal bona fide debts owing* by such person. In making up the sum of such debts owing, there shall not be taken into account an obligation to a mutual insurance company, or an unpaid subscription to the capital stock of a joint stock company, nor a subscription for a religious, scientific, literary or charitable purpose; nor an acknowledgment of indebtedness, unless founded on some consideration actually received, * * * nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor a greater amount or portion of a liability as surety, than the person * * * believes that such surety is in equity bound * * * to * * * contribute * * *."

Your question doubtless arises from the fact that at tax listing time, viz.: the day preceding the second Monday in April, each taxpayer will naturally have charged against him for collection on the duplicate of the county the taxes for the second half of the previous year, or the current year (depending upon the sense in which the word "year" is used). This is, of course, not necessarily the case, as every taxpayer has the right to pay the entire amount of taxes charged against him in any year at any time prior to the 20th of December of that year, and after the duplicate is in the hands of the treasurer for collection. Customarily, however, the situation as I have described it exists. Of course, it is conceivable that a taxpayer making a return in April of any year may have charged against him in addition to the last half of taxes charged in the previous year, delinquent taxes for other years, which he has not yet paid.

The face of section 5327, above quoted, does not furnish an answer to the question because there is no complete definition of the word "debt." It is true that certain express exceptions from what might otherwise be the meaning of this word are made by the section. All these are apparent on the face of the quotation which I have made. However, all of these excepted obligations are of one kind, viz., obligations created by the voluntary act of the obligor, and arising out of a contract by him entered into.

None of the excepted claims are similar to claims of the state for taxes, which is a claim arising not by virtue of the voluntary act of the taxpayer and not owing its origin to an express or even an implied contract by him entered into.

It might be argued that the phrase "all legal claims and demands" as used in connection with the term "credits" might with propriety be employed for the purpose of defining the term "debts," which is not expressly so defined. That is to say, there might be force in an argument to the effect that inasmuch as credits consist of the sum of all legal claims and demands, deducting debts, the things deducted should be of the same kind as the things from which they are deducted. Whether or not this supposed principle is valid, the solution of your question is not greatly aided by its application as the phrase "all legal claims and demands" still lacks an accurate definition.

The question which you ask, then, is one which must depend for solution upon judicial interpretation. You refer to the case of Peter vs. Parkinson, Treasurer, 83 O. S., 36. This case involved the right of the county commissioners to compromise a claim for delinquent personal taxes, and the conclusion of the court was that the right did not exist because the claim for taxes was not a "debt due to the county" within the meaning of section 2416 of the General Code. In reaching this conclusion the court placed stress upon the nature of a tax as such rather than upon the consideration that the taxes are not primarily due to the county, which consideration was mentioned merely as an additional reason for the conclusion reached (see page 49). On page 47 of the Opinion, per Crew, J., is found a discussion of the nature of a tax. The following is quoted therefrom:

> "In City of Camden vs. Allen, 2 Dutcher's Reports (New Jersey), 398, Chief Justice Green says: 'A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded upon contract or agreement. It operates *in invitum*. Pierce vs. City of Boston, 3 Metc., 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon contract express or implied.'"

The court also cites upon this principle Perry vs. Washburn, 20 Cal., 318, Shaw vs. Peckett, of Boston, (3 Met. ,520) and Shaw vs. Peckett, (26 Vt., 482), Lane County vs. Oregon, 7 Wall., 71; Meriwether vs. Garret, 102 U. S., 472; City of Augusta vs. North, 57 Maine, 392; and 1 Cooley on Taxation (3 ed.) page 17.

These authorities all sustain the principle upon which they are cited, but none of them, including the principal case of Peter vs. Parkinson, are exactly in point, as none of them concern the deduction of "debt" from other taxable things.

This line of decisions, however, of which the above cited cases are leaders, was cited in the case of Bailies vs. Des Moines, 127 Iowa, 124, which is a case exactly in point. The statutes of the state of Iowa permit the deduction of debts from money as well as from credits, the phrase being, that the person required to list may deduct from the amounts of moneys and credits "all debts in good faith owing by him." The sequence of dates respecting the period of assessment and collection in that state is similar to that in this state, so that the question arose naturally in Iowa just as it has evidently arisen, or is about to arise, in your county. The attorney general of Ohio has given an opinion similar to that which you say has been given by a prominent attorney of your city, and it seems that the practice in Iowa has been, as it may have been in Ohio, to regard unpaid taxes as debts for the purpose of deduction. The court held, however, upon the line of authorities already cited, that within the meaning of the Iowa statute the term "debt" did not include unpaid taxes, but imported obligations arising out of contracts express or implied. I can see no distinction between the phraseology of the Iowa and the Ohio statutes in this particular. If any distinction could be said to arise it would be by virtue of the enumeration of the things in

the Ohio statute which are not to be included within the meaning of the term in its primary significance. As already pointed out, however, all these enumerated things are obligations which arise out of express or implied contracts. So that this enumeration cannot be relied upon to enlarge the meaning of the term "all legal bona fide debts owing" beyond what it would be held to mean under the authorities cited.

I am of the opinion that the reasoning of the Iowa supreme court is sound and that it is proper to apply the line of authorities cited in Peter vs. Parkinson and in the Iowa case as well, to the solution of the present question.

It is my conclusion, therefore, that unpaid taxes, either real or personal, may not be deducted from the sum of claims amd demands owing to a person required to list property for taxation for the purpose of ascertaining the amount of his taxable "credits."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

262.

BUILDING COMMISSION, COURT HOUSE—POWERS AND PROCEDURE OF MAKING EXTRA ALLOWANCE TO ARCHITECT.

Since the contract providing for the employment of an architect in the building of the court house at Ottawa, Ohio, provided five per cent. as the entire fee and fixed time of employment as correspondent with the time set forth in the various contracts with contractors, and since no provision for extra allowance was made, in accordance with section 2341, General Code, in writing, and by a vote of five members of the commission, the fact that the main contract for construction was delayed, will not entitle such architect to fees in excess of said five per cent.

COLUMBUS, OHIO, May 3, 1913.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—On December 31, 1912, Honorable J. W. Smith, then prosecuting attorney of your county, requested my views as to the claims of Frank L. Packard, architect, against the court house building commission of your county for extra allowance for premium bonds, services and expenses, after August 1, 1911, as architect and superintendent of construction of the court house in your county.

Mr. Packard entered into a written contract with said building commission December 16, 1909, in which his powers and duties are fully, and with the exception hereinafter referred to, clearly set forth. He was to prepare contracts, plans, specifications, details, and the like and superintend construction for which he was to receive five per cent. on the aggregate cost of construction, to be paid one-half (two and one-half per cent.) when the contracts were let and the balance as the work progressed. Twice in said contract the words "entire fee" having reference to said five per cent. are used.

The matter of time of employment is cared for as follows: "The length of time covered by the architect's services in supervision shall correspond with the time set forth in the contracts between said building commission and the various contractors as prepared by the architect for the completion of the work and approved by said building commission."

The principal contract for construction was made with R. A. Evans & Company, was dated May 19, 1910, and contained the following provisions: "This contract

shall be fully completed on or before August 1, 1911, or pay or cause to be paid to said owner the sum of fifteen dollars per day for each and every day said work shall remain uncompleted, for and as liquidated damages."

The contract was not completed on August 1, 1911, nor until December 12, 1912, and the claims of Mr. Packard all accrue since said date and on account of such failure to complete. No new or additional contract was made with Mr. Packard, but the continued to fulfill his duties until the building was finished.

Section 2339, General Code, authorizes the employment of architects and reads:

> "The commission may employ architects, superintendents and other necessary employes during such construction and fix their compensation and bond."

The building commission, under favor of this section, entered into the contract of December 16, 1909, with Mr. Packard, and having done so, and his plans, specifications, etc., having been adopted and contracts made in pursuance thereto, were the powers of the building commission ended in so far as employment of architects were concerned? If they were not, and the contract of December 16, 1909, is to be construed as expiring by limitation in accordance with its own terms on August 1, 1911, did the failure of the contractors to complete the building by that time furnish an exigency calling for further action by the building commission, and authorize a second or additional contract with an architect?

At this point we are confronted with section 2341, General Code, which reads

> "Resolutions for the adoption or alteration of plans or specifications, or award or contracts, hiring of architects, superintendent or other employes and the fixing of their compensation, the approval of bonds, and the allowance of estimates shall be in writing and require for their adoption the votes of five members of the commission, taken by yeas and nays recorded on the journal of the county commissioners. When signed by five members of the commission the county auditor shall draw his warrant on the county treasurer for the payment of all bills and estimates of such commission."

The serious question arises when we attempt to determine whether there is power to make a second contract with an architect; that the contract with Packard was intended to cover the entire construction for an entire fee of five per cent. cannot be disputed.

However, Mr. Packard's claim must rest and can only rest upon the fact that his contract terminated with the time at which under their contracts the contractors should have completed the building. Such being his contention, it does not lie in his mouth to say either that this contract was not ended at that time, or that there was no power under section 2339 to make a new contract.

Sections 2339 to 2343, General Code, in line with other provisions of our laws, provide a means for changes in plans, specifications, bills of material and the like, and establish the manner in which it may be done.

The language, "Resolutions for the adoption or alteration of plans or specifications * * * *hiring of architects* * * * allowance of estimates shall be in writing and require for their adoption the votes of five members of the commission taken by yeas and nays recorded on the journal of the commissioners. When signed by five members of the commission the county auditor shall draw his warrant, etc.," may not require a contract with an architect to be in writing but it does require the resolution of hiring to be in writing, entered on the journal of the commissioners and signed by five members of the commission, before a warrant may issue.

These sections prescribe the manner of hiring architects, and to my mind are exclusive. Such being the construction, no implied contract can be enforced by an architect, nor recovery be had or allowance made on a quantum meruit.

I am of the opinion that in the absence of a showing of re-employment, Mr. Packard has no claim for extra time after August 1, 1911, nor expense of any character, and if one is presented the question is burdened with grave doubts, and almost insurmountable obstacles, the principle of which is that to construe Mr. Packard's contract as having a time limit the same as the contractors, and to hold that it is of the essence thereof, and recognize his right and duty under his employment to prepare all contracts for construction, vests in him the power to shorten the contractors' time limit and thus furnish an opportunity for a renewal of his own contract; in other words gives him an opportunity to squeeze the contractors as to time limit on construction and reap advantage to himself by securing a new or additional contract for supervision.

Besides to give Mr. Packard's contract the construction its language demands, he gets five per cent. on aggregate cost, and this is referred to as "the entire fee" and "said entire fee," the use of which language is abhorrent, as it seems to me to a conclusion that the time limit fixed in the Packard contract was of its essence, and he is entitled to no more than five per cent.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

269.

CONTRACTS—EXTRA ALLOWANCE FOR ALTERATIONS MADE BY CONTRACTOR IN ACCORDANCE WITH VERBAL DIRECTION OF ARCHITECT WITHOUT WRITTEN AGREEMENT NOT PERMITTED.

Under section 2340, General Code, changes in contracts made by the building commission may not be made without written agreement between the commission and the contractor, and under section 2341, General Code, resolution of such changes must be in writing and receive the yeas and nays of five members of the commission.

When changes are made, therefore, without such precaution and solely in accordanc with the verbal direction of the architect no allowance may be made.

COLUMBUS, OHIO, May 10, 1913.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of February 21, 1913, before me, in which you say:

"On the 24th day of December, 1912, you rendered an opinion to J. W. Smith, then prosecuting attorney of Putnam county, Ohio, upon the following questions submitted to you by him, to wit:

1. "This county has just completed the building of a court house under the provisions of section 2333 et seq. of the General Code. Can a claim by the contractor for extras be enforced against the county where such changes or additions were made without any agreement in writing between the commission and the contractor as provided for in section 2340 of the General Code?

2. "If the claim cannot be enforced against the county would the commission be authorized in its discretion to allow such extras if they considered that such changes were necessary and that the county had received full value for such changes or extras?

"The questions submitted to you by Mr. Smith involve only the construction of section 2340 of the General Code of Ohio, and especially the following language contained in said section, to wit: 'No such change shall be made until the price to be paid therefor shall have been agreed upon in writing between the commission and the contractor.'

"The contention between the building commission of Putnam county, Ohio, and the contractor, Robert H. Evans & Company, of Columbus, Ohio, arose under the following conditions, to wit:

"On the 19th day of May, 1910, the building commission of Putnam county, Ohio, entered into a contract with Robert H. Evans & Company for the construction of a court house, authorized under section 2333 et seq., General Code of Ohio. The original plans and estimate were adopted by the commission, and the architect duly employed, and the said contractor entered upon the construction of said building and his bid therefor in pursuance of the original plans, specifications and estimate as submitted by the architect. It appears that when the construction of the building had reached the stage of putting on the roof, it was found by the contractor and the architect that the plans as originally made and the details therefor were faulty in this, to wit: that the support of the roof, as shown on page 14 in the upper right hand corner in the original plans, would not be sufficient to carry the weight of the roof, and the architect thereupon made new details for said cornice and submitted the same to the contractor, showing the change to be made in the construction of this part of the building. The new details as submitted by the architect to the contractor are herewith enclosed.

"There was no contract or agreement in writing between the commission and the contractor fixing the price of material and labor necessitated by the change in the original plans. The only authority to the contractor for making such change being given verbally by the architect at the time he submitted to the contractor the amended details for this particular part of the building which is enclosed.

"Under the circumstances in this case, would the architect have the authority to instruct the contractor to make this change in the original plans, under section 2338 of the General Code, and article 3 of the contract?"

Article III of the contract provides as follows, to wit:

"No alterations shall be made in the work except upon written order of the architect; the amount to be paid by the owner, or allowed by the contractor, by virtue of such alterations to be stated in said order. Should the owner and contractor not agree as to the amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in article XII of this contract."

My opinion of December 24, 1912, referred to by you on the questions submitted was as follows:

"Attention is called to the sentence 'no such change shall be made until the price to be paid therefor shall have been agreed upon in writing between the commission and the contractor.' Inasmuch as a 'change' may not be made until a written agreement as above provided is entered into, it necessarily follows that payment cannot be made for a change in the plans or contract not so entered into.

"I am further of the opinion that the commission is not authorized to make payment of claims which cannot be enforced against the county."

To this opinion I still adhere, and shall endeavor to cover the additional facts, questions and law applicable thereto as set forth in your above quoted communication.

I have before me the contract of Evans & Company with the court house building commission of your county. It appears from the facts stated in your letter that the architect made certain changes in the details of the original plans and submitted them to the contractor. *He then gave verbal authority and instructions to the contractor to make the changes for which extra compensation is sought.* The building commission, including the county commissioners, was not party to these changes, no record thereof was made, and no memorandum or additional contract in writing was entered into relative thereto. No prices for these changes were fixed by architect, contractor or any one else, and if any allowance is to be made therefor, the same must be based upon the state of facts above recited, as a *quantum meruit.* Can any allowance be made, in view of the facts and the law as applied thereto? In my opinion it can not be done.

County commissioners and the four freehold electors appointed by the court, under section 2333, General Code, constitute the building commission and serve until the completion of the building. Their powers and duties cannot be delegated. The duties and powers of this commission are all statutory, and no money can be paid out of the county treasury even with their sanction and approbation unless the preliminary statutory steps leading up to such disbursement have been complied with literally. Such board has no implied powers, and he who deals with them is chargeable with a knowledge of what the law is relative to contracts, alterations thereof or extras thereunder. The matter, then, resolves itself into a simple proposition as to what the statute says concerning the course to be pursued in a case covered by the facts submitted herein.

Section 2340, General Code, says:

"When approved by the building commission, plans, drawings, representations, bills of material, specifications of work and estimates of cost thereof shall be filed by the county auditor in his office and shall not be altered unless such alteration shall first be drawn, specified and estimated as required by law for the original plans and approved by the building commission. *No such change shall be made until the price to be paid therefor shall have been agreed upon in writing between the commission and the contractor.*"

Section 2341, General Code, provides that "*resolutions for the adoption or alteration of plans or specifications, etc., shall be in writing, and require for their adoption the votes of five members of the commission, taken by yeas and nays and recorded on the journal of the county commissioners.*

This utterly precludes the idea that the architect can make the alterations himself, submit the same to the contractor and orally order him to complete the work in conformity therewith. If the members of the building committee shall acquiesce therein or agree orally to such changes, their action would not render the county liable for the extras claimed thereunder.

The contract itself, in article 3 thereof, as quoted heretofore, specifically provides:

"No alterations shall be made in the work except upon the written order of the architect, the amount to be paid by the owner or allowed by the contractor by virtue of such alterations to be stated in said order."

No such compliance was had with the above terms, and any oral arrangement in that behalf renders the same ineffectual.

In view of the language of the statutes above quoted and the terms of the contract, I think the architect had no authority to order these changes made in the manner he did, and that no recovery can be had by the contractor for such extras.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

272.

GERMAN CRIMINAL AUTHORITIES PERMITTED TO CLAIM REWARD OFFERED IN OHIO FOR ARREST AND APPREHENSION OF CRIMINAL IN GERMANY.

In Germany the rule prohibiting an officer to claim a reward for services which he is required to perform by virtue of his office, does not maintain, and German authorities may claim and receive a reward offered in Ohio for the arrest and conviction of a criminal unpunished in Germany.

COLUMBUS, OHIO, May 20, 1913.

HON. THEODORE H. TANGEMAN, *Prosecuting Attorney, Auglaize County, Wapakoneta, O.*

MY DEAR SIR:—I am in receipt of your letter of May 5th, in which you supply additional information relative to the claim of certain officers of the German government to a reward for the arrest and conviction of Joseph and John Hormann for the crime of horse stealing. It appears from the correspondence that the county commissioners of Auglaize county on the 18th day of May, 1907, adopted a general resolution offering a reward of fifty dollars ($50.00) for the detection, apprehension and conviction of horse thieves and of persons aiding and abetting in the stealing of horses.

In pursuance of this resolution the sheriff of the county caused to be printed and circulated notices of the reward offered by the county commissioners, together with a description of a certain horse, the property of Reverend B. Grimm, alleged to have been stolen by said Joseph and John Hormann. These men were tried and convicted of stealing said horse by the Bavarian land court at Memmingen, Germany, and sentenced to two years' imprisonment.

In view of the fact that the persons claiming this reward are officers of a foreign government, the strict rule that prohibits public officers accepting a reward for arrest and conviction of criminals does not apply. The real purpose which your board of commissioners has in view has been subserved by the foreign government in imposing a sentence for the crime committed. Your county and this state has been saved the expense growing out of the trial, and to my mind in honoring of a claim of this kind, even though the statutes may not have been strictly complied with, no abuse can result. Liberal treatment should be shown toward the officers and representatives of a foreign government who have assisted in meting out punishment to such offenders as the two Hormanns; and, too, when you consider the German government is punishing its own citizens for crime committed in Ohio, one is impressed with the lofty purpose of that government. Every consideration of justice and courtesy, in my judgment, requires that Auglaize county shauld pay the reward.

I am sending you this opinion in duplicate so that a copy thereof may be kept on file with your county auditor to the end that the bureau of inspection and supervision of public offices will be advised when they come to examine these items.

Thanking you for your courtesy and promptness, I beg to remain,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

277.

DUTY OF COUNTY COMMISSIONERS TO HOLD AND DISPENSE TRUST FUND BEQUEATHED TO INFIRMARY DIRECTORS.

It is well settled that public corporations may hold bequests in trust for public uses and under section 2522, General Code, which requires county commissioners to make all contracts and purchases necessary for the county infirmary, they may hold and carry out the terms of a bequest made to the infirmary directors for the benefit of infirmary inmates.

COLUMBUS, OHIO, May 27, 1913.

HON. CHAS. F. ADAMS, *Prosecuting Attorney, Lorain, Ohio.*

DEAR SIR:—Under date of May 3rd, you requested my opinion as follows:

> "Prior to the enactment of the law dispensing with the infirmary directors and placing the infirmary under the control of the commissioners, the infirmary directors of Lorain county received a bequest in a certain will. The fund received by them was to be devoted to the providing of 'luxuries' for the inmates of the infirmary.
>
> "I desire to know whether any action on the part of the commissioners or infirmary superintendent is necessary to reduce this fund to their control, or whether by virtue of the statute, they are the successors of the infirmary directors to the extent that they may proceed with the disbursement of the fund according to the will?"

The power of the infirmary directors to receive this bequest was conferred by original section 2522, General Code. This section at the time the bequest was received, was as follows:

> "The board infirmary of directors shall make all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates. It shall meet not oftener than once each month at the infirmary, but the president shall call a special meeting thereof at any time he deems necessary. The directors shall keep a book in which the clerk shall record the proceedings at their meetings and of their transactions, which book shall at all times be open to public inspection."

Upon the power of the infirmary directors to receive this bequest, under the conditions imposed, the following is said in Dillon's municipal corporations, sections 981 and 982:

> "Section 981 (566). Municipal and *public corporations* may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Burdens of a peculiar character rest upon compact populations residing within restricted and narrow limits, to meet which property and revenues are absolutely necessary, and, therefore, legacies of personal property, devises of real property and grants or gifts of either species of property directly to the corporation for its own use and benefit, intended to and which have the effect to ease it of its obligations or lighten the burdens of its citizens, are, in the absence of disabling or restraining statutes, valid in law. Thus, a conveyance of land to a town or other public

corporation, for benevolent or public purposes, as for a site for a school house, city or town house, and the like, is based upon a sufficient consideration and such conveyances are liberally construed in support of the object contemplated.

"Section 982 (567). Not only may municipal corporations take and hold property in their own right by direct gift, conveyance or device, but the cases firmly establish the principle, also, that such corporations, at least in this country, are capable, unless specially restrained, of taking property, real and personal, *in trust for purposes germane to the objects of the corporation,* or which will promote, aid or assist in carrying out or perfecting those objects."

The same principle applies to the board of infirmary directors, and I am of the opinion that there can be no question of their right to receive this bequest and to devote it to the proposition named.

The powers formerly resting in the board of infirmary directors have been transferred substantially in quantity to the county commissioners by section 2522 of the General Code, which section now reads as follows:

"Section 2522. The board of county commissioners shall make *all contracts and purchases necessary for the county infirmary and prescribe such rules and regulations as it deems proper for its management and good government, and to promote sobriety, morality and industry among inmates.* The commissioners shall keep a separate book in which the clerk, or if there is no commissioners' clerk, the county auditor, shall keep a separate record of their transactions respecting the county infirmary, which book shall at all times be open to public inspection."

Under the power herein conferred upon the county commissioners to make all contracts and purchases for the county infirmary and to maintain the management and control of this institution, I am of the opinion that they have the same power to hold and administer this bequest as did the infirmary directors.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

296.

LEVIES IN ROAD DISTRICTS, UNDER SECTION 7095, GENERAL CODE, FOR INTEREST AND SINKING FUND PURPOSES MADE SUBSEQUENT TO JUNE 1, 1911, NOT EXCEPTED FROM THE 1910 TAX LIMIT OF THE SMITH ONE PER CENT. LAW.

Levies for interest in sinking fund purposes, not authorized by the electors prior to the enactment of the Smith one per cent. law in special districts, created for road or ditch improvements, are excepted by the terms of section 5649-3a from the limits of county, township, municipal and school levies.

The provision of this statute taking such levy from the control of the budget commissioners merely prevents the budget commissioners from cutting the same down, but does not exempt such levies from the 1910 tax limitations.

COLUMBUS, OHIO, June 4, 1913.

HON. A. M. HENDERSON, *Prosecuting Attorney, Mahoning County, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 17, 1913, in which

you request my opinion as to the application of the 1910 tax limit of the so-called "Smith One Per Cent. Law" to levies in road districts organized under section 7095 of the General Code for the purpose of providing for interest and sinking fund purposes in connection with an issue of bonds of such district made subsequently to June 1, 1911.

At the outset of the discussion of the question which you present, I call your attention to the fact that the so-called Kilpatrick bill passed by the current session of the general assembly eliminates from the Smith one per cent. law all reference to any 1910 tax limitation. This bill has passed the general assembly, but whether or not it is at present in effect depends upon the interpretation of article 2, section 1-d of the constitution of the state as amended in 1912. This part of the constitution provides for the initiative and referendum and prescribes a general rule under which

> "No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided." (Section 1-c).

Section 1-d then provides exceptions to this general rule, among which is the following:

> *"Laws providing for tax levies* * * * shall go into immediate effect."

Now, the amendment to the Smith one per cent. law does affect the levying of taxes. It does not, however, directly provide for a tax levy in the sense, for example, that a tax levy is *"provided for"* by the so-called Hite road levy law passed by the current session, or by the statutes relating to the levies for interest, sinking fund and university purposes.

My opinion is not requested upon the point which I have raised, and I do not propose to anticipate the question to an undue extent. It occurs to me, however, that if the Kilpatrick bill be regarded as a law providing for a tax levy, it is already in effect, and obviates the whole question raised by you.

If, on the other hand, the Kilpatrick bill is not yet a law, and will not become a law until ninety days after having been filed by the governor in the office of the secretary of state, then a somewhat different situation arises because the bill has either not yet been filed or has been filed within the past few days by the governor in the office of the secretary of state. That being the case, the ninety days which the constitution provides for will not expire until sometime in July. The budget commission, however, under the general provisions of the Smith law, is required to meet and perform its work in the month of June. It is well known that the budget commission frequently requires a much longer period for the completion of its work and sometimes remains in session until the time is at hand for the delivery of the duplicate to the treasurer for collection of taxes thereon, the provisions of the Smith law respecting the time in which the work shall be performed being merely directory.

There is, therefore, a serious question as to whether or not the Kilpatrick bill would be operative this year if it be held to be otherwise than a law providing for a tax levy. Pursuasive reasons occur to me for holding both that the budget commission, if it were in session when the Kilpatrick bill became effective, might disregard the 1910 limitation; and, on the other hand, that the budget commission would be bound by the law as it existed when it began its work, and therefore by the 1910 limitation.

I call your attention to these matters because of the bearing which they may possibly have on your question. So far as your question is concerned it arises under the Smith law prior to its amendment by the Kilpatrick bill. The status of the road districts under section 7095 of the General Code is, it seems to me, made rather clear in the Smith law itself. Section 7095 of the General Code provides a method of im-

proving roads by general taxation through the organization of two or more contiguous townships into road districts. The township, when so organized by the county commissioners upon the petition of resident taxpayers of the proposed district, becomes a special taxing district for road purposes under the government of road commissioners, one from each township in the district. These commissioners have the power to borrow money for the purpose of improving the roads designated by them for improvement in the district. This does not, however, affect the levying power, that being reserved to the county commissioners. (See sections 7123 and 7127). Apparently the bonds may be issued from time to time as the needs of the improvement project require, the limitation being upon the amount which may at any one time be outstanding. (See section 7124).

That provision of the Smith one per cent. law which it seems to me clearly defines the status of the levies made by the county commissioners for the purpose of road districts of this kind, is one of the provisions of section 5649-3a. That section, in the first instance, provides certain interior limitations, i. e., limitations upon the rate for current purposes of municipal corporations, townships, school districts and counties then follows this provision:

> "Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments * * * and levies * * * *in special districts created for road or ditch improvements, over which the budget commissioners shall have no control.*"

Now, it will be observed that the only limitation of the Smith law from which levies in special districts created for road improvements are expressly exempted are these limitations upon county, township, municipal and school district levies as such. If it had been the intention of the legislature to exempt these levies from the other limitations of the act, it would have been most appropriate to insert the proposition which I have quoted in section 5649-2 or 5649-3 wherein there are certain exceptions which have been expressly made from the operation of the 1910 tax limitation, and also from the operation of the ten mill limitation. The general assembly's choice of phraseology in this instance cannot be ignored. Considering this point, then, it seems logical to hold that the general assembly intended the levy in the special road improvement district should be within those limitations of the act from which they were not expressly exempted.

Regard must be had, however, to the phraseology "over which the budget commission shall have no control;" yet when this clause is properly considered it offers no special difficulties. The budget commissioners have no control over certain other levies that are within the 1910 tax limitation and also the one per cent. limitation of sections 5649-2 and 5649-3. I refer to the state levies which must be taken into consideration in determining the application of both of the limitations just referred to, but which are quite beyond the control of the budget commission.

It seems clear to me that the levies in the special road districts, for road districts are like state levies in this particular. They cannot be reduced by the budget commission, but they must be first taken out together with state levies from the sum, so to speak, of the available amount in any district under the 1910 and the one per cent. limitation, leaving the remainder of such fund available for other purposes, for which taxes are to be levied. Putting it in another way, the budget commissioners have no control over these levies, but they must take these levies into consideration in exerting their control over the other levies which must be made in the district in which the former are applicable.

Of course it is possible that a part of the levies made in a given road district are outside of some of the limitations of sections 5649-2 and 5649-3 by reason of the fact

that they constitute levies for interest and sinking fund purposes to provide for indebtedness incurred prior to the passage of the Smith act, which levies are exempted from the ten mill limitation by both of the sections last above mentioned. This, however, is not the case with the levies concerning which you particularly inquire. These levies would be made for the purpose of providing for the retirement of obligations incurred subsequently to the passage of the Smith act and without a vote of the people. Therefore they would have to be counted in ascertaining the operation of the 1910 tax limitation, and also that of ten mills.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

299.

LOTTERIES—PLANS BY BUSINESS ORGANIZATION OF GIVING AWAY TICKETS UPON EACH PURCHASE OF A DEFINITE VALUE, SAID TICKETS TO ENTITLE POSSESSOR TO CHANCE DRAWINGS FOR PRIZES, ARE PROHIBITED IN OHIO.

A lottery is defined as a distribution of prizes—something valuable—by chance or lot. And under adjudicated cases, section 13063, General Code, prohibiting lottery schemes, business organizations may not give away tickets for each cash sale of a definite value, entitling the possessor to certain chances on prizes to be decided by lot.

COLUMBUS, OHIO, June 7, 1913.

HON. BENJAMIN OLDS, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—On April 15, 1913, you submitted to this department a request for an opinion as follows:

> "Several business men organizations in this county propose giving away tickets for each cash sale of whatever amount the same may be, each $1.00 in value to be entitled to a chance, and every so often to give away prizes the winner of the prizes to be decided by lot, and have asked my opinion as prosecuting attorney, whether or not the same would come within the condemnation of the statute law of the state of Ohio. Will you kindly give me your opinion as to the same."

In reply thereto, section 13063, of the General Code, provides as follows:

> "Whoever vends, sells, barters or disposes of a ticket, order or device for or representing a number of shares or an interest in a lottery, 'policy' or scheme of chance, by whatever name, style or title denominated or known, whether located or to be drawn, paid or carried on within or without this state, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both."

Section 13064, of the General Code, provides as follows:

> "Whoever establishes, opens, sets on foot, carries on, promotes, makes, draws or acts as 'backer' or 'vender' for or on account of or is in any way concerned in a lottery 'policy,' or scheme of chance, by whatever name, style

or title denominated or known, whether located or to be drawn, paid or carried on within or without this state, or by any of such means, sells or exposes for sale anything of value, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

A lottery has been defined by Bouvier's law dictionary as follows:

"A scheme for the distribution of prizes by chance."

A lottery is defined by Webster's dictionary as

"A distribution of prizes by lot or chance."

And by the Century dictionary as follows:

"Distribution of anything by lot, determination by chance; a scheme for the distribution of prizes by chance, among persons purchasing tickets, etc."

In law the term "lottery" embraces all schemes for the distribution of prizes by chance.

In the case of United States vs. Olney, 1 Abbott's United States reports, page 275, it is held:

"A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a 'lottery' within the operation of a law imposing a tax on lotteries, for the purposes of revenue."

At page 279 of the opinion therein the United States district court defines "lottery" as follows:

"A distribution of prizes—something valuable—by chance or lot constitutes a lottery."

In the case of Stevens vs. Times-Star (72 O. S.) page 112, the Ohio supreme court comments upon the various definitions of the term "lottery" at page 147 of the opinion as follows:

"Many definitions of the word lottery are found in the books. An often quoted definition is given by Folger, J., in Hull V. Ruggles, 56 N. Y., 424, which is 'where a pecuniary consideration is paid, and it is determined by lot or chance according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery.' 'A sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks.' "

American Cyclo. "A lottery," says the supreme court of Michigan, in The People vs. Elliott, 74 Mich. 2 4, "is a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part nor can human reason foresight, sagacity, or design enable him to

know or determine such result until the same has been acccomplished." However, it should not be concluded that the term "lot or chance" implies that if any element of certainty or skill enters into the scheme, it therefore relieves it of its character as a lottery, or scheme of chance. Chance is something that befalls; the result of unknown or uncertain forces or conditions. An intelligent definition is given in 6 Cyc., 89 C. thus: "Possibility, hazard, risk or the result or issue of uncertain and unknown conditions or forces, neither understandingly brought about by one's act, nor pre-estimated by one's understanding."

"A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid or agreed to pay, a valuable consideration for the chance to obtain a price." (25 Cyc. 1633).

You state in your request that it is the plan of the business men's organizations in your county to give away tickets for each purchase of $1.00 in value of merchandise, said ticket entitling such purchaser to a chance to draw prizes, the winners to be determined by lot. The weight of authority seems to hold to the effect that, procuring such tickets by the purchasing of goods, or with goods purchased, does not take such a proposition, similar to the plan of your business men's organization as above stated, out of the category of being a lottery or scheme of chance.

In the case of Stevens vs. Times-Star, supra, the newspaper company gave a chance to each subscriber, giving a fifty cent subscription, to guess upon the result of a certain election, the one guessing the closest to the total vote cast to receive a certain prize and others next nearest to receive prizes of less value, in accordance with their guess. The court held this proposition to constitute a lottery or scheme of chance, as follows:

"A guessing contest, instituted by a newspaper company, by which persons are invited to deliver to the company fifty cents each, twenty-four cents of which being payment for a subscription to the newspaper and the twenty-six cents for the privilege of making a guess upon the total vote for a state officer who is to be chosen at an approaching election, the guesser coming nearest to the actual total vote cast to receive a money prize from the fund equal to one-tenth thereof, and others next nearest to receive from the fund lesser money prizes, is within the condemnation of the statutes of Ohio against lotteries and schemes of chance and is an unlawful enterprise."

In the case United States vs. Olney, supra, an agreement was entered into by the defendant to sell a number of lots, each purchaser of a lot to receive a ticket which entitled him to a chance in drawing one of several other lots which were reserved for the lottery. The court in that case held that this proposition constituted a lottery as follows:

"A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved or prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a 'lottery' within the operation of a law imposing a tax on lotteries, for the purposes of revenue."

In construing said section 13063 and section 13064 of the General Code, (6930 and 6931 Bates Revised Statutes) supra, the court in the case of the Jackson Steel Nail

Co. vs. Marks, 4 C. C. R., page 343, held that the method of determining by a drawing, to whom of several subscribers a lot or lots were to be conveyed, constituted a scheme of chance or lottery, as follows:

> "Where a corporation undertook to raise money by agreeing to convey to the several persons who would subscribe for one or more of 400 lots at $200 each, to be paid for in the manner pointed out in said contract—the lot or lots so to be conveyed to the several subscribers to be determined by a drawing—*this was a scheme of chance in contravention of the provision of section 6930-31, Revised Statutes, and therefore void.* And no action can be maintained to recover the price agreed to be paid for such lots.
>
> "Offers of prizes to purchasers of goods, the prizes to be distributed by chance among the purchases (purchasers) constitute lotteries, whether the goods purchased or the chance to obtain a prize is the consideration that moves the purchaser to enter into the transaction; and of similar nature is the distribution of prizes by chance among purchases of concert tickets. (25 Cyc. 1637)."

In referring to the celebrated case of the American Art Union decided in the New York court in 1852, the court in the case of United States vs. Olney, supra, at page 282 of the opinion says:

> "The scheme of the Art Union was that by paying five dollars any person could become a subscriber and entitled to an engraving and certain numbers of The Bulletin containing the proceedings of the society, and the chance of obtaining one of a number of valuable paintings, which in December of each year were to be distributed by lot among the members. The drawing was to be conducted precisely as in this case, by placing the name of the subscriber in one box and the name of the painting in another. A number being drawn from the latter box, a name was drawn from the former one, and the person whose name was thus drawn was to be the owner of the prize represented by that number.
>
> "The supreme court decided that this was a lottery, 13 Barb. 577. The case was then taken to the court of appeals and argued on behalf of the Art Union with great ability. The court of appeals affirmed the decision of the supreme court that the scheme was a lottery." 7 N. Y. (3 Seld. 228).
>
> "The proprietors of a newspaper, in pursuance of a pre-arranged and advertised scheme, issued to each subscriber for their paper, in addition to the paper itself and without extra charge, a ticket which entitled the holder to participate in a distribution of prizes offered by the proprietors to all persons who should become subscribers. The distribution was made by lot. Held, that the scheme was a lottery within the purview of the criminal laws; and it made no difference that the tickets were not sold, but were given to subscribers and to no one else. (The State vs. Murford 73 Mo. Rep. 647.)
>
> "A merchant who gives to a designated class of customers an opportunity to secure, by lot or chance, any article of value additional to that for which such customers have paid, violates the provisions of section 407 of the Penal Code, which declares that 'no person shall keep, maintain, employ or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing.'" (Meyer vs. State of Georgia, 51 L.R.A. 496.)

As measured by the above quoted definitions and by the principles laid down in the above cited authorities, it is apparent that the proposed plans of the business men's organizations of your county, as set forth in your inquiry constitute a lottery or scheme

of chance and therefore this department is constrained to hold that the same come within and are prohibited by sections 13063 and 13064 of the General Code, above quoted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

302.

SNYDER ACT—BONDS MAY BE SOLD ONLY UPON ADVERTISEMENT AND BIDS.

The provision of section 5 of the Snyder act, permitting bonds issued thereunder to be sold at popular subscription, refers to that style of popular subscription which is provided for by sections 3926 and 3927, General Code, and bonds issued, therefore, under this act may not be sold at private sale without advertisement and bids.

COLUMBUS, OHIO, May 27, 1913.

HON. D. F. DUNLAVY, *Prosecuting Attorney, Ashtabula County, Jefferson, Ohio.*

DEAR SIR:—I acknowledge receipt of your telegram of May 26th in which you request my opinion as to whether or not bonds issued under the so-called Snyder emergency act passed by the recent session of the general assembly, known as house bill No. 640, may be sold without competitive bids.

Section 5 of the act referred to provides in part as follows:

> "* * * Such bonds may be sold at popular subscription or otherwise at not less than par. Their sale shall be advertised by notice published once a week, for two consecutive weeks, in one newspaper published and of general circulation in the county, or in either county, in case the municipal corporation or district is located in more than one county. When sold at popular subscription they shall be distributed to bidders according to the rules prescribed for municipal bonds by section 3827 of the General Code. * * *"

In my opinion no bonds may be sold under this act at private sale without advertising, but the advertisement required by the above quoted provision must be made in all cases.

"Popular subscription" to which the act refers is similar to that provided for by sections 3926 and 3927, General Code, which requires advertising.

Accordingly, I advise that bonds issued under the act mentioned may not be sold at private sale.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

310.

WHEN PROVISIONS OF BUILDING CODE MAKE NECESSARY A GREATER EXPENDITURE FOR THE ERECTION OF A TOWN HALL THAN HAS BEEN AUTHORIZED BY ELECTION, A NEW ELECTION IS NECESSARY TO AUTHORIZE THE INCREASE—SUBMISSION OF QUESTION AT REGULAR ELECTION.

When under the terms of sections 3395 and 3396, General Code, an election in a township is held, and at such election the erection of a town hall, at a settled cost, is favorably voted upon, and an expenditure in excess of the amount authorized is made obligatory, by virtue of the building code provisions, such increased expenditure may not be made without the holding of a subsequent election upon the question of making the same, with a result favorable to the excess expenditure.

Under section 4840, General Code, since a special election is not authorized for such purpose, the question must be voted upon at a regular election.

COLUMBUS, OHIO, June 9, 1913.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 28th, requesting my opinion upon the following question:

> "If, after a vote has been taken and carried in a township upon the proposition of issuing bonds in an estimated amount, for the purpose of erecting a township hall, it develops that the amount so authorized to be borrowed is insufficient to complete the building in accordance with the specifications of the state building code, may the amount necessary to complete the township hall be borrowed without holding another election; and if another election is necessary may it be a special election, or must the proposition be submitted at a general election?"

It is, of course, obvious that the mere fact that the requirements of the state building code are responsible for the additional cost of the proposed structure is immaterial.

I am clearly of the opinion that money may not be borrowed in addition to that already authorized without resubmitting the question. Section 3395, General Code, under which this proceeding is had, expressly provides that the electors of the township shall have notice "of the estimated cost" of the proposed improvement.

It will be noticed that the election is, however, not upon the proposition of borrowing money, but upon the proposition of levying taxes. Sections 3395 and 3396, General Code, provide as follows:

> "If in a township it is desired to build, remove, improve or enlarge a town hall, at a greater cost than is otherwise authorized by law, the trustees may submit the question to the electors of the township, and shall cause the clerk to give notice thereof and of the estimated cost, by written notices posted in not less than three public places within the township at least ten days before election." (Section 3395).
>
> "At such election the electors in favor of such hall, removal, improvement or enlargement shall place on their ballots 'Town Hall—Yes,' and those opposed 'Town Hall—No.' If a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax, but not

in any year to exceed four mills on the dollar valuation. Such tax shall not be levied under such vote for more than seven years. In anticipation of the collection of taxes, the trustees may borrow money and issue bonds for the whole or any part therefor, bearing interest not to exceed seven per cent. payable annually." (Section 3396).

The question submitted is the policy of building by general taxation a structure of the estimated cost specified in the notices of election. The bonds are to be issued in anticipation of taxes to be levied. In fact, the building might be constructed without the issuance of any bonds whatever.

There is no express inhibition against expending more money for the purpose authorized than the estimated cost of the improvement as stipulated in the notices of election. I am of the opinion, however, that the effect of the notice is to create such an implied limitation; so that if the cost of the building materially exceeds the amount estimated the levy of taxes or the issuance of bonds for the excess might be enjoined at the suit of a taxpayer. Whether or not a slight and perhaps accidental excessive expenditure would, under the peculiar machinery of these sections, create such a right of action is a question which it is not necessary to determine on the facts which you submit, because it appears from your letter that the estimated cost was six thousand dollars and the total cost will be nine thousand dollars, an increase of fifty per cent. over the estimated cost.

As to the questions repecting the kind of an election which may be held, I call attention to the fact that the section above quoted contains no specific provision, and that, therefore, the case is one within the intendment of section 4840, General Code, which provides as follows:

"Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

It is clear that under this section the question cannot be submitted otherwise than at a regular election.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

313.

DUTY OF BOARD OF DIRECTORS OF AGRICULTURAL SOCIETY TO MAINTAIN FENCE IN THE SAME MANNER AS INDIVIDUALS.

Inasmuch as a county agricultural society is not a public corporation, such society is comprehended by the terms of a statute applicable to persons generally and such corporation is obliged to maintain fences to the same extent that individuals are so required to do.

COLUMBUS, OHIO, June 2, 1913.

HON. THOS. E. MCELHINEY, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—Under date of April 30th you submitted a request for my opinion upon the question of the constitutionality of the laws providing for two days road

labor; and also whether or not the board of directors of an agricultural society are obliged to maintain fences enclosing their grounds. The first question I answered by sending you copy of an opinion heretofore rendered, and I am pleased to now take up your second question. Your inquiry is as follows:

> "Is it the duty of the board of directors of an agricultural society to maintain all or any part of the fence inclosing their grounds when the same are owned by the society?"

The method of organization and the powers and duties of county and district agricultural societies are set out in sections 9880 to 9910, General Code. These statutes provide, in brief, for the organization of such societies and the incorporation of the same for the purpose of holding fairs and offering awards for the improvement of agricultural implements and products. Certain provisions are therein made for assistance to such societies in the purchase of their property and for reimbursement of their funds by the county. Sections 9885 and 9906 of these statutes are as follows:

> "Section 9885. County societies which have been, or may hereafter be organized, are declared bodies corporate and politic, and as such shall be capable of suing and being sued, and of holding in fee simple such real estate as they have heretofore purchased, or may hereafter purchase, as sites thereon to hold their fairs. They may mortgage the grounds of the society for the purpose of renewing or extending pre-existing debts, and for the purpose of furnishing money to purchase additional land. But if the county commissioners have paid money out of the county treasury to aid in the purchase of the site of such grounds, no mortgage shall be given without the consent of such commisssioners.
>
> "Section 9906. When the title to grounds and improvements occupied by agricultural societies is in the county commissioners, the control and management of such lands and improvements shall be vested in the board of directors of such society so long as they are occupied and used by it for holding agricultural fairs. Moneys realized by the society in holding county fairs and derived from renting or leasing the grounds and buildings, or portions thereof, in the conduct of fairs or otherwise, over and above the necessary expenses thereof, shall be paid into the county treasury of the society, to be used as a fund for keeping such grounds and buildings in good order and repair, and in making other improvements from time to time deemed necessary by its directors."

Under the first quoted of these statutes county societies are made bodies corporate with power to sue and be sued, and to hold real estate as sites whereon to hold their fairs. Under this statute and the accompanying sections, which recognize throughout the duty of the board to hold and conduct such fairs, and to manage the property, there can be no question of the power of the board to maintain fences on the property where the same are a necessary incident to the conduct of the fairs and the proper maintenance of the grounds.

This opinion is strengthened by the terms of section 9906, General Code, which specifically vests in the board of directors of such society the control and management of such lands and improvements, even though the title to the same be vested in the county commissioners.

If there be any duty, therefore, to keep the grounds of an agricultural society fenced, the board of directors of such society, being given the full control and management of the grounds and improvements, would be the officers vested with the responsibility of carrying such duty into effect.

I have been able to find nothing in the statutes of this state expressly requiring such grounds to be fenced in any special manner. There are numerous provisions throughout the statutes, however, making it incumbent upon private individuals who are owners of property to maintain fences on the same. Ordinarily, a statute requiring an individual or "person" to maintain a fence includes a corporation. In Clark & Marshall on private corporations, sections 23 and 24, the following is said:

> "Section 23. *In general.* A corporation is a 'person', 'resident,' 'inhabitant' or 'citizen,' within the meaning of such terms in a constitutional or statutory provision, when it is within the reason and purpose of the provision, but not otherwise.
>
> "Section 24. *A corporation as a 'person.'* Since a corporation is a legal entity, and has an artificial existence distinct from that of its members, so that it can act through its duly-authorized agents as if it were an individual, it has been properly described as an 'artificial person.' While it is invisible and intangible, it is a person in the law, and, as such, it has repeatedly been held to be within a constitutional or statutory provision using the word 'person,' and not referring to corporations in express terms.
>
> "The rule in this respect is that, when a constitutional or statutory provision confers a right or imposes a duty or liability upon any 'person' generally, without referring to corporations *eo nomine*, it applies to corporations, as well as to natural persons, if they are within its reason and purpose. But they are not included if they are not within its reason and purpose. In some states there is an express statutory provision that the word 'person' in a statute may be extended to bodies politic and corporate, but such a provision is not at all necessary.

There are decisions, both of this state and other states, wherein the court passed upon the nature of agricultural societies. Thus, on page 66 of Clark & Marshall on Private Corporations, the following is said:

> "A state board of agriculture, or agricultural society, composed of private individuals, and incorporated for the purpose of promoting agriculture, holding agricultural fairs, etc., is not a public corporation, though the state has made an appropriation of money for its benefit."

In the case of Markley vs. State of Ohio, 12 O. C. C. n. s. page 83, the court says:

> "In Dunn vs. Agricultural Society, 46 O. S. 97, the supreme court of Ohio held that this, the Brown County Agricultural Society, was a private corporation aggregate, being a number of natural persons associated together by their free consent for the better accomplishment of their purposes, and were bound to the same care in the use of their property and conduct of their affairs to avoid injury to others as natural persons, and a disregard or neglect of that duty involves a like liability.
>
> "If this association was a public agency established exclusively for public purpose by the state, and connected with the administration of the local governments, then it might well be said the legislature had authority to regulate even to prohibition of acts which would interfere with its successful operation. The court, however, having found that it was a private corporation it must be treated the same as a natural person, though it may serve a public purpose."

and in the case of Chemical Company vs. Calvert, 7 O. N. P. n. s. 107, the language of the court is as follows:

"The supreme court of this state has expressly decided in Dunn vs. Agricultural Society, 46 O. S. 93, that a county agricultural society, organized under the act of February 8, 1846, and amendments thereto, was not a public agency of the state, invested with power to assist the state in the conduct of local administration, and with no power to decline the functions devolved upon it, but was only a voluntary association of individuals formed for their own advantage, convenience and pleasure.

"Some time after the passage of the act by the legislature of this state creating the state board of agriculture, the legislature of the state of Indiana passed an act which is practically a copy of the Ohio act creating the Ohio state board of agriculture, and it seems manifest that the legislature of Indiana merely copied the Ohio law upon the subject.

"In the case of Downey vs. The Indiana State Board of Agriculture, 129 Indiana 443, the supreme court of Indiana decided that the Indiana state board of agriculture was a private corporation. The reasoning of the supreme court of Indiana in deciding that case seems to me to leave no reasonable doubt that our state board of agriculture, which was created under precisely a similar law to that of the Indiana state board of agriculture, is a private corporation.

"It seems that laws similar to the law of Ohio under which the Ohio state board of agriculture was created, were originally passed in other states besides Ohio and Indiana, and that when brought before the courts it was held that these corporations were not public corporations or agencies of the state, but private corporations. It seems that Minnesota also had such a law, and in the case of Lane vs. The Minnesota State Agricultural Society, 62 Minn. 175, it was decided by the supreme court of that state that the state agricultural society was not a public corporation organized for the purpose solely of discharging a governmental function. The court pointed out that the state had no voice in the selection or control of its officers or in fixing their compensation, etc. After this decision, the legislature of that state proceeded to create a department of agriculture.

"The case of Thomas vs. Lambert, 44 Iowa 239, is also authority upon the point that this state board of agriculture is not a public agency of the state. Other authorities are cited to the same effect in the brief of plaintiff's counsel, but these seem to me to be conclusive upon this proposition, and I am therefore forced to the conclusion that the Ohio state board of agriculture is not a public corporation, or agency, or department of the state government, but is essentially a private corporation."

Such agricultural societies not being agencies of the state must be held to be included in the same manner as individuals in statutes prescribing regulations with reference to the maintenance and repair of fences. From the nature of your question it would not seem necessary to enumerate the special provisions making such regulations.

In conclusion, therefore, I am of the opinion that the board of directors of county agricultural societies are bound to maintain fences on their grounds in the same manner and to the same extent as individuals are required so to do.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

315.

INDIGENT WIDOW OF SOLDIER WHO HAS SUBSEQUENTLY MARRIED AND DIES A WIDOW MAY BE BURIED AT THE EXPENSE OF THE COUNTY.

Under section 2950, General Code, the county commissioners may bury at the expense of the county, the body of the widow of any soldier who has done service at any time in the army of the United States. Under this statute a widow who marries after the decease of such soldier and whose second husband dies leaving her in indigent circumstances, may upon her death be buried at the expense of the county.

COLUMBUS, OHIO, June 9, 1913.

HON. E. L. SAVAGE, *Prosecutinp Attorney, Paulding, Ohio.*

DEAR SIR:—On May 15, 1913, you submitted to this department for our opinion, the following request:

> "We beg to ask you for a construction of section 2950 of the General Code. Does said section authorize the county commissioners to defray the necessary funeral expenses in a case presenting the following facts and conditions?
>
> "There recently died in this county a woman whose first husband was a soldier. After the first husband's death she married a man who was not a soldier. After living with him some years he died. After the death of the second husband the widow's pension which had accrued by reason of the death of her first husband, was restored to her. She survived her second husband several years and *died in indigent circumstances not owning sufficient property to pay the necessary funeral expenses.* The question is should the county commissioners, under the provisions of said section, defray the necessary funeral expenses of this woman?"

In reply thereto, section 2950 of the General Code, provides as follows:

> "The county commissioners of each county shall appoint two suitable persons in each township and ward in the county, other than those prescribed by law for the care of paupers and the custody of criminals, who shall contract, at a cost not to exceed seventy-five dollars, with the undertaker, selected by the friends of the deceased, and cause to be interred in a decent and respectable manner, the body of any honorably discharged soldier, sailor or marine having at any time served in the army or navy of the United States, or the mother, wife or widow of any such soldier, sailor or marine, or any army nurse who did service at any time in the army of the United States, who dies, not having the means to defray the necessary funeral expenses. Such burial may be made in any cemetery or burial ground within the state, other than those used exclusively for the burial of paupers and criminals."

You state in your letter of inquiry, that after the death of the first husband who was a soldier in the war of the rebellion, his widow received a pension for some years and then remarried and of course her pension was discontinued at the time of her second marriage. After the death of her second husband, her pension was again restored to her as the widow of her first husband, who, as herein before stated, was a soldier in the war of the rebellion. This was done I take it, in accordance with section 4708 of the Federal Statutes, which said section provides in part as follows:

"The remarriage of any widow, dependent mother, or dependent sister entitled to pension shall not bar her right to such pension to the date of her remarriage, whether an application therefor was filled before or after such marriage; but on the remarriage of any widow, dependent mother, or dependent sister having a pension, such pension shall cease: Provided, however, That any widow who was the lawful wife of any officer or enlisted man in the army, navy or marine corps of the United States, during the period of his service in any war, and whose name was placed or shall hereafter be placed on the pension roll because of her husband's death, as the result of wound or injury received or disease contracted in such military or naval service, and whose name has been or shall hereafter be dropped from said pension roll by reason of her marriage to another person who has since died or shall hereafter die, or from whom she has been heretofore or shall be hereafter divorced, upon her own application and without fault on her part, and if she is without means of support other than her daily labor as defined by the acts of June twenty-seventh, eighteen hundred and ninety, and May ninth, nineteen hundred, shall be entitled to have her name again placed on the pension roll at the rate now provided for widows by acts of July fourteenth, eighteen hundred and sixty-two, March third, eighteen hundred and seventy-three, and March nineteenth eighteen hundred and eighty-six, such pensions to commence from the date of the filing of her application in the pension bureau after the approval of this act."

By virtue of the provisions of said statute, the Federal Government recognized her at least to the extent of granting her a pension as the widow of her first husband, notwithstanding the fact that she has remarried, and her second husband was also deceased.

It was the clear intention of the legislature in enacting section 2950 of the General Code, supra, to provide that every honorably discharged soldier, sailor or marine, should be interred or buried in a respectable manner and that every mother, wife or widow of any such soldier, sailor or marine, should also be interred or buried in a respectable manner.

Therefore, in direct answer to your question, it is the opinion of this department for the foregoing reasons, that the county commissioners, at least from a humanitarian standpoint and under the circumstance you state in your inquiry; should defray the necessary funeral expenses of the woman about whom you inquire, whose first husband was a soldier in the war of the rebellion and whom the United States government recognized as the widow of such soldier, by restoring her pension to her after the death of the second husband.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

324.

BANK HOLDING COUNTY FUNDS UNDER CONTRACT FOR DEPOSIT THEREOF PAYS RATE PROVIDED BY CONTRACT FOR PERIOD DURING WHICH SUCH FUNDS ARE HELD OVER PERIOD SPECIFIED IN THE CONTRACT.

When a bank holds or deposits county funds under contract with the county, providing for their deposit for three years at the rate of 4.51 per cent., the bank should be required to pay the same rate for the period such funds are held over the time designated by the contract when the banks make no objections thereto.

COLUMBUS, OHIO, June 6, 1913.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—On February 6, 1913, you made the following request for my opinion:

> "On November 1, 1909, the First National Bank of Wilmington, Ohio, was made the depository for the county funds for the period of three years ending November 1, 1912. The rate to be paid was 4.51.
>
> "Near the close of said term said funds were readvertised, but on account of a defect in the advertisement a readvertisement was made necessary, and the money was not finally awarded, and the new depository created until December 23, 1912. The rate to be paid being 2.90 for both active and inactive deposits.
>
> "From November 1 to December 23, 1912, the aforesaid bank retained the moneys of the county, and made no attempt and expressed no desire to turn the money into the county treasury.
>
> "The question is whether the bank should pay to the county 4.51 per cent. on the average daily balance on deposit in the bank from November 1 to December 23, 1913."

Under the facts detailed by you, if at the expiration of the three year period the bank did not wish to continue paying at the rate of 4.51 per cent. on the funds of the county deposited with it, it should have returned such deposit to the treasurer at that time.

Section 2729 of the General Code is as follows:

> "Upon the acceptance by the commissioners of such undertaking, and upon the hypothecation of the bonds as hereinafter provided, such bank or banks or trust companies shall become the depositary or depositaries of the money of the county and remain such for three years or until the undertaking of its successor or successors is accepted by the commissioners."

I take it that under this section the bank is undoubtedly the designated depository from the time its undertaking is accepted by the commissioners until the date when the undertaking of its successor or successors is accepted, and so long as it receives and retains the funds of the county, it must be considered that it receives and retains them under the contract made with the county when the funds were awarded to it and its undertaking accepted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

330.

PERSON ACQUITTED ON GROUND OF INSANITY SHALL BE DELIVERED TO PROBATE COURT OF COUNTY WHERE TRIED TO BE PROCEEDED AGAINST ON CHARGE OF LUNACY AND COMMITTED TO HOSPITAL FOR INSANE AS A PATIENT FROM COUNTY WHERE TRIED.

Under section 13612, General Code, a person tried and indicted for an offense in a county other than his residence and acquitted on the ground of insanity, should be certified by the clerk of the trial court to the probate court of the county where tried. Such probate court shall proceed upon the charge of lunacy and commit the defendant to a proper hospital for the insane as a patient of the county where tried.

COLUMBUS, OHIO, June 6, 1913.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—In your letter of May 14th, you say:

> "A man is indicted for horse stealing in Carroll County. Defense is insanity. Jury in common pleas court finds him insane. He is sent to the probate court, and he finds that his legal residence is in Lucas county."

Your first letter was indefinite as to the procedure in finding him insane. Upon inquiry from this office, under date of June 3, 1913, you give us the information necessary, as follows:

> "The jury found the defendant not guilty on the sole ground of being insane at the time he committed the act."

You then ask: "Which probate judge, of Carroll or Lucas county, should proceed as of inquest held?"

Section 13612, General Code, provides as follows:

> "When a person tried upon an indictment for a offense is acquitted on the sole ground that he was insane, such fact shall be found by the jury in the verdict, and certified by the clerk to the probate court. Such person shall not be discharged, but forthwith delivered to the probate court, to be proceeded against upon the charge of lunacy, and the verdict shall be prima facie evidence of his insanity."

This is the statute governing and controlling the question submitted by you. In order to determine which probate court should hear the case we must examine the law governing the proceedings under the above section.

I am of the opinion that the clerk of the court in which the verdict of acquittal was rendered, upon the sole ground of insanity, should certify said verdict to the probate court of the county in which he was tried; and that the person so tried should not be discharged but delivered to the probate court of the county in which he was tried; that, thereafter, said defendant, so acquitted upon the sole ground of insanity, should be proceeded against upon the charge of lunacy by the said probate court in conformity to law. When found insane in such proceeding he shall be committed to and be received by the proper hospital for the insane as a Carroll county patient. This seems to be the only rational solution of the proposition.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

331.

COUNTY COMMISSIONERS—REBUILDING OF COURT HOUSE DESTROYED BY FIRE—NECESSITY FOR ELECTION—WHEN AN EXPENDITURE EXCEEDS $50,000—PROCEDURE FOR BOND ISSUE—ILLEGALITY OF CHANGE IN CONTRACT—NON-NECESSITY OF AUDITOR'S CERTIFICATE—LEGALITY OF PROCEDURE WHEN CONTRACT MADE PRIOR TO AUTHORIZATION OF ELECTORS—EFFECT OF RECOVERY OF INSURANCE—USE OF PROCEEDS OF TAX FOR CURRENT YEAR— DETERIORATION OF STANDING WALLS PART OF ORIGINAL DESTRUCTION, NOT A SUBSEQUENT CASUALTY—CURE OF DEFECTS BY AUTHORIZATION OF ELECTORS SUBSEQUENT TO MAKING OF CONTRACT—ARCHITECT'S FEE PAYABLE FROM COUNTY OR BUILDING FUND.

Under section 5638, General Code, the county commissioners may not expend more than $15,000 for the building of county buildings without the authorization of electors, except in the event of casualty, and as otherwise provided, nor may they expend more than $10,000 for the enlarging, repairing, improving or rebuilding of a public county building without the authorization of electors.

Under section 2436, General Code, which must be read in connection with and in pai materia to section 5638, General Code, as an exception thereto, the county commissioners may expend up to $50,000 for the rebuilding of a court house destroyed by fire without the authorization of the electors. The limitation of this latter section being upon the amount of the expenditure and not a separate limitation upon appropriation, levy and expenditure.

When, therefore, the county commissioners in the event of such casualty, have on hand an amount recovered from insurance and a further amount from the county treasury, and contemplate an expenditure exceeding $50,000, and issue bonds, and enter into contract for the erection of a building exceeding such amount, the question of whether a subsequent election ratifying such contract and issue of bonds would cure the proceedings is one of doubt. The legality of the contract would in all probability be upheld by the court when so ratified, but the legality of the bond issue, at least in so far as original bond holders as opposed to bona fide purchasers for value are concerned would be questionable.

The holding of such election, however, with favorable action and the ballot, disclosing the facts as they existed, would operate to confirm the estoppel existing against the county, and the courts, under the circumstances, of emergency would in all probability be constrained to protect the bond holders and the contractors.

When such expenditure is authorized there is nothing to prevent the use of a tax levied for the county building fund for the current year to pay such expenditure.

Under section 2436, General Code, there can be but destruction, authorizing such expenditure, and the subsequent deterioration of the standing walls during the period of reconstruction cannot be construed such a second casualty as to authorize a renewal of the proceedings on such expenditure.

Inasmuch as section 5639-1, General Code, authorizes the county commissioners to fix a day upon which such question shall be submitted, the same shall be submitted at a special election. Inasmuch as there is no express provision authorizing the county commissioners to provide for alterations and changes in the plans and specifications without advertisement for bids, where the amount exceeds $200.00, changes involving an excessive amount are illegal.

Architects' fees may be paid either out of the general county fund or out of the building fund; the better and more general practice being to pay out of the building fund.

COLUMBUS, OHIO, June 23, 1913.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of memorandum, dated June 12th, and

prepared by yourself, setting forth the statement of facts upon which certain questions arise, concerning which questions you invite my opinion. I also acknowledge receipt of your letter of June 16th, suggesting an additional question upon the same statement of facts.

The facts are as follows:

"The court house of Huron county was partially destroyed by fire in the summer of 1912. The building and its contents were covered by insurance, so that the county realized about thirty-four thousand dollars from this source.

"Immediately after the occurrence of the fire the commissioners caused plans, specifications, details and estimates to be prepared. Such plans, etc., were duly submitted to the commissioners, clerk of court, sheriff, probate judge and the appointee of the judge of the court of common pleas, as provided in section 2348, General Code. Said plans provided for the enlargement and fire-proofing of the building and the veneering of the exterior walls, which were left standing at the time of the fire, with sawed sand stone. The architect's estimate of the cost of the building, exclusive of numerous items of equipment was about $91,000.

"While the plans, etc., were in process of preparation the commissioners, without a vote of the people, assuming authority under section 2436, General Code, authorized the sale of bonds in the amount of fifty thousand dollars. The bonds were sold and delivered, realizing about $54,000 in cash.

"There was, at the time, about $12,000 in the general building fund of the county, so that the total amount of money available for the work was about $89,000.

"On January 2, 1913, the contract for the building was entered into. providing in the aggregate for expenditures amounting to about $82,500. Time after time, during the progress of the work, numerous additions and changes have been made in the plans and specifications, bringing the total expense of the general contract up to substantially $85,000.

"In the meantime separate contracts for the installation of necessary equipment have been made, aggregating in amount a sum sufficient to make the entire cost of the proposed improvement about $100,100.00, to which must be added a five per cent. architect's fee.

"Now, it has just been discovered that the old outside walls, which have been subjected to the elements during the winter, and which have deteriorated during that time, are not strong enough to sustain the burden of the new building and will have to be rebuilt. If this is done the general contract expense will be increased about $20,000, making the total expense of the improvement in the neighborhood of $128,000.

"The commissioners have asked the budget commission for a liberal allowance for general building fund purposes."

I think I have fairly abstracted the necessarily lengthy statement of facts which you make. Upon this statement you submit the following quesions:

"1. Under section 2436, General Code, can the commissioners *expend* more than $50,000 without submitting the question of the policy of the expenditure to the electors; or does the limitation fixed in that section refer only to the amount of bonds that can be issued without a vote?

"2. Can the proceeds of the tax for the current year, levied for general building fund purposes be used to help in rebuilding the court house?

"3. Does the deterioration of the standing walls, as described in the

statement of facts, constitute a separate casualty? And if so, does its occurrence authorize a further bond issue without a vote of the electors, under section 2436, General Code?

"4. May a special election be now held to authorize the issuance of more bonds, and the expenditure of the money necessary to complete the building? If so, or in case a submission at a general election is required, what amount should be indicated on the ballot—the amount over and above funds already on hand; or the entire cost of the building; or the cost of the building in excess of $50,000?

"5. Assuming a negative answer to the first question, above stated, may the defects in the proceedings already had be cured by an election to be held in the future?

"6. Have the commissioners power to make changes or alterations in plans for the rebuilding of a court house, made necessary by unforeseen contingencies, involving an expenditure of over $200.00, and to enter into supplementary or subsiduary contracts therefor with the original contractor without advertising for bids?

"7. Can the architect's fee be paid from the general county fund; or must it be paid from the building fund?"

The following sections of the General Code are involved in your questions:

"Section 5638. The county commissioners shall not (1) levy a tax, (2) appropriate money, or (3) issue bonds for the purpose of building county buildings * * * the expense of which will exceed $15,000, except in case of *casualty and* as hereinafter provided; * * * or *enlarge*, repair, improve or rebuild a public county building, the entire cost of which expenditure will exceed $10,000; without first submitting to the voters of the county the question as to the policy of making such expenditure.

"Section 5639-1. When the board of county commissioners desires to submit such question to the voters of the county it shall pass * * * a resolution declaring the necessity of such expenditure, fixing the amount of bonds to be issued, if any, *in connection therewith*, and fixing the date upon which the question of making any such expenditure shall be so submitted, and shall cause a copy of such resolution to be certified to the deputy state supervisors of elections of the county; and thereupon the deputy state supervisors shall * * * make * * * arrangements for the submission of the question * * * *at the time fixed in such resolution.*

"* * * notice of the submission of any such question shall be given the deputy state supervisors by publication * * * which notice * * * shall state (1) the amount of such proposed expenditure, (2) the amount of the bonds, if any, to be issued in connection therewith, (3) the purpose for which such expenditure is to be made, and (4) the time of holding such election.

"Section 5640. The ballots * * * shall have printed upon the same the words, 'In favor of the expenditure of $_____ for the purpose of _____' and 'Against the expenditure of $_____ for the purpose of _____,' said blanks to be filled *with the amount proposed to be expended* and the purpose for which said money is to be expended. * * *."

Before quoting other sections I deem it proper to pause for the purpose of commenting upon the meaning of the sections already quoted.

Obviously, the limitation upon the power of the county commissioners, imposed by these related sections, affects not only the power to borrow money by the issuance of bonds, but also, and equally, the power to make the expenditure. In fact, the

question submitted substantially amounts to a joining of the two propositions, in that the notice of election is required to set forth both the total expenditure and the amount of bonds to be issued; so that it is presumed that the electors have in mind both of these questions when voting upon the proposition submitted to them.

Section 5638, General Code, above quoted, is peculiar in another respect. The exception "in case of casualty and as hereinafter provided" is apparently limited to the matter of *building* county buildings, and by a strict reading of the statute there is no exception on its face to the requirement that the *repair and rebuilding* of public county buildings, if the entire cost of the expenditure will exceed ten thousand dollars, be submitted to the voters of the county. In fact, I cannot avoid the conclusion that so far as section 5638 and succeeding sections *themselves* are concerned, there is no exception whatever to the requirement that the enlargement, improvement, repair and rebuilding of a public county building, if it exceeds $10,000 in cost, be submitted to the voters of the county.

It is my opinion that the words "except in case of casualty" constitute an exception to the requirements respecting the *building* of a court house, and not the rebuilding thereof. To hold otherwise would be to do violence to the English language.

I pause here to remark that this distinction is by no means inconsequential; for if the enterprise be the *building* of a court house, and the total cost exceeds $25,000, then, there *must* be a court house commission, under section 2333 and succeeding sections, General Code, but a court house commission is not required in case the proposition is to "rebuild."

But, of course, the sections which I have already quoted do not set forth all the exceptions to their operation. There are several others than those specified in section 5638 itself. Thus, section 5643 does away with the necessity of submitting the proposition to the electors in cases of the decay or destruction of important public bridges. The section which you cite, section 2436, is of this class. It provides as follows:

> "For the purpose of rebuilding (a) * * * court house destroyed by fire or other casualty, the commissioners of a county may (1) appropriate money, (2) levy tax, (3) issue and sell the bonds of such county *in anticipation thereof*, in an amount not to exceed $50,000, without first submitting to the voters of said county, the question of rebuilding such * * * court house, appropriating such money, levying such tax and issuing and selling such bonds * * * The provisions of section twenty-four hundred and forty-four (requiring the circulation of hand bills or the publication of notice) and fifty-six hundred and sixty (requiring the issuance of an auditor's certificate) of the General Code shall not apply to the making of any of the improvements mentioned in this section."

It is apparent on the face of this section, in the first place, that it is intended to be an exception to the provisions of section 5638, et seq.; otherwise, the reference therein, to the submission of the question to a vote of the electors, would be meaningless. Therefore, the two sections are to be considered together, being strictly in pari materia. So construing them, the conclusion inevitably follows that the limitation of $50,000 in section 2436 is upon the power of the commissioners *to make the expenditure*—not merely upon their power to issue the bonds. The fact that the commissioners may have on hand in the treasury, available for expenditure, an amount which, added to the sum of $50,000, will presumably provide for the improvement, does not dispense with the necessity of submitting the question of spending the aggregate amount in excess of $50,000 to a vote of the electors.

This is my opinion in answer to your first question.

For purposes of convenience, I shall now take up your fifth question, which is

intimately related to your first question, and the answer to which will, I think, throw some light upon the meaning of the statutory provisions already considered.

It is to be observed that both section 5638 and its successors, on the one hand, and section 2436, on the other hand, impose limitations upon the power of the commissioners to do one of three things, viz: *appropriate* money, levy taxes, and issue bonds. There is in neither of these sections, or groups of sections, any *direct* bearing upon the power of the commissioners to *enter into contracts.*

Now, under the general statutes relative to the powers and duties of county commissioners, the making of a contract constitutes an *appropriation* of money. But this is solely by virtue of section 5660, General Code, which requires that before a contract be entered into by the county commissioners the auditor of the county certify that the money necessary therefor is in the treasury to the credit of the proper fund and not appropriated for any other purpose, or is levied and in process of collection; and which further expressly provides that "the sums so certified shall not thereafter be considered unappropriated and the county * * * is fully discharged from the contract * * *."

Now, section 2436, General Code, expressly exempts the making of the improvements to which the section relates from the provisions of section 5660, General Code. As I construe this portion of section 2436, it relates to the improvement, as such, and not merely to the expenditure of the money derived from the issuance of the bonds.

There is what amounts to an interesting question of law upon the point whether or not the making of a contract for the rebuilding of a court house, destroyed by fire or other casualty, amounts technically to an "appropriation" of money for that purpose; and as to whether or not a contract made before any money had been appropriated, and before the authority of the electors to make the improvement had been secured, would not become perfectly valid *ab initio* upon subsequently securing the approval of the electors; that is to say, whether or not contracts made under these circumstances are subject to adoption or ratification by the electors, and, while unenforceable prior to such ratification, become valid thereafter.

Under the peculiar circumstances of the case, however, I do not believe the action of the commissioners should be determined by the application of strict rules of law. Contracts were entered into after competitive bidding and full compliance with every statute, save the one I am now discussing. If, subsequently, that statute is complied with, I would certainly not advise that the contractor's performance be interrupted or interfered with. Clearly, the payments which have already been made to him are legal in the sense that they cannot be recovered back. State vs. Fronizer, 77 O. S. 7, The decision cited, being grounded upon the doctrine of unjust enrichment, it seems clear to me that in the absence of an action by the prosecuting attorney or some tax payer, enjoining further proceedings under the contract, the work might, and in good morals should, be allowed to proceed to completion, and payments should be made therefor.

Indeed, I am by no means certain that the effect of a subsequent election would not be, as I have already stated, a ratification of the contract already let, by virtue of the non-application of section 5660, General Code, to such contract, and therefore a validation of whatever defects may have existed in the execution of the contract.

It is otherwise with respect to the bonds. Strictly speaking, these bonds may have been unlawfully issued. Nevertheless, they have been sold, and, in the hands of bona fide holders at least, would be enforceable against the county. So that I do not deem this question of great importance.

Before leaving the discussion of your first and fifth questions, I wish to acknowledge that the construction which I have placed upon section 2436 is not the only construction which might be placed upon it, according to a liberal reading of its language. The alternative meaning is that which would make the $50,000 limit apply to the appropriation of money, the levying of the tax, and the amount of the bond issue; so

that, in reality, the aggregate limit is $150,000 instead of $50,000. That is to say, such a construction would hold that the commissioners might issue bonds to the amount of $50,000, appropriate money to the amount of $50,000, and levy a tax to the amount of $50,000, each as separate actions, before being required to seek authority of the electors to rebuild the court house.

My principal reason for rejecting such a construction has already been stated. I repeat it, however, It is that section 2436 must be read in connection with section 5638, and as an exception to the latter section. So reading it, it appears that the $50,000 limitation must be regarded as relating to the expenditure in gross.

There is another reason, however, which may, with propriety, be stated. The power to issue bonds, imposed by this section, is not a separate and distinct power, such as is a similar one embodied in section 2434 (which also gives power to borrow money for the rebuilding of a court house.) Under section 2434 the borrowing power is asserted independently of the levying power. That is to say, the commissioners are authorized to borrow on the credit of the county, and then must provide for retiring the bonds through the county debt fund.

But when the commissioners are proceeding under section 2436, they must first make the levy and can only issue bonds in anticipation thereof. From your statement of facts, I am unable to apprehend whether or not the commissioners followed the procedure of section 2434, or that of section 2436, in issuing the bonds. The two procedures are in reality quite distinct and virtually opposite to each other. If the commissioners did not go through the form, at least, of levying the tax before making the bond issue, they have not strictly followed section 2436.

It appears, therefore, that the power to "levy tax" is not a separate thing from the power to "issue and sell bonds," as both are created in section 2436; and that the $50,000 limitation applies, at the very least, to the exercise of these two powers together. This conclusion would reduce the limitation which I have already mentioned to $100,000. That is to say, it would still leave room for the contention that the appropriation of money, and the levying of the tax and issuance of bonds in anticipation thereof, are two separate things, and that $50,000 might be appropriated, and another $50,000 borrowed, in anticipation of a tax levy.

Even if this be the correct construction, the opinion previously expressed would apply, because the total cost of the improvement already provided for is in excess of $100,000, while the cost of rebuilding the wells will make the aggregate expense on account of the improvement greatly exceed that sum.

I am inclined, however, for reasons already expressed, to the view that the $50,000 limitation is upon the expenditure, and not upon the appropriation of money and the levying of a tax, separately.

Fully answering your fifth question, then, I am of the opinion that the validity of the contracts heretofore let may be regarded as questionable, but that a subsequent favorable vote of the electors would at least, in the absence of an affirmative action taken by the prosecuting attorney or some tax payer, or in the absence of the resisting of payments on the part of the commissioners, serve to strengthen the estoppel which would be worked against the county in case the contract was fully performed and payments made thereunder.

So far as the bonds are concerned, I am of the opinion that they may have been unlawfully issued, because, as you point out, the power conferred in section 2436, to appropriate money and issue bonds in anticipation of taxes, cannot be exercised at all "without first submitting," etc. I would not say unequivocally, however, that the bonds were not properly issued. If they were issued before the insurance money was received and appropriated by the commissioners to the rebuilding of the court house, then, the bonds were properly issued; but the appropriation was unlawfully made. Conversely, if the insurance money was received, and by resolution appropriated by

the commissioners before the bonds were issued, then, the bonds were unlawfully issued. That is because, as already pointed out, it is the act which causes the $50,000 limit to be exceeded that is the unlawful act.

If the facts were such as to make the bonds invalid at the time of their issuance, yet, that is a matter of which the county would have to avail itself as an affirmative defense, and after a subsequent election had been held, by which the electors had expressed their approval of the entire transaction, I do not believe a court, having regard to the emergency which actually existed, and all the circumstances of the case, would permit the county to interpose such a defense, especially as against a bona fide holder.

Answering your second question, I am of the opinion that a tax for the current year may be levied for the building fund, and when collected appropriated and used for the purpose of completing the court house; *provided*, authority of the electors is hereafter obtained to expend more than $50,000 for that purpose. That is to say, I believe that by virtue of section 2436 the commissioners are without authority to expend money, no matter how it may have been raised, whether by taxation or otherwise, in excess of $50,000, for the purposes therein mentioned, without a vote of the people.

Answering your third question, I am clearly of the opinion that within the meaning of section 2436 there has been but one "destruction," regardless of how many separate "casualties" have occurred. The authority to spend $50,000 without a vote of the people does not depend upon the number of agencies which may have contributed to the destruction, nor upon the number of separate and distinct events that may have reduced the court house to the condition requiring rebuilding, but upon the mere fact that it is destroyed. Of course, if between two casualties the court house had been rebuilt, the case would be different. My answer to your third question is therefore in the negative.

Answering your fourth question, I beg to state that section 5639-1, in my opinion, clearly authorizes a special election, in that it gives to the commissioners authority to fix the date upon which the question shall be submitted. It is true that the word "special" is not used; and it is true also that section 4840, General Code, provides as follows:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

However, I am of the opinion that sufficient provision is made in section 5639-1 for a special election, and that the same may be held at any time which the commissioners may fix upon.

In my opinion the question to be submitted at the election should, from the viewpoint of caution, at any rate, fix the entire amount to be expended, including that already expended and including the bonds which have already been issued therein. In other words, if the aggregate cost of the improvement is expected to be in the neighborhood of $125,000 that should be the amount printed upon the ballots. The notice of the election should, in my opinion, mention the issuance of bonds. This is not at all necessary, and the notice should not be misleading, in that it should state that the bonds already have been issued.

However, I have recommended this procedure because of its possible bearing upon the question suggested by your fifth question, already discussed. In other words, while I agree with you that it is not absolutely essential that the entire amount be

indicated on the ballot, or that the amount of bonds already issued should be mentioned in the notice, yet, there could not be any valid objection to this procedure; it would certainly not invalidate the election, and it might have some bearing by way of estopping the county to take advantage of any possible defects in the prior proceedings. You will observe, therefore, that my suggestion is not made with reference to the strict necessity of the case.

Your sixth question involves an examination into all of the provisions relating to the powers and duties of the county commissioners, and in particular those respecting entering into contracts for the construction of public buildings. As you say, there is nowhere any express authority vested in the county commissioners to provide for alterations and changes in the plans and specifications of an improvement instituted by them, and to enter into supplemental contracts for such purposes with the original contractor without advertising for bids, unless the amount of the additional expenditure does not exceed $200, in which case section 2354 permits this to be done, by necessary implication.

You point out that section 2340 expressly provides for such changes in the erection of a new court house, through a court house commission, and that the sections providing for the construction of state buildings authorize these things to be done. I regret to state that these considerations but confirm me in the conclusion which I have reached; which is that desired action cannot be taken. That is to say, there is no authority, either expressed or implied, in the county commissioners to make changes or alterations in the specifications, and to enter into supplementary contracts with the original contractor without advertising. The authority is not *express*, as you point out; it is not *implied*, because the *implication* which arises from the fact that the legislature has in other instances expressly conferred the power is to the effect that it did not intend that the power should exist where not expressly conferred. The maxim which applies is *Expressio Unius Est Exclusio Alterius*. This principle is said to apply most strongly and appropriately to cases where the imposition of a *power* is in question.

I am aware that it is sometimes said that courts will construe statutes reasonably; but I do not believe that it is sound law to hold that a mistake of the legislature can be corrected by the courts, especially when to do so would necessitate the creation of a power and the imposition of definite limitations upon that power, both of which are essentially legislative acts.

Nor does the fact that there is an exigency amounting to an emergency, in the present instance, alter the case. It cannot be said that the present exigency or emergency is any greater than that which existed when the court house was burned down. There is no greater cause for haste at the present time than there was in July, 1912. Yet, it could not be contended that merely because the county is suffering for lack of a court house, all provisions of law requiring the letting of contracts for its rebuilding at competitive bidding should be dispensed with.

As a strict proposition of law, I think it must be conceded that the power to act in an emergency differently from that which is prescribed as a course of official conduct in other instances cannot be created by implication; for if there were such power the official imagination would be very quick to construct an emergency at every possible juncture.

Remedial legislation is doubtless advisable; but the mere fact that such legislation, if it were similar to the other statutes to which you call attention, would provide the precise manner in which alterations and changes should be made, and the limitations upon them, is of itself sufficient reason for holding that where the power is not expressly conferred it does not exist.

I am of the opinion, therefore, that changes or alterations in the plans, made necessary by unforeseen contingencies, involving the expenditure of over $200.00, may not be made and contract therefor let to the original contractor without advertising

for bids. Accordingly, the tearing down and rebuilding of the walls, which is now contemplated, must be let as a separate contract, after advertising in the manner provided by law.

Answering your seventh question, I am of the opinion that the architect's fee should be paid from the building fund. No statute requires it to be paid otherwise than as are other claims against the county. The commissioners may have discretion to provide for this expenditure either out of the general fund or out of the building fund; and the fact that the architect is most often employed before the building fund is provided, and sometimes before it is even determined finally to proceed with the improvement, strengthens this view; but the better and customary practice is to regard his fee as a part of the cost of construction.

My opinion has been very hastily prepared, because of the acuteness of the situation, as you have described it to me. I confess that I have not been able to give to the matter the extended research that I might have given to it under other circumstances.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

332.

POWERS OF FLOOD RELIEF COMMISSION TO EMPLOY ENGINEER TO SURVEY GREAT MIAMI RIVER FOR PURPOSE OF INVESTIGATING NECESSITY OF DEEPENING, WIDENING AND STRAIGHTENING—"REBUILDING" INCLUDES "REPLACEMENT"—IMPROVEMENT NOT SUBJECT TO REFERENDUM—DUTIES OF EMERGENCY COMMISSION EXTEND AS WELL TO TEMPORARY AS TO PERMANENT WORK.

The term "replacement" as used in section 9 of the Snyder Emergency Act, provides the power to widen, deepen or straighten a river, under the proceedings provided by sections 2428 and 3623, of the General Code, and inasmuch as this act is intended to be read in connection with and parallel to the emergency commission act, such power must be comprised within section 10 of the later act, empowering the emergency commission to rebuild public works destroyed or damaged by the flood.

This view is further supported by the fact that such straightening and widening are incidental and necessary to the improvement and repair of damaged bridges, which powers are clearly conferred by the emergency act.

The emergency commission, therefore, in conjunction with the county commissioners may employ a resident engineer for the purpose of making a survey of the Great Miami river with the end in view of ascertaining the necessity of straightening, widening and deepening such river.

Such survey must be considered one of the proceedings mentioned in the last part of section 9 of the Snyder Bill. Inasmuch, however, as by general law such a proceeding would not be subject to a referendum vote, section 8 of the Snyder Act must control in its effect to exempt such a proceeding from the necessity of a vote of the electors.

Since the Snyder Act and the emergency commission act must be read together, the powers and duties of the emergency commission must be deemed to be extended to the temporary as well as the permanent work to be done.

COLUMBUS, OHIO, June 13, 1913.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 26th, submitting

for my opinion thereon certain questions arising under section 10 of Senate Bill No. 287, which is entitled, "An Act to establish the Ohio relief commission; to define the powers and duties, etc."

> "First: Does the word 'rebuilding' in section 10 defining the powers and duties of the emergency commission include the term 'replacement' as used in section 9 of the Snyder bill?
>
> "Second: And if so, can an engineer be employed to make a survey of a river, through the entire county for the purpose of securing knowledge to prevent the recurrence of the recent flood?
>
> "Third: And would said survey be considered as one of the proceedings mentined in the last part of section 9 as herein stated?
>
> "Fourth: And before said river can be permanently deepened, widened or straightened is it necessary to subject the same to the approval of the electors or to a referendum?
>
> "Fifth: Do the powers and duties of the emergency commission extend to the temporary as well as the permanent work to be done and as provided in the Snyder bill?"

Section 10 of Senate Bill No. 287, to which you refer is as follows:

> "Section 10. The emergency commission of any county shall exercise in conjunction with the county commissioners such powers and duties as are conferred upon the county commissioners in so far as they extend to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913, and the emergency commission shall exercise and perform such duties jointly with such county commissioners."

Section 9 of House Bill No. 640, providing a method of securing necessary funds to meet the emergency situation presented by the occurrence of the recent floods, provides in part as follows:

> "* * * The term 'replacement' as used in this act includes the temporary establishment and operation of ferries and the widening, deepening or straightening of any river, creek or run which overflowed its banks and caused damages to public or private property at the time mentioned in section 1 of this act, as provided in sections 2428 and 3623 of the General Code, for the purpose of preventing the recurrence of destructive floods. In addition to the powers vested in municipal corporations by section 3677, General Code, such municipal corporations shall have special power to appropriate, enter upon and hold real estate within and without their corporate limits in furtherance of the above mentioned purpose. Provided, however, that proceedings for the permanent deepening, widening or straightening of a river, creek or run shall be subject to the approval of the electors or to a referendum as provided by general law."

It appears from your letter that the first question which you ask is suggested by that which constitutes your second inquiry, that is to say, the exact matter before the emergency commission and the county commissioners is, as to whether or not they may jointly employ an engineer to make a survey of the Great Miami river in Butler county, for the purpose of ascertaining what, if anything, may be done to prevent a recurrence of the recent floods.

I do not know that it is necessary for the purpose of your second question to

answer your first question. I take it that the principal part of the public works belonging to Butler county as such, which were destroyed by the floods in question, consist of the county bridges across the Great Miami and other streams.

The county commissioners, under the general statutes of the state, would, in the construction of the necessary bridges, or for their protection, have the powers in them vested by section 2428, General Code. These powers do not depend upon the provisions of section 9 of House Bill No. 640, but would have existed if that section had never been passed. In fact, section 9, whatever its effect upon the power of the commissioners in this respect, does not confer any new or additional power upon them, but only that measure of power for the specific purpose already generally conferred by section 2428, General Code.

Section 2428, General Code, historically, is a part of the context with section 2429 et seq. These sections constitute a special proceeding which can be commenced only by the filing of a petition, signed by one or more tax payers, with the county auditor. This, however, amounts to no more than a mere formality as it would be easy to get *one* tax payer to file the necessary petition.

Section 2430, General Code, especially authorizes the appointment of a competent engineer, but does not permit the appointment of a non-resident engineer. The engineer appointed must be a resident of the county. While section 2430 is not very explicit, I am of the opinion that it authorizes the engineer to make such a survey as will enable him to report upon the policy of the straightening of the creek or water course, and to estimate the cost thereof. A question arises here which seems to involve considerable difficulty.

Section 2428 and succeeding sections of the General Code limit the authority of the county commissioners to the straightening of "creeks and water courses," and under this language I do not believe it would be held that the Great Miami river in Butler county could be straightened by the county commissioners for the protection of a bridge, it not being a "creek" or "water course."

Other statutes of the General Code might be cited for the purpose of showing that where it is intended that large streams and rivers shall be subject to the jurisdiction of the commissioners they are expressly mentioned. On the other hand, however, section 9 of the so-called Snyder act, House Bill No. 640, refers to "any river, creek or run," and this phraseology is clearly applicable to the Great Miami river in Butler county. Now, I have already stated in a general way, that it did not seem to be the intention of the legislature to enlarge the powers of the county commissioners by section 9 of House Bill No. 640. I was speaking then in the sense which related to the proceeding to be followed as bearing upon the employment of an engineer. Considering said section 9, however, from the point of view of the stream which may be straightened, I am of the opinion that it is clearly the intention of the legislature to enlarge the power of the county commissioners thereby, and to make, for the special purpose of said House Bill No. 640, the machinery of section 2428 et seq., General Code, extend to large streams and rivers as well as to creeks and water courses.

It becomes necessary, therefore, to determine whether the term "rebuilding" as used in the emergency commission act includes the term "replacement" as used in House Bill No. 640. Of course, consideration of this question might be obviated by holding that inasmuch as the emergency commission clearly must join with the county commissioners in rebuilding the bridges, and inasmuch as the rebuilding of the bridges is contingent upon their proper protection by the making of any necessary alterations in the channel of the river, the authority of the emergency commission should be regarded as extending to the preliminary steps as well as to the letting of the contracts for the construction of the bridges and the succeeding steps in connection therewith.

However, I have reached my conclusion upon other grounds. The two acts in question clearly relate to the same subject matter which is special in its nature. They must be read and construed in connection with each other, and each of them must

receive a liberal construction for the purpose of affecting the objects plainly within the contemplation of the legislature. Indeed, I think that the interpretation which is to be given to each of these measures is the most liberal which is at all possible. The necessities of the situation which the legislature was trying to deal with require such a liberal construction. Authorities might be cited upon this point, but I regard it as elementary. I believe it to have been the intention of the legislature, expressed with sufficient clearness in section 10 of the emergency commission act as to obviate all reasonable doubt, that the commission therein provided for should act as a check upon the county commissioners in all undertakings growing out of damages wrought by the floods of March and April, 1913.

I think the phrase "repairing, rebuilding and restoring public works" is sufficiently comprehensive to support this conclusion. Now, one of the activities, which by prior legislation the county commissioners had been authorized to undertake, with special reference to the flood damages in question, was that mentioned in section 9 of the Snyder act. As extended by that section, the powers of county commissioners become very important in counties like Butler county. It is not to be supposed that the legislature did not intend that the commissioners, in the exercise of these powers, should be subject to the same restraint and entitled to the same assistance to which they are subject and entitled in other matters growing out of the floods.

I am, therefore, of the opinion that whether or not the word "rebuilding," by itself, be regarded as inclusive of or synonymous with the word "replacement" as used in the Snyder act, yet it was the intention of the legislature in passing the emergency commission act that it should be regarded as a part of the same scheme of legislation as House Bill No. 540 and construed in connection with it, and that therefore objects within the contemplation of House Bill No. 640 are to be regarded as within the purview of Senate Bill No. 287. It follows from this that if the proceedings are properly instituted under section 2429, General Code, an engineer may be employed to make the necessary surveys; each survey, however, must relate to the protection of a particular bridge or bridges. I should imagine, however, that it could well be regarded as a measure protective of the county bridges in Butler county to investigate the necessity of straightening the Great Miami river throughout its entire course in that county.

I am, therefore, further of the opinion that because of the fact that the two acts of the legislature above referred to must be construed together, the powers of the emergency commission extend to the proceedings provided for in section 2428 et seq., so that although the taxpayer's petition would be filed with the county auditor as provided in said section 2429, yet the advertisement provided in section 2431 and the employment authorized by section 2430 should be made by the county commissioners with the approval of the emergency commissioners. It therefore follows that upon the necessary jurisdictional steps being taken, the employment of the resident engineer, authorized to be employed under section 2430, should be made jointly by the county commissioners and the emergency board. The foregoing constitutes an answer to your first and second questions.

Answering your third question I am of the opinion that in the academic sense the proceedings of which the survey in question would be a part, do constitute "proceedings" within the meaning of section 9 of the Snyder act.

However, answering your fourth question, which is related to your third question, I am of the opinion that it is not necessary before the river could be permanently deepened, widened or straightened to submit the question to a vote of the electors. The said provision of section 9 is in full as follows:

> "The term 'public property,' as used in this act means and embraces, among other things of like nature, any public building, school house, publicly owned and operated public utility and all equipment, wires, poles, pipes,

machinery and all other things used in connection therewith, any street or road machinery, fire and police apparatus, any public works of any kind, levee, embankment, ditch, drain, storm sewer, sanitary sewer, bridge, culvert, viaduct or approach to any of them, and all and singular, every kind and description of public improvement, building, structure or article of public use, which the authorities mentioned in this act are severally empowered by the laws of this state to make, construct, purchase or maintain and repair, save and excepting those which are herein defined to be public ways. The term 'public ways' means and embraces streets, alleys, sidewalks and public places and all things appurtenant thereto in municipal corporations, and the paving or other improvements heretofore constructed or made thereon, whether by assessment of abutting property or otherwise; and all public highways and roads, including those for the repair of which county commissioners are authorized to make emergency levies under sections 7410 and 5649-4, General Code. Provided, however, that in case any road or highway is repaired under authority of this act by any board of county commissioners, such commissioners shall not be authorized thereafter to levy for the repair of such road or highway under the provisions of section 7419, General Code, save for emergencies arising subsequently to the occurence of the floods mentioned in section one of this act. The term 'replacement' as used in this act includes the temporary establishment and operation of ferries and the widening, deepening or straightening of any river, creek or run which overflowed its banks and caused damage to public or private property at the time mentioned in section one of this act, as provided in sections 2428 and 3623 of the General Code, for the purpose of preventing the recurrence of destructive floods. In addition to the powers vested in municipal corporations by section 3677, General Code, such municipal corporations shall have power to appropriate, enter upon and hold real estate within and without their corporate limits in furtherance of the above mentioned purpose. Provided, however, that proceedings for the permanent deepening, widening or straightening of a river, creek or run shall be subject to the approval of the electors or to a referendum as provided *by general law.*"

This section must be read in connection with the earlier provision of section 8 of the same act, which is as follows:

"Proceedings under the general laws of this state for the permanent repair, reconstruction or replacement of public property and public ways, destroyed or injured in the manner described in section one of this act, shall not be subject to any provisions of such laws requiring the submission of the proposition to make such repair, reconstruction or replacement, or to expend money for such purposes to a vote of the electors, or subjecting any ordinance or resolution making or authorizing to be made any such contract to a referendum. * * *"

It appears upon examination of these related provisions that the effect of section 8 is to dispense with the necessity of any approval of the electors or referendum vote *in cases in which the general statutes provide for such approval or referendum.* The object of the proviso in section 9, then, is to except from the operation of section 8, in so far as it does operate upon them and no further, the special proceeding to which it relates. In other words, the provison in section 9 really belongs in section 8, and has the same effect as if section 8 read:

"Proceedings under the general laws of this state for the permanent

repair, reconstruction or replacement of public property and public ways, destroyed or injured in the manner described in section one of this act, shall not be subject to any provisions of such laws requiring the submission of the proposition to make such repair, reconstruction or replacement, or to expend money for such purposes to a vote of the electors, or subjecting any ordinance or resolution making or authorizing to be made any such contract to a referendum; *but this exception shall not be so construed as to apply to proceedings for the permanent deepening, widening or straightening of a river, creek or run.* Money to be derived from bonds or notes issued under authority of section three of this act shall, when their issuance is authorized, and for the purpose of the certificate that money for the specific purpose is in the treasury, as required by the general law, be deemed in the treasury and in the appropriate fund."

Construing the Snyder act as a whole, then, it clearly appears that it was not the intention of the legislature in the use of the peculiar phraseology of section 9 to make anything subject to the approval of the electors which was not subject thereto under the general laws of the state.

I find nothing in the general statutes of the state requiring the submission of the proposition to spend money for the purposes set forth in section 2428, etc., to a vote of the electors. The general statutes requiring the approval of the electors of certain county expenditures are sections 5638 et seq., General Code, but these sections do not mention the expenditures referred to in section 2428 et seq. In fact, the method of procedure outlined in the sections last above mentioned is inconsistent with the idea of submission to a popular vote.

I am, therefore, of the opinion that whatever proceedings are had by the county commissioners and the emergency commission, acting jointly under section 2428 et seq., as enlarged by section 9 of House Bill No. 640, it will not be necessary to submit the proposition of making the proposed improvement to a vote of the electors. The power to straighten, widen or deepen the river, however, is not a general discretionary power but must be exercised only for the purposes mentioned in section 2428, General Code. So that if the two commissions jointly acting should determine upon the policy of expending money for the purpose of straightening the Great Miami river, without reference to the protection of any particular county bridge of county road, this would constitute an abuse of discretion which could be restrained by the courts; the more so because the procedure of section 2428 et seq., has, in a very limited sense, the elements of a quasi judicial proceeding. Restraint by the powers of the court is, in this instance, to be substituted for the popular check which is imposed by section 5638 et seq., General Code.

Answering your fifth question, I am clearly of the opinion that the powers and duties of the emergency commission extend to the temporary as well as the permanent work to be done. This conclusion is inevitable in the light of the principle already announced that the Snyder act and the emergency commission act must be read together. Of course if temporary work has already been done by the county commissioners either under the general law or in the special manner provided for in the Snyder act, the obligations so incurred are not affected by the subsequent appointment of the commission.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

333.

MOTHERS' PENSION—PROBATE JUDGE MAY NOT PAY CLAIMS UNTIL LEVY AND APPROPRIATION FOR THE PURPOSE HAVE BEEN MADE, UNLESS FUNDS ARE PROVIDED THROUGH CHARITABLE SOURCES.

Under section 1683-9, General Code, the county commissioners are required to provide the sum necessary for mothers' pension purposes by a levy therein provided for.

Inasmuch as under section 5649-3d, General Code, appropriations may not be made for any purposes not set forth in the annual budget, and as the budget commission will not meet until June, 1914, and as no appropriation may be made until March, 1915, the probate judge will be without power to pay any such claims until such time, unless funds are provided through charitable channels.

COLUMBUS, OHIO, June 27, 1913.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge your letter of May 15th, in which you request my opinion as to the power of the county commissioners or any other county authority to appropriate money at the present time for the payment of so-called "mothers' pensions;" and as to the power of the juvenile court to make an order for the payment of such a "pension" before funds are provided out of which the order can be paid.

Through a misapprehension I delayed giving consideration to your letter until the present time. I had not carefully examined the act in which "mothers' pensions" are provided for, being Senate Bill No. 18, and was unaware of the provisions of section 3 thereof, hence I supposed that the first question to be encountered was whether or not the act was one "providing for tax levies," and that question being involved in a case pending in the supreme court at the time your request was received, I deemed it proper to await the decision of that court.

Section 3 of the bill referred to provides, however, that the act shall go into effect "as provided in section 1c of article II of the Constitution." In the enrolled bill there is a typographical error in this provision which, however, does not, in my opinion render ineffective the obvious legislative intent. It is provided in section 1c of article II of the constitution that certain laws shall not go into effect until ninety days after they have been filed by the governor in the office of the secretary of state; therefore it was the clear intention of the legislature that regardless of whether or not this act could be regarded as one "providing for tax levies" it should not go into effect until ninety days after it was filed in the office of the secretary of state. The bill was not filed in the office of the secretary of state until a date, which under the provisions of section 3, would postpone its effectiveness until sometime in August, 1913.

The provisions of the act, which as a whole is sometimes referred to as the "children's code," which provides for the so-called "mothers' pension" are sections 1683-2 to 1683-9 inclusive, General Code, as enacted therein. The operative provisions of these sections are as follows:

> "Section 1683-2. For the partial support of women whose husbands are dead, etc. * * * when such women are poor, and are the mothers of children not entitled to receive an age or schooling certificate * * * the juvenile court may make an allowance to each such woman as follows: * * * The order making such allowance shall not be effective for a longer period than six months * * *."
>
> "Section 1683-3. Such allowance may be made by the juvenile court, only upon the following conditions: First—the * * * children * * * must be living with the mother * * *; second—* * * only when in the

absence of such allowance, the mother would be required to work regularly away from her home and children * * *; third—the mother must * * * be a proper person * * * for the bringing up of her children; fourth—such allowance shall * * * be necessary to save the * * * children from neglect * * *; fifth—it must appear to be for the benefit of the child to remain with such mother; sixth—a careful preliminary examination of the home of such mother must first have been made by * * * such * * * competent * * * agency as the court may direct * * *.

"Section 1683-5. *Should the fund at the disposal of the court for this purpose be sufficient to permit an allowance to only part of the persons coming within the provisions of this act, the juvenile court shall select those cases in most urgent need of such allowance.*

"Section 1683-9. It is hereby made the duty of the county commissioners to provide out of the money in the county treasury *such sum each year thereafter* as will meet the requirements of the court in these proceedings. To provide the same they shall levy a tax not to exceed one-tenth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to all the limitations provided by law * * *. The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge."

All these sections must be considered together. So that whereas section 1683-2 by itself creates a power in the juvenile court, and section 1683-3 by itself imposes but six limitations upon the exercise of that power, section 1683-5 indicates rather conclusively that the valid exercise of the power depends upon other conditions than those recited in section 1683-3, viz., the existence of a fund at the disposal of the court. How this fund is to be provided is indicated in section 1683-9; that is to say, there is no way other than that mentioned in section 1683-9 by which the juvenile court may have at its disposal the fund out of which to make allowances; and as the power of the juvenile court to make the allowance is dependent upon the existence of this fact, the steps provided for in section 1683-9 must have been taken according to law before the power to make the allowance arises.

Therefore, the provisions of section 1683-9 are, in the last analysis, controlling. This section is not entirely clear. The first sentence would indicate that the county commissioners may provide the sum necessary to meet the requirements of the court from any moneys in the county treasury. If the sentence stood alone then it would be competent for the commissioners, whether they had made a specific levy for this purpose or not to allow at the beginning of the fiscal year by way of appropriation for the succeeding fiscal year a sum which in their judgment would be necessary for the support of the juvenile court in this particular.

I heretofore held in an opinion to the prosecuting attorney of Franklin county, rendered shortly after the Smith one per cent. law became effective, that the beginning of the fiscal year of the county is the first of March. I would be of the opinion that the word "year" as used in section 1683-9 must be regarded as referring to the fiscal year, and particularly that beginning on the first of March; for upon the rendition of the opinion aforesaid the bureau of inspection and supervision of public offices promulgated a ruling to the same effect, and the various counties have since been conconducting their business upon the theory that the first of March marks the beginning of the fiscal year. I believe it would be a fair inference to make that the general assembly in enacting a law involving the making of an annual allowance of funds would have in mind the fiscal year that had been accepted in practice.

If the first sentence in said section 1683-9 then stood alone there would be some ground for holding that the county commissioners would have the right to make an appropriation out of the general levies of the county in March 1914, to meet the requirements of the juvenile court in the proceeding provided for in the preceding sections.

Even if the first sentence stood alone, however, the question would not be entirely free from doubt. Section 5649-3d of the Smith one per cent. law, so-called, provides *inter alia*, "no appropriation shall be made for any purpose not set forth in the annual budget." If the purposes of the juvenile court under the "mothers' pension" law be regarded as a "purpose" within the meaning of this section, and unless the first sentence of section 1683-9 be regarded as an implied amendment to section 5649-3d, or as an exception to it, no appropriation could be made in March 1914, for that purpose unless a levy had been previously made in June 1913, therefor.

It is unnecessary to discuss further the possible separate effect of the first sentence of section 1683-9 because this sentence does not stand alone. It is immediately followed in the context by the requirement that the commissioners "to provide the same" shall levy a special tax. I am of the opinion that this provision is controlling for two reasons:

In the first place it qualifies the sentence which immediately precedes, and is to be regarded as indicating the only way in which the county commissioners may "provide out of the money in the county treasury" the sum necessary to meet the requirements of the court. This would be the primary and logical grammatical construction of the two sentences, where the commissioners are directed to provide something and the manner in which they shall provide that thing is pointed out. The provision is a grant of power and the maxim *expressio unius est exclusio alterius* applies and leads to the conclusion that there is no other legal way of "providing" the fund.

In the second place the fact that the general assembly has at least granted *authority* to the commissioners to make a special levy indicates very clearly that the purpose for which the levy is to be made is a special purpose and not a general purpose, which might be met out of the general funds of the county. It is here that section 5649-3d again comes into play. If the purposes of the "mothers' pension" act were to be regarded as general purposes of the county, then if the commissioners had made the levy in 1913 for the general county fund it would be proper, despite the provisions of the section just cited, to make an appropriation out of that fund for the purpose of the juvenile court under this act; but inasmuch as the legislature has at least declared the purpose of the "mothers' pension" fund to be a special purpose, it by that declaration negatived the possible contention that such purposes are purposes properly to be met by an appropriation out of a levy for the general fund of the county.

I call attention in passing to the fact that while I have paraphrased section 1683-9, as a matter of fact, the word "any" is not used in that section, and the provision is that the commissioners shall "provide out of the money in the county treasury" the necessary sum.

Having regard to all the facts to which I have called attention, I am clearly of the opinion that the commissioners will be without authority to provide a sum necessary for the court's purpose by appropriation or otherwise, until they have made a specific levy for that purpose, and until that levy has produced "money in the treasury," i. e., until after the first semi-annual settlement of the proceeds of such levy.

Now inasmuch as the act does not go into effect until August I am of the opinion that the commissioners may not make the levy referred to in section 1683-9 until 1914. The date as of which all levies made in the year 1913, so to speak, is the first Monday in June; for this is the date on which the budget commission is convened, and all levies are in theory made before that time; so that no board or officer has authority to make a levy for this year unless the authority existed prior to the first Monday in June.

Inasmuch as the commissioners will be without authority to make the levy provided for in the act until June 1914, and inasmuch also as the proceeds of such levy cannot be appropriated for the purpose of the act until March 1915, I am of the opinion that it is not until the first of March 1915 that any fund can be provided for the use of the court under the "mothers' pension" provision of the act.

I have already expressed the opinion that the juvenile court is without authority to make any allowance until there is a fund at its disposal for this purpose. I have

also expressed the opinion that the ordinary county levy to be made in the year 1913 cannot be appropriated for this purpose. This opinion extends to the question of appropriating the levies for juvenile court purposes for the reason that the general levies for the purposes of the juvenile court, such as the payment of costs, transportation of children, salaries of probation officers, etc., are, in the contemplation of this new law separate and distinct objects and purposes as compared with the objects and purposes of the "mothers' pension" provisions, and would have to be held so under section 5649-3d.

The question arises as to whether there are or can be any funds at the disposal of the juvenile court "for this purpose" before proceeds of the levy made by the county commissioners for such purpose become available?

It would be easy to answer this question in the negative for reasons already apparent, were it not for the use of the word "thereafter" in section 1683-9, supra. Its use indicates an apparent legislative intention that until the county commissioners are able to act, the court shall make the allowance out of some fund other than one provided especially for this purpose by the commissioners.

I can, however, find no authority of law for the expenditure of any public moneys other than the proceeds of the levy provided for in section 1686-9 for this purpose. The question as to whether or not the ordinary juvenile court levies are available for this purpose has already been discussed and decided in the negative.

It seems to me that in the course of the preparation of this bill its draftsman must have contemplated the insertion of a provision which would make the law effective immediately upon its technical taking effect, and would adequately provide for its administration in a fiscal way between that date and the date when the proceeds of the first levies became subject to expenditure. Possibly at one time there was in the bill a provision of this sort, and the word "thereafter" may have referred to such a provision. The law at present, however, lacks any such temporary provision, and I am of the opinion that no such provision can be constructed by inference for the mere purpose of providing an antecedent for the word "thereafter." Indeed, the word "thereafter" may be construed, in order to give it effect, as meaning "hereafter." It would have to be so construed or else regarded as meaningless.

Having decided, then, that (unless funds are provided for the administration of the juvenile judge through charitable channels) the judge of the juvenile court may not make allowance for "mothers' pensions" until the fund for that purpose is provided and appropriated, I am of the opinion that the powers provided for in the related sections may not be exercised until after the first of March, 1915.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

335.

TOWNSHIP TRUSTEES MAY NOT PAY BIGGER PERCENTAGE FOR ROAD IMPROVEMENT THAN IS AUTHORIZED BY THE STATUTES.

Inasmuch as the statutes do not so authorize, the trustees of Greene township may not pay from township funds twenty-five per cent. of the cost and expense of the surveying, supervision and construction of a road within the township.

COLUMBUS, OHIO, June 28, 1913.

HON. THOMAS H. MOORE, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 16th, which is as follows:

"Would you please give me an opinion on the following: the Trustees of Green township, Ashland county, Ohio, passed the following resolution.

Minutes of meeting held in Green township, December 19, 1900.

The following resolutions were passed:

To the commissioners of Ashland county, Ohio:—Whereas, state aid is desired, that a certain road, in whole or in part in this township be improved, pursuant to the provisions of an act passed by the general assembly, to amend certain acts, creating a state highway department to provide for state aid in the construction of highways (99 Ohio Laws 308-320); Therefore be it resolved, that we believe that the public interest demands the improvement of the said roads described as follows: 'Beginning at a point in the township of Green, at the north corporation line of Loudonville, Ohio, on what is known as the Loudenville and Ashland road and running north to a point in the township of Green, at or near the residence of Anderson Byers, a distance of two miles in Green township.'

Resolved further, that we, the trustees of Green township, Ashland county, Ohio, do agree for ourselves and our successors in office to pay from the township funds in the manner provided in said act, twenty-five per cent. (25) of the cost and expense of survey, supervision and construction of said improvement.

H. J. NEPTUNE,
—. A. MCCLURE,
Trustees of Green township.
O. W. CRONE,
Ashland county, Ohio.

Attest: S. N. WELSH, Clerk.

"The above trustees agreed varbally with the abutting property owners to assume the entire 25 per cent. of the cost of the improvement, and relieve the abutting owners from paying any part of the improvement as required by the General Code (99 Ohio Laws 308-320). No assessment or apportionment as to benefit or frontage was ever made.

"Now the present trustees have refused to pay the extra 10 per cent. which should have been assessed to the abutting property owners and which was assumed by the former trustees and the ones who passed the foregoing resolutions. The present trustees have placed the matter with me for an opinion.

"Can the trustees who made the foregoing resolution make an agreement with the abutting property owners by which they can place on the township the entire 25 per cent. of the cost of such improvement, and relieve the abutting property owners of their proportion as provided by said act? And if said trustees made such agreement does it relieve the abutting property owners of their share as provided by the act under which this improvement was made."

It appears from the resolutions of the township trustees, quoted above, that it was adopted on December 19, 1908, so that it becomes necessary to consider the provisions of law that were applicable at that time.

The powers of township trustees with respect to road improvements, under the state highway law, as it existed when said resolution was adopted, were defined by sections 6, 16 and 17 of an act of 1908 (99 O. L., page 308), carried into the General Code, edition of 1910, at sections 1187, 1207, 1208 and 1210, which sections provided:

"If the county commissioners fail to make such application before the first day of January, following the appropriation by the general assembly, the trustees of a township of such county may apply in like manner for aid from such appropriation. Such application shall contain an agreement on the part of the township to pay one-half the cost of construction of a road or highway, including surveys and other necessary expenses, by an assessment on the township of thirty-five per cent. thereof, and fifteen per cent. thereof, on the property fronting on such road or highway. (Section 1187).

"One-half of the cost and expenses of such improvement shall be paid by the treasurer of the county in which the highway is located upon the order of the county commissioners, issued upon the requisition of the state highway commissioner, from any fund in the county treasury for the construction of improved highways under the provisions of this chapter. One-half of the amount so paid by the county shall be apportioned by the county commissioners to the township or townships and the abutting property as provided in the next section. (Sec. 1207.)

"One-fourth of the cost and expenses of such improvement shall be apportioned to the township in which such road is located. Of the amount so apportioned to the township, three fifths shall be charged upon the whole township, and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the abutting property according to the benefits accruing to the owners of lands so located. At least ten days' notice of the time and place of making such apportionment shall be given to persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the cost of establishing county roads. (Sec. 1208.)

"The township trustees shall certify the assessment to the county auditor, who shall place it upon the tax duplicate against the property benefited. The county treasurer shall collect such assessments in the same manner as other taxes are collected, and in such payments as may be approved by the county auditor. The township trustees shall pay the portion of the cost and expenses assessed to the township in the same manner as other claims are paid. (Sec. 1210.)

Section 1187 applied only to a case where the township trustees were dealing directly with the state highway commissioner, when the county commissioners had failed to make application for the state aid money. It is manifest from the language of the resolution, that the township trustees in question were not dealing directly with the state highway commissioner, but with the county commissioners, who had made

application to the state highway commissioner, for the use of the state aid money for the construction of a certain road improvement. Further consideration of section 1187 will therefore be unnecessary.

Section 1208, in language that cannot be misunderstood, provided that one-fourth of the cost of a road improvement under state highway law, should be apportioned to the township in which the road to be improved was located, and of the amount so apportioned, three-fifths was to be a charge on the whole township and two-fifths was to be a charge upon the property abutting on the improvement. The method of procedure in making the assessment against the abutting property was clearly set forth in section 1208.

The township trustees were required by section 1210 to certify such assessments to the county auditor, whose duty it was to place them on the tax duplicate against the property benefited, and the county treasurer was charged with the duty of collecting such assessments.

It was clearly the duty of the township trustees in this instance to assess ten per cent. of the cost of such improvement against the abuttting property, according to the benefits received thereby and their action in agreeing to place the entire twenty-five per cent. of the cost of said improvement upon the township as a whole, which would have the effect of relieving the abutting property from the payment of ten per cent., which the statute says it shall bear, was unquestionably illegal and void. Public officers cannot abrogate the statutes of the state by verbal agreement as they attempted to do in this case, or otherwise.

Such illegal agreement is not binding upon the present trustees and in my opinion it is their duty to proceed to make an assessment against the property abutting said improvement in the manner provided in the statutes above quoted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

336.

COUNTY CORONER MAY HOLD INQUEST AND CHARGE FEES ONLY UPON SUSPICION OF DEATH BY VIOLENCE.

Under section 2856, General Code, a county coroner may only hold an inquest and charge fees therefor, when he knows or has good reason to suspect that death has been caused by violence, i. e., unlawful means.

COLUMBUS, OHIO, June 19, 1913.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Under date of June 13, 1913, you inquire:

> "The county coroner for the month of May presented a bill to the county commissioners of this county amounting to $505.45, for inquests held, etc. It appears that he viewed in all ninety-six bodies, and charged for the same three dollars, as provided for by statute.
>
> "It appears, that the coroner, for some time whenever he has information that an accident occured on railroad, in a factory or any other place, and any one is killed, he would view the body and charge the county with three dollars for viewing the body and also for mileage and the necessary writing. The same is true of cases of people who die where they had no medical attendance at the time."

You submit a number of cases and the cause of death. These include death by apoplexy, asthma, chronic alcoholism, pneumonia, bronchitis, still born, starved to death and similar causes of death.

The authority for a coroner to hold an inquest is found in section 2856, General Code, which reads:

> "*When informed that the body of a person whose death is supposed to have been caused by violence* has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due process of law."

Section 2857, General Code, provides:

> "The coroner shall draw up and subscribe his finding of facts in writing. If he finds that the deceased came to his or her death by force or violence, and by any other person or persons, so charged, and there present, he shall arrest such person or persons, and convey him or them immediately before a proper officer for examination according to law. If such persons, or any of them, are not present, the coroner forthwith shall inform one or more justices of the peace, and the prosecuting attorney, if within the county, of the facts so found, in order that the persons may be immediately dealt with according to law."

These sections were known as sections 1221 and 1222 of the Revised Statutes, and were construed in State ex rel. vs. Bellows, 62 Ohio St., 307, wherein it is held:

> "Within the meaning of section 1221, Revised Statutes, providing for inquests by the coroner, a dead body 'is found within the county' when it is ascertained to be in the county; and death is supposed to have been caused by violence whenever the coroner from observation or information has substantial reason for believing or surmising that death was caused by unlawful means."

The court quotes from the two foregoing sections and then says on page 310:

> "It is thus indicated that the inquest is intended to aid in the detection of crimes and in the punishment of those who perpetrate them. Construed with this purpose in view, and with reference to their natural meaning, the sense in which the words and phrases of the statutes are used should not be the subject of serious doubt. *A death 'caused by violence' is a death caused by*

unlawful means, such as usually call for the punishment of those who employ them. A body 'is found' within the county when it is ascertained by any means that it is in the county. 'Death is supposed to have been caused by violence' whenever from such observation as he may be able to make, and from such information as may come to him, the coroner is for reasons of substance led to surmise or think that the death has been so caused.

"It is the duty of the coroner to hold an inquest and to perform the other duties enjoined upon him by these sections of the statute whenever a dead body is found within his county and he knows or may reasonably believe that death was caused by unlawful means. For such services he is entitled to the compensation which the defendants propose to pay."

The court then approves the opinion of the circuit court in the same case as reported in 8 Circuit Decisions, 376. The syllabi in the circuit court report read:

"Meaning of the words 'Found' and 'Violence' as used in section 1221, Revised Statutes.

"The word 'found' in this section is jurisdictional, and means being present in the county. *'Violence means the unlawful use of physical force or other agency to cause death. It does not include mere accident or casualty.*

"The corner is authorized and required to hold an inquest upon a dead body lying in his county, when he knows, or has reason to suppose, the death was caused by unlawful means."

Shearer, C. J., says on pages 378 and 379:

"Of course, it is not in every case of death from unknown causes that the coroner would be authorized to hold an inquest; but if he knows, or has reasonable ground to believe, the death was the result of violence, or unlawful means, the coroner not only may, but is required to hold an inquest. *Violence, in the sense used in the statutes, means force unlawfully exercised, as distinguished from mere accident or casualty.*"

"We are, therefore, of opinion 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 the 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.

"The word 'supposed' in the statute does not necessarily imply doubt, uncertainty or ignorance of the cause of the death. It is broad enough to include both suspicion and knowledge. If the coroner either knows or suspects the death to have been by violence, he may act."

This question was also passed upon by Hon. U. G. Denman, attorney general, as shown in report of the attorney general for 1909-1910, at page 493. He holds that the coroner has no authority to hold an inquest over the body of a person killed by a railway train in the presence of several witnesses.

By virtue of section 2856, General Code, the coroner is authorized to hold an inquest over the body of a person "whose death is supposed to have been caused by violence." The court in State vs. Bellows, 62 Ohio St., 307, supra, say "a death caused by violence is a death caused by unlawful means, such as usually call for the punishment of those who employ them."

The coroner, therefore, can only hold an inquest when he knows or has good reason to suspect that death has been caused by violence, by the use of unlawful means.

He would not be authorized to hold an inquest over a body of a person whose death was caused by railroad accident, or by accident in a factory, if the accident was not caused by unlawful means, or if there was no reason to suspect that it was caused by unlawful means.

An inquest would not be authorized where death was caused by or resulted from disease, such as asthma pneumonia, bronchitis, still born, starved to death, tuberculosis, and other similar diseases.

In order to hold an inquest it must be a death by violence, and not a natural or mere accidental death. An accidental death without reasonable ground to believe that it was caused by unlawful means, would not authorize an inquest. A death by starvation under suspicious circumstances of wrongful death could be inquired into by the coroner.

In order to draw his fee the coroner is not bound, in all cases, to find that the death was caused by unlawful means. The circumstances, however, must be such as to make a reasonable man suspect that unlawful means had been used. The coroner must act in good faith upon the information given him and must reasonably suspect that violence has been used, through unlawful means, although upon investigation he might find that no wrong had been in fact done.

The coroner would not be authorized to hold an inquest over persons who die without medical attendance, unless the circumstances would cause a reasonable man to suspect that death had been caused by unlawful means.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

337.

NECESSITY OF AUDITOR'S CERTIFICATE UPON EXPENDITURE OF MONEYS RECEIVED FROM SALE OF SPECIFIC BONDS—NECESSITY FOR NEW CONTRACT FOR ALTERATIONS—PERMANENT REPAIRS UNDER SNYDER ACT.

From the face of section 5660, General Code, and the decisions upon the question, the question whether or not the auditor's certificate is necessary for the expenditure of moneys received from the sale of bonds for a specific purpose must be considered doubtful. It is therefore recommended that such certificate be obtained.

When extra work is made necessary through alterations required, the same should be provided for by separate contract. When replacements are made necessary by reason of a recent flood, which are permanent and not temporary in their nature, the procedure of section 1 of the Snyder act is not available.

COLUMBUS, OHIO, June 16, 1913.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 5th, requesting my opinion upon the following facts and the questions presented thereby:

> "Some time ago the question of erecting what is known as the Thirty-first Street Bridge in Lorain, Ohio, was submitted to popular vote and the result was the issuance of bonds to the extent of $70,000.00 to pay for the improvement, which bonds were all sold and the money is in the treasury. The contracts were let as follows: For the fill to the approach, $10,500.00; for

the substructure, $5,621.66; for the superstructure, $24,967.00, and the auditor's certificate of funds was as follows: For the fill to the approach of the bridge, $22,520.00; substructure, $7,000.00; superstructure $25.00.00. By reason of the action of the flood this year much earth was washed away where this fill is being made, which will necessitate the expenditure of an additional $3,000.00 to properly complete the work. The action of the water also demonstrated that an additional expense of $1,500.00 willl be necessary to properly protect the bridge by means of a heavy rip-rap wall. My questions are as follows:

"*First:* Is the certificate of funds by the auditor in the case of the issuance of bonds for specific purposes, such as this, required?

"*Second:* Is it necessary for the commissioners in providing for this extra work and expense, which at the time of the letting of the contract was unknown, to proceed as for a new improvement and enter into a separate contract for this work?

"*Third:* May we legally, under the flood act, proceed to let, after proper resolution or application to the court of common pleas, contracts for this additional work and take the money out of this fund?"

It seems to me that your first question is sufficiently answered by the provisions of section 5660, General Code, which is the section requiring the issuance of the auditor's certificate. It provides in part that,

"Money to be derived from lawfully authorized bonds, sold and in process of delivery, shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund."

A provision of this sort would have been unnecessary, and would be meaningless if there were no requirement that a certificate be issued against the proceeds of bond issues.

In making this statement, however, regard must be had to the decision in the case of Akron vs. Dobson, 81 O. S. 66. This was a decision under a similar section of the municipal code, then denominated section 1536-205. The third branch of the syllabus in the case is as follows:

"3. Section 1536-205, Revised Statutes, providing that no contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or other order for the expenditure of money, be passed by the council or by any board or officer of the municipal corporation, unless the auditor of the corporation shall first certify to council that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, does not apply to an ordinance appropriating the money obtained by council, from a sale of bonds made by it, to the purpose for which the bonds were sold."

It appeared that the entire bond issue in question in this case was to be devoted to the purchase of certain real estate and fire apparatus and nothing else. In the opinion, as pages 77 and 78, is found the following:

"It is also contended that the contract is void because the auditor did not certify to the council that the money required for the contract was in the city treasury as prescribed by section 1536-205, Revised Statutes. The supplemental

petition avers that the auditor did not so certify. This is denied by the answer in the circuit court, and that court does not make any finding upon that issue. This contract cannot create an obligation against the city in the nature of a debt, to meet which no funds have been provided. The council issued and sold the bonds and appropriated the proceeds to meet the expenditures it authorized, and any obligations incurred by the ordinance under the authority conferred are payable only out of the appropriation, so that the section can have no application to such a case."

It does not really appear that the court's dictum (which does not exactly correspond to the third branch of the syllabus), was necessary to a decision of the case, inasmuch as the lower court had not made a finding of fact as to the issuance of a certificate, which was necessary because an issue of fact was raised on this point. The difference between the syllabus and the opinion in this particular is apparent. The syllabus declares that the issuance of the certificate is not necessary when the *ordinance* appropriating the money is passed, about which there could be no dispute. The opinion, however, speaks of the issuance of the certificate in connection with the *contract;* and this appears to have been the only question involved, and the question concerning which, as above remarked, the lower court made no finding of fact.

This decision is therefore unsatisfactory as a clear exposition of the law. A similar holding is found in the case of Emmert vs. City of Elyria, 74 O. S. 185, the second branch of the syllabus in which is as follows:

"Sections 45 and 45a of the municipal code (1536-205 and 1536-205a, Revised Statutes, Bates 5th ed.) providing in substance that no contract involving the expenditure of money shall be entered into unless the auditor of the corporation shall first certify to council that the money required for the contract is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, and that a contract entered into contrary to such provision shall be void and that the money to be derived from lawfully authorized bonds or noted sold and in process of delivery shall be deemed in the treasury and in the appropriate fund, do not apply to contracts for street improvements, when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement."

In the opinion of the court is found the following:

"In Comstock vs. The Incorporated Village of Nelsonville, supra, it is held that, in the absence of an exception, section 2702 applied to so much of the cost of the street improvement as was to be paid by the city out of a levy and that it did not apply to so much as was to be paid by special assessment, for the reason that the payment that was to be made by the city was included in the general levy which was subject to limitation. As the general law then was, the city was not authorized to provide for its part by a levy extending over a number of years and by bonds issued in anticipation of the collection of the levy. Section 51 of the Code provides that bonds may be issued in anticipation of the collection of assessments and that the assessment may be payable in one to ten installments, and section 53 provides that any city or village is authorized to issue and sell its bonds as other bonds are sold to pay the corporation's part of any improvement and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon, and in section 95 it is provided that municipalities shall have power to issue bonds in anticipation of special assessments, and such bonds may be in

sufficient amount to pay the estimated cost and expense of the improvement, so that it would seem to follow now that a municipality may issue bonds in sufficient amount to pay the estimated cost and expense of an improvement and may levy taxes in addition to all other taxes authorized by law, to pay the bonds issued and sold to pay its part of the cost of the improvement, that sections 45 and 45a do not apply to improvements for which the city has authorized bonds to be issued to pay the entire estimated cost and expense."

These decisions are under the city sections. Logically, they should apply also to the interpretation of section 5660. If it be the opinion of the court, however, that sections like these do not apply when the whole bond issue is for a single purpose I cannot understand how the decisions could be worked out with respect to county bonds, because nearly all county bond issues are for single specific purposes.

In the present state of the law I cannot advise otherwise than that the question is a doubtful one. It would be safer, however, to comply with the strict letter of section 5660. This should not be a cause of embarrassment, because the money is actually in the treasury. On the facts which you submit, the county originally had $70,000 in its treasury to pay for the improvement, which I think is unquestionably available for the purpose of making these additional expenditures. Of this $70,000 approximately $54.520 has been certified to, the effect of which, under section 5660, is to appropriate the money to the particular contracts on which the certificates were issued. Such money cannot be regarded as available for any other expenditure and could not be regarded, therefore, as available for the purposes which you mention, unless such purposes be regarded as in the nature of "extras" on the contract for the approaches already let, which, as I shall hereafter point out, is not the case. If your figures are correct, however, there remains something in excess of $15,000 of the proceeds of the bonds issued, which is in the treasury and not certified against. When the contract for the additional work is let, in the manner which I shall describe in, answering your second question, these certificates can be issued against this $15,000.

Answering your second question, I beg to state that in my opinion it is necessary in providing for the extra work which must be done, to proceed as for a new improvement and to enter into a separate contract for this work. I have searched in vain through the provisions relating to the letting of county contracts, as incorporated in the so-called "building regulations," found in sections 2343 to 2366, inclusive, and expressly made applicable to contracts for bridge approaches by section 7559, General Code, for any authority to incur what are known as "extras," regardless of the circumstances. Other provisions of law, such as those relating to the construction of state buildings, the doing of municipal contract work, and the construction of school houses, contain express or inferential authority for entering into supplemental contracts with the principal contractor, in case any additional work is required on his contract, with out necessitating competitive bidding on such additional work. I cannot avoid the conclusion that these express provisions in the other statutes simply emphasize the lack of any such provisions in the county statutes.

I am of the opinion, therefore, that any work required on a county improvement which is not covered by the original plans and specifications must be separately contracted for; and if the amount thereof exceeds $200.00 as provided in section 2354, the entire process of the preparation of plans and specifications and estimates, their approval and the letting of the contract, after competitive bidding, must be gone through with.

Your third question suggests a manner in which, under certain circumstances, the formalities of which I have just been speaking may be obviated. The provision of the Snyder act, to which you refer, is as follows:

"Section 1. The commissioners of any county or any road district, the board of education of any school district, the council of any municipal corporation or the trustee of any township are hereby empowered to authorize or enter into contracts temporarily to repair, reconstruct or replace any public property or public way which such commissioners, council or trustees are authorized to repair, reconstruct or construct under any general law of this state, if such public property or public way has been destroyed or injured by floods occurring in March and April, 1913, and if urgent public necessity exists for the making of such temporary repair, reconstruction or replacement; and to appropriate money, levy taxes, borrow money or issue bonds for such purposes. None of the provisions of the General Code requiring notice of any like repair or improvement to be given, imposing any limitation upon the time within which like contracts may be entered into or authorized; requiring competitive bidding in entering into like contracts; requiring the issuance by the auditor or clerk of a certificate that the money for such contracts is in the treasury or in process of collecting, unappropriated for any other purpose; requiring ordinances for like purposes to be published; requiring the submission of propositions to make like repairs or to reconstruct or construct like public improvements, property or way, or to expend money or levy taxes therefor to a vote of the electors; or subjecting any ordinance or resolution making any such contract or authorizing the same to be made, to a referendum of the electors, shall in any way apply to or govern proceedings for entering into or authorizing such contracts or appropriating money therefor. Directors of public service or safety in cities shall not be required to advertise for competitive bids in entering into any contract authorized by this section.

Provided, however, before any such contract for temporary repair, reconstruction or replacement involving an expenditure of more than five hundred dollars is authorized or entered into, such commissioners, board or council shall apply to the common pleas court of the county, or of any county in which any part of any such school district, road district or municipal corporation is located, or to any judge thereof. Such application shall set forth the nature of the repair, reconstruction or replacement proposed to be made, and the amount of money proposed to be expended upon each building, plant, sewer, aqueduct, reservoir, water mains, (including water pipes connected therewith), apparatus, levee, embankment, street, alley, bridge, culvert, viaduct, or approach thereto, or to any of them, or upon each like public improvement or public way, and the necessity thereof. Such court or judge shall forthwith hear and finally determine such application, and if it is found that such public necessity exists, that the proposed repair, reconstruction or replacement is temporary in its nature and should be made forthwith, and that the amount of money proposed to be expended therefor is reasonable and justified by such necessity, said court or judge shall allow the application, and board of officers so applying shall be authorized to proceed in the manner provided in this section. * * *"

It appears from your statement of facts that the proposed repairs and replacements are permanent and not temporary in their nature. I should be of the opinion, therefore, that the procedure of section 1 is not available to you, and that you would have to act under section 8 thereof, which is in part as follows:

"Section 8. Proceedings under the general laws of this state for the permanent repair, reconstruction or replacement of public property and public ways, destroyed or injured in the manner described in section one

of this act, shall not be subject to any provisions of such laws requiring the submission of the proposition to make such repair, reconstruction or replacement, or to expend money for such purposes to a vote of the electors, or subjecting any ordinance or resolution making or authorizing to be made any such contract to a referendum. * * *"

This section, it will be observed, does not do away with the necessity of advertising for bids or preparing plans and specifications.

Even if application should be made to the common pleas judge, and he should allow the same, that would not, in my judgement, be a complete adjudication of the matter. As the proceedings before him are entirely exparte and summary in their nature it would still be possible for any interested taxpayer to raise the question as to whether or not the proposed repairs were actually temporary in their nature.

In my opinion, therefore, you should not proceed under section 1 of the Snyder act in making these repairs, but should act under the provisions of the building regulations.

I might add that while you assume that the county will be obliged to pay the additional three thousand dollars to complete the work which was damaged by the flood, there would appear to be some question as to whether or not under these circumstances the loss should not fall upon the contractors. Not knowing the circumstances, and not having the contract before me, and you not having requested my opinion upon this point, I express none, but suggest the question to you for your consideration. This suggestion, of course, relates solely to the three thousand dollar item of which you speak and not to the fifteen hundred dollar expenditure.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

340.

DUTY OF COUNTY COMMISSIONERS TO PAY EXPENSE OF PURSUIT INCURRED BY SHERIFF UPON ESCAPE OF PRISONERS—QUESTION OF NEGLIGENCE IN PERMITTING ESCAPE ONE OF FACT.

When prisoners have escaped from the county jail by inserting their arms through the gratings of the jail door and turning the key therein, the fault should not necessarily be imputed to the sheriff, who has nothing to say as to the nature and construction of such door, and the county commissioners may pay the expenses incurred by such sheriff in pursuing and recapturing such prisoners.

COLUMBUS, OHIO, June 17, 1913.

HON. T. E. MCELHINEY, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—In your letter of June 7, 1913, you say:

"Some months ago three prisoners escaped from the jail in Morgan county in the following manner: There is one outside entrance to the jail proper, there being two doors to this entrance, the inner door being of iron bars running from top to bottom and cross bars from side to side. The bars in question leave apertures two and one-half or three inches square at all points where the bars cross; the door is made of solid plate surrounding the lock for a distance of nine inches on the side of the lock measuring from the

key hole and seven inches to the bottom of the plate in which the lock is situated. The spaces between the bars will permit the hand of an ordinary sized person and a portion of the arm to reach through.

"On the occasion above mentioned, the prisoners in said jail were given the liberty of the corridor surrounding the cage, it being in the forenoon, and the matron and assistant doing some scrubbing and other cleaning in and about the corridor and cell; upon leaving the corridor on an errand the key was left inserted in the lock from the outside thereof, and the door being locked, and by means of reaching the hand and arm through the aperture before described, one of the prisoners was able to reach the key, unlock the door, and in this manner effect an escape.

"In pursuing the prisoners and recapturing them, items of expense were incurred in the way of livery and automobile hire, assistance for the sheriff, and other expenses, and the sheriff has presented these items in his expense account for payment by the county commissioners.

"I desire the opinion of your department as to whether these different expenses are proper charges against the county and properly included in the sheriff's itemized list of expenses, or whether they should be paid individually by the sheriff.

"The commissioners of the county have, by the placing of additional iron bars and plate, rendered it impossible for a prisoner to again reach the key if the same should be left in the lock as on this occasion.

"It has been customary for the sheriff in this county to give the prisoners through the day the liberty of the corridors of the jail, and especially is this true at or about meal times, or on occasions when the work was being done in the jail in the way of cleaning and rearranging cells."

From your very full statement of the case, I am unable to see that the sheriff was guilty of such acts of negligence as would preclude him from being allowed his reasonable expenses in the pursuit, recapture and return of escaped prisoners. The commissioners are charged with the erection and maintenance of a suitable jail in which to safely keep and confine prisoners. The sheriff is chargeable with due diligence in keeping prisoners and restraining them under all the conditions and circumstances existing at the time. He is not bound to repair the jail, not give it the highest physical efficiency to prevent an emergency, not ordinarily to be anticipated. Good faith, ordinary care, watchfulness and vigilence, are all that can be expected of him, in view of the circumstances. If he was not negligent or careless to that degree as to fairly and clearly impute to him the direct cause of their escape, he ought not to be chargeable therewith. This is a matter that should appeal to the fairness and good judgment of the county commissioners, in the light of all the circumstances and the condition of the jail; and if they allow the sheriff's bill, their action in that behalf can not be questioned, when done in good faith.

Each and every such case as you submit, should be determined in the light of good judgment and fairness. Humanity would warrant giving prisoners the use of the corridors, at reasonable times, the same as trusties at penal institutions are afforded extra privileges; and if any such should betray the confidence reposed in them and escape, it is the duty of the sheriff in charge to pursue and retake them; and in the absence of known and established negligence or carelessness, they should be reimbursed as to their expenses, under section 2997, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

341.

MONEYS RECEIVED UNDER SECTION 7033, ET SEQ., GENERAL CODE, MAY NOT BE EMPLOYED TO IMPROVE COUNTY OR TOWNSHIP LINE ROADS.

Sections 7177 and 6995, General Code, are the only provisions in the statutes for the improvement or construction of a county or township line road and under the terms of sections 7033 to 7052, General Code, township trustees are not empowered to expend the moneys received thereby for the purpose of improving a township and county line road.

COLUMBUS, OHIO, June 28, 1913.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I have your letter of April 4th, in which you inquire as follows:

> "New London township, outside the corporate limits of the village of New London, has been erected into a road district under provisions of sections 7033 to 7052, General Code, and bonds of the district sold. Can the money so raised for improving the public ways of the district be used to improve by macadamizing a township and county line road, or such section thereof as has been apportioned to New London township under section 7177, General Code, without any assistance from the adjoining township or county? Can section 6995, General Code, apply to such case, or to any other than townships improving under section 6976 et seq? If not how can a township line road be improved?"

Sections 7033 to 7052, General Code, provide a scheme whereby bonds may be issued and taxes levied for the improvement of roads, when the township or part thereof is established by the township trustees as a road district. Said sections make no provision for the improvement of any road that does not lie wholly within a road district.

Section 7177, General Code, provides:

> "If a road is established as a part of the line or boundary of a township or municipal corporation, the trustees of such adjoining townships and council of such corporation, shall meet at a convenient place as soon after the first Monday of March as convenient, and apportion such road between the townships, or township and corporation, as justice and equity requires. The trustees of the respective townships, and council of the corporation, shall cause the road to be opened and improved accordingly, and shall thereafter cause their respective portions to be worked and kept in proper repair."

In order to come within the purview of section 7177, a road must be either on the line between two townships or on the line between a township and a municipal corporation, in the same county. That section has no application to a county line road.

Section 6995, General Code, provides:

> "The county commissioners and the township trustees may improve any county or township line road or public highway by jointly agreeing in regard thereto, and paying for said improvement under any plan and specifications authorized by law for road improvement in any county and township in the state."

The last quoted statute is incorporated in the subdivision of the township road laws, entitled "Roads partly within a municipality." When township trustees are improving roads under said subdivision, they may agree with the trustees of the adjoining township in the same county or with the county commissioners of an adjoining county, as to the improvement of a road or roads which are on a line between two townships of the same county or on a line between one county and a township of another county.

The method of improving roads prescribed by sections 7033 to 7055 is exclusive and independent of that prescribed by sections 7177 and 6995, respectively, and the

provisions for the improvement of county or township line roads found in the latter sections cannot be so as to apply to improvements made under the former.

I am therefore of the opinion that money raised to improve roads under sections 7033 and 7052 cannot be used to improve a township and county line road or such section thereof as has been apportioned to a township under section 7177, General Code, with or without assistance from the adjoining township or county. Section 6995 applies only to a case where township trustees are improving roads under the subdivision in which that section is found, to wit, sections 6976 to 7018, inclusive.

The only provisions of statute I have been able to find for improving township line roads are those embraced in sections 6995 and 7177, supra.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

342.

LIABILITY OF PARENT TO PROVIDE SCHOOL BOOKS FOR CHILD WHEN ABLE SO TO DO.

Under sections 7763, 12977 and 12978 of the General Code, the parent if able so to do is bound to see to the education of his child and must provide the latter with books, or be subjected to the penalty provided by section 1655 of the General Code.

COLUMBUS, OHIO, April 17, 1913.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I herewith acknowledge the receipt of your letter of January 28 1913, wherein you inquire as follows:

> "The board of education of one of our townships has submitted to me the following inquiry: The board has passed a rule whereby they furnish school books free to pupils who are unable to furnish the same. One of the residents of the school district who has ample means and is able to provide his children with school books refuses to furnish the same and sends his children to school without any books. Is there any provision under our statutes whereby this parent can be compelled by the board to furnish his children with school books, and if so, what is that provision?"

In reply to your inquiry would say that section 7763 of the General Code provides for the school attendance of children between the ages of eight and fourteen years as follows:

> "Every parent, guardian or other person having charge of any child between the ages of eight and fourteen years must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having a superintendent, or by the principal of the private or parochial school upon satisfactory showing, either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent, or clerk as the case may be, to teach the branches named in the next preceding section."

Section 12977 of the General Code provides that except in certain cases the parent or guardian in charge of a minor between eight and fourteen years of age shall cause such minor to attend school as follows:

> "Whoever being the parent or guardian or other person in charge of a

minor between eight and fourteen years of age or a minor between fourteen and sixteen years of age who has not passed a satisfactory fifth grade test in the studies enumerated in section seventy-seven hundred and sixty-two or is not regularly employed, upon notice from a truant officer as provided by law, fails to cause such minor to attend a public, private or parochial school, unless such person proves his inability so to do, shall be fined not less than five nor more than twenty dollars, or the court may in its discretion, require the person so convicted to give a bond in the sum of one hundred dollars, with sureties to the approval of the court, conditioned that he or she will cause the child under his or her charge to attend some recognized school within two days thereafter, and to remain at such school during the term prescribed by law; and upon the failure or refusal of any such parent, guardian or other person to pay said fine and costs or furnish said bond according to the order of the court, then said parent, guardian or other person shall be imprisoned in the county jail not less than ten days nor more than thirty days.

Section 12978 of the General Code provides that a person violating the preceding section may be required to give a bond in the sum of $100.00, etc., as follows:

"The court may require a person violating the next preceding section to give a bond in the sum of one hundred dollars, with sureties to the approval of the court, conditioned that such person will cause such minor to attend such school within two days thereafter, and remain in attendance therein during the term as provided by law."

Section 7739 of the General Code provides that each board of education *may* furnish school books free of charge, as follows:

"Each board of education may furnish, free of charge, school books, necessary to enable the parent or guardian, without expense therefor, to comply with the requirements of this chapter, to be paid for out of the contingent fund at its disposal. Such levy each year, in addition if necessary to that otherwise authorized, as may be necessary to furnish such school-books free of charge to all the pupils attending the public schools, is hereby authorized. But pupils wholly or in part supplied with necessary school books shall be supplied only as other or new books are needed. All school books furnished as herein provided, shall be the property of the district, and loaned to the pupils on such terms and conditions as each board prescribes."

You state that your board has adopted a rule whereby they furnish school books free to pupils whose parents are unable to provide the same. I will not pass upon the legality of this rule so adopted by said board of education for the reason that it is not necessary to take it into consideration in this particular case. While it is doubtful whether or not a board of education can legally adopt and enforce such a rule, nevertheless, the adoption of such rule does not relieve the parents who are able to do so, from the duty of contributing to the support, maintenance and education of their minor children under seventeen years of age, as will be hereinafter pointed out. You state that the parent in this case is sending his children to school as he is legally required to do by virtue of sections 7762, 12977 and 12978 of the General Code, above quoted, and that such parent is amply able to provide school books for his said children, but refuses to do so. If said parent desires to raise any question as to the validity of the rule passed by the board of education, he must do so in some way other than refusing to furnish his children with school books.

Sections 7709 and 7714 inclusive, of the General Code, provide in substance the manner whereby boards of education shall procure and provide the necessary text books for their respective schools.

Section 7715 of the General Code provides that such books so provided must be sold to the pupils of school age in the respective school districts at not to exceed ten per cent. of the price paid by the board of education to the publisher, as follows:

"Each board of education shall make all necessary provisions and arrangements to place the books so purchased within easy reach of and accessible to all the pupils in their district. For that purpose it may make such contracts, and take such security as it deems necessary, for the custody, care and sale of such books and accounting for the proceeds; but not to exceed ten per cent. of the cost price shall be paid therefor. Such books must be sold to the pupils of school age in the district, at the price paid the publisher, and not to exceed ten per cent. there for added. The proceeds of sales shall be paid into the contingent fund of such district. Boards also may contract with local retail dealers to furnish such books at prices above specified, the board being still responsible to the publishers for all books purchased by it."

Section 7716 of the General Code provides that when pupils remove from any district and have such text books as were adopted by such district, and which are not the same as those of the district into which they move, that the board of the district from which they remove shall purchase such books at the fair value thereof as follows:

"When pupils remove from any district, and have text books of the kind adopted in such district and not the kind adopted in the district to which they remove, and wish to dispose of them, the board of the district from which they remove, if requested, shall purchase them at the fair value thereof, and resell them as other books. Nothing herein shall prevent the board of education from furnishing free books to pupils as provided by law."

Parents are charged with the care, support, maintenance and education of their children under seventeen years of age by virtue of the provisions of section 1655 of the General Code as follows:

"Whoever is charged by law with the care, support, maintenance or education of a minor under the age of seventeen years, and is able to support or contribute toward the support or education of such minor, fails, neglects, or refuses so to do, or who abandons such minor shall be fined not less than ten dollars nor more than five hundred dollars, or imprisoned not less than ten days nor more than one year, or both. Such neglect, non-support or abandonment shall be deemed to have been committed in the county in which such minor may be at the time of such neglect, non-support or abandonment. Each day of such failure, neglect or refusal shall constitute a separate offense, and the judge may order that such person stand committed until such fines and costs are paid."

Inasmuch as school books are not furnished free of charge to the pupils of parents who are able to pay for them in the district about which you inquire, then such books must be sold to such pupils in accordance with section 7715 of the General Code, and a statutory duty is imposed upon such parents to pay for the books so sold to such pupils by virtue of the provisions contained in sections 7715 and 1655 of the General Code.

I assume the children of the parent in question are under seventeen years of age, and, therefore, if such parent who is able to do so, fails, neglects or refuses to buy books for his children, then he is, to that extent, refusing to contribute to the education of his children, and is subject to prosecution under the provisions of said section 1655 of the General Code.

Under the circumstances which you state, and for the foregoing reasons it is the conclusion of this department that such parent is not only required to send his children to school, as provided by sections 7763, 12977 and 12978 of the General Code (unless his said children come within some of the exceptions of said statutes), but is also bound to provide books for his said children and can be prosecuted for not doing so by virtue of section 1655, supra.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

346.

JOINT BODY CONSISTING OF EMERGENCY FLOOD RELIEF COMMISSION AND COUNTY COMMISSIONERS MAY ACT ONLY UPON THE ASSENT OF EACH INDIVIDUAL BOARD VOTING INDEPENDENTLY.

Inasmuch as under the emergency flood commission act, wherever the flood commission is referred to, it is spoken of as an independent commission in itself, and inasmuch as furthermore, county commissioners are everywhere referred to as an independent board rather than as individuals, constituting such board, the authorizations of the act extending to joint actions upon the part of the emergency commission and the county commissioners require both the consent of the flood commission acting as a board and also the consent of the county commissioners acting in like capacity for all acts authorized to be jointly performed by them.

Inasmuch as the making of allowances for payment, under section 2460, General Code, constitutes just as much a part of the proceedings as does the entering into and approval of contracts, the joint consent of both the commission and the county commissioners is required in such allowance.

COLUMBUS, OHIO, June 12, 1913.

HON. ROBERT G. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 24th requesting my opinion on the following question arising under Senate Bill No. 287, which is entitled "An act to establish the Ohio flood relief commission, etc."

1. "What is the constitution of the joint body which consists of the emergency commission and the county commissioners; that is, should the two bodies for the purpose of the act organize as a single commission, and when so organized should the votes of a majority of the individual members, consisting of the county commissioners and the members of the emergency commission, determine the action of the body; or should the two bodies—the emergency commission on the one hand, and the county commissioners on the other—be regarded as separate bodies in joint session as in the case of joint county ditch proceedings; or should the emergency commission be regarded as a quasi corporate entity, which, for the purposes of the act, is added to the membership, so to speak, of the county commissioners, having as a body a vote in the deliberations of the county commissioners respecting the matters to which the act refers equal to the vote cast by an individual county commissioner.

2. "The further question arises as to whether or not the emergency commission is required to join with the county commissioners in making allowances for payments under section 2460, General Code, in so far as payments are made upon contracts relating to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913."

You have submitted with your questions a very full statement bearing upon the questions for which I thank you.

As you state sections 7 and 10 of said S. B. No. 287 present both of the questions above stated, these sections are as follows:

"Section 7. If within fifteen days after this act shall take effect a peti-

tion signed by the electors of any county, equal in number to ten per centum of those who voted at the last regular county election, shall be filed with the Ohio flood relief commission, stating that public works or public property in such county has been seriously damaged by the floods of March and April, 1913, so as to constitute an emergency which the county commissioners are unable to meet and that such authorities are unable to adequately provide for the repair of the damage caused by such floods and for the reconstruction of public works made necessary thereby, the Ohio flood relief commission shall forthwith investigate the statements of such petition. If the commission finds that the statements therein made are true, they shall so notify the probate judge of such county who shall within five days appoint with the approval of the Ohio flood relief commission not to exceed four electors of such county to constitute the emergency commission of such county.

"Section 10. The emergency commission of any county shall exercise in conjunction with the county commissioners such powers and duties as are conferred upon the county commissioners in so far as they extend to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913, and the emergency commission shall exercise and perform such duties jointly with such county commissioners."

The form in which your first question is above phrased suggests what I think are the three possible constructions of the peculiar language of section 10 above quoted. The first of the three possible constructions is that which would read the section as having an effect similar to that of section 2333, e. seq., of the General Code, providing for the organization and constitution of a court house commission. Some of these related sections are as follows:

"Section 2333. When county commissioners have determined to erect a court house or other county building at a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to vote of the electors thereof. If determined in the affirmative, within thirty days thereafter, the county commissioners shall apply to the judge of a court of common pleas of the county who shall appoint *four suitable and competent freehold electors of the county who shall in connection with the county commissioners constitute a building commission and serve until its completion.* * * *"

"Section 2338. After adopting plans, specifications and estimates, the *commission* shall invite bids and award contracts for the building and for furnishing, heating, lighting and ventilating it, and for sewerage thereof. Until the building is completed and accepted by the *building commission it* may determine all questions connected therewith, and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county.

"Section 2339. The *commission* may employ architects, superintendents and other necessary employes during such construction and fix their compensation and bond.

"Section 2340. *When approved by the building commission*, plans, drawings, representations, bills of material, specifications of work and estimates of cost thereof shall be filed by the county auditor in his office and shall not be altered, unless such alteration shall first be drawn, specified and estimated as required by law for the original plans and *approved by the building commission.* No change shall be made until the price to be paid therefor shall have been agreed upon in writing between the commission and the contractor.

"Section 2341. Resolutions for the adoption or alteration of plans or specifications, or award of contracts, hiring of architects, superintendent or

other employes and the fixing of their compensation, the approval of bonds, and the allowance of estimates shall be in writing and require for their adoption the votes of *five members of the commission, taken by yeas and nays recorded on the journal of the county commissioners. When signed by five members of the commission,* the county auditor shall draw his warrant on the county treasurer for the payment of all bills and estimates of such commission."

The method of procedure employed in these related sections is, as you point out in your letter, a most convenient one. The sections themselves would answer as to the court house commission all of the questions which you raise concerning the emergency commission. The very clearness of these sections and the method of procedure under them is doubtless what has induced you to state in your letter that "the idea of the single joint commission similar to the court house act is certainly the most practicable." You also suggest that "the legislature in enacting the present act seems to have more closely followed the idea of the court house commission, etc."

I have looked at that question as to the adoption or rejection of the first possible construction above suggested from the same angle of view, that is to say, it has seemed to me that there are several points of similarity as between section 10 of the emergency commission act and the whole court house commission act, so as to lead one to the reasonable assumption that the legislature may have had in mind the procedure of the latter in enacting the former. Unfortunately, however, there are insuperable difficulties in the way of construing section 10 of the emergency commission act as having the same effect as that of the above quoted provisions of the court house commission act.

In the first place, the court house commission consists of a definite number of persons, i. e., seven, of which the "four freeholder electors" constitute four members and the individual commissioners the other three members. The "commission" provided for in the court house act is a single body, always referred to as such. On the other hand the "emergency commission" provided for in sections 7 and 10 of the act under consideration consists of the electors appointed by the probate judge. Nowhere is there any provision that the county commissioners shall be members of the emergency commission. Furthermore, the number of members of the emergency commission is not fixed by the act. Whereas, in order to constitute a court house commission it is necessary to have seven members, four of whom shall be competent freehold electors, and three of whom shall be the county commissioners, yet as to the emergency commission, if it were to be regarded as a single body embracing the commissioners as members, the numerical membership would be indefinite. This would, of itself, be a sufficient reason for holding against any such possible construction, for if the body is to be a single one, of which the individual commissioners are members, then the constitution of a quorum in that body would be a matter which would be left to the discretion or caprice of the probate judge in determining the number of members whom he would appoint to the "emergency commission." This would lead to two constitutional difficulties. First, it might be claimed with a great show of reason that the delegation to the probate judge of the power to determine the number of members of the single body and thus to constitute a quorum and a majority vote would amount to a delegation of legislative power, the subjects being matters almost universally governed by legislation in other similar instances.

Second, it could be well claimed that an act which would result in a commission of five members in one county, so that the commissioners would have the balance of power in that county, and seven members in another county in which the commissioners would not have the balance of power, would be an act of a general nature lacking uniformity of operation. But there is an essential difference between section 2333 and

related sections on the one hand and sections 7 and 10 of the emergency commission act which appears on the face of the respective sections.

In section 2333, General Code, it is provided that "the freehold electors shall act in connection with the county commissioners;" in section 7 of the emergency act the "four electors *themselves* constitute the emergency commission, and the county commissioners have no membership in such commission. Then it is provided in section 10 that the emergency commission constituted, as provided in section 7, shall exercise in conjunction with the county commissioners the power therein conferred.

I am of the opinion, therefore, that the first possible construction of sections 7 and 10 above suggested must be rejected and that the individual members of the emergency commission do not constitute members of a single body of which the individual county commissioners are also members, and in which body the vote of each individual is of equal weight and the majority of the individuals is necessary to determine the action of the body. Choice is, therefore, to be made between the other two possible constructions above suggested.

Which of the other two constructions will be given to the language of section 10 might be said to depend largely upon the interpretation of the phrase "county commissioners." In the court house commission act above quoted from the word "commissioners" evidently refers to the individual members of the board of county commissioners, and not to the board itself. This does not necessarily appear on the face of section 2333, but does appear upon consideration of section 2341 above quoted. In fact I think that the provisions of section 2341 and that section alone produce the result of which I speak, and that if it were not for that section it would not so clearly appear that the commission provided for in section 2333 consisted of seven members.

In the case of section 10 of the emergency commission act I have reached the conclusion that the phrase "county commissioners" is used in what virtually amounts to its commonest sense, viz., meaning the "board of county commissioners." In the chapter relating to the powers and duties of county commissioners the phrase is oftenest used in this sense.

I shall not burden this opinion by quoting the numerous provisions of that chapter but call attention to the fact that the whole phrase "board of county commissioners" is but seldom used while the commonest phrase is "the county commissioners" or merely "the commissioners." Whenever it is so used in this chapter it is clear that it means the board of county commissioners because all three commissioners need not concur as the action of the county commissioners is by majority vote. This then is the primary and ordinary meaning of the phrase "county commissioners." It refers not to the individual members of the board in the collective sense but to the board itself as a governmental entity and body corporate.

This conclusion is strengthened by consideration of section 6 of the emergency act relating to the commission in cities, which is as follows:

> "Section 6. The emergency commission of any municipality shall have, in conjunction with the director of public service, all the powers and duties of the director of public service in such municipality in so far as they may extend to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913, and shall exercise and perform such powers and duties jointly with such director."

The last clause of the above section is parallel to the last clause of section 10. I am of the opinion that the legislature intended the effect of the one to be similar to that of the other. There can be no question as to the meaning of the phrase "the emergency commission * * * shall exercise and perform such powers and duties jointly

with such director." The use of the word "jointly" in this connection, together with the designation of the emergency commission as a "commission" and not the members of it as "commissioners" lead to the conclusion that the concurrence of a city emergency commission, as a unit, determined by a majority vote of the members thereof, with the director of public service on the other hand, is necessary to any action to be taken under said section 6.

So then, would I construe section 10. In my opinion the emergency commission is not a fourth county commissioner; but it is a body politic. The case cited by you of Chesborough vs. Commissioners, 37 O. S. 508, in so far as it relates to the necessity of a majority of each board of county commissioners in a joint county ditch proceeding concurring in the official action, may be applied to the construction of said section 10.

I am, therefore, of the opinion in answer to your first question that the county commissioners and the emergency commission shall not organize as a single joint body except perhaps in an informal way and for convenience. The emergency commission should separately organize, and upon any question arising, the emergency commission should determine its attitude by a majority vote of its members, and the county commissioners determine their attitude by a majority vote of the individual commissioners, and if the two attitudes thus determined upon do not agree no action can be taken.

I observe that you state that this construction does not appeal to you because of the opportunity for the two bodies to become dead-locked and thus defeat the operation of the law, a result which ought to be avoided. I acknowledge the force of this suggestion; but it is not permitted to read into a statute phraseology which is not there nor to ignore express provisions which are present there because of the mistaken policy of the legislature.

Answering your second question, I am of the opinion that the issuance of warrants to conform to contracts made by the two boards jointly must be approved in the same manner.

Section 2460 cited by you, provides in part as follows:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. * * *"

In my opinion, the provisions of section 10, by necessary implication extend the authority of the emergency commission as far as that of the county commissioners extends with respect to the repairing, re-building and restoring of public works destroyed or damaged by floods of March and April, 1913. It surely cannot be contended that the allowance of a claim against the county, created under and by virtue of a contract made in pursuance of this joint authority but referable to that contract for the purpose of determining the extent of performance and the amount due, is not a power of the county commissioners respecting the repair, re-building and restoring of public works destroyed or damaged by the floods mentioned. It seems to me that it is a power which is related to such repairing, re-building and restoring equally as closely as is the power to enter into the contracts themselves. It involves the superintendence of the contracted work with respect to its performance, and one of the evident designs of the emergency commission act being to place a check upon the county commissioners with respect to the matters which it concerns, this superintendence must be deemed to be within the scope of the powers referred to in section 10.

I am, therefore, of the opinion that warrants for payments on contracts made by

the emergency commission and the county commissioners acting jointly under section 10 of senate bill No. 287, may be issued only upon the proper certificate of the emergency commission and the commissioners, jointly made, this being a case wherein the amount due "is authorized to be fixed by some other person or tribunal" within the meaning of said section 2460, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

348.

ACT PROVIDING FOR REBUILDING OF SCHOOL HOUSE DESTROYED BY CASUALTY OR CONDEMNED BY CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES IS PROPERLY DECLARED AN EMERGENCY MEASURE AND TAKES EFFECT IMMEDIATELY.

COLUMBUS, OHIO, June 23, 1913.

HON. FRANK C. ANDERSON, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 18th submitting certain facts on which the following question of law arises:

> "Is an act of the general assembly, containing an emergency section, passed by the required vote, subject to the referendum?
>
> "The act in question takes out of the Smith law limitations, levies to provide for the retirement of bonds issued either before or after the passage of the act for the purpose of re-building or replacing a school house destroyed by casualty or condemned by the action of the chief inspector of workshops and factories.
>
> "The emergency recited is that without the removal of the tax limitations many school districts will be unable to comply with the orders of the inspector, etc."

Clearly, the declaration of an emergency under section 1d of article 2 of the constitution, as amended, is within the discretionary power of the legislature. The legislature is required to recite the acts constituting an emergency and necessitating the withdrawal of the legislation from the referendum If the recitals so made do not of themselves in law make out a case of an emergency and of necessity of immediate effectiveness, in all probability a court would hold the emergency section void. However, in the case you state, the facts do, in my opinion, constitute an emergency, and the legislature's recital of these facts cannot be disputed.

I am, therefore, of the opinion that the act to which you refer is at present in effect, and that by virtue thereof a budget commission may allow a board of education a sinking fund levy for the purposes referred to in the act in excess of the fifteen mill limit of the Smith law.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

349.

COUNTY COMMISSIONERS MAY NOT MAKE EMERGENCY LEVY FOR ROAD PURPOSES WITHOUT SPECIFYING PARTICULAR ROADS.

Levies made under section 7419, General Code, by the county commissioners for the repair of roads destroyed by floods, or other casualties and exempted from the general tax limitations, may not be made by the county commissioners for general road purposes without specifying the particular roads which are in need of such repair.

COLUMBUS, OHIO, June 16, 1913.

HON. E. W. COSTELLO, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 7th wherein you request my opinion on the following question:

> "May the county commissioners under section 7419 make a levy for general road purposes without specifying the particular roads which are in need of repair and for the real purpose of providing a fund for the general improvement, maintenance and repair of roads throughout the county outside of the Smith law limitations?"

The question involves the joint construction of sections 7419 and 5649-4, General Code, which are as follows:

> "Section 5649-4. For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine and seventy-four hundred and nineteen of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor, irrespective of any of the limitations of this act.
>
> "Section 7419. When one or more of the principal highways of a county, or part thereof, have been destroyed or damaged by freshet, land slide, wear of water courses, or other casualty, or, by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof, have become unfit for travel or cause difficulty, danger or delay to teams passing thereon, and the commissioners of such county are satisfied that the ordinary levies authorized by law for such purposes will be inadequate to provide money necessary to repair such damages or to remove obstructions from, or to make the changes or repairs in such road or roads as are rendered necessary from the causes herein enumerated, they may annually thereafter levy a tax at their June session, not exceeding five mills upon the dollar upon all taxable property of the county, to be expended under their direction or by the employment of labor and the purchase of materials in such manner as may seem to them most advantageous to the interest of the county, for the construction, reconstruction or repair and maintenance of such road or roads or part thereof."

In the case of State on the relation of the Tax Commission vs. The Auditor of Franklin county, decided last year by the then circuit court of Franklin county, this question was squarely raised and passed upon. It was therein held that the commissioners may not levy under section 7419 for general purposes and have their levy regarded as "an emergency" levy under section 5649-4, but that the resolution of the county commissioners making the levy must specify each road which has been damaged

and is in need of repairs, the casualty occasioning the emergency and the amount of money needed for the particular road; and that an emergency must be recited in order to justify the auditor in making the levy directly without the intervention of a budget commission and irrespective of any of the rate limitations.

Whether or not a levy may be made in the manner described by you under section 7419, but subject to the limitations of the Smith one per cent. law was a question not passed upon in the case to which I have referred; nor is this the question which I understand you to ask.

The case to which I refer is not reported so far as I know, although it is possible you may find it in some of the recent law publications. I participated in the action myself, however, and the records of this department disclose with exactness what was held and determined therein.

I am of the opinion, therefore, that the commissioners may not make a levy outside of the Smith law limitations under section 7419, General Code, in the manner described by you.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

353.

COUNTY COMMISSIONERS MAY NOT EXPEND MORE THAN $50,000 FOR INFIRMARY AND BUILDINGS WITHOUT VOTE OF THE PEOPLE, EVEN THOUGH FUNDS ARE ON HAND.

Under sections 5638, 5640 and 2436, General Code, county commissioners are limited to an expenditure of $50,000 without vote of the people for the rebuilding of an infirmary destroyed by fire or other casualty and the fact that there are funds in the treasury in excess of said $50,000 does not operate to exempt from this requirement.

COLUMBUS, OHIO, June 10, 1913.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Under date of February 21, 1913, you requested my opinion as follows:

> "Can the commissioners of Clark county, Ohio, expend $75,000 or $100,000 for land for an infirmary and buildings thereon, part of the money being now in the poor fund, and the other part expected from the sale of the present infirmary site, without first submitting the question of such expenditure to a vote of the people, as provided by section 5639-1, General Code?"

Among other buildings designated therein, section 2419 of the General Code provides that an infirmary shall be provided by the commissioners when in their judgment it is needed, and that the same shall be of such style, dimensions and expense as the commissioners determine. (56 O. L. 160.)

Among other provisions therein stated, section 2433, of the General Code, provides that the commissioners may purchase land for an infirmary at such prices and upon such terms and payment as are agreed upon between them and the owners of the property. (66 O. L. 52.)

These provisions conferred ample authority on the commissioners to purchase land for the purpose and erect an infirmary building without submitting any question in regard thereto to the voters of the county. Later, however, as a limitation on the power of the county commissioners conferred by these statutes as to infirmary or other

county buildings, the legislature, by an act providing for rates of taxation for county purposes, provided further as follows:

> "The county commissioners of any such county shall not levy any such tax or appropriate any money for the purpose of building public county buildings, purchasing sites therefor, or for lands for infirmary purposes, or for building any bridge, except in case of casualty, as provided for in section two, the expense of which shall exceed ten thousand dollars, without first submitting to the qualified voters of said county the question as to the policy of building any public county building or buildings or for purchasing sites therefor, or for the purchase of lands for infirmary purposes by general tax * * * each proposition shall be separately submitted, and printed tickets shall be provided by the said county commissioners, on which shall be printed 'For ————tax, yes;' which blank shall be filled with a proper designation of the proposed improvement, as the notice may require." (74 O. L. 95.)

Saving amendments to the provision as to the cost of expense figures of the building or purchase, exceeding which the provisions of the act were to apply, this act as far as the question here presented is concerned remained practically as originally adopted down to 1911. (R. S. Sec. 2825; G. C. Secs. 5638, 5640.)

In view of the fact that the provisions above noted were originally enacted as part of an act providing and regulating taxes for county purposes and since then so classified, and the further fact that by the provisions noted the question to be submitted to the voters was as to the policy of building county buildings, or the purchase of land for infirmary purposes by *general tax*, and that the vote or ballot provided for in form was one in favor of or against the *tax* for the improvement or purchase submitted, there is room for doubt whether the statutory provisions above noted had any application to expenditures for the purposes named in the statute which were not thereafter to be provided for by taxation. As to this, however, I am not unmindful that the courts, in cases where this question was not made and where obviously the cost of the improvements there in question was to be met by taxation, have spoken of this statute as applying where the cost or expenditure exceeded the figures named in the statute.

State ex rel vs. Davis 55 O. S. 1, 14.
State ex rel vs. Brown 60 O. S. 462, 471.
State ex rel vs. Commissioners 5 N. P. 260.

In 1911 the legislature by act (102 O. L. 447) amended section 5638, General Code, and for section 5640 substituted section 5640-1, which sections as amended and substituted are as follows:

> "Section 5638. The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expense of which will exceed $15,000.00 except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00 except in case of casualty and as hereinafter provided; or enlarge, repair, improve or rebuild a county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county the question as to the policy of making such expenditure.
>
> "Section 5640-1. The ballots provided by the deputy state improvisors shall have printed upon the same the words 'in favor of the expenditure of $————for the purpose of————————' and 'against the expenditure of

> $———' for the purpose for which said money is to be expended. If the board of the county commissioners desire to submit upon the same ballot more than one question as to the expenditure of money for any of the purposes referred to in section 5638, the same may be done by proper resolution and notice, and by separately stating upon said ballot each proposition, as above provided."

The legislature by these amendments have eliminated the question hereinbefore suggested; for the provision now is, not that the question submitted to the voters shall be as to the policy of erecting county buildings or purchasing infirmary lands by *general tax*, but that the question submitted shall be as to the policy of making *expenditure* for the propositions, and this likewise is the form of the ballot prescribed in section 5640-1. The provisions above noted seem clearly to exclude any authority on the part of the county commissioners to make the proposed expenditure in question without submitting the same to the voters of the county, even though the money to meet such expenditure may not have to be raised by an issue of bonds and tax levy.

Section 2436, General Code, provides as follows:

> "For the purpose of rebuilding an infirmary destroyed by fire or other casualty, the commissioners of a county may appropriate money, levy tax and issue and sell the bonds of such county in anticipation thereof, in an amount not to exceed fifty thousand dollars, without first submitting to the voters thereof the question of rebuilding such infirmary, appropriating such money, levying such tax and issuing and selling such bonds."

It is plain that there is nothing in the situation of fact presented in your inquiry bringing the same within the provisions of the section last noted, and it follows that the commissioners as to this transaction are governed by the provisions of section 5638, and that the question of the proposed expenditures will have to be submitted to the voters of the county in manner and form provided for in sections 5639-1 and 5640-1.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

354.

COUNTY COMMISSIONERS NOT AUTHORIZED TO FIX ESTIMATE FOR BIDS ON ERECTION OF SUPERSTRUCTURE FOR A BRIDGE — ESTIMATE IN CASE OF ERECTION OF SUBSTRUCTURE—PLANS AND SPECIFICATIONS NOT TO BE APPROVED BY COMMISSIONERS, AUDITOR AND SURVEYOR IN ERECTION OF SUPERSTRUCTURE.

Under section 2343, General Code, county commissioners are authorized to have plans and specifications made and to fix an estimate for bids upon the erection of a substructure of a bridge. Under the same statute, however, bids may be received upon iron or reinforced concrete substructures for bridges upon plans and specifications submitted by the bidders themselves.

Under section 2344, General Code, the county commissioners may or may not cause plans and specifications to be prepared as they see fit for bids upon the erection of a superstructure for a bridge, but there is nothing in the statute authorizing or requiring the commissioners to fix an estimate for such bids.

Under section 2345, General Code, they must receive bids for a superstructure upon plans and specifications submitted by the bidders themselves in the erection of a superstructure.

The reference in sections 2353, 2354 and 2358, General Code, to estimates required in the erection of bridges generally, must be considered inconsistent with the above quoted statutes, and is to be explained by the fact that in times passed this reference referred to estimates formerly required by the laws in the erection of bridges generally.

There is nothing in the statutes, therefore, prohibiting the making of a contract for a bridge superstructure in excess of any estimate fixed by the county commissioners.

The requirement of section 2350, General Code, that plans and specifications of work and estimates relating to the building of a bridge shall be submitted to the commissioners, county auditor, and county surveyor for approval and deposited with the county auditor for inspection of the parties interested, refers only to such plans and specifications and estimates as are authorized to be prepared by the county commissioners, and has no application to plans and specifications prepared and filed by the bidders themselves.

Under section 2343, General Code, bids upon the erection of a substructure for a bridge may not exceed the estimate fixed by the county commissioners, even though the plans and specifications therefor have been submitted by the bidder himself.

COLUMBUS, OHIO, July 3, 1913.

HON. ALLEN THURMAN WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 14th submitting for my opinion thereon the following questions:

> "1. Are county commissioners authorized to award a contract for a bridge superstructure to a bidder who submits with his bid his own plans and specifications, at a price in excess of an estimate which has been made by the engineer upon the direction of the commissioners, acting under section 2343, General Code, said estimate relating both to the substructure and the superstructure of the bridge?
>
> "2. Must the plans and specifications which may be submitted by a bidder, in case his bid is accepted, be approved by the commissioners, auditor and surveyor under section 5350, General Code?"

I am not sure that your letter relates solely to the contract for the superstructure,

and shall also consider the question of a contract for the substructure as a separate question.

Sections 2343 etc., General Code, constitute all the statutory provisions relating to the letting of bridge contracts. I quote such portions of the related sections as throw light upon the questions which you submit.

"Section 2343. When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or *substructure* for a bridge * * * before entering into any contract therefor * * * they shall cause to be made by a * * * civil engineer the following: full and accurate plans * * *; accurate bills * * * of * * * material * * *; full and complete specifications * * *; and full and accurate *estimate* of each item of expense, and of the aggregate cost thereof.

"*Nothing in this section shall prevent the commissioners* from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

"Section 2344. When it becomes necessary to erect a *bridge*, the county commissioners shall determine the length and width of the superstructure, * * * and advertise for proposals for performing the labor and furnishing materials * * *. *In their discretion* the commissioners may cause to be prepared, *plans, descriptions and specifications* for such superstructure, which shall be kept on file in the auditor's office for inspection * * * and invite bids or proposals in accordance therewith.

"Section 2345. They *shall* also invite, *receive and consider* proposals *on any other plan* at the option of the bidders, and *shall* require that all proposals on such plan shall be accompanied with plans and specifications * * *."

"Section 2346. In their advertisements the commissioners shall * * * state the time when the place where bids will be opened and *contract awarded.* At such time and place, or at a time to which they shall publicly adjourn the consideration thereof, they shall publicly open * * * the proposals made and *award the contract* * * * for the erection of such superstructure to the person or persons * * * who is the lowest or best bidder or bidders, considering price, plan, material and method of construction.

"Section 2347. The plans and specifications upon and according to which the contracts are awarded, shall be kept on file in the office of the auditor and made a part of the contract with the successful bidder or bidders. * * *

"Section 2348. If the plans, drawing, representations, bills of material and specifications of work, and estimates of the cost thereof in detail and in the aggregate *required* in the preceding sections relate to the building of a court house or jail, or an addition to or alteration, repair or improvement thereof, they shall be submitted to the commissioners, together with the clerk of the court, the sheriff and probate judge, and one person to be appointed by the judge of the court of common pleas, for their approval. * * *"

"Section 2350. If the plans, drawings, representations, bills of material, specifications of work and estimates relate to the building of a bridge, they shall be submitted to the commissioners, county auditor and county surveyor. If approved by a majority of them, a copy thereof shall be deposited with the county auditor and kept for the inspection of parties interested."

"Section 2352. When the plans, drawings, representations, bills of material, specifications and estimates *are so made* and approved, the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time and place where

sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such building, bridge or bridge substructure * * * and a contract based on such proposals will be awarded. * * *. They (the plans, etc.) shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract.

"Section 2355. If they fail to make a contract as herein provided, on the day named in the notice, the commissioners may continue from day to day until it is made. Such contract, *so far as it relates to public buildings or bridge substructures*, shall be awarded to and made with the person who offers to perform the labor and furnish the materials at the lowest price, and gives good and sufficient bond for the faithful performance of the contract *in accordance with the plan or plans, descriptions or specifications herein required*, which shall be made a part of the contract.

"Section 2358. No contract shall be made for a public building, *bridge or* bridge substructure * * * at a price in excess of the estimates required to be made by the preceding sections."

I assume, of course, that the amount of the proposed contract exceeds one thousand dollars so as to be subject, under the provisions of section 2353, not above quoted, to the appropriate provisions of the chapter which are above quoted.

I shall first consider your first question in so far as it relates to the contract for a superstructure. I confess that in this connection I find but a single ambiguity on the face of the related sections, and this consists of the use of the word "bridge" in section 2358.

Let it first be noted that section 2343, General Code, certainly does not relate in any way to the superstructure of a bridge. This is true for two reasons: 1. The section in clear and unequivocal language mentions "substructure for a bridge" and is silent respecting the remainder of the structure. 2. Section 2344 explicitly relates to superstructures and the contract therefor and is silent as to substructure.

Therefore, the necessary conclusion is that section 2343 relates only to the substructure and that section 2344 relates only to the superstructure. The two parts of the bridge are clearly and definitely separated for the purpose of the letting of contracts. Does it not necessarily follow from this that the commissioners have no authority whatever under section 2343 to cause a competent civil engineer to make "a full and accurate estimate of each item of expense, etc.," as to the *superstructure* of a bridge? I cannot escape an affirmative answer to this question. If the county commissioners cause plans to be made they must by that act incur an expense; that is they must employ some one to do the work. The work which they can thus procure to be done must be limited to the subjects enumerated in the section. The superstructure of a bridge is not mentioned in the section. Therefore, there is no authority for the commissioners to have estimates of cost relating to the superstructure of a bridge prepared, at least so far as section 2343 is concerned. In fact the same conclusion follows, so far as this section is concerned, as to the making of plans and specifications. Authority to have such plans and specifications made for a superstructure must be found elsewhere, and it is found stated in clear and unequivocal language in section 2344.

So that when you state in your letter that the commissioners acting under section 2343 caused plans, specifications and estimates to be made of the proposed bridge improvement, inlcuding both substructure and superstructure, you have perhaps described an illegal act of the county commissioners. Inasmuch, however, as the commissioners had authority under section 2344 to have plans and specifications prepared so much of their official acts are not open to objection.

In the second place, section 2344 which does relate to the preparation of plans,

descriptions and specifications for the superstructure expressly makes such preparation *discretionary* with the county commissioners; and this is emphasized by consideration of section 2345 which is couched in mandatory language and makes it the unavoidable duty of the county commissioners to invite, receive and consider proposals or plans submitted at the option of bidders. The only thing then which the county commissioners under section 2344 are required to do before advertising for bids is to fix the length and width of the superstructure, and whether it shall be a single or double track. Upon these specifications they may advertise for bids without further preliminaries.

It is clear, therefore, that sections 2344 and 2345, which especially relate to the letting of contracts for the superstructure, not only do not require but do not even authorize the commissioners to have estimates made in advance of advertising.

The reason for this is perhaps sufficiently obvious in that when a bidder bids on his own plans he makes his own estimate, being the amount of his bid. In the very nature of the case an estimate of the cost must relate to a particular improvement according to a specified plan. The estimate of the cost of a bridge constructed according to one plan cannot be said in any way to relate or to be applied appropriately to the cost of constructing a bridge at the same place according to another plan. The two bridges would not be the same structure, and the policy of the legislature being to permit competition in plans, the sole and essential reason for the making of an estimate, which necessarily relates to a single plan, is done away with. It is absolutely clear to me then, that sections 2343 to 2345 inclusive contain no *requirement* that an estimate be prepared as a condition precedent to advertising for bids for the construction of a bridge superstructure.

Section 2350, General Code, is not necessarily inconsistent with this. It is to be read in connection with section 2348 from which it appears that the phrase "required in the preceding sections" must be regarded as qualifying the phrase "plans, drawings, representations, bills of material, specifications of work and estimates" as it occurs in sections 2348, 2349, 2350 and 2351, originally all a part of section 797, Revised Statutes.

Section 2350 will be further discussed in a subsequent portion of this opinion For the present purpose, however, it may be dismissed with the statement that plans, specifications and estimates for a bridge *substructure "relate to* the building of a bridge," and it is these plans, etc., which must be submitted to the commissioners, auditor and surveyor and not necessarily the plans for the superstructure.

Sections 2353 and 2354, General Code, neither of which I have quoted above, both refer to "estimated cost of a public bridge * * * *or bridge substructure.*" But in the light of what I have already pointed out these provisions serve merely to create a possible ambiguity like that already referred to in section 2358. The phrase "estimated cost" as used in these sections does not necessarily refer to a cost ascertained by an engineer employed for the purpose of making an estimate, and certainly it cannot apply if there is no authority to employ an engineer for such purpose. Presumably, then, those sections could be given force and effect by holding that the "estimate" referred to therein is to be made by the commissioners themselves in the exercise of their discretion.

I come now to section 2358. I have already pointed out that there is no *requirement* in any of the sections preceding this section that an estimate of cost be made by an engineer or architect for the construction of a bridge superstructure. This being true it would appear that the section in so far as it relates to a contract for a "bridge" is meaningless, for it is clear from a reading of section 2344, General Code, that the word "bridge," wherever used in these statutes means and refers to the superstructure only, or at least refers to the structure as an entirety, including both substructure and superstructure. At all events it does not mean merely "substructure." Nevertheless, it is equally clear, as already stated, that there is no requirement in any of the

preceding sections for the preparation of an estimate covering superstructure. Here then, is an ambiguity which cannot be explained away or accounted for as readily even as that presented by sections 2353 and 2354 already referred to.

In order to resolve this ambiguity I have deemed it proper to refer to the phraseology of the related sections as they existed prior to the codification, and to the legislative history thereof upon familiar and well established principles of statutory construction.

Sections 2343, 2344, 2345, 2350, 2353, 2354 and 2358 were all originally enacted in 66 O. L. page 52, and thereafter amended in 85 O. L., 219, since when none of them have been amended by the legislature save in immaterial respects and in process of codification. Section 2343 was section 7 of the act of 1869. I quote enough of it to show the significant changes between its original form and its present form:

> "In all cases where it shall become necessary for the commissioners of any county to erect any * * * *bridge* * * * such commissioners, before entering into any contract for the erection of * * * such * * * *bridge* * * * shall make, or procure some competent architect to make * * * a full, accurate and complete estimate, etc."

Originally, then, the bridge contract was to be entered into as a whole. There was no separation into superstructure and substructure. In this act there is nothing corresponding with sections 2344 and 2345. This section 7, however, was amended two years later, 68 O. L., 20, so as to eliminate the word "bridge" from the first portion thereof, and to add the following after the end of the sentence containing the requirement of an estimate:

> "and where it shall become necessary to erect or cause to be erected any *bridge* such commissioners shall determine the length and width of such bridge, whether the same shall be single or double track, etc., and shall advertise * * * for proposals * * * ; and the commissioners may *but are not required* to prepare or cause to be prepared plans, descriptions and specifications for such bridge, etc."

Now, the effect of this amendment of section 7 was to take all reference to bridges out of what has since become section 2343 and to make *all* bridge contracts subject to the procedure outlined in what is now sections 2344 and 2345, General Code. In other words, there was a period of time during which what has become section 2343 did not relate to bridges *at all*, and in which the contract for an entire bridge, including both substructure and superstructure was to be awarded on plans submitted by the bidders without any estimate being made whatever.

Now, during this period of time, what is now section 2358 was in force in substantially the same form as it is now found in the Code. It constituted section 11 of the act in 66 O. L., 52. The legislature in 1871 did not expressly amend this section but it seems very clear to me that by doing away with the requirement that estimates be prepared in the letting of bridge contracts they destroyed for the time, at least, its application to such contracts.

Subsequently the related sections were amended and reenacted in 85 O. L., 218, some seventeen years after the amendment to section 7 of the original law. At that time the sections took on practically their present form, although in the meantime, of course, the phraseology had been somewhat changed in the process of codification in 1880.

The amendment of 1888 left section 796 R. S., which was the new part of section 7 of the original act incorporated therein in 1871 substantially as it was, inserting merely the word "superstructure" in place of the word "bridge" as it occurred the

second time in original section 7. It amended section 795, which has since become section 2343 by inserting the words "or any substructure for a bridge or bridges." It reenacted section 800 which has since become section 2358, amending it so as to insert the words "public building, bridge or bridge substructure" in place of the words "court house, jail, infirmary or bridge" as in the original.

Now it was perfectly consistent for the legislature of 1888 to insert the limitation on contracts relating to bridge substructures, because it had required estimates to be made in such cases; but its use of the word "bridge" in section 800 cannot be satisfactorily explained excepting by the fact that the word was there in the original section, and though rendered nugatory by the intermediate amendment to section 795 R. S. was simply allowed to remain. In other words the legislature did not deliberately *put* the word "bridge" into section 800 when it amended that section in 1888, but it simply *left* it there. At all events, the intention of the legislature to do away with the necessity for the *requirement* of the preparation of estimates for bridge contracts in 1871 is very clear; likewise the intention to separate the substructure from the superstructure and to provide a different procedure for the two parts of the structures with respect to the letting of contracts is clearly apparent in the legislation of 1888. So that under the law of 1888, which is the law still in force, although the phraseology has been changed in process of codification, no estimate whatever was either required or authorized to be made covering that portion of the bridge contract which relates to superstructure.

I am of the opinion, therefore, that the word "bridge" in section 2358 and in sections 2353 and 2354 is not, in the light of the legislative history sufficient to permit the conclusion that said section 2358 prohibits the making of a contract for a bridge superstructure at a price in excess of any estimate; for no estimate is required or authorized to be made for such contract. In reaching this conclusion I have taken into consideration certain decisions of courts which I will now discuss.

In Bridge Co. vs. Campbell, 60 O. S. 406, a bridge company was denied the right to recovery against the county for a bridge consisting both of substructure and superstructure constructed under an alleged contract with the county commissioners who had ignored every provision of law. After quoting the statutes beginning with section 795 and ending with section 800 Burket, Judge in delivering the opinion of the court, says at page 425:

> "No notice of the proposed levy was published; nor record of the contract was entered in the minutes of the commissioners by the auditor; no plans or specifications were ever made, approved or deposited with the auditor; no contract was ever submitted by the commissioners to the prosecuting attorney for his approval, and none was ever approved by him.
>
> "These omissions are fatal to the validity of the contract, and by force of the above cited sections of the statute, the contract is totally void and imposed no obligation on either party to it."

It will be seen that the commissioners in proceeding as they did in this case ignored all the provisions of the statute. The decision, therefore, is not narrowed to the single point now under discussion and cannot be regarded as an authority in point either way.

In State ex rel. vs. Biddle, 3 N. P., 173, the facts as stated in the opinion of the court show that the commissioners attempted to purchase at *private sale* a bridge consisting of both substructure and superstructure without any record or proceeding showing that any contract of any kind had been entered into. The facts are substantially the same in this case as in the case of Bridge Co. vs. Campbell, *supra*. Indeed, the parties are the same and suspicion arises that the facts are exactly the same.

Accordingly the same conclusion must be reached as to the Nisi Prius decision as has already been expressed respecting the supreme court decision.

In State ex rel. vs. Amlin, 13 O. D. N. P., 334, these statutes were considered but the question involved in the case pertains principally to the substructure and the court's consideration thereof on page 339 shows that the distinction between the substructure and the superstructure was in his mind. On page 341, however, section 800, revised statutes, now section 2358, General Code, is considered in the following language:

> "It is further claimed that defendants let the contract for the *superstructure* for more than the engineer's estimate of the cost thereof * * *. Section 800, revised statutes, provides that 'no contract or contracts shall be made for *any* * * * bridge or bridge substructure * * * at a price in excess of the estimates in this chapter required to be made.'
>
> "Defendants contend that this does not refer to superstructures. A bridge proper consists of two parts, substructure and superstructure. The section mentions '*bridge or bridge substructure.*' By the use of both terms the legislature clearly intended to express more than the substructure. By the word 'bridge' may have been meant the entire structure, substructure and superstructure or it may have intended to give to the word the meaning properly given it, and to have referred to the superstructure. In either event I must conclude that within the contemplation of this section the county commissioners had no authority to make a contract for any superstructure for a sum in excess of the estimate under their direction by the county engineer."

Here, then, is an express holding which is contrary to the conclusion which I have stated. However, the injunction was granted on other grounds as is apparent from a reading of the entire decision and inasmuch as the contract for the entire bridge including both substructure and superstructure was a single one, the expression of opinion which I have quoted was not necessary to a decision in the case. It will be seen that Judge Williams, who rendered the opinion, did not consider section 800, Revised Statutes, in its relation to the other sections in the chapter of which it was a part, and that he merely *assured* that an estimate covering the superstructure as well as the substructure was both authorized and required by such other sections. This I have shown to be erroneous. Hence, in spite of the fact that a common pleas court has expressed a view contrary to that which I have stated, I have felt obliged to adhere to that view.

In State ex rel. vs. Huston, 4 N. P. (N. S.), 423, a decision of Judge Bigger of the same court as that which decided the case last discussed, the distinction between sections 795 and 796 R. S., is clearly pointed out and made a ground of decision on page 425. The court sustained a motion made by defendants (the bridge contractors) to strike from the petition an averment that in letting a contract for a superstructure the commissioners had failed to have plans, specifications and estimates made by the engineer. The holding is that section 795 relates wholly to the substructure and that, therefore, the failure of the commissioners to comply with it cannot invalidate a contract for the superstructure. This is in accordance with the view I have expressed and in so far as it is, it is inconsistent with the decision in State ex rel. vs. Amlin, *supra*. It is fair to say, however, that Judge Bigger was not called upon to consider the effect of section 800, Revised Statutes. In fact no court has ever considered the inter-relation of sections 800 and 796, revised statutes, being sections 2358 and 2344 and 2345, General Code, respectively, which it seems to me is clearly required by the question which you ask.

In State ex rel. vs. Snyder vs. Commissioners, 2 N. P. (N. S.) 261, the facts are very much like those in the Fulton county case in which the Buchanan Bridge Co. was a party, above cited, in that none of the provisions of law were complied with.

The court in deciding the case ignores the distinction between sections 795 and 796, and on page 269 says:

> "Not until plans, specifications, etc., are prepared by the commissioners or by some competent architect or civil engineer for them, with an estimate of the cost in detail and in the aggregate of any particular bridge, all of which shall be approved by a majority of the commissioners with the county auditor and the county surveyor, and all these things on file in the auditor's office, have agents of bridge companies, or others, any business to transact with the commissioners, much less any right to prepare their own plans and specifications, drive a bargain with the commissioners, procure their own signature to a contract, with their own plans and specifications attached, without any public light thrown upon it."

This decision is quite inconsistent with that of Judge Bigger in the case last cited and ignores the plain language of the statute. I cannot escape the conclusion that it is erroneous. It was purely obiter so far as being necessary to support the judgment in the case is concerned, therefore I feel justified in ignoring it.

It will be seen, therefore, that the decisions of the Nisi Prius courts upon questions incidentally involving the single question which you present are not harmonious; so that there is no well established judicial interpretation of the section involved in an answer to your inquiry. I have felt justified, therefore, in pursuing my own investigation into the legislative history of these sections with a view to ascertaining what the real intention of the general assembly was. That investigation has completely satisfied me and has led to the adoption of the conclusion which I have reached, which is that your first question, in so far as it relates to a contract for the superstructure, must be answered in the affirmative, because the commissioners are not authorized or required to have an estimate made covering the superstructure; and because further when bridge contractors offer their own plans and specifications and bid on them their bid itself becomes the "estimate."

I will now consider your second question in so far as it relates to the contract for the superstructure. I am satisfied that this question must be answered in the negative. That is, plans and specifications for the superstructure submitted by a bidder are not to be approved by the commissioners, auditor and surveyor under section 2350.

This, it seems to me, necessarily follows from the provisions of sections 2346 and 2347 above quoted. These sections explicitly require that proposals for bridge superstructures shall be opened on the date stipulated in the advertisements for bids and that the *contract shall be awarded at the same time.* They also require that when the contract is awarded the plans and specifications shall be filed in the office of the auditor. Now, the provisions of section 2350, above quoted, are to the effect that the plans, etc., which are to be submitted to the commissioners, auditor and county surveyor shall not be filed in the office of the county auditor until they are so approved; and it is clearly the intention of this section, which must be read in connection with section 2352 that the filing of the plans, so approved, in the office of the auditor, is for the purpose of permitting prospective bidders to inspect them. Said section 2352, provides:

> "When plans, drawings, representations, bills of material, specifications and estimates *are so made and approved,* the county commissioners shall give public notice in two of the principal papers of the county * * * of the time when and place where sealed proposals will be received for * * * the erection of such * * * bridge or substructure * * * and a contract

based on such proposals will be awarded * * *. The notice shall * * * state when and where such plan or plans, descriptions, bills and specifications can be seen."

It is clear then that the plans which are to be approved by the commissioners, auditor and surveyor are plans upon which competitive bids are to be invited before the contract is let; and further, by reading the related sections together it is equally clear that such plans are those which relate to the substructure only and not to the superstructure. How could it be otherwise? If when a bidder submits plans with his bids those plans are then to be advertised again for competitive bidding, in that case any bidder at such subsequent competitive bidding would also be entitled to submit plans with his bid by virtue of section 2344, and in case new plans were accepted by the county commissioners the process would have to be repeated an indefinite number of times. The conclusion is unavoidable that the procedure with respect to superstructures is entirely distinct from that in respect to substructures; that, by virtue of sections 2346 and 2347 the commissioners have the right to accept plans offered and bid upon by a bidder, and that when they are so accepted, and a contract is thereby entered into the same must be filed in the office of the auditor. The transaction is then at an end.

I will now consider your first question, assuming that it may relate to a contract for a substructure. This question involves consideration of the last clause of section 2343 above quoted, which is as follows:

"Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

In my opinion this provision not being followed up by other provisions like those found in sections 2346 and 2347 is not to be construed like the similar provision relating to contracts for superstructures. I am of the opinion that notwithstanding that bidders on iron or reinforced concrete substructures have the right to submit their own plans and specifications, yet a contract for the substructure may not be let on such plans and specifications in excess of the estimate required by section 2343 to be made of the cost of building such substructure. It will be well to have the engineer make an estimate of the cost of an iron or reinforced concrete substructure so that no confusion may arise by reason of his failure so to do.

I am of the opinion, then, that your first question, in so far as it relates to the substructure, must be answered in the negative, although it has been answered in the affirmative in so far as it relates to the superstructure.

I have reached the first two conclusions above expressed very reluctantly. It would be much more pleasant to ignore the plain language of the statutes, as one or two of the Nisi Prius courts have done, upon the theory that the legislature must have intended to protect the county treasury by providing for full and free competition in letting bridge contracts. I do not believe, however, that it is good law to disregard and virtually set aside statutory provisions on the ground that they are unwise or impolitic. I suppose that some would say that the statutes, as I have construed them, encourage monopoly and are vicious in a high degree. If this be the case the fault lies in the legislature, for it was clearly and unmistakably the intention of the general assembly to make possible, at least, the elimination of competition with respect to the construction of bridges according to any specified plans, and to substitute therefor competition in *plans*. To be sure this is not destroying competition entirely. Com-

petition is of two kinds, viz.: in price and in quality of goods. Evidently the general assembly supposed that plans for the construction of a bridge were considerations of quality, and that competition in plans was worth while even at the expense of competition in price. If this be wrong or unwise it is for the legislature to correct.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

355.

INHERITANCE TAX LAW—WHO EXEMPT FROM INHERITANCE TAX—HALF BROTHER CONSIDERED BROTHER WITHIN THE LAW.

Under amended sections 5331 and 5333, of the inheritance tax law, the exemption to brothers, sisters, nephews and nieces was abolished. These amended sections became effective upon its passage and approval May 5, 1913.

Where there is no express provision in an act amendatory of an inheritance tax statute, inconsistent with the general provisions of section 26 of the General Code, the provisions of the prior law will be regarded as controlling of the taxes from estates becoming subject thereto before the amendment and these exceptions apply to the taxation of inheritance created prior to May 5, 1913, although the tax has not yet been collected.

Within the meaning of the statutes, a half brother is considered a brother.

COLUMBUS, OHIO, July 16, 1913.

HON. M. F. MERRIMAN, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 1st requesting my opinion upon the following questions:

> "*First.* Does the fact that a legatee or devisee is a brother of a decedent exempt him from the payment of the collateral inheritance tax?
>
> "*Second.* Does the fact that such devisee is the son of a brother exempt him from the payment of the tax?
>
> "*Third.* Is a half brother exempt from the payment of the tax?
>
> "*Fourth.* Is the son of a half brother exempt from the payment of the tax?"

The statute, the construction of which is involved, is as follows:

> "Section 5331. All property within the jurisdiction of this state, and any interests therein * * * which pass by will or by the intestate laws of this state * * * to a person * * * other than to or for the use of the father, mother, husband, wife, brother, sister. niece, nephew, lineal descendant, adopted child * * * or the lineal descendants thereof, or the lineal descendants of an adopted child, the wife or widow of a son, the husband of the daughter of a decedent shall be liable to a tax of five per cent. of its value, above the sum of two hundred dollars. * * *"

It seems to me that the answer to your first question is perfectly apparent upon the face of the statute. If the legatee or devisee is a brother of the decedent himself,

the section does not apply to his interest at all. Contrary would, of course, be true if the legatee or devisee were the brother-in-law of the decedent. In Re Bates' Estate, 7, N. P. 625.

The answer to your first question carries with it the answer to your second because such a person as is referred to in your question would be a "nephew" within the meaning of the statute. In re Bates' Estate, *supra*.

Your third question raises the query as to whether or not a brother of the half-blood is a "brother" within the meaning of the statute. This question was decided in the affirmative in a case entitled In Re Ormsby's Estate, 7 N. P. 542. This is a Nisi Prius decision and is not well reported. I am of the opinion, however, that upon principle it is correct. Although exemptions from taxation are to be strictly construed, yet the enumeration of relatives in section 5331, General Code, does not, strictly speaking, constitute a list of exemptions. The tax is denominated a collateral inheritance tax, and the legislative history of inheritance taxation in this state discloses that originally, at any rate, the inheritances not subject to the collateral inheritance tax were to be taxed as direct inheritances. Therefore, this is not a case of exemption from taxation but rather of the exclusion of certain things for the purpose of definition by this method. That being the case I am of the opinion that the word "brother" should be used in its popular sense so as to include a brother of the half-blood as well as a brother of the whole-blood.

Similar reasoning would lead to an affirmative conclusion with respect to your fourth question. In other words, I am of the opinion that the test as to what constitutes a "brother" is to be applied for the purpose of ascertaining what constitutes a "nephew."

I feel impelled to inject into the discussion of the general topic suggested by your letter a question which you do not directly ask. It so happens that about the time I received your letter, though in all probability subsequently to the death of the decedent concerning whose estate you inquire, the general assembly amended sections 5331 and 5333, General Code, so as to abolish the exemptions to brothers, sisters, nephews and nieces concerning the application of which language of the old statute you inquire.

The amendatory act will be found in 103 O. L. 463, passed April 15, 1913, and approved May 5, 1913. Section 5331, General Code, seems to be a law "providing for a tax levy" within the meaning of section 1d of article II of the constitution as amended. It satisfies three tests suggested by the court in the recently decided, and not yet reported, case of State ex rel. Schreiber vs. Millroy, in that it provides for the levy of a specific rate upon definite subjects of taxation for definite purposes, and thus contains all the elements of a tax levy. Furthermore, the law itself makes the levy so that the interposition of no local or executive levying authorities is necessary in order that the levying power shall be exerted, and, therefore, this law became effective immediately upon its passage and approval, viz.: on May 5, 1913.

I take it that on the date on which this law became effective the estate or estates, concerning which you inquire, had not been settled and the taxes on the taxable inheritances therein had not been paid. The question would, therefore, arise as to what law, as between the old statute and the new statute governs the taxation of these inheritances, which question is rendered more acute perhaps by the decision of the supreme court in the case of Friend vs. Levy, 76 O. S. 26. This case, however, carefully examined, constitutes a complete answer to the suggested question. It involved the question as to the time of taking effect of the repeal of the former direct inheritance tax law. The repealing act contained an exception to the effect that the estates in which the inventory had already been filed at the date of the passage of the act should be subject to the repealed law. The supreme court first found this exception to be unconstitutional, and therefore void. Nevertheless, the court found that the general

assembly in incorporating this exception in the repealing act conclusively evinced an intention to take the repeal out of the operation of the general provisions of section 79, revised statutes, now section 26, General Code, which provides that:

> "Section 26. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutings, or proceeding, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution or proceeding existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The court was of the opinion that the exception in the repealing act before it, though void, constituted an "express provision" inconsistent with the general rule of present section 26 within the meaning of that section, in that its use showed that the legislature did not intend the general statute to apply.

A careful examination of the decision will show, however, that the court regarded section 79 R. S., now section 26, General Code, as generally applicable to a case of this sort. That is to say, the right to collect an inheritance tax from the inheritor's portion of the estate of a decedent dying prior to the amendment of the inheritance tax law was evidently regarded by the court as either a "proceeding" or a "cause of proceeding" within the meaning of the statute, Therefore, it seems that where there is no express provision in an act amendatory of an inheritance tax statute, inconsistent with the general provisions of section 26, General Code, the provisions of the prior law will be regarded as controlling the collection of the tax from estates becoming subject thereto before the amendment.

Inasmuch as the act in 103 O. L. 463 contains no provision inconsistent with the general rules of section 26, General Code, I am of the opinion that the conclusions already expressed apply to the taxation of inheritances created prior to May 5, 1913, although the tax has not yet been collected.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

359.

SCHOOL PROPERTY—BOARD OF EDUCATION MAY ISSUE AND SELL BONDS—AMOUNT OF BONDS MAY BE ISSUED AND SOLD ONE YEAR—ORDER TO ISSUE BONDS SHALL BE MADE AT REGULAR MEETING OF BOARD.

In order to obtain or improve school property, a board of education may issue and sell bonds. No greater amount of bonds can be issued in one year than would equal the aggregate of a tax at the rate of two mills for the year next preceding such issue.

The order to issue bonds shall be made only at the regular meeting of the board and by a two-thirds vote of the full membership of the board.

COLUMBUS, OHIO, June 13, 1913.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 4th in which you request my opinion upon the following question:

> "The board of education of York township of this county is compelled to construct a new school building in the village of Elgin at a cost of about $3,500; they have on hand in their building fund about $1,700; they have increased their levy so that it will yield them the other $1,800 during the year 1914. They desire to proceed with the construction of this building. Can they do so and borrow the remaining $1,800 for a year, or can they call a special election and vote on a bond issue for the amount?"

It seems to me that your question is sufficiently answered by a consideration of section 7629 of the General Code which is as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds 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. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

This department has previously held that under this section a vote of the electors is not required in order to authorize the borrowing of necessary money. If, therefore, the levy of two mills on the duplicate of the preceding year will produce the necessary amount—and I take it from the facts you state that this must be so—the solution of your question would seem to follow.

Boards of education have no authority to borrow money otherwise than by the issue of bonds under this section, or the preceding, except for the purpose of meeting obligations already lawfully incurred. This is by virtue of section 5656 of the General Code to which I refer you. You will readily observe that this section is not available in the case which you present.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

362.

COUNTY COMMISSIONERS—PURCHASE OF TOLL BRIDGE BELONGING TO PRIVATE CORPORATION—VOTE OF ELECTORS.

County commissioners may lawfully purchase or condemn toll bridge belonging to a private corporation at a cost in excess of $18,000, without submitting the question of the policy of the expenditure to a vote of the electors.

COLUMBUS, OHIO, July 9, 1913.

HON. D. F. DUNLAVY, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 13th in which you request my opinion upon the following question:

> "May the county commissioners purchase a toll bridge belonging to a private corporation at a price in excess of $18,000 without submitting the question of the policy of the expenditure to a vote of the electors?"

As you state, there are only two sections of the General Code which need be considered in connection with this question, viz.: Sections 7566 and 5638, which are as follows:

> "Section 7566. The county commissioners of a county in which there is a toll bridge, or a bridge owned by a person or corporation authorized by law to charge and collect toll for crossing it, may purchase such bridge, with the approaches, at a price agreed upon by them and the owners of the bridge. If they are unable to agree with the owners thereof, upon such purchase and sale, the commissioners may appropriate it."
>
> "Section 5638. The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed $15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed $18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed $10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

As you state in your letter, the power granted in section 7566 is an unqualified one; but section 5638, being of later date, would control, if at all applicable to the purchase of a bridge.

However, in my opinion, section 5638 is not applicable to the purchase of a toll bridge. The language of the statute is to the effect that the commissioners shall not make an expenditure "for *building* a county bridge" without first submitting, etc. There is no reason of policy for making any distinction between the building of a bridge and the purchase of a toll bridge with respect to the requirement of submitting the question to the electors. The anomaly, however, is the result of the legislature's action. The sections are too plain to admit of any forced construction.

I am, therefore, of the opinion that the county commissioners may lawfully purchase or condemn a toll bridge belonging to a private corporation, at a cost in excess of $18,000.00, without submitting the policy of the expenditure to the vote of the electors in the manner provided by section 5638, et seq, General Code.

You also ask my opinion as to whether or not a levy for the so-called "Mothers'

Pension Fund" may be made this year. I enclose herewith copy of opinion to Hon. Cyrus Locher, prosecuting attorney of Cuyahoga county, which answers this question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

365.

HOUSE BILL No. 678 SUBJECT TO REFERENDUM—ANNUAL BUDGET—COUNTY COMMISSIONERS—BLIND RELIEF.

House Bill No. 678, 103 Ohio Laws, 833, did not go into effect immediately upon its passage, but is subject to referendum, and does not go into effect until ninety days after filing in the office of the secretary of state. This bill was not in effect at the time that the annual budgets are required by law to be filed, viz.: the first Monday in June, 1913.

The county commissioners are authorized to levy a tax at a limited rate for the relief of the needy blind, and if they fail to make an estimate for budget purposes for blind relief, the budget commission is without power to authorize any such levy.

COLUMBUS, OHIO, July 9, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 9th, requesting my opinion upon the following questions:

1. "Did House Bill No. 678, 103 Ohio Laws, 833, go into effect immediately upon its passage?

2. "If the first question be answered in the affirmative, was there any authority, on the first Monday in June, for any county officer to submit, and for the budget commission to allow, a levy for the blind relief fund?

3. "If the first question be answered in the negative, and if it be proper for the budget commission to allow an estimate for the blind relief fund, what board or officer should make and certify the estimate?"

The law to which you refer is entitled "An act to create an Institution for the Relief of the Needy Blind." It establishes a state institution, "to mean under this act a board," for the purpose mentioned. The board thus created is authorized to levy taxes in the following language:

> "Section 8. In addition to the taxes levied by law for its purposes, the said board may certify to the said auditor of state, to be levied and collected as other taxes, a state tax not to exceed one-sixth of one mill on the dollar, to be levied and collected upon the taxable property of the state for the purpose of creating a fund for the blind as herein provided. Provided, however, that such levy shall be subject to the limitations provided by law upon the maximum and combined maximum rates of taxation. After the passage of this act and on the demand of the state treasurer the treasurers of the respective counties shall transfer and pay over to the state treasurer all moneys in their possession under present levies for the relief of the blind."

Section 10 of the act repeals all former provisions of law relating to the relief of

the needy blind, including section 2969, General Code, by virtue of which the county commissioners have been heretofore authorized to make levies for this purpose.

It is clear, therefore, that if the repealing section took effect prior to the first Monday of June, county commissioners would not be authorized to certify any levy for the relief of the blind; nor would any other county authority be authorized to do so. The only authority of law for making such a levy would be that found in section 8, above quoted.

The question, therefore, is squarely presented as to whether or not the provisions of section 8, which have been quoted, constitute the entire law found in 103 O. L. 833, a "law providing for tax levies" within the meaning of section 1d of article 11 of the constitution, as recently amended.

In an opinion to the tax commission of Ohio, relating to the time of taking effect of the so-called Kilpatrick bill, amending sections 5649-2 and 5649-3, General Code, I expressed the view that an act authorizing a levy to be made by some local or executive officer or board is not an act "providing for tax levies" within the meaning of the constitutional provision above cited. The question upon which that opinion was rendered was before the supreme court in the recent case of State ex rel. Schreiber vs. Milroy, which had been submitted to the court when I received your letter but had not yet been decided. In the meantime the supreme court has decided the case in question and has sustained the view that the so-called Kilpatrick act is not an "act providing for tax levies," and will not therefore become effective until ninety days after it was filed by the governor in the office of the secretary of state.

The court's decision, however, is upon a different ground than that of which I have spoken in this letter. The court apparently interprets in its opinion the phrase "laws providing for tax levies" by furnishing a definition to the effect that, in order that a law may be one which "provides for tax levies," it must designate the purpose for which the levy is to be made, must prescribe the rate which is to be or may be levied, and must designate the subjects of taxation upon which the rate is to be levied. It was because sections 5649-2 and 5649-3, General Code, which were amended by the act before the court, did not incorporate all three of these elements that the court held that it was not in the excepted class but was subject to referendum.

The court did not find it necessary, therefore, to pass upon the question as to whether or not a law which merely authorizes a levy of taxes upon designated property, for a specific purpose, at a limited rate, does constitute a "law providing for a tax levy." The question, therefore, cannot be regarded as settled. I have, however, already expressed my opinion upon the general proposition in the letter to the tax commission, above referred to, a copy of which you have. My opinion has not, I confess, been strengthened by examination of the supreme court's decision. I am prepared to go so far as to state that it is at least inferable from the court's opinion that the view which I hold would not be accepted by the court. However, the question has not been passed upon, and perhaps was not considered by the court. I, therefore, feel obliged to adhere to my opinion, and to hold that a law which merely authorizes some tribunal other than, and subordinate to, the legislature of the state to make a tax levy is not a "law providing for a tax levy."

Now, the act in question is clearly a law such as I have been discussing. It does not require an annual levy; it leaves the question as to whether or not a fund shall be provided from year to year to the judgment and discretion of the so-called "institution." It merely confers authority to make the levy, and does not impose any duty so to do.

Therefore, it is my opinion, for reasons more completely stated in the previous opinion referred to, that the act found in 103 Ohio Laws, 833, is not at present in effect,

and was not in effect at the time on which the annual budgets are required by law to be filed, namely: the first Monday in June, 1913.

Your second question, which assumes an affirmative answer to your first question, is obviated by the negative answer which I have returned thereto.

I shall answer your third question in the light of the conclusion reached with respect to your first questions, and without considering the constitutionality of present section 2969, General Code, which, I am compelled to state, has been seriously questioned in the courts.

The operation of this section is not in any way interfered with by the act to which you refer, passed February 18, 1913, and filed in the office of the secretary of state March 10, 1913, 103 Ohio Laws, page 60. This act amends sections 2967, 2967-1 and 2968, General Code, so as to abolish the blind relief commissions and to extend their powers and duties to county commissioners. It does not, however, amend section 2969, nor did it take effect until after the first Monday in June.

Section 2969 need not be quoted. It merely authorizes the county commissioners to levy a tax at a limited rate for the purpose of providing for the relief of the needy blind. It is perfectly clear on its face, and its meaning is not qualified by any related sections. The power to levy taxes for the relief of the blind is vested in the county commissioners. If the commissioners fail to make an estimate for budgetary purposes for blind relief the budget commission is without power to authorize any such levy.

You state in your letter that the budget commission of Hamilton county has received an alleged estimate, submitted by the probate judge. Obviously, this estimate cannot be considered.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

370.

CLERK HIRE—POWER OF COUNTY COMMISSIONERS TO ALLOW CLERK HIRE—POWER OF COMMON PLEAS JUDGE TO ALLOW ADDITIONAL CLERK HIRE.

When the county commissioners have fixed an aggregate sum for clerk hire during the year at a time designated, they have no power subsequently to take further action increasing the amount of such allowance, when the aggregate amount was then equal to or less than the maximum amount allowed by law.

Under section 2980, General Code, a common pleas judge may allow such additional amount of money as he deems necessary to pay the salaries of clerks, deputies, bookkeepers or other employes as may be required, and upon such allowance the county commissioners shall transfer to the general county funds, such amounts as may be necessary to pay such salary or salaries.

COLUMBUS, OHIO, July 2, 1913.

HON. W. V. WRIGHT, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Under date of January 23, 1913, you requested my opinion as follows:

"On the 29th of November, as provided by section 2980, Code, the probate judge of this county prepared and filed with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, clerks and other employes, showing in detail the requirements of his said office for the year beginning January 1st, next thereafter.

"The commissioners in fixing an aggregate sum to be expended for such period, acting under the belief that the common pleas court judge had power to make additional allowance should such office require it, without regard as to whether the amount so fixed by the said board should be equal to or less than the aggregate amount due the said office by computing the proper per cent. of the fees, costs, etc., collected for the use of the county in such office, fixed an amount less than the aggregate amount so due the said office.

"The commissioners now realize that the allowance made the said probate judge is entirely inadequate, and the common pleas judge is entirely inadequate, and the common pleas judge being powerless to act in the premises, may they now correct their record so as to allow the said probate judge the aggregate amount to which his office is entitled?"

Sections 2980 and 2980-I of the General Code provides as follows:

"Section 2980. On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter, with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal.

"Section 2980-I. The aggregate sum so fixed by the county commissioners

to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office county recorder's office, sheriff's office or office of the clerk of courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof, and eighty-five per cent. on all over ten thousand dollars of the fees, costs, percentages, penalties, allowances and other perquisities collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same, said judge shall find that such necessity exists he may allow such sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund to such officer's fee fund, such sum of money as may be necessary to pay said salary or salaries.

' 'When the term of an incumbent of any such office shall expire within the year from which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

The question presented depends for its solution on the proper construction of the statutory provisions above noted. The precise question being one as to the power of the county commissioners, the determination of the question may safely proceed on the inquiry as to whether or not such power has been vested in them by statute; for it is clear that as to any subject matter they have only such powers as are thus given them.

"The board of county commissioners can exercise only such powers as are conferred upon them by law."

State ex rel. vs. Yeatman 22 O. S. 546, 551.
Commissioners of Mahoning Co. vs. Ry. Co. 45 O. S. 401, 403.
Commissioners of Medina Co. vs. Leighty I. C. C. (n. s. 431).

And it is likewise clear that when power with reference to a given subject matter is conferred by statute, such power must be exercised in substantial compliance with the directions of the statute.

Treadwell vs. Commissioners, 11 O. S. 183, 190.
State ex rel. vs. Yeatman 22 O. S. 553, 554.
Ritter vs. Railway Co., 6 N. P. (n. s.) 161, 166.

Section 2980 provides that not later than five days after the filing by one of the officers designated in section 2979 of the statement of the probable amount necessary to be expended for clerk hire in his office for the ensuing calendar year, the county commissioners shall fix an aggregate sum to be expended for such purpose during the year, and further provides that the sum so fixed shall be reasonable and proper and that the finding of the commissioners shall be entered upon their journal.

The direction of the statute as to the time within which the commissioners are to

make the allowance is stated in negative terms and in this respect exhibits the features of a mandatory statute.

However this may be, it is clear that the express terms of the statute make provision for but one aggregate allowance by the county commissioners; for it provides that at the time designated they shall fix an aggregate sum which shall be reasonable and proper in amount, and it follows that if the amount to be fixed by the commissioners at the time directed by the statute is to be one reasonable and proper to meet the requirements of the office for clerk hire during the ensuing year, no other or further allowance on their part is contemplated by the statute. Nor is there anything in the provisions of section 2980-I which confers any power on the county commissioners to make any other or further allowance than that to be fixed at the time directed by the provisions of section 2980.

Section 2980-I was enacted expressly as a supplement to section 2980 and, by familiar rules of construction, its provisions are to read, not as standing alone, but in connection with section 2980 as well as other statutes relating to the general subject matter.

Section 2980-I provides that the aggregate sum "so fixed" by the county commissioners for clerk hire in the particular office, shall not exceed a certain amount based on a percentage of the income of the office for the previous year therein designated. The statute in providing for a division of the aggregate amount to be allowed for the ensuing year between an incumbent of the office and his successor in office during the year, directs that "at the time of fixing the same" the commissioners shall designate the amount to be expended by each. It is thus to be noted that in each instance when the provisions of section 2980-I refer to the action of the county commissioners in fixing an aggregate amount for clerk hire, the reference, reading the sections above noted as standing together, is clearly to the particular time designated in section 2980 and none other. I am therefore of the opinion that when the county commissioners have fixed an aggregate sum for clerk hire during the year at the time designated, they have no power subsequently to take further action increasing the amount of such allowance, whether the aggregate amount thus fixed was equal to or less than the maximum amount then allowable by them on the basis fixed by the statute. I am confirmed in this opinion by the provisions of 2980-I when read in the light of reasons calling for its enactment. There were three defects more or less manifest in the practical operation of the law as it stood before enactment of section 2980-I; first there was no check on the amount that the county commissioners might fix as an allowance for clerk hire for any office other than the requirement that such amount should be reasonable and proper, which obviously was a matter wholly within the sound judgment and discretion of the county commissioners; on the other hand there was no provision for the contingency that the business of such office might necessarily require an amount in excess of that fixed by the commissioners; again under the law as it then stood, it was legally possible for an incumbent of the office to exhaust the aggregate amount fixed as clerk hire for the year, and thus leave his successor in office during the year without money for clerk hire during the remainder of the calendar year for which the aggregate amount was fixed.

Section 2980-I in express terms clearly provides for the first and third defects in the operation of the law as it stood before the enactment of the section, and as to the second defect in the operation of the prior law noted, it is just as clear, whatever may be said of the scope of the proviso in this section on this point, that the section does not in any of its provisions attempt to remedy the defect by conferring any power on the county commissioners to increase the allowance fixed by them at the time designated in section 2980. The failure of the legislature to expressly authorize the county commissioners to increase their allowance for clerk hire up to the maximum amount to which the office might be entitled on the income basis fixed by the statute is significant to the point that it was not the intention of the legislature that they should

have this power. If it had been the intention of the legislature that the commissioners should have this precise power, it is reasonable to believe that it would have been granted in express terms.

The only provision of this section providing for an allowance in excess of that fixed by the commissioners at the time designated in section 2980 is that authorizing a judge of the common pleas court to make an additional allowance on the application of the officer if the necessity therefor is found by the judge. This provision as the power of a common pleas judge to make an additional allowance for clerk hire is stated in form of a proviso in the statute, and if it is to be thus considered and as such read solely in connection with the preceding language of section 2980-I, apart from the provisions of other sections, there may be at first blush color to the contention that the right of the officer to apply to a common pleas judge is limited to the condition that the county commissioners shall have fixed the clerk hire of his office at the maximum amount to which the office is entitled on the income basis provided by the statute. It is to be noted, however, the county commissioners are not under any direction by force of the provision of section 2980-I to fix the aggregate sum for any of the offices named in the maximum amount to which such office may be entitled, nor is it contemplated that they should in all cases do so. The only purpose of the enacting clause of this section, preceding the proviso, is to prescribe an amount beyond which the commissioners are not authorized to go in fixing the aggregate sum for clerk hire for such office. And considering this proviso as strictly such it seems clear that the words "additional allowance" therein are referable to the allowance actually made and fixed in any case by the commissioners rather than to the maximum prescribed, and the additional allowance provided for is additional to that made by them whether it be equal to or less than the maximum.

However, it is not an appropriate function of a proviso to confer power, but rather to qualify, limit or restrain the operation of general terms contained in the previous part of the section or act. This proviso does not by its terms in any way qualify, limit or restrain that part of section 2980-I which preceded it, but allows full force and effect to the provisions of the section prescribing the maximum amount which the commissioners are authorized to fix as clerk hire for any of the offices therein named, and, moreover, contains within itself an express and independent grant of power. I am of the opinion therefore, that this proviso is not strictly such but it partakes rather of the nature of an additional enactment, and as such is to be considered and construed in connection with all the sections relating to the subject matter.

Sumstein vs. Mullen, 67 O. S. 382, 410.
In re Day, 181 Ill. 80.
Probst vs. Railroad, 139 N. C. 397, 399.
Georgia Railroad vs. Smith, 128 U.S. 174, 181.

> "It is a well established rule that the provisions of a statute are to be construed in connection with all laws in *para materia*, and especially with reference to the system of legislation of which they form a part, so that all the provisions may, if possible, have operation according to their plain import."

Cincinnati vs. Connor, 55 O. S. 82, 89.

The chapter of which these sections are a part discloses a complete legislative scheme providing for a compensation of deputies and clerks in the county offices therein named. Prior to the enactment of section 2980-I, as before noted, one of the defects in the operation of the law relating to this subject matter was that there was no provision for the contingency that the actual requirements of a particular county

office might necessarily call for an allowance in excess of that fixed by the commissioners. By the enactment of section 2980-I, whatever limitations may be implied therein on the power of the common pleas judge to act, it is certain the legislature has not provided for such defects in the prior law by granting any authority or power on the county commissioners to make an allowance for deputy and clerk hire in addition to that made by them at the time directed by statute: And assuming that the legislature intended to meet and provide for this manifest defect in the enactment of this section, I am of the opinion that it did so by its grant of power to the common pleas judge, and that the judge on application may make an additional allowance for clerk hire in any case where he finds the necessity therefor, whether the sum fixed by the commissioners for such purpose be the maximum amount to which the office is entitled or less.

I might add, by force of the rule of construction before noted, that since the enactment of section 2980-I, section 2981 is to be read in connection with the provisions of the latter statute; and so read the limitation on the compensation of deputies and clerks is that such compensation shall not exceed in the aggregate the amount allowed by the county commissioners, and the additional allowance, if any, made by the common pleas judge under section 2980-I.

It is further to be noted that the money allowed by the common pleas judge is not available until the commissioners have transferred the same from the general county fund to the fee fund of the office affected by such allowance.

The precise question made in your inquiry is, as to the power of the county commissioners to make an additional allowance for clerk hire for the office therein named, but your inquiry assumes that the common pleas judge of the county is without power to act on the premises stated. On the considerations above noted I am unable to agree with the assumption made. I am advised that the common pleas court of Noble County (McGinnis, J.) came to a conclusion contrary to that reached by me, holding that the common pleas judge was without jurisdictional power to act under section 2980-I, unless the sum fixed for clerk hire by the commissioners was the maximum. This decision was affirmed by the circuit court of that county without report. The common pleas court of Coshocton County (Nicholas, J.) in a later decision reviews the opinion of the judge in the Noble county case and comes to a conclusion sustaining the view that the commissioners have authority to make but one allowance for clerk hire, and that the common pleas judge has power to act even though the sum fixed by the commissioners is less than the maximum amount to which the office is entitled. It seems to me that the conclusion reached by Judge Nicholas in his construction of section 2980-I, as to the power of the common pleas judge to act under its provision is correct. The contrary construction of this section as to such power of the common pleas judge leaves the law still defective in a particular which was undoubtedly within the cognizance of the legislature at the time of the enactment of the same and which defect was sought to be remedied by the enactment.

With reference to the power conferred upon the common pleas judge by this section, I do not apprehend that there can be any valid constitutional objection to its exercise by him if he choses to do so.

State vs. Judges, 21 O. S. 1.
Walker vs. Cincinnati, 21 O. S. 14.
State ex rel. vs. Cincinnati, 52 O. S. 419, 450, 451.

I note that your question in form is one as to the power of the county commissioners to correct their record, but the facts stated show that the real question is one

as to their power by subsequent action to increase the amount fixed by them as clerk hire for the particular office named at the time designated by the statute, and this in my opinion they cannot do.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

380.

TOWNSHIP TREASURER—FEES ALLOWED FOR DISBURSING FUNDS—DEPOSITORY.

No compensation is provided by sections 7033 to 7052, for the services of the township treasurer in disbursing funds placed thereunder. He is entitled to the compensation prescribed by section 3318, of all such money actually paid out by him on the order of the township trustees. This would not include funds placed in the township depository, nor those turned over to the treasurer.

COLUMBUS, OHIO, July 24, 1913.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—In your letter of April 4th you inquire:

> "What fee is the township treasurer entitled to for disbursing funds held by him under provision of sections 7033 to 7052? Does section 7015 apply to such funds? Or is he entitled to two per cent. under section 3318?"

Sections 7015 and 3318, General Code, provide:

> "Section 7015. The treasurer of such township shall receive and disburse all money arising from the provisions of this subdivision of this chapter. He shall receive as compensation therefor one-half of one per cent. of the first ten thousand dollars, or less, distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, to be paid out of the township funds, and he shall not receive other compensation for services rendered under such subdivision.
>
> "Section 3318. The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

It is to be observed that the compensation of the township treasurer under section 7015 is to be computed upon moneys raised under the *subdivision of the chapter of the General Code*, of which said section is a part. Sections 7033-7052 constitute an entirely separate and distinct subdivision of the General Code from that in which 7015 is found, and it is therefore my opinion that the compensation prescribed by section 7015 cannot be paid to the township treasurer for disbursing money raised pursuant to sections 7033-7052.

Examinations of the latter sections disclose that no specific compensation is fixed therein for a township treasurer when disbursing money raised by virtue of their pro-

visions, nor is such treasurer expressly charged with the duty of receiving and paying out such money.

Township trustees are authorized by section 7051 to levy a general tax upon the taxable property in the road district, to provide means to pay the cost of road improvements and principal and interest on bonds issued for such purpose, the authority to issue bonds being found in other sections of the same subdivision. The moneys so raised are township funds and the township treasurer is by reason of that fact the legal custodian thereof.

As no compensation is provided by section 7033-7052 for the services of the township treasurer in disbursing funds raised thereunder, I am of the opinion that he is entitled to the compensation prescribed by section 3318 for all of such moneys actually paid out by him on the order of the township trustees. This would not, of course, include funds placed in the township depository nor those turned over to a succeeding treasurer.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

381.

SURVEY OF FORFEITED LAND—WHEN SURVEYOR MAY NOT COLLECT —MEANING OF "HELD IN COMMON WITH SOME OTHER PERSON."

When a county surveyor makes a survey of forfeited lands, without being authorized to do so by the county auditor, the surveyor does not acquire a valid claim against the county and his bill for making such survey cannot be legally paid out of the county treasury.

The phrase "unless it is held in common with some other person" refers to and modifies the clause "the tract of land so sold" and not the entire original tract.

COLUMBUS, OHIO, July 24, 1913.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of January 26, 1913, wherein you inquire as follows:

> "Section 5762, of the General Code, provides in part as follows:
>
> "The county auditor on making a sale of a tract of land to any person, under this chapter, shall give to such purchaser a certificate thereof. If the land so sold is not an entire original tract, and the auditor deems it necessary, such certificate shall be directed to the county surveyor of the county, requiring him to proceed at the request of the purchaser, his heirs or assigns, to ascertain the boundaries of the tract of land so purchased, unless it is held in common with some other person.
>
> "The General Code seems to be silent as to who is to pay the surveyor for this work and we desire to know whether this surveyor's bill is paid from the county treasury and charged against the land so sold or does the county pay the bill and stop at that? Also, what is meant by 'unless it is held in common with some other person'? Does that mean unless the entire original tract is held in common with some other person or persons?"

As you state in your letter, there is no statutory provision to pay a surveyor for such work. Since the receipt of your inquiry by this department, the bureau of inspec-

tion and supervision of public offices has submitted to us a report of its examiner, involving the same surveyor's bills, about which you request an opinion. In said report it appears that the county auditor never at any time authorized the county surveyor to make a survey of any land sold at forfeited sale and there is no record whatever of any certificate having been issued, authorizing such surveys. It further appears from said report, that the auditor did not deem such survey necessary. It is to be noted that said section 5762, of the General Code, supra, provides in substance that if the land so sold is not the entire original tract, a certificate shall be directed to the county surveyor, requesting him to proceed to ascertain the boundaries of such tracts of land, provided "the auditor deems it necessary."

Section 2803, of the General Code, relative to a record being kept of all surveys made by the county surveyor, whether official or otherwise, or by other competent surveyors, contains a provision similar to that contained in section 5762 of the General Code above quoted. Said section 2803 of the General Code provides as follows:

> "The county surveyor shall make and keep in a book provided for that purpose, an accurate record of all the surveys made by himself or his deputies for the purpose of locating any land or road lands or fixing any corner or monument by which it may be determined, whether official or otherwise. Such surveys shall include corners, distances, azimuths, angles, calculations, plats and a description of the monuments set up, with such reference thereto as will aid in finding the names of the parties for whom made and the date of making such surveys. Such book shall be kept as a public record by the county surveyor at his office, and shall be at all proper times open to inspection and examination by all persons interested therein. Any other surveys made in the county by competent surveyors, duly certified by such surveyor to be correct and deemed worthy of preservation, may by order of the commissioners, be recorded by the county surveyor." (R. S. Sec. 1178.)

It is to be noted that all unofficial surveys are not to be recorded by the county surveyor unless "deemed worthy of preservation." In constructing said section, the supreme court in the case of Strawn vs. Commissioners, 47, Ohio State 404, held that the county surveyor, who makes a survey for a private individual and records the same without its having been found to be worthy of preservation by the commissioners, does not acquire a claim against the county, as follows:

> "A county surveyor, who makes a survey for a private individual, upon an employment by him, and records the same without its being submitted to the county commissioners and found by them to be worthy of preservation, does not thereby acquire a valid claim against the county, to be paid for making such record."

Upon like reasoning and for the reason as stated above that the county auditor had never at any time authorized a surveyor to make a survey of such forfeited lands and that the county auditor had never deemed such survey as being necessary, it is the opinion of this department that such surveyor does not require a valid claim against the county and that the surveyor's bills for work in surveying such forfeited lands, under the circumstances as above set forth, cannot be paid legally out of the county treasury.

You also inquire as to what is meant by the clause "unless it is held in common with some other person," and "does that mean unless the entire original tract is held in common with some other person or persons?"

In answer thereto, it is my judgment that said phrase means the tract of land purchased at the sale of the county auditor in accordance with said section, and does

not refer to the entire original tract. The clause, "unless it is held in common with some other person," refers to and modifies the clause, "the tract of land so purchased," rather than "the entire original tract," which latter clause is in the first part of the sentence. In further substantiation of my opinion in this regard, I quote from section 5765 of the General Code, which provides as follows:

> "Any person claiming any land, inlot, outlot, or part of lot, by virtue of a sale made under the provisions of this chapter, as tenant in common with any other person or persons, may apply for partition thereof, in like manner as is provided for the partition of real estate. On presenting the county auditor's deed, the court, before which application for such partition is made, shall set off to such person, the land claimed in the deed as his share, in the manner prescribed by law for the partition of estates, in lands, tenements or hereditaments of joint tenants, tenants in common, and co-partners."

It is apparent from the provisions contained in said sections 5762 and 5765, of the General Code, that the survey required to be made by the surveyor in the former section, in order to ascertain the boundaries of the tract of land so purchased in accordance therewith, is to be waived; for the reason that if any person claims any land, inlot, outlot or part of lot by virtue of a sale made under the provisions of said section 5762, as a tenant in common with any other person or persons, such person may make an application for a partition of such lands so sold in like manner as is provided for the partition of real estate, and the establishing of the boundaries of such real estate, and the setting off by metes and bounds of the portions of the various claimants if the property is in such shape that it can be so set off, is an incident of the partition proceedings so provided for by said section 5765, and necessarily takes the place of the survey required by section 5762, General Code, for the purpose of ascertaining the boundaries of the tract of land so sold. In other words, the survey required by section 5762, *supra*, is not necessary when a survey is required by virtue of a partition proceeding in accordance with section 5765, *supra*. Therefore, the clause "unless it is held in common with some other person" only refers to and modifies the clause "the tract of land so sold" and not the entire original tract.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

388.

EXPERT WITNESS—GRAND JURY—ALLOWANCE OF WITNESS FEES OF EXPERT WITNESS TESTIFYING BEFORE GRAND JURY.

Under the provisions of section 2494, General Code, the approval of the court is clearly made a condition precedent to the allowance of the claim of an expert witness testifying before the grand jury or a trial court, not only as to the amount of the claim, but also to its allowance or disallowance altogether.

COLUMBUS, OHIO, July 10, 1913.

HON. B. F. ENOS, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Under favor of July 3rd, you request the opinion of this department as follows:

> "Some time since we had a microscopical and chemical examination made, by a chemist in a poisoning case in this county, and afterward fully

paid the chemist for his work. Thereafter this chemist was called as a witness before the grand jury. Now is he entitled to fees as an expert witness before the grand jury under favor of section 2494, General Code?

"The chemist is claiming fees as an expert witness, and a certificate has been made under favor of said section 2494, but the common pleas court has refused to approve the same, or rather has refused to approve any amount as such fees."

Section 2494, General Code, as is follows:

"Upon the certificate of the prosecuting attorney or his assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the county commissioners may allow and pay such expert such compensation as they deem just and proper and the court approves."

By virtue of this statute, the approval of the court is clearly made a condition precedent to the allowance of the claim for services of an expert witness, testifying before the grand jury or the trial court.

The facts stated in your letter are not sufficient to permit of comment upon the merit of the claim in the present case. From your statement, however, that the chemist was fully paid for his microscopical and chemical examination, it would seem reasonable to suppose that any agreement had with him was intended to cover the examination only and the payment for the same was not presumed to include his services as witness before the grand jury. Whether or not this was actually the case does not appear in the facts set forth.

My opinion must be limited upon the facts stated to the power of the court with reference to the claim and from the terms of this statute, I am of the opinion that the discretion of that official extends not only to the allowance of the amount of the claim, but must also be allowed to rule upon its allowance or disallowance altogether. I am, therefore, forced to conclude that if the court in the exercise of the discretionary powers conferred, sees fit to disapprove the amount specified for such services, such claim cannot be allowed, at least in the absence of clear and unmistakable abuse of discretion upon the part of the court.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

389.

PRESENTING OF A DEED FOR RECORD—NUMERICAL ORDER OF FILE—DEED MAY NOT BE WITHDRAWN AFTER FILING AND BEFORE BEING RECORDED.

From the time a deed is presented for record until it is recorded, each instrument shall be kept on file in the same numerical order and there exists no legal right on the part of the recorder or any other person to withdraw a deed presented for record during such period from the office of the recorder.

COLUMBUS, OHIO, July 10, 1913.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Under date of June 20th, you request my opinion as follows:

> "*First.* Can a deed presented to have recorded and filed by the county recorder, be withdrawn before it is recorded and if so by whom?
>
> "*Second.* Can an attorney or any other person withdraw the deed temporarily, between the time of filing and recording?
>
> "*Third.* Can the grantee or grantees withdraw the deed after the same is filed by the recorder and not recorded?"

In the absence of express statutory provision for a different procedure, the question of the right of a recorder to retain possession of a deed presented to him for any purpose, would of course depend upon the ordinary rules of bailment and the agreement of the parties with reference thereto.

The procedure for the recording of deeds, however, is governed by statute, and I am of the opinion that section 2758, General Code, affords an answer to your inquiries. This section is as follows:

> "Section 2758. Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date and the precise time of day of its presentation, and a file number. Such file numbering shall be consecutive and in the order in which the instrument of writing is received for record, except chattel mortgages, which shall have a separate series of file numbers, and be filed separately, as provided by law. *Until recorded each instrument shall be kept on file in the same numerical order for easy reference, and, if required,* the recorder shall, without fee, give to the person presenting it a receipt therefor, naming the parties thereto, the date thereof, with a brief description of the premises. When a deed or other instrument is recorded, the recorder shall indorse thereon the time, when recorded, and the number or letter and page or pages of the book in which it is recorded."

By this statute it is provided after a deed is filed with the recorder for the purpose of being recorded that "until recorded each instrument shall be kept on file in the same numerical order for easy reference." This language expressly gives the recorder custody of a deed from the time of filing to the time of its being recorded and there is nothing in the statutes which entitles a grantee or any other party to withdraw a deed during such period.

It is necessary for the proper maintenance of the system set forth in the statutes for the recording of deeds or papers that strict safeguard be imposed and that rules of order and precision be maintained, and in view of this express provision of the statute,

I am of the opinion that there exists no legal right upon the part of the grantee or any other person to withdraw a deed presented for recording, during such period, from the office of the recorder.

The words "for easy reference" undoubtedly give the right of any member of the public to inspect such deed, but this right cannot be extended so as to permit the withdrawal of the instrument from the office. The recorder is charged with the custody of the same and is undoubtedly charged with the responsibility of its safe keeping, and would be answerable for any loss or inconvenience which would result from the loss of the instrument.

In view of this conclusion, it is unnecessary to answer your second and third questions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

390.

COUNTY COMMISSIONERS—COUNTY INFIRMARY—PUBLICATION IN NEWSPAPER—COUNTY COMMISSIONERS TO FURNISH STATEMENT FOR PUBLICATION CONCERNING FINANCIAL TRANSACTIONS OF COUNTY INFIRMARY.

Under the provisions of section 2536, General Code, when two newspapers of general circulation and of opposite politics volunteer to publish free of charge a detailed statement of the financial transactions of the county commissioners in connection with the infirmary, the county commissioners are obliged to furnish the auditor with the necessary statement for such publication.

COLUMBUS, OHIO, July 9, 1913.

HON. B. F. DUNLAVY, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Under date of June 13th, you inquire as follows:

"Under section 2508, General Code, do the county commissioners have to report in their report a detailed statement of the expenses of the county infirmary? I call your attention in this matter to section 2536, of the General Code, and ask you if that has any bearing upon the question. I would take it that under section 2536, General Code, when the infirmary directors were in charge of the institution, in that instance no report need be published unless the proprietors or managers of two newspapers, within the county, volunteered to publish the report without expense, but now that the county commissioners have charge of it, it is my opinion that they must comply with section 2508 and include within their report the report of the county infirmary."

Sections 2507, 2508 and 2536, General Code, are as follows:

"Section 2507. On or before the third Monday in September of each year, the county commissioners shall make to the court of common pleas of the county a detailed report of their financial transactions during the year next preceding such date. Such report shall be in writing, and itemized as to amount, to whom paid, and for what purpose.

"Section 2508. Such report shall be published immediately in a com-

pact form one time in two newspapers of different political parties, printed and of general circulation in such county. If two such papers are not so published, the publication shall be in one paper only. In addition to such publication, the report shall be published in the same manner in one newspaper, if there be such, printed in the county in the German language and having a bona fide general circulation of not less than six hundred among the inhabitants of such county speaking that language.

"Section 2536. If in any county the proprietors or managers of two newspapers of general circulation and opposite politics notify the county auditor that they will publish free of charge a full and detailed statement of the receipts and expenditures of the county commissioners of the county for any designated month or months, the auditor shall at once so notify the county commissioners, who within twenty days shall furnish the auditor with a full account in detail of all moneys received and paid out by them during such month, whence it was received and to whom and for what purposes paid."

I am pleased to say that I agree fully with the conclusions stated by you.

The language of sections 2507 and 2508 is clear, and it is the manifest intention thereof that such statement should comprise a detailed account of all financial transactions conducted by the county commissioners.

When the legislature shouldered the county commissioners with the duties pertaining to the county infirmary, they in no wise exempted the financial transactions connected with such duties from the requirement of sections 2507 and 2508, above quoted, and I am of the opinion that all moneys received or expended in this connection should be included in said report.

Neither can I find any difficulty with reference to section 2536, General Code, and I am of the opinion that such a report need only be published when the proprietors or managers of two newspapers of general circulation and opposite politics volunteer to publish free of charge a detailed statement of the financial transactions of the county commissioners in connection with the county infirmary. When such offer is made by such newspapers, the county commissioners, by virtue of this statute, are obliged to furnish the auditor with the necessary statement for publication.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

393.

COUNTY COMMISSIONERS—POWER TO LEASE ROOMS IN COURT HOUSE —JEFFERSON COUNTY LAW LIBRARY ASSOCIATION—PROSECUTING ATTORNEY SHOULD OCCUPY ROOMS IN COURT HOUSE.

County commissioners are without power to lease rooms in a court house to a private firm when such rooms are needed for the use of the county.

When a private concern occupies rooms in a court house and these rooms are needed for the use of the prosecuting attorney, the private concern should be ousted and the rooms occupied by the prosecuting attorney.

COLUMBUS, OHIO, July 25, 1913.

HON. W. C. BROWN, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Under date of June 24th you requested my opinion as follows:

> "The Jefferson County Law Library Association has a room furnished it by the county commissioners, in accordance with law, adjoining which is the office formerly occupied by the prosecuting attorney. In the court house is a suite of offices occupied by Messrs. Erskine & Vail, attorneys at law, who pay the commissioners two hundred dollars a year; the room occupied by Messrs. Erskine & Vail being leased to them until the first of April, 1914. The Jefferson County Law Library Association has requested of the commissioners that the room formerly occupied by the prosecuting attorney be given to them for law library purposes, claiming that the same is necessary for a proper use of the library by its members. The Library Association has a valuable collection of books, estimated at possibly twelve or thirteen thousand dollars; part of the library is stored in other parts of the court house for the reason that there is not sufficient room in the present quarters, and there is no place for study in the library.
>
> "The commissioners are of the opinion that the room formerly occupied by the prosecuting attorney is needed by the Law Library Association, to be added to their private quarters. The prosecuting attorney at the present time occupies two rooms in the National Exchange Bank Building, in the city of Steubenville, Ohio, one of which costs sixteen dollars a month, the other eighteen dollars a month. There is no available room for the prosecuting attorney in the court house other than the room which the Law Library Association has requested and the rooms occupied by Messrs. Erskine & Vail, under lease until April 1, 1914.
>
> "The following proposition has been made to the county commissioners by the prosecuting attorney, that the county pay the rent of the office in the National Exchange Bank Building that rents for sixteen dollars a month, or apply the rental at the rate of two hundred dollars a year that is received from Messrs. Erskine & Vail, upon the rent of the prosecuting attorney in the National Exchange Bank Building. This the commissioners are willing to do if the same is legal. Being interested in the matter myself, I would appreciate it if you would render the commissioners an opinion."

Section 3055, General Code, requires the county commissioners to provide rooms for a law library as follows:

> "For the use of such law library, the board of county commissioners of

the county shall provide at the expense of the county, a suitable room or rooms with sufficient and suitable bookcases, in the county court house, or if there is no suitable room or rooms to be had therein, any other suitable room or rooms at the county seat, and shall heat and light them. The books and furniture of the law library association used exclusively in such library, shall be exempt from taxation."

The powers of the county commissioners with reference to the provision of rooms for county officers are set forth in the following statutes, 2433, 2434, 2446 and 2419.

"Section 2433. When, in their opinion, it is necessary, the commissioners may purchase a site for a court house, or jail, or land for an infirmary or a detention home, or additional land for an infirmary or county children's home at such price and upon such terms of payment, as are agreed upon between them and the owner or owners of the property. The title to such real estate shall be conveyed in fee simple to the county.

"Section 2434. For the execution of the objects stated in the preceding section, or for the purpose of erecting or acquiring a building in memory of Ohio soldiers, or for a court house, county offices, jail, county infirmary, detention home, or additional land for an infirmary or county children's home or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief of the support of the poor, the commissioners may borrow such sum or sums of money as they deem necessary, at a rate of interest not to exceed six per cent. per annum, and issue the bonds of the county to secure the payment of the principal and interest thereof.

"Provided, that if the judge designated to transact the business arising under the jurisdiction provided for in section 1639 of the General Code of the state of Ohio, shall advise and recommend in writing to the county commissioners of any county the purchase of land for and the erection of a place to be known as a detention home, or additional land for an infirmary or county children's home, the commissioners without first submitting the question to the vote of the county may levy a tax for either or both of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property on the tax duplicate of said county.

"Section 2446. When in the opinion of the commissioners it is necessary to procure real estate, or the right of way, or easement for a court house, jail, or public offices, or for a bridge and the approaches thereto, or other lawful structures, and they and the owner or owners thereof are unable to agree upon its purchase and sale, or the amount of damages to be awarded therefor, the commissioners may appropriate such real estate, right of way or easement, and for this purpose they shall cause an accurate survey and description to be made of the parcel of land needed for such purpose, or in case of a bridge, of the right of way and easement required, and shall file it with the probate judge. Thereupon the same proceedings shall be had, as are provided for the appropriation of private property by municipal corporations.

"Section 2419. A court house, jail, offices for county officers and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions and expense, as the commissioners determine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein."

Section 2447, General Code, confers upon the county commissioners power to

dispose of such real estate as is not needed for public use. This section is as follows:

> "If, in their opinion, the interests of the county so require, the commissioners may sell any real estate belonging to the county, and not needed for public use."

The power of county commissioners to lease property owned absolutely by them is upheld in the case of Widow vs. Commissioners, 5 O. S., page 204, The syllabus of this case is as follows:

> "Where real estate is vested absolutely in the county commissioners, for public purposes, they may dispose of it in the same manner as individuals could."

On page 205 of this decision, Judge Lane said:

> "A corporation is an artificial person, and by the terms of its creation it possesses the same capacity, to purchase or to sell, that an individual has who possesses the capacity to contract."

In this case the power of the county commissioners to lease the property was contested but such power was upheld by the court.

The syllabus of the case of Weir vs. Day, 35 O. S. page 143, is as follows:

> "1. Under the act of May 1, 1873, entitled 'an act for the reorganization and maintenance of common schools' (70 Ohio L. 195), boards of education are invested with the title to the property of their respective districts in trust for the use of public schools, and the appropriation of such property to any other use is unauthorized.
>
> "2. A lease of a public schoolhouse for the purpose of having a private or select school taught therein for a term of weeks, is in violation of the trust; and such use of the schoolhouse may be restrained at the suit of a resident taxpayer of the district."

On page 145 Judge McIlvaine uses the following language:

> "The questions in this case relate solely to the power of a board of education to appropriate the public schoolhouse of its district to private uses, or, indeed, to any use other than public schools.
>
> "Section 37 of the 'act for the reorganization and maintenance of common schools' passed May 1, 1873 (70 Ohio L. 195), in force when the original action was commenced, provides: 'The several boards of education of all school districts now organized and established, and all school districts organized under the provisions of this act, shall be and they are hereby declared to be bodies politic and corporate, and as such capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of property, both real and personal, and taking and holding in trust for the use and benefit of such districts any grant or devise of land, and any donation or bequest of money or other personal property; and of exercising such other powers and having such other privileges as are conferred by this act.' And section 39 reads as follows: 'All property, real or personal, which has heretofore vested in and is now held by any board of education, or town or city council, for the use of public or common schools in any district is hereby, vested in the board of education provided for in this act, having under this act jurisdiction and control of the schools in such district.'
>
> "By virtue of these sections, all public school houses are vested in the

boards of education, in trust for the use of the public or common schools, and the appropriation of them to any other use is unauthorized and unlawful. The power of 'disposing of property' conferred upon such boards by section 37, was intended to and does relate solely to property not needed for the use of the public schools.

"We do not mean to say that a court of equity will interpose its extraordinary power, by writ of injunction, against every casual or temporary use of such property for other than public school purposes, but it is quite clear to our minds that its appropriation, by lease, for a private school for a term of weeks, ought to be restrained.

"It has been suggested that a distinction might be made between uses other than for the public schools; and that those which are educational in character might be allowed, while those not educational should be prohibited. We can see no ground for such distinction. The property having been acquired and maintained by general taxation, for the use of public schools, to which all the youth of the district are entitled to admission, it would be a violation of the trust to devote it to any educational purposes to the benefits of which, each youth within the district, of school age, might not of right demand admission upon equal terms with others in like condition."

The principle of public property being burdened with a public trust so as to place a restraint upon the powers of its alienation, by *quasi* corporations, was recognized in the case of Widow vs. Commissioners above cited, by the following language by the court of Judge Lane, appearing on page 207 thereof:

"Admitting that civil corporations incidentally possess the power to transfer a good title by deed, it may still be insisted that a person taking the estate holds it subject to the same trusts as while in the hands of the corporation. Perhaps such a trust may sometimes be raised by the terms of the donation. If the land be made subject to uses expressed on the face of the deed, which can not be enjoyed consistently with the exclusive dominion and enjoyment of the alienee, perhaps the trust might be enforced; as where lands were given to a municipal corporation, to be holden for a common, walk, or public fountain, perhaps the purchaser may take it, subject to the rights of the inhabitants. But the case before cited, from Vesey & Boame, shows that when property held for general corporate purposes is aliened, even for purposes not corporate, such alienation is absolute."

I am of the opinion that the case presented by you discloses an analogous principle to that which is the basis of the decision in the case of Weir vs. Day. Under 2447, General Code, the power of the county commissioners to sell real estate is restricted to such as is not needed for county purposes, *a fort ori* the same restriction extends to their power to lease. When a court house is erected, it is burdened with the trust requiring its use for county purposes, and its devotion to foreign purposes when required for county purposes, is as much a violation to the trust burden as was the lease of the school house in the case of Weir vs. Day.

I therefore conclude that the county commissioners are without power to lease rooms in the court house to a private firm, when such rooms are needed for the use of the prosecuting attorney. This firm should be ousted from their rooms and their offices made available to the prosecuting attorney. The law library association may then be permit ed the use of the rooms formerly given to the prosecuting attorney.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

394.

ROAD COMMISSIONERS—DUTY TO DESIGNATE ROADS AND STREETS FOR IMPROVEMENT—TOWNSHIP TRUSTEES—CENTER LINE OF TOWNSHIP.

Under section 6985, General Code, it is the duty of the road commissioners to designate the roads and streets in a township, which in their opinion should be repaired. The township trustees in choosing the roads to be improved are lijmited to these roads designated by the commissioners.

The trustees must first improve the roads nearest the center line of the township running north and south.

COLUMBUS, OHIO, July 25, 1913.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—In your letter of April 14th, you request my opinion as follows:

> "The trustees of Coitsville township, this county, acting under sections 6976, etc., have held an election to determine the question of improvement of roads which carried in favor of improvement, appointed a commission and the commissioners have recommended the improvement of three roads, none of which run north and south as referred to in section 6987 and which are not traveled upon to as great an extent as two other roads running north and south in the township. The trustees have consulted me with reference to whether or not they could pave the two roads which were not referred to in the commissioners' recommendation."

Sections 6976 to 7018 inclusive of the General Code of Ohio, provide a complete scheme for the improvement of roads in a township, including roads extending into or through a municipality.

Section 6985 and 6987 provide as follows:

> "Section 6985. Such commissioners shall designate and determine the established roads and streets in the township which in their opinion shall be improved. The commissioners shall call to their assistance a competent engineer, who shall make a correct map of the township, plainly showing the established roads and streets therein which have been by such commissioners designated for such improvement, also profiles of such roads and streets showing the grade thereof, as they then exist or have been established, which he shall turn over to the custody of the township clerk.
>
> "Section 6987. After the report of the commissioners, and the map and the profiles have been filed with the township clerk, the township trustees, in determining which roads shall be first improved, of those designated by the commissioners, shall select those nearest the center line of such township, north and south. If, in their opinion, it is not expedient to improve all roads in all directions at one time, they shall improve the roads which in their opinion are the most traveled and used within such township."

It is the duty of the road commissioners under section 6985 to designate the roads and streets in a township which, in their opinion, shall be improved. They are also empowered by said section to employ a competent engineer whose duty it is to make a

map of the township, plainly showing which roads have been *designated* by the commissioners for improvement, and to make profile thereof.

After the report of the commissioners, and map and profile have been filed, the township trustees must choose the roads to be improved, but in making their choice, the trustees are limited by section 6987 to *those roads designated by the road commissioners.*

Section 6989 provides for the advertising for bids and letting of contracts after the "trustees, by resolution, have determined to improve such designated roads."

These various provisions of statute read together clearly justify the conclusion and it is my opinion that the township trustees in question may not improve any roads other than those designated by the road commissioners.

The fact that none of said roads run north and south does not, in my judgment, authorize the trustees to disregard the recommendation of the commissioners. The words "north" and "south" appearing at the end of the first sentence of section 6987, in my opinion, qualifies the clause immediately preceding them, that is, they refer to the direction of an imaginary line running through the center of a township, north and south, rather than to the direction of the roads themselves. The township trustees must first improve the roads nearest the center line of the township running north and south, whatever may be the direction in which such roads extend.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

397.

BLIND RELIEF COMMISSION ABOLISHED BY HOUSE BILL No. 180.

The blind relief commission was abolished with the taking effect of House Bill No. 180, and consequently, does not continue in office during the years 1913 and 1914. The office does not exist after July 8, 1913.

COLUMBUS, OHIO, July 18, 1913.

HON. A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I have your letter of July 15, 1913, in which you inquire:

> "Mr. A. H. N. has requested me to secure an opinion from you as to whether or not the blind relief commission continues in office for the year 1913 and 1914.
>
> "It is my opinion that house bill 180 found on page 60 of the laws of Ohio, volume 103, abolishes county blind relief commissions and that said law is in force at this time and until house bill 678, as found in the laws of Ohio, volume 103, page 833, becomes a law on August 11, 1913, at which time the said law will take the place of the law created by house bill 180.
>
> "It is my opinion that the blind relief commission ended with the passage of house bill 180 and that in the light of the above named law the blind relief commission does not continue in office for the year 1913 and the year 1914, and if the same is your opinion, I would like to have you write confirming my opinion as herein stated."

House bill 180, 103 O. L. 60, was filed in the office of the secretary of state March 10, 1913, and therefore went into effect July 8, 1913. Inasmuch as it repeals sections

2962, 2963 and 2964, its effect is to abolish the blind relief commission at the time of its taking effect.

House bill 678, 103 O. L. 833, was filed with the secretary of state May 13, 1913, and takes effect on August 11, 1913, as stated by you, and as it specifically repeals sections 2962-3-4-5-6-7, 2968-1, 2968, 2969 and 2970, H. B. 180 is repealed.

The result is that H. B. 180 is in effect from July 8, 1913, to August 11, 1913, when H. B. 678 takes effect, and that after the taking effect of H. B. 180, there is no blind relief commission for the reason that there is no such office to fill after July 8, 1913.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

398.

BOARD OF COUNTY EXAMINERS—CERTIFICATE FROM FOREIGN STATE—EXAMINATION.

The board of county examiners has no authority to honor a certificate of teachers who have taught in a foreign state, or to issue certificates to them without taking an examination in this state.

COLUMBUS, OHIO, July 14, 1913.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 3rd wherein you submit for my opinion the question whether or not the boards of examiners have the right to honor certificates of teachers who have taught for years in a sister state and issue certificates to them without requiring them to take an examination in this state.

I infer, since you as prosecuting attorney are making the inquiry, that you refer to the county board of examiners.

The sections prescribing the duties of the county board of examiners are found in sections 7811 to 7837, General Code, inclusive.

Section 7816, General Code, provides as follows:

> "The board shall make all needful rules and regulations for the proper discharge of its duties and the conduc' of its works, subject to statutory provisions and the approval of the state commissioner of common schools."

After providing for the necessary examination and the kinds of certificates that may be issued, section 7824, General Code, provides:

> "County boards of school examiners at their discretion may issue certificates without formal examinations to holders of certificates granted by other county and city boards of school examiners."

Section 7825, General Code, provides as follows:

> "Each county board of school examiners may make its own regulations to grant certificates without formal examinations, except in theory and practice of teaching and in the science of education, to graduates of schools for the training of teachers, having at least a two-years' course of study in addition to graduation from a first grade high school, and of colleges or universi-

ties, with at least a four years' course of study in addition to graduation from a first grade high school. Certificates thus granted to such graduates may be issued, on application, within one year after graduation, first for one year; and at their expiration, on satisfactory evidence of success in teaching, for longer terms."

The provisions of section 7816, General Code, *supra*, that the board shall make all needful rules and regulations for the proper discharge of its duties and the conduct of its work are not broad enough as it seems to me to permit of issuing of such certificate as you inquire about. Especially so, since there are statutory provisions relative to the issuing of such certificates found in later sections.

Section 7824, General Code, *supra*, provides how certificates may be issued without examination to those who already hold Ohio certificates.

Coming now to a consideration of section 7825, General Code, *supra*, it will be seen that certificates may be issued without examination except in theory and practice and in the science of education to graduates of schools for training of teachers having at least a two years' course of study in addition to graduation from a first grade high school and to graduates of colleges and universities, but that the provision is that certificates thus granted to such graduates may be issued on application within one year after graduation, first for one year; and at the expiration on satisfactory evidence of success in teaching, for longer terms. This section does not limit the right of the board of school examiners to issue certificates to graduates of schools for training of teachers in Ohio or of the colleges and universities in Ohio, but such section is general. However, as I take it, the provision that the certificate 'may be issued on application within one year after graduation' is to be considered as a limitation upon the board of school examiners in issuing certificates under said section 7825, General Code.

Your question is in reference to teachers who have taught for years in a sister state. This is not covered by section 7825, General Code, nor do I find any section of the statutes which do give authority to board of school examiners to so issue certificates without examination to teachers who have taught for years in a sister state.

I am informed that it has been customary in certain counties of the state to issue a certificate under such circumstances, but since I can find no authority of law permitting of such issuance, and since the board of school examiners have only those powers which are granted them by statute, I am constrained to hold that the board of county examiners have no authority to honor certificates of teachers who have taught for years in a sister state and issue certificates to them without taking an examination in this state.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

400.

TAXES AND TAXATION—SALE OF REAL ESTATE—FORFEITURE.

Where A and B enter into an agreement in the month of March, whereby A agrees to sell to B real estate valued at $13,000 or forfeit to B $500, the property to be delivered on April 25th, A should not be assessed for $12,500 as credits, as this merely amounts to an executory agreement to buy certain lands at a stipulated price or to forfeit $500. deposited with A.

COLUMBUS, OHIO, July 25, 1913.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of July 7th requesting my opinion upon the following statement of facts:

> "A, the owner of real estate situated in Fulton county, and a resident of said county, in March, 1913, entered into an agreement with B, a resident of Henry county, by the terms of which it was agreed that A would sell the said real estate to B for the sum of $13,000 on the 25th day of April, 1913, or forfeit $500, and B would purchase the said real estate on said 25th day of April or forfeit $500. B deposited the sum of $500 as such forfeiture with A at the time the contract was entered into. On April 25th B elected to purchase the property and A elected to sell it and the bargain and sale was consummated and the deed was delivered.
>
> "What, if any, personal tax should be assessed against A on account of the above transaction?"

The agreement of the parties to which you refer was entered into prior to the day preceding the second Monday of April, but the transaction was closed after that date. The manner in which the transaction terminated ultimately cannot affect the question in any way. For the purpose of determining the amount of A's personal assessment the status of the transaction on the day preceding the second Monday of April with the possibilities which then existed must be considered, and that alone. In all cases of this sort the intention of the parties is controlling. The agreement as you state it, however, seems to be so explicit that it is scarcely likely that there are other facts which might be shown with a view to giving to the arrangement between the parties an effect other than that which appears to follow from the facts which you set out.

On your statement of facts A clearly possessed no incohate right of action against B which might have become perfected on B's failure to take the real estate on the 25th of April at the price agreed upon for any amount in excess of $500. That is to say, on the day preceding the second Monday of April A's right against B was contingent upon B's failure to buy the land and consisted simply of a right to retain for his own use the $500 which B had deposited with him.

So far, then, as B's obligation to A, under the contract of March, 1913, is concerned, it amounts merely to an executory agreement to buy certain land at a stipulated price or to forfeit the sum of $500 deposited with A for that purpose.

On the other hand, the obligation of A to B under the contract of March, 1913, did not alter the case. On the day preceding the second Monday of April B possessed an executory obligation against A whereby if A should fail to deliver to him a deed for the property on a day certain in the future A would be obliged to forfeit and pay to B the sum of $500.

These mutual obligations are such as to clearly eliminate the land itself from con-

sideration. True, the land constituted the subject-matter of the contract, but the right of action which either party would have against the other would not be such as would enable the one to compel the specific performance of a contract to convey nor either to recover damages upon the basis of the loss of the land or $13,000. Though not exactly an option the contract amounts to little more than an option coupled with an agreement to purchase or forfeit the sum of $500.

Contracts of this general character have, under tax laws similar to our own, been held not to create a taxable credit. In re Shields, 10 L. R. A. n. s. 1061, 111 N. W. 963 (La. 1907). Brown vs. Thomas, 37 Kansas, 282. Schoonover vs. Petcina, 126 Iowa 261.

In other words, in order that a contract right may be taxable as a credit it must at least create a demand such as the law will recognize and enforce, fixed and certain, and not indefinite nor contingent, and liquidated, as to its amount. 37 Cyc. 784.

No such demand as to the sum of $13,000 is created by the contract described by you.

I am, therefore, of the opinion that A should not be assessed for the sum of $13,000 or more accurately, for the sum of $12,500 as credits on account of the transaction described by you.

It appears from your letter that A concedes his liability to be taxed upon the $500 deposited with him as moneys. I, therefore, do not consider any question which might arise respecting this amount.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

402.

BONDING COMPANY—JOINT AND SEVERAL LIABILITY FOR THE FULL AMOUNT OF THE BOND—BOND OF COUNTY TREASURER.

Under the provisions of section 2633, General Code, as amended in 103 Ohio Laws 540, where two bonding companies sign a joint and several bond of a county treasurer, the companies so signing render themselves jointly and severally liable for the full amount of the bond.

COLUMBUS, OHIO, July 28, 1913.

HON. CHARLES H. DUNCAN, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—Under date of July 1st you call my attention to section 2633, General Code, as amended at the recent session of the legislature, 103 Ohio Laws 540, which provides in part as follows:

> "Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more freehold sureties approved by the commissioners and conditioned for the payment, according to law, of all moneys which come into his hands, for state, county, township or other purposes."

And you inquire whether under the language of said section "with two or more bonding or surety companies as surety" if two companies were to go on the bond of the treasurer each such company could limit its liability to half the amount of the bond either by splitting the bonds or executing two bonds or by stipulation to that effect in one bond signed by both companies. The provision is that the two companies

are to go on the bond as *surety*. The word "surety" is used in the singular, and, therefore, the legislature must have intended that the two companies were to sign but one joint and several bond fixing the liability of each for the full amount of the bond. It would hardly be contended that if four or more freehold sureties were to go upon a bond of the treasurer each of said sureties would be permitted to limit his liability to only a proportionate part of the bond signed by him. There can be no doubt that it was the intention of the legislature that the bonding companies were to sign a joint and several bond and render themselves so liable for the full amount of the bond required.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

411.

BOARD OF EDUCATION—AMOUNT THAT MAY BE EXPENDED FOR THE CONSTRUCTION OR REBUILDING OF A SCHOOL HOUSE WITHOUT SUBMITTING THE QUESTION TO A VOTE OF THE PEOPLE.

When the tax duplicate of the preceding year is such that a tax of two mills would raise only $2,600, the board of education may not expend for the construction of a school house the sum of $3,300 without first submitting the question of the expenditure to a vote of the people.

COLUMBUS, OHIO, July 21, 1913.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 1st in which you request my opinion upon the following question:

> "The state inspector of workshops and factories has ordered a certain board of education to discontinue the use of a certain school house which will, in the aggregate, cost about $3,300 to have the improvements made as designated.
>
> "The tax duplicate of last year is in amount such that a tax of two mills thereon would raise only about $2,600. Can the board of education, under the terms of sections 7630-1 and 5649-4, of the General Code, as amended by the last legislature, borrow more than $2,600 without a vote of the people, and make a tax levy of two and one-half mills to repay the loan?"

Your question assumes that the sum of $2,600 is the total amount which can be borrowed by the board of education for the purposes stated under the provisions of sections 7625 to 7630 inclusive, General Code.

This assumption is correct and I shall not discuss these sections further. Your reference to sections 7630-1 and 5640-4, General Code, calls attention to the provisions of an act passed by the last session of the general assembly found in 103 L. O. 527. This act supplements section 7630, General Code, by the enactment of section 7630-1 and amends section 5649-4. The amendment of section 5649-4 is for the purpose of taking out of the Smith law limitations, so called, levies made under authority of section 7631. Said section 5649-4 need not be considered in this connection.

Section 7630-1, in my judgment, contains the answer to your question. It provides as follows:

> "If a school house is wholly or partly destroyed by fire or other casualty,

or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such fund under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, *and upon the approval of the electors in the manner provided* by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

It is obvious that the sole purpose of section 7430-1 is to enable money to be borrowed when the obstacle to the borrowing of the money is the tax limitation of the district. Not only is there nothing in the section which indicates that it was intended to dispense with the necessity of a popular vote, but the section expressly provides that a vote of the electors is necessary in order to secure the authority to borrow money thereunder.

Therefore your question must be answered in the negative despite the provisions of section 7630-1, or more accurately, because of the express provisions thereof, read in connection with section 7625 et seq, the aggregate amounts of the indebtedness which may be incurred by a board of education for the purpose of which you state in any one year without a vote of the people, is $2,600.

The borrowing power of boards of education is very restricted under the statutes of this state. Save for the purpose of funding or refunding a valid and existing indebtedness, such boards have no power to borrow money other than that specified in the sections which have already been discussed. Therefore, if the board of education concerning which you inquire desires to expend the sum of $3,300, the tax duplicate of the district being such as you describe it to be, it is absolutely necessary that the board of education submit the question to a vote of the people.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

423.

BOND ISSUE BY TOWNSHIP TRUSTEES TO MEET TOWNSHIP SHARE OF HIGHWAY IMPROVEMENT EXPENSE—OBLIGATION IMPOSED ON TOWNSHIP BY LAW.

Township trustees may not issue and sell bonds under the joint authority of sections 3295, 3939, et seq, for the purpose of contributing the township share of a highway improvement. If the township trustees desire to borrow money for the purpose of meeting their portion of the cost of a highway improvement, they must do so under section 1223, General Code. The bonds referred to under section 1223 may be issued without a vote of the people, regardless of the outstanding indebtedness of the township.

No action of the trustees is necessary to impose the obligation upon the township; this obligation being imposed by the law itself and the proceeding through which it is imposed is carried on by the county commissioners on the one hand and by the state highway commission on the other.

COLUMBUS, OHIO, June 27, 1913.

HON. CHEEVER W. PETTAY, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 26th, requesting my opinion upon the following question:

> "May the township trustees issue and sell bonds under the joint authority of section 3295, General Code, and section 3939 et seq., General Code, for the purpose of contributing the township's share of a state highway improvement?"

You state it as your opinion that unless the township trustees have some authority to borrow money under the procedure mentioned by some other sections of the General Code, a state highway improvement contract cannot lawfully be let. It appears that in the specific instance which you have in mind, owners of abutting property have petitioned for a particular improvement, and the county commissioners have applied for state aid, having required the trustees of the township to guarantee the township's portion by resolution. Apparently, the only thing remaining to be done in the proceeding is the actual letting of the contract.

I shall first discuss the question as to whether or not a certificate that the township's portion of the money is in the treasury etc., is required to be issued by the township clerk, in this class of cases, and if so, at what point in the proceedings it should be issued. This question has been raised in my mind, although you do not expressly invite my opinion thereon.

Section 5660, General Code, is the only section which requires the issuance of any such certificate by the township clerk. It is as follows:

> "* * * The trustees of a township * * * shall not (1) enter into any contract, agreement or obligation involving the expenditure of money, or (2) pass any resolution or order for the appropriation or expenditure of money, unless the * * * clerk * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn. * * * Such certificate shall be filed and forthwith recorded and the sums so certified shall not thereafter be considered unappropriated until the * * * township * * * is fully discharged from the contract, agreement or obligation, or so long as the order or resolution is in force."

Obviously, this statute applies to and governs the creation of obligations by the

voluntary act of the trustees. It has long been recognized that this section does not apply to the creation of obligations imposed upon a taxing district by law, or by the action of authorities other than those of a taxing district itself. Thus, for example, it does not apply to the salary of a county officer; nor does it apply to the judicial expenses chargeable against a county treasury. I do not know that I can cite authorities upon these propositions, but it seems to me they are self-evident.

The first thing, then, for consideration is as to whether or not, under the present state highway law, the obligation of a township to pay a part of the expense of constructing a state highway is one that is created by the act of the township trustees. If it appears that the township is charged with a proportion of the cost and expense of constructing such a highway, without any action on the part of the township trustees, then, it must be held that the issuance of a clerk's certificate is not required. If, on the other hand, the improvement of a highway under the state highway law calls for any action on the part of the township trustees, as a necessary step therein, then, this certificate should be issued, if at all, before that step is taken.

Inasmuch as your question has arisen after practically all the steps have been taken, excepting the letting of the contract itself, I shall first consider in this connection whether or not the issuance of a Burns law certificate at this stage of the proceedings is necessary in order to render such contract valid.

Section 1201, General Code, governs this matter. It provides as follows:

> "Upon receipt of the application and certified copy of the resolution of the county commissioners, the state highway commissioner shall advertise for bids for two consecutive weeks in two newspapers of general circulation and of opposite politics, published in the county in which the improvement is to be made. Such notice shall state that plans and specifications for the improvement are on file in the offices of the state highway commissioner and county commissioners, and the time in which bids therefor will be received. Subject to the approval of the county commissioners the state highway commissioner shall award the contract to the lowest responsible bidder."

It is obvious that the township trustees have nothing whatever to do with letting the contract under this section. The contract is to be let by the state highway commissioner, with the approval of the county commissioners. These two public agents then concur as one of the contracting parties, and, therefore, it might well, and perhaps should, be held that the Burns law certificate must be issued as a prerequisite to the action of the *commissioners* under this section.

So far as this section is concerned, however, it cannot give rise to the duty to issue a Burns law certificate as to the township's portion. Section 5660, General Code, does not, as already pointed out, apply to obligations imposed upon the township by some outside authority. Clearly, the letting of the contract, if it results in imposing an obligation upon the township, is an act of an outside authority, and not an act of the township trustees. Therefore, if this section stood alone it would have to be held that a Burns law certificate may not be required as to the township's portion.

It appears, therefore, that so far as the facts stated in your letter are concerned, the necessity for the issuance of a certificate, if any, either arose at some prior stage of the proceedings or will arise at some subsequent stage thereof; it does not arise at the point to which those proceedings have progressed, viz.: the letting of the contract by the state highway commissioner, with the approval of the county commissioners.

I will now consider the statutes relating to the obligation of the township to pay any portion of the expense of a state highway improvement, for the purpose of ascertaining whether or not such obligation arises necessarily, or in any case, through or by virtue of the action of the township trustees. For that purpose I quote the fol-

lowing provisions of the state highway law, being all of the provisions in any way relating to the subject:

"Section 1185. The *commissioners of a county* may make application to the state highway commissioner for aid from an appropriation by the state for the construction, improvement, maintenance, or repair of highways. * * * If the county commissioners have not made use of the apportionment to such county, in the year in which it is available, then the *township trustees* may make application prior to the first day of April of the succeeding year. * * *"

"Section 1186. Each application for state aid in the construction, improvement, maintenance or repair of highways shall be accompanied by a proper *certified resolution* of the county commissioners or *township trustees* having jurisdiction of the road to be constructed, improved, maintained or repaired, stating that the public interest demands the improvement of the highway therein described; that the description does not include any portion of the highway in the limits of any municipality.

"Section 1188. If the trustees of a township make application under this chapter, the state highway commissioner may proceed with the construction, improvement, maintenance or repair of such road or highway in the manner provided in case of an application by the county commissioners. In such case the township trustees shall have the same rights and powers as are given county commissioners under this chapter, and the township clerk and township treasurer, respectively, in case of application by township trustees shall have the same rights and powers as are given to the county auditor and treasurer.

"Section 1189. Upon the receipt of an application, the state highway commissioner shall determine whether the highway sought to be improved is of sufficient public importance to come within the purpose of this chapter. * * * If the highway commissioner approves of the construction, improvement, maintenance or repair of such highway or any part thereof he shall certify his approval of the application or such part thereof to the *county commissioners.* * * *

"Section 1192. * * * The county commissioners or trustees of townships in which the highway is situated may also improve a highway to a greater width than herein specified if their application therefor contains a stipulation to pay such added cost and expense; or such county commissioners, trustees and abutting property owners may join in an application for an increase of width of an improvement by jointly agreeing to pay the added cost and expense thereof. * * *

"Section 1193. Upon the completion of the maps, plans and specifications of the proposed road improvement, the state highway commissioner shall cause an estimate to be made of the cost and expense of its construction and transmit to the county commissioners, together with the certificate of approval thereof, copies of such maps, plans and specifications.

"Section 1194. Upon the receipt of the maps, plans and specifications of a proposed improvement, with the approval thereof by the state highway commissioner, the county commissioners by majority vote may adopt a resolution that such highway be constructed under the provisions of this chapter. A certified copy of such resolution shall be transmitted to the state highway commissioner.

"Section 1198. If the owners of fifty-one per cent. of the lineal feet adjacent to such road or highway petition the county commissioners for its improvement under the provisions of this chapter, the county commissioners

shall grant the petition, if from a view of such road or highway they are of the opinion that the improvement will be for the best interests of the public.

"Section 1199-1. If the owners of fifty-one per cent. or more of the lineal feet abutting on a (an) intercounty highway petition the county commissioners for its construction, improvement, maintenance or repair under the provisions of this chapter, the county commissioners shall grant the petition, if they are of the opinion that the improvement will be for the best interests of the public. The county commissioners may, without the presentation of such petition, make application for aid from an appropriation by the state as provided in section 12 (General Code, section 1185) of this chapter.

"Section 1200. Before their approval of the proposed road improvement, the county commissioners *may* require that the trustees of the township or townships through which it extends agree to pay twenty-five per cent. of the cost and expense thereof, and that the trustees by resolution, approve the construction, improvement, maintenance or repair of the same."

In this connection I also quote section 1200 as enacted in 99 Ohio Laws, 310, which is apparently repealed by implication by the present section bearing that number:

"Before their approval of a road improvement, the county commissioners shall require that the township or townships through which it extends shall pay twenty-five per cent. of the costs thereof, and that the trustees, by resolution, approve its construction."

Section 1201 has already been quoted.

"Section 1205. Upon the completion of the improvement the state highway commissioner shall immediately ascertain the cost and expense thereof and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement and a statement of the apportionment to the county commissioners and trustees of the township or townships.

"Section 1206. The state's proportion of the cost and expense of the construction, improvement, maintenance or repair of any highway under the provisions of this chapter shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner from an appropriation made to carry out its provisions. *The county's, township's and property owners' proportion* of the cost and expense of such construction, improvement, maintenance and repairs, shall be paid by the *treasurer of the county,* in which the highway is located upon the warrant of the county auditor issued upon the requisition of the state highway commissioner from *any funds in the county treasury* for the construction, improvement, maintenance or repair of roads.

"Section 1207. Whenever there are one or more improvements to be made in any county and the cost and expense thereof is equal to or is less than twice the amount apportioned by the state to a county, then the state shall pay fifty per cent. of such cost and expense.

"Whenever there are one or more such improvements to be made in any county and the cost and expense thereof exceeds twice the amount apportioned by the state to a county, then the state shall pay the amount of the apportionment for said improvement or improvements apportioned as may be agreed upon by the state highway commissioner and the county commissioners.

"Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of improvement.

"Section 1208. Except as otherwise provided one-fourth of the cost and expense of such improvement shall be apportioned to the township or townships in which such road is located. Of the amount so apportioned three-fifths shall be a charge upon the whole township or townships and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the cost and expense of establishing county roads. If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. * * *

"Section 1210. The township trustees shall certify the assessment to the county auditor, who shall place it upon the tax duplicate against the property benefited. The county treasurer shall collect such assessments in the manner as other taxes are collected, and in such payments as may be approved by the county auditor. *The township trustees shall pay the portion of the cost and expense assessed to the township in the same manner as other claims are paid.*

"Section 1210-1. * * * The township trustees of any township in which a road is constructed under the provisions of this chapter may, by resolution, waive any part or all of the apportionment of the cost and expense of such road as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without an assessment upon the county or owners of abutting property upon such road.

"Section 1212. Each contract under the provisions of this chapter shall be made in the name of the state, signed by the state highway commissioner or deputy, attested by the chief clerk of the department and approved by the commissioners of the county in which the improvement is made. * * *"

In all the foregoing statutes I fail to find any official authority by virtue of which the township trustees can *avoid* the imposition upon the township of the obligation to pay one-fourth of the cost and expense of the improvement. The owners of abutting property, if they petition, petition the county commissioners—not the township trustees. The application to the state highway department is made in the first instance by the county commissioners, not the township trustees. (Of course, I am not considering the case where the commissioners fail to make application and the improvement is initiated by the trustees. Nothing in this opinion should be construed to apply to such a case.) The estimated cost of expenses, when made by the highway commissioner, is to be approved by the county commissioners, not the township trustees. The contract, as already stated, is to be made by the state highway commissioner, with the approval of the county commissioners; the trustees have no part in it. The apportionment of the cost and expense is to be made by the state highway commissioner in strict accordance with the statute. Trustees do not *assume* the obligation to pay twenty-five per cent. of the cost and expense; the statute itself imposes that obligation upon the township, which the trustees must meet as they meet other claims against the township. The state highway commissioner simply determines the *amount* chargeable against the township. The township treasurer does not even *pay*, in the

first instance at least, the township's portion or any part of it. The money for the immediate discharge of the contract is to come directly out of the county treasury. The contractor has no claim against the township, but the county treasurer seemingly has, although no machinery is afforded to the county treasurer for collecting this claim.

There is one section, and one only, that is not in harmony with the procedure as I have outlined it. I refer to section 1200, above quoted. In its original form this section provided that the county commissioners "shall require that the township * * * shall pay twenty-five per cent. of the cost." Practically, the only change made in this section when it was amended by implication in 102 Ohio Laws, 333, section 26, so far as it relates to the powers and duties of the county commissioners, was to change the word "shall" to "may." Therefore, the word "may" in present section 1200 cannot be read as equivalent to "shall;" and the county commissioners, if they choose, need not require that the trustees pass the resolution referred to in this section; and failure so to require does not invalidate the proceedings. This is clear also from an examination of the other sections, which explicitly state that twenty-five per cent. of the cost shall be apportioned to the township.

Therefore, the determination as to whether or not the county commissioners will have the trustees pass the resolution referred to in section 1200 lies with the county commissioners. It follows from this that the trustees cannot, by refusing to pass this resolution, relieve the township of the obligation to pay twenty-five per cent. of the cost. In other words, this resolution, apparently, is a mere formality, insofar, at least, as it relates to the apportionment of the original cost of an improvement petitioned for. The resolution may have some application and force with respect to the matter of maintenance and repair. This is a subject which I have not investigated.

Now, there are cases in which the township trustees may, by their voluntary act, impose an obligation upon the township. One of them is that in which the trustees substitute themselves for the commissioners in initiating the improvement, after the commissioners have failed to avail themselves of their privileges under the statute. Another is when the trustees waive the assessment of abutting property and agree that the township shall pay the whole twenty-five per cent. primarily assessed against the township. Proceedings of these sorts would constitute, in my judgment, the incurring of obligations involving the expenditure of money within the meaning of section 5660, General Code.

But where the proceedings for a state highway improvement take their normal course, I am of the opinion, and clearly so, that no action of the trustees is necessary to impose the township's obligation upon it. The law itself imposes the obligation, and the proceedings through which the obligation is so imposed are carried on by the county commissioners, on the one hand, and the state highway commissioner, on the other hand. This is true even where the county commissioners see fit to go through the empty formality of requiring the township trustees to assume to pay twenty-five per cent. of the cost of the improvement under section 1200, above quoted.

I am, therefore, of the opinion that nowhere in the course of the entire proceedings for the improvement of a state highway, and the payment therefor, is the issuance of a certificate that the money required for the township's portion of the improvement is in the township treasury, unappropriated, etc., necessary; and I am further of the opinion that any practice or requirement of the state highway department to the contrary is without authority at law.

In a way, what I have said answers your question, but it is not responsive to the exact query which you raise. I shall therefore now discuss the statutes under which provision may be made for money to pay the township's portion.

In a former opinion, a syllabus of which you say you have seen, I have held that sections 3295 and 3939, read together, do not authorize a township to borrow money for any of the purposes specified in section 3939, unless such purposes are township

purposes. This opinion, as you point out, does not cover the question now submitted, for the reason that the improvement of roads under the state highway department law is, in part at least, a township enterprise, because a part of the cost of the improvement is imposed by law upon the township.

There is another principle of law, however, which is to be taken into consideration in determining whether or not section 3939, General Code, applies to a given subject, and that is this: if the power to borrow money for a specific purpose be vested in township trustees, under sections other than sections 3295 and 3939, then, such other sections must be deemed to be exclusive. In other words, if it appears that the general assembly has at any time authorized the borrowing of money for a given purpose, by a special method, inconsistent with section 3939 and succeeding sections. such special method must be deemed exclusively to apply to the exercise of the borrowing power for that purpose.

Now, in the highway law, as amended in 99 O. L. 316, section 21, designated as section 1223, General Code, the general assembly provided as follows:

> "It shall be lawful for the commissioners of any county or for the trustees of any township to incur indebtedness or to issue bonds at a rate of interest not exceeding four per cent. in the manner authorized by law, for the payment of the said county or said township's share of the cost of any highway improvement undertaken under the provisions of this act, or any other act in which the state of Ohio pays one-half the cost of construction; provided, further, that for the purpose of carrying out the provisions of this act the county commissioners of any county or the trustees of any township in addition to any limit fixed by law or to any authority under any act now in force giving authority to sell bonds and fix the rate of interest and levy taxes to provide for their payment may, by unanimous vote of the board of county commissioners or of the township trustees, provide for the sale of bonds, fix the rate of interest not exceeding four per cent. and levy taxes for the purpose of paying the same."

This section clearly conferred upon township trustees special borrowing power and limited it with respect to the rate of interest to be paid by a limitation different from that to be found in section 3939. In my opinion the power thus conferred was, at the time, exclusive, and that would be a sufficient reason for holding that section 3939 did not then apply to the raising of money to discharge the township's proportion of the cost of a state highway improvement.

Now, the last act of the general assembly amending the state highway law (excepting the one passed by the last session of the general assembly, which is probably not yet in effect, and which, at all events, would not apply to your improvement) was that found in 102 Ohio Laws, 333. This act has an interesting legislative history. As originally passed it repealed nearly all of the sections of the then existing highway law, and substituted an entirely new scheme of legislation. Among the new sections then enacted was section 52, which provided that the county commissioners and the township trustees, respectively, should have special levying power within limitations exclusive of any limitations upon aggregate amounts of similar levies, thus constituting the levies exceptions to the previously passed Smith One Per Cent. law. The governor in a message, shown at page 349, 102 Ohio Laws, vetoed this section, and in addition vetoed sections 58 and 59 of the bill. Section 58 repealed certain specific sections of the highway law; and section 59 was as follows:

> "This act shall supersede all sections and parts of sections or acts and parts of acts not herein expressly repealed which are inconsistent herewith."

In stating his reasons for vetoing the repealing sections Governor Harmon used the following language:

> "While the entire repealing sections are struck out by my action there will be no real difficulty, because they cover only the old state highway law which this bill replaces, re-enacting most of it. Being later and on the same subject the bill will repeal by implication the parts of the old law which are different."

The governor, therefore, did not think that his action would result in leaving the new act in such a shape that it would by implication repeal *all* the provisions of the old law. He stated it as his opinion that some of the old law would be necessarily retained, i. e. that part which was not inconsistent with the new law. Furthermore, he evidenced this feeling by vetoing section 59, the result of which action was to preserve such parts of the old law as were not in direct conflict with any provision of the new law, even though the original intention of the legislature had been to adopt an entirely new scheme.

The governor did not veto section 53, which has been numbered section 1223, General Code, and is as follows:

> "The county commissioners in anticipation of the collection of such taxes and assessments, and whenever in their judgment it is necessary, are hereby authorized to sell the bonds of any such company in which such construction, improvement, maintenance or repair is to be made to any amount not exceeding, in the aggregate, one per cent. of the tax duplicate of such county. Such bonds shall state for what purposes issued, and their interest at a rate not in excess of five per cent. per annum, payable semi-annually, and in such amounts to mature in not more than ten years after they are issued, as the county commissioners shall determine. Such bonds shall be advertised once each week for four consecutive weeks in two newspapers published and having a general circulation within the county. Such bonds shall be sold to the higest responsible bidder and for not less than par and accrued interest. The county commissioners may reject any and all bids. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement, maintenance or repair of the highway for which the bonds were issued, except that any balance remaining after all of the cost and expense of the improvement have been paid, shall become a part of the county road improvement fund."

In my opinion, however, the vetoing of section 52 left nothing upon which section 53 could operate; because the bonds authorized to be issued under said section 53 are to be issued "in anticipation of the collection of such taxes and assessments" and not otherwise. In other words, the power thus conferred was not a general bororwing power, but merely a power to anticipate the collection of specific taxes. The authority to levy the taxes having been terminated by the veto of the governor, the authority to borrow the money fell with it. Therefore, in my opinion, section 53 of the new law, being section 1223, General Code, is not and never was in effect.

If it were in effect it would of itself constitute an answer to your question; for if it could be given any meaning at all, it would indicate that the *county commissioners* should borrow all the money necessary to provide for the cost of the improvement including the township's share, as well as the county's share. It cannot, however, be given this or any other effect; it is simply null.

This statute never having been operative, having, so to speak, been constructively vetoed when the governor vetoed section 52, I am of the opinion that original section 1223, General Code, was never *repealed by implication*, and that it is as present

in effect, and will be until the act passed by the last session of the legislature becomes effective.

It is to section 1223, General Code, then that we must look for authority to borrow money. This section controls, for reasons already stated, to the exclusion of section 3939, General Code, bieng quite inconsistent with it, and being a statute pertaining to a particular subject, and of the kind which always, under familiar rules of statutory construction, take precedence over other statutes general in their nature, regardless even, in some instances, of the temporal order in which the two statutes are passed. As a matter of fact, the legislative history of the two statutes involved, viz.: Sections 1223 and 3939, shows that the former was originally the later act, although the latter has been amended in other particulars since the former was enacted.

I am of the opinion, therefore, that the township trustees, if they desire to borrow money for the purpose of meeting their portion of the cost of a highway improvement, must do so under section 1223, as passed 99 Ohio Laws, 316, and not under authority of section 3939, General Code, referred to in section 3295.

I would be of the further opinion that the limitations imposed by the sections succeeding section 3939 do not apply; and that the bonds referred to in section 1223 may be issued without a vote of the people regardless of the outstanding indebtedness of the township.

I realize that my opinion leads to an unfortunate conclusion, in that it is now practically impossible to dispose of four per cent. bonds. This situation, however cannot change the legal aspect of the case.

I am aware also that my conclusion upon the first point suggested by me might lead to the further conclusion that there is no way in which the state highway commissioner or the county commissioners can satisfy themselves that the township's portion of the cost of the improvement is to be met. This, too, is a defect in the law. As a matter of fact, by virtue of the vetoing of section 52, the township's portion of the obligation, unless provided for by an issue of bonds, would have to be met out of the general township fund, there being no authority at law to levy taxes especially for the purpose of contributing to a state highway improvement. In fact, the provision of section 1210, above quoted, would govern; and if the township trustees refused to "pay the portion of the cost and expense assessed to the township in the same manner as other claims are paid," the question would arise as to whether or not there is any way for the county treasurer to compel the township trustees to make the payment; and still further, if there should be no money in the general township fund to meet the expenditure, whether or not the county treasurer, by appropriate action, could compel the making of a sufficient levy for such purpose.

All these questions are very embarrassing and suggest the necessity for additional legislation. While I have not examined the newly passed act of the legislature, I understand that it supplies many of the defects which I have suggested and is much more workable than the law which I have been obliged to construe. It may be that the relief in your particular situation lies in awaiting the effect of this new law. That, however, is a question upon which I would prefer not to express an opinion, unless my opinion were particularly invited upon that point.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

430.

SIGNERS OF INITIATIVE, SUPPLEMENTAL OR REFERENDUM PETITIONS MUST PLACE THEREON THEIR NAME, THE NAME OF THEIR TOWNSHIP OR COUNTY OR MUNICIPALITY.

Under the provisions of article 2, section 18, of the constitution, it is necessary for each signer of any initiative, supplemental or referendum petition to write in for himself the name of his township and county or the name of the municipality, street and number and the ward and precinct. This information may not be filled in by a second party.

COLUMBUS, OHIO, July 17, 1913.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Under date of July 15th you call my attention to article II, section 1g of the constitution as amended September 3, 1912, and you request my opinion whether each signer must for himself write in the name of the township and county or name of the municipality, the street and number and ward and precinct. It would seem to me that the language of said section of article II answers your inquiry itself in that it states: "Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and *his place of residence.*" It then proceeds to state how he shall designate his place of residence as follows: "A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of *his residence,* and the ward and precinct in which the same is located."

While it is true that the person soliciting the signatures in making his affidavit to the part of the petition solicited by him is required only to state the number of signers and that each signature attached was made in his presence and to the best of his knowledge and belief each signature is genuine and that he believed the signers to be electors and that they signed with knowledge of the contents and on the date set opposite their name, yet from the clear statement that each signer shall place on the part of the petition signed by him his place of residence, I am of the opinion that each signer must for himself write in the name of the township and county, or the name of the municipality, the street and number and the ward and precinct, and that such section does not authorize the filling in of this information by a second party.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

431.

THE PROVISIONS OF THE NEW CONSTITUTION RELATING TO THE TAKING OF DEPOSITION IS NOT SELF-EXECUTING—AN ATTORNEY APPOINTED TO TAKE CARE OF A CASE IN COURT IS ONLY TO ACT IN THE COURT WHEREIN HE IS APPOINTED.

1. The provisions of the new constitution relating to taking deposition is not self executing. It requires legislation to give effect thereto and provide the manner of taking deposition. Provision for taking such deposition is to be found in 103 Ohio Laws, 433-434.

2. Under section 13562, General Code, an attorney appointed by the common pleas court to assist in the trial of a case is only bound to take care of a case in the court wherein he is appointed. This court then allows him for fees which the commissioners pass upon and pay in such amount as they approve. His service is then at an end.

COLUMBUS, OHIO, July 26, 1913.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—In your letter of June 19, 1913, you ask my opinion on three propositions, as follows:

> "*First.* In the trial of a murder case the court appointed an attorney to assist you. During the trial counsel so appointed took sick and retired from the case. Thereupon the court appointed another attorney to assist in the completion of the trial. A conviction was had. Defendant objected to the new appointment and alleged the same as a principal ground in motion for a new trial. The motion was overruled and error proceeding, based thereon, is now pending in the court of appeals.
>
> "You ask whether the appointment of the second attorney and permitting him to assist in the prosecution was reversible error."

It is a rule of this department not to render an opinion as to the merits of questions at issue in cases pending in the courts. In this case the exact question you submit is before the court of appeals, and it would not be proper for me to express an opinion thereon at this time. For this reason I feel compelled not to render an opinion on your first question.

> "*Second.* Under the present constitution can the state take depositions without a law being passed providing for doing so?"

This provision of the new constitution is not self executing and it requires legislation to give effect thereto and provide the manner of taking such depositions. By consulting 103 Ohio Laws, pages 443 and 444, you will see that the legislature has made provisions for the taking of such depositions, effective August 8, 1913.

> "*Third.* Under the statute providing for the appointment of an assistant to the prosecutor, it *seems* to be limited to the appointment of an attorney to assist in the *trial* of the case. Are the services of assisting limited to the mere trial or do they extend to the hearing of the case in the higher courts on review?"

Section 13562, General Code, provides:

> "The common pleas court or the circuit court, whenever it is of opinion

that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners shall pay such assistant such compensation for his services as such court approves and to them seems just and proper."

Under this statute the attorney appointed by the common pleas court is only bound to take care of the case in that court. This court then allows his fees for the services rendered in that court, which the commissioners pass upon and pay in such amount as they approve. That is the end of the employment unless the circuit court (now court of appeals) appoints him to render services in that court in the same case. He cannot receive fees for services in the reviewing court unless such court appoints him and allows his fees. The reviewing court might deem the services unnecessary and refuse to appoint. Each court has exclusive jurisdiction as to such appointment to assist in the trial of such cases, pending in their respective courts; and the common pleas appointment does not extend to, or bind the reviewing courts. Counsel is not bound to appear and render services in the reviewing court without an appointment therein.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

440.

PART OF TOWNSHIP SCHOOL DISTRICT MAY NOT BE UNITED WITH ANOTHER SCHOOL DISTRICT FOR HIGH SCHOOL PURPOSES.

There is no statutory provision for the uniting of a part or portion of a township school district with another township, village or special school district for high school purposes.

Where a petition asks for the uniting of the north half of Salt Creek township school district of Pickaway county to the village school district of Tarlton for high school purposes, such petition cannot be granted.

COLUMBUS, OHIO, August 11, 1913.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Under date of June 21, 1913, you submitted the following inquiry:

"I am enclosing herewith a request for an opinion relative to the union-ization of school districts for high school purposes received from the clerk of the board of education of Saltcreek township school district, Pickaway county, Ohio."

The request referred to in your inquiry and which was received by you from the clerk of the board of education of Saltcreek township school district, Pickaway county, Ohio, reads as follows:

"Enclosed please find a petition presented to the board of education of Saltcreek township school district, Pickaway county, Ohio, at its last meeting, May 31, 1913.

"You will observe that it purports to be signed by residents of the north half of Saltcreek township school district and requests the board of education of that district to join the north half of the territory comprising the said school

district with the village school district of Tarlton (lying within the boundaries of Saltcreek civil township and adjoining Saltcreek township school district on the north) for high school purposes only.

"The board of education are in doubt as to their authority to comply with the request of the petitioners. That is, they are in doubt whether the statutes, sections 7669, 7670, 7671 and 7672 of the General Code, Ohio Laws, authorize the uniting of less than whole districts for high school purposes only.

"The board understands that under section 4692, General Code, and sections following any part of the territory of one school district may be transferred to another school district for general school purposes, that is to say, for all school purposes, elementary, high or otherwise. But the petitioners in the petition herewith sent you do not ask for a transfer of the north half of the territory comprising Saltcreek township school district to Tarlton school district for all school purposes, so as to make such annexed territory a part of the village district, to wit, Tarlton school district, but only ask that so much of Saltcreek township school district be united with Tarlton school district for high school purposes, the high school thereof to be governed by a committee of two from each board.

"Please advise whether the petition may be granted under the statutes."

In reply thereto I desire to say that section 7669 of the General Code provides for the uniting of two or more adjoining township school districts or a township district and a village or special school district, or any two or more of such school districts, for high school purposes, as follows:

"The board of education of two or more adjoining *township school districts*, or *of a township district and of a village or special school district situated partially or wholly within the township, or of any two or more of such school districts*, by a majority vote of the full membership of each board, may unite such districts for high school purposes. Each board also may submit the question of levying a tax on the property *in their respective districts*, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in *each district* before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building, or if there is a suitable building in either district owned by the board of education that can be used for a high school building, it will not be necessary to submit the proposition to vote and the boards may appropriate money from their funds for this purpose."

Section 7670 of the General Code provides that any high school so established shall be under the management of a high school committee and such high school shall be free to all the youth of school age within *each district*, as follows:

"Any high school so established shall be under the management of a high school committee consisting of two members of each of the boards creating such joint district, elected by a majotiry vote of such boards. Their membership of such committee shall be for the same term as their terms on the boards which they respectively represent. Such high school shall be free to all youth of school age within *each district*, subject to the rules and regulations adopted by the high school committee, in regard to the qualifications in

scholarship requisite for admission, such rules and regulations to be of uniform operation throughout *each district.*"

Section 7671 provides how such high school shall be maintained and supported as follows:

> "The funds for the maintenance and support of such high school shall be provided by appropriation from the tuition or contingent funds, or both, *of each district,* in proportion to the total valuation of property in the *respective districts,* which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

It is to be noted that the above sections provide for the establishment of joint high schools by the respective school districts therein enumerated in their entirety and there is no statutory provision for the uniting of a part or a portion of any school district therein enumerated with another school district for high school purposes.

Therefore, in conclusion, it is my opinion in the absence of any statutory provision for the uniting of a part or a portion of a township school district with another township village or special school district for high school purposes, that the petition for the uniting of the north half of the Saltcreek township school district to the village school district of Tarlton for high school purposes, cannot be granted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

442.

COUNTY COMMISSIONERS WITHOUT AUTHORITY TO PURCHASE AUTOMOBILE FOR USE OF COUNTY SURVEYOR.

The county commissioners may not purchase an automobile for the use of the county surveyor. The right of the county surveyor as a public officer to compensation, fees, allowances, etc., must depend upon express legislative enactment or on necessary implication from the terms used. Since there is no statutory provision broad enough to authorize the commission to make this purchase, they are without authority to do so.

COLUMBUS, OHIO, June 10, 1913.

HON. A. H. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I have your letter of April 15, 1913, in which you inquire as follows:

> "Have the commissioners authority to purchase an automobile for the use of the county surveyor ?"

The only statutory provision having any bearing on the question here made is section 2786, General Code, which provides as follows:

> "The county surveyor shall keep his office at the county seat in such room or rooms as are provided by the county commissioners, which shall be furnished with all necessary cases and other suitable articles, at the expense of the county. Such office shall also be furnished with all tools, instruments and books, blanks and stationery necessary for the proper discharge of the official

duties of the county surveyor. The cost and expense of such equipment shall be allowed and paid from the general fund of the county upon the approval of the county commissioners. The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expense incurred in the performance of his official duties. (R. S. section 1181.)"

Nothing in the way of specific authority is given by this section to either the surveyor or the county commissioners to purchase an automobile at the expense of the county. The case of State ex rel. vs. Commissioners of Mahoning county, 10 C. C. (n. s.) 398, in which the court denies the right of the sheriff to purchase vehicles for official use at the expense of the county, is in my opinion conclusive against any authority to be implied from the provisions of section 2786, authorizing the county commissioners or the surveyor to purchase for his use an automobile at the county's expense.

The case above referred to was decided on a construction of section 1296-29 R. S. later carried into the General Code as section 2997. This statute providing for payment of the expenses of county sheriffs in the discharge of their official duties was much broader with reference to the question there made, than is section 2786 with respect to the right of the county commissioners to purchase an automobile for the use of the county surveyor.

The court in the case before cited says:

"If the legislature intended to have county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it would certainly have so provided in unambiguous terms."

This language of the court is pertinent with reference to the question here made with respect to the construction of section 2786.

Whether the question made is approached from a view presented by a consideration of the compensation, fees or allowances due the surveyor, or from a view as to the powers of the county commissioners, the result is the same. The right of the surveyor as a public officer to compensation, fees or allowances must depend on express legislative enactment or on necessary implication from the terms used.

State ex rel. vs. Commissioners Mahoning Co. supra.
Sage vs. Commissioners, 82 O. S. 126.
Thorniley vs. Commissioners, 81 O. S. 108.

The same is true with reference to the powers of county commissioners.

Commissioners vs. R. R. Co., 45 O. S. 401, 403.
State ex rel. vs. Yeatman, 22 O. S. 546, 551.
Commissioners of Medina County vs. Leighty, I. C. C. (n. s.) 431.

I am of the opinion that none of the provisions of section 2786 are broad enough or specific enough to authorize the commissioners to purchase an automobile for the use of the county surveyors nor to authorize any allowance to the surveyor for the expense of any such purchase made by him.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

444.

WHEN A JUSTICE OF THE PEACE IS APPOINTED TO FILL A VACANCY, HIS SUCCESSOR SHOULD BE ELECTED AT THE NEXT REGULAR ELECTION OF SUCH OFFICERS FOR A FULL TERM OF FOUR YEARS.

When a vacancy occurs in the office of justice of the peace, the successor to the person appointed to fill such vacancy should be elected at the next regular election for such office for a full term of four years.

COLUMBUS, OHIO, September 3, 1913.

HON. OLIN M. FARBER, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your letter of August 11, 1913, in which you inquire:

> "Jabez Dickey was elected a justice of the peace for Madison township, this county, in November, 1911, and commissioned to serve until December 31, 1915. On January 8, 1913, he resigned, and B. B. Dickey was appointed by the trustees of said township to fill out the unexpired portion of the term of said Jabez Dickey.
>
> "I respectfully ask for your opinion on the following point: Should the successor of said Jabez Dickey as such justice of the peace be elected at the November election for the year 1913 or the year 1915?"

The act of April 13, 1913, 103 O. L. 314, established the office of justice of the peace, fixed their powers, jurisdiction and duties the same as existing on September 3, 1913. The last clause of section 1 of said act reads:

> "All laws and parts of laws in force on said date, in any manner regulating such powers and duties, fixing such jurisdiction or pertaining to such office, or the incumbents thereof are hereby declared to be and remain in force until specifically amended or repealed, the same as if herein fully re-enacted."

Mr. B. B. Dickey, having been appointed on January 8, 1913, the question may arise as to its validity on account of the amendment to the constitution taking effect on January 1, 1913, and abolishing the office as one provided by the constitution. This question is not covered by the decision of the supreme court. See State ex rel. vs. Redding, 87 O. S. 385-400.

However, Mr. B. B. Dickey accepted the appointment, qualified, and is a de facto justice of the peace at least.

Section 10 of the General Code reads:

> "When an elective office becomes vacant and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

Section 1714, General Code, reads:

> "If a vacancy occurs in the office of justice of the peace by death, removal,

absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

Section 1715, General Code, reads:

"At the next regular election for such office a justice of the peace shall be elected in the manner provided by law, for the term of four years commencing on the first day of January next following his election."

Construing these sections together, and I think it clear that sections 1714 and 1715 make the "other provision" meant by section 10, therefore, a successor to Mr. Jabez Dickey must be elected in 1913, and for the full term of four years as provided by section 1715, General Code.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

453.

PAROLE OF PRISONERS FROM WORKHOUSE—MANAGER OF A WORKHOUSE MAY FOR GOOD CAUSE PAROLE PRISONERS CONFINED THEREIN.

The board of workhouse directors have authority to discharge prisoners confined in the workhouse, when there is good and sufficient cause for so doing. The authorities of such institution are the sole judges of what constitutes good and sufficient cause. When they execute their power fairly, their action is final.

When a prisoner is paroled, the officers designated in section 4133, General Code, should make the conditions of the parole and provide for the retaking of the prisoners should the conditions of the parole be violated.

The rule requiring the recommendation of the trial court on good cause shown can be suspended and the prisoner paroled without the same.

The board of pardons has nothing to do with the parole of a prisoner sentenced by a mayor of a village. No notice is necessary to the prosecuting attorney or to the attorney prosecuting the case.

COLUMBUS, OHIO, September 6, 1913.

HON. TOM S. MADDOX, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—In your letter of August 13, 1913, you ask:

"I desire to submit the following questions to you for an opinion, to wit:

1. "Has the board of workhouse directors authority to grant an absolute release of a prisoner under section 4133 of the General Code, when it was shown that he was convicted by perjured testimony, a fact which was not known at the time of his trial and until the time had expired for the filing of a bill of exceptions?

2. "If an application is made to the board of directors of the workhouse

for the conditional release of a prisoner on parole, may he be paroled on such terms as said board of directors may specify in the absence of rules and regulations suggested in section 4134 of the General Code?

3. "Have the said directors authority to suspend the rules and parole a prisoner for good cause shown, even though their rules and regulations provide that the same shall not be done without the recommendation of the trial court.

4. "Has the board of pardons power and authority to recommend to the governor the pardon of a prisoner confined in the workhouse, for good cause shown, when he has been convicted and sentenced thereto by the mayor of a village? If so, does the procedure in such cases conform to the statutory provision in regard to notice to the prosecuting attorney apply, as to indictable offenses, or must notice be given to the attorney representing the prosecution of the alleged defendants?"

I will take these questions up and answer them in their order.

1. Section 4133, General Code, reads as follows:

"An officer vested by statute with authority to manage a workhouse may discharge, for good and sufficient cause, a person committed thereto. A record of all such discharges shall be kept and reported to the council, in the annual report of the officer, with a brief statement of the reasons therefor."

This is a very broad section and would seem to give the governing officials of the workhouse full power to *"discharge for good and sufficient cause"* any person committed to such institution. The authorities of such institution are vested with discretionary powers in that behalf; and they are, in my opinion, the sole judges of what constitutes *"good and sufficient cause."* To them alone is delegated, under this section, the right to determine whether the facts and circumstances in *each case* warrant their exercise of the power to discharge; and when fairly exercised, their action in that behalf is final and unquestionable.

Such action, in a clear case, is one of humanity, right and justice toward the incarcerated one, and is intended to grant relief to him without being compelled to resort to the slower proceedings of parole or pardon through other boards or authorities. In other words, this section affords *speedy relief* to a prisoner whom the workhouse authorities believe is entitled to his freedom without being compelled to await the circumlocution attendant upon other forms of release.

2. Section 4134, General Code, provides:

"Such officer also may establish rules and regulations under which and specify the conditions on which a prisoner may be allowed to go upon parole outside of the buildings and enclosures. * * *"

Under this section the officer designated in section 4133 should make rules providing for the parole of prisoners prior to their release; but in my opinion the said rules and regulations can be made at the time of the release of each particular prisoner. These rules could impose conditions and provide for retaking and reconfining a prionser in case of violation of the conditions of his parole.

3. I am of the opinion that a rule requiring the recommendation of the trial court can be suspended, on "good cause shown," and a workhouse prisoner paroled without the same.

4. The board of pardons has nothing to do with a prisoner confined in the work-

house under sentence of a mayor of a village; and the matter of notice to the prosecuting attorney or attorney prosecuting the case is not required.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

458.

LIQUOR LICENSE COMMISSIONER CANNOT BE APPOINTED IN COUNTIES WHICH HAVE NEVER VOTED DRY, BUT WHICH HAVE NO SALOONS.

In counties which have never been voted dry and which have no saloons, it is the duty of the liquor license commission not to appoint a county liquor license commission for such county.

COLUMBUS, OHIO, September 10, 1913.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—In your communication of August 30th you submit for my opinion the question whether or not liquor licensing commissioners must be appointed in your county, stating that:

> "The liquor license law, Vol. 103 O. L. page 218, section 7, provides, 'In each county of the state where the sale of intoxicating liquors has not been prohibited from the county by law, there shall be a board, etc.' Geauga county has never been voted dry as an entirety. At least some of the townships have no record of such a vote. Our vote has all been taken under the old Beal law and there has never been a county vote under this law, there being no saloons in our county."

Your attention is called to section 7 of the act found in 103 O. L. 218, which provides in part as follows:

> "For the purpose of licensing the traffic in intoxicating liquors in this state, the state is hereby divided into licensing districts, and each county in this state shall constitute a licensing district.
>
> "In each county of the state, wherein the sale of intoxicating liquor is not prohibited throughout the county by law, there shall be a board consisting of two commissioners, representing the state, not more than one of whom shall belong to the same political party, known as 'The ..... County Liquor Licensing Board,' the blank to be filled with the name of the county. Each commissioner shall be a qualified elector of the state, residing in the county in question, and shall be appointed by the state liquor licensing board. * * *."

It is apparent that since your county is one wherein the sale of intoxicating liquor is not prohibited throughout the county by law, following the exact letter of the statute, it would be necessary to appoint a county liquor licensing board; but as it must be conceded that the legislature never intended to demand a vain and useless thing, I have concluded that in those counties where, owing to township or Beal law local option elections, the various subdistricts of the county are "dry," that it would be useless to appoint a county board who would have no duties to perform. The state board certainly would not fix compensation for officers who, under no circumstances,

could perform any services. I have, accordingly, advised the governor and the state liquor licensing board that there will be no violation of any duty in case action is not taken in appointing county liquor licensing boards in those counties in which to all intents and purposes the sale of intoxicating liquor is prohibited throughout the county, even though this prohibition has not been effected by the result of a county local option election.

I reach this conclusion, feeling that under all the circumstances the public should neither be put to the expense of maintaining a county liquor licensing board nor to the cost of holding an election by reason of a technical requirement of the statute. While I construe section 7 as providing for the appointment of a liquor licensing board in each county of the state wherein the sale of intoxicating liquor *is not prohibited throughout the county by law,* still, I do not believe it was the intention of the people in amending the constitution, nor of the legislature in passing the liquor licensing law, to create saloons in counties where they have not heretofore existed.

In answer to your question, therefore, it is my opinion that under the circumstances of the case in Geauga county the state liquor licensing board is justified, and I believe it is their duty, to refuse to make any appointment of a county liquor licensing board in your county.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

459.

JUSTICE OF THE PEACE, MAYOR OR POLICE JUDGE HAS FINAL JURISDICTION IN THE PROSECUTION OF VIOLATIONS OF THE FISH GAME AND BIRD LAWS.

A justice of the peace, mayor or police judge shall have final jurisdiction, within his county, in the prosecution for violations of section 13413, General Code. Section 13413, General Code, is a part of the fish, game and bird law of the state, controlled by section 1464, General Code.

COLUMBUS, OHIO, August 9, 1913.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Under date of July 1, 1913, you inquire as follows:

> "Has the justice of the peace, mayor or police judge final jurisdiction within his county in a prosecution for a violation of section 13413 of the General Code, and is section 13413 a part of the fish, game and bird laws of the state, controlled by section 1464 of the General Code?"

In reply to your inquiry I desire to say that section 1464 of the General Code provides as follows:

> "A justice of the peace, mayor or police judge shall have final jurisdiction within his county in a prosecution for a violation of any provision of the laws *relating to the protection, preservation or propagation of birds, fish and game* and shall have like jurisdiction in a proceeding for the condemnation and forfeiture of property used in the violation of any such law."

Section 13413 of the General Code as amended March 5, 1913, (103 O. L. 111), provides as follows:

> "Whosoever shall catch, kill or injure a skunk, or pursue it with such

intent, except from the fifteenth day of November to the first day of February both inclusive, or whoever shall at any time or place dig out, or smoke out with fumes or gases, any skunk or in any manner destroy the den or burrow of any skunk, or whoever during the period when it shall be unlawful to kill such animal shall have in his possession the green pelt of a skunk unless such person can show by the original signed by the shipper that such pelts were shipped from without the state shall be fined not less than ten dollars nor more than twenty-five dollars.

"This section shall not prevent the owner of a farm or any one authorized by him in writing from killing a skunk when doing an injury upon his premises. *The provisions of this section shall be enforced by the commissioners of fish and game.*"

Game animals are defined as follows:

"Animals pursued and taken by sportsmen."—Webster's Dictionary.

"Those wild animals who are pursued or taken for sport or profit in hunting, trapping, fowling or fishing."—Century Dictionary.

"Birds and beasts of a wild nature obtained by fowling and hunting."—Bouvier's Law Dictionary.

The American-English Encyclopaedia, second edition, volume 11, page 654, defines "game" in general as follows:

"Birds and beasts of a wild nature obtained by fowling and hunting."

By reason of the above definitions it is my opinion that said section 13413 of the General Code is a provision of law *relating to the protection, preservation and propagation of game.* It is to be noted that section 1464 of the General Code specifically provides that a justice of the peace, mayor or police judge shall have final jurisdiction within his respective county in a prosecution for violation of any *provision of the laws relating to the protection, preservation or propagation of birds, fish and game.*

Therefore, inasmuch as said section 13413 of the General Code above quoted, *relates to the protection, preservation and propagation of game,* and inasmuch as said section provides that the provisions thereof shall be enforced by the commissioners of fish and game, it is my opinion that said section 13413 is a part of the bird, fish and game laws of the state of Ohio and any violation of said section comes within section 1464 of the General Code above quoted as being a violation of a provision of the laws relating to the *protection, preservation and propagation of game,* and it follows in accordance with the foregoing reasoning that a justice of the peace, mayor or police judge has final jurisdiction within his county in a prosecution for a violation of said section 13413 of the General Code, above quoted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

462.

LEVIES MADE UNDER GEHRETT LAW TO BE USED FOR THE EXTINGUISHMENT OF THE BONDS ISSUED UNDER THAT LAW—THESE FUNDS MAY NOT BE USED TO REPAIR ROADS WHICH HAVE BEEN IMPROVED.

Levies made under the original Gehrett law are subject only to the limitations to which they would have been subject had that law been continued in force, and are not subject to the limitations prescribed in section 6945, General Code, as amended 103 O. L. 202.

The present section 5654, General Code, which has just gone into effect, governs the disposition of all levies made and bonds issued under the original Gehrett law, so that if there is at present a surplus in a fund created by an issue of bonds under this law, which has not been expended or transferred to the general fund, such surplus must be applied to the extinguishment of the bonds as therein provided, and may under no circumstances be used to repair a particular road which has been improved.

COLUMBUS, OHIO, August 14, 1913.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 1st requesting my opinion upon the following questions:

"1. Is it compulsory that the county follow the provisions of sections 12946 and 12946-2 and pay twice a month? (103 O. L. page 154.)

"2. Under the Thomas Stone road law (Ohio Laws Vol. 103, pages 198-204) section 6945 provides for a maximum levy of 3 mills. Should these 3 mills include the Gehrett law levies already made, or are they in addition thereto? This section also provides that the 3 mill levy is subject to the maximum limitation upon the aggregate amount of all levies now in force. Does this mean the 10 mill limit, as provided by law, or the 15 mill limit which includes sinking and interest levies?

"3. Under section 5654, as amended in Vol. 103 of Ohio Laws, at page 521, can the county commissioners expend any surplus from a bond issued for Gehrett law roads for the repair and maintenance of said roads, or shall the surplus be transferred to the sinking fund to meet the principal and interest on said bonds?"

I am indebted to you also for a copy of an opinion rendered by you to the auditor of Lucas county upon these questions, and for the very full statement of your views embodied therein.

Your first question is answered by the enclosed opinion to Hon. Geo. C. Von Beseler, city solicitor, Painesville, Ohio, August 11, 1913.

Answering the first subdivision of your second question, I beg to state that in my opinion levies made under what was known as the Gehrett law, formerly sections 6926 et seq., General Code, should not be regarded as within the three mill limit of present section 6945.

I understand that in referring to the Gehrett law levies already made, you mean levies under original sections 6926 to 6956 inclusive, which said sections were held to be repealed by implication by a recent decision of the supreme court, but proceedings under which are validated or attempted to be validated by the act found in 103 O. L. 132. Section 1 of that act provides:

"All * * * taxes * * * levied or to be levied on account of such

roads * * * are hereby declared and held to be valid, and boards of county commissioners or other officers shall have full power and authority to proceed with the construction and completion of all roads in process of construction under said section * * * and shall also have full power and authority to taxes * * * to pay for the construction and improvement of any such roads, and to do any and all things contemplated by such petitions under said sections."

The original Gehrett law was in very many respects like the act found in 103 O. L. 198 et seq., and consisted of the same numbered sections of the Code. The repeal of this act by implication must have taken place on the 10th day of May, 1910, when the act found in 101 O. L. 247 took effect. Accordingly from that date there was no such law as that embodied in the General Code sections bearing numbers 6926 to 6956, inclusive. The act found in 103 O. L. 132, is an exercise of the special legislative power vested in the general assembly by section 28 of article II of the constitution, and its purpose was simply to authorize the taxing authorities to levy such tax as might enable the authorities to carry out to completion proceedings begun under the old law after the date when its life was held to have been terminated. In addition to such levies there would, of course, be levies under the repealed sections made for the purpose of retiring bonds issued thereunder before the time when the repeal became effective. Indeed, I do not question that all levies made for the purpose of retiring bonds issued under the Gehrett law, either before or after its implied repeal, would have to be sustained irrespective of the passage of the curative act. My opinion, however, is not invited upon this or any related question, but assumes that levies shall be made for this purpose.

I have discussed these matters because of the fact that the present so-called Thomas road law, being sections 6926 et seq., found in 103 O. L. 198, and at present in effect purport to repeal the sections which constituted the original Gehrett law and to re-enact them for the purpose of amendment. Technically, therefore, this act, which passed and became effective at a date later than the act found in 103 O. L. 132, repealed the Gehrett law just as the latter act revised it. This technical view-point, however, in my opinion, is incorrect. While in deference to the constitutional provisions the sections of the General Code which are "amended" in the so-called Thomas law, are repealed and re-enacted, yet this is formal merely. The actual repeal of the sections, the number of which the legislature deemed it proper to use in the new act was effected on May 10, 1910. Therefore, the law embodied in the sections bearing these numbers was not a continuous rule of action unaffected by the simultaneous repeal and re-enactment within the familiar rule of statutory construction. What is now sections 6926 et seq., General Code, is an entirely new law, similar to, but by no means identical with the old Gehrett law. There was a hiatus of nearly three years between the implied repeal of the Gehrett law and the enactment of the new law, and the fact that the new law was in for an "amendment" of the old, cannot bridge this gap. Nor is the question affected by the curative act above referred to. This act did not revive the old law in its entirety; it merely authorized uncompleted proceedings to be carried to completion in accordance with its provisions.

From all this consideration then I am of the opinion that it was not the intention of the general assembly to regard levies made under the corresponding sections of the Gehrett law as governed by the limitations of the Thomas act. The two acts are entirely independent and the fact that their section numbers correspond and their subject-matter is similar, is entirely immaterial. This conclusion is strengthened by consideration of section 6956a, and of the title of the act found in 103 O. L. 198, from both of which it appears that the intention is expressly declared to provide an addi-

tional method "for the improvement of any public road * * * in addition to all other methods provided for by law."

I am, therefore, of the opinion that levies made under the original Gehrett law are subject only to the limitations to which they would have been subject had that law been continued in force, and are not subject to the limitations prescribed in section 6945, General Code, as amended in 103 O. L. 202.

Answering the second subdivision of your second question which relates to the interpretation of section 6945 in its proper application to the Thomas law, so-called, I quote the section in its entirety, as follows:

> "For the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid, the commissioners are authorized to levy upon the taxable property of any township or townships within the county in which such improved road is to be or has been constructed, not exceeding three mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject to the maximum limitation upon the aggregate amount of all levies now in force."

In my opinion the words "maximum limitation upon the aggregate amount of all levies now in force" mean, the ten mill limit of the Smith One Per Cent. law. The exact meaning of this phrase is somewhat doubtful. Sections 5649-2 and 5649-3 provide for the ten mill limit which is to include all levies excepting certain designated interest and sinking fund levies. This limitation is no where described but is referred to as follows: "The maximum rate of taxes that may be levied for all purposes," (Section 5649-2); "a maximum rate of ten mills" (5649-3). The word "aggregate" is not used in this phrase, but it is necessarily implied as the limitation is upon the aggregate rate as such.

Section 5649-5 contains the only other limitation which could possibly have been intended by the language used in section 6945. The limitation provided for is that of fifteen mills, and it is referred to as "the *combined* maximum rate for all taxes levied." This provision does not contain the word "aggregate." It does, however, refer to aggregate levies just as the ten mill limit does. However, I am of the opinion that the fifteen mill limit cannot be appropriately referred to in other legislation without the use of the word "combined" which is its distinguishing characteristic.

Another reason suggested in your opinion supports the view that the ten mill limit covers the three mill levy provided by section 6945. By inference at least the levy is designated as one "for township purposes," and it is clearly the intention of the Smith law, as a whole, that all levies for current township, county, municipal and school purposes shall be within the ten mill limit, unless by favor of a vote of the people. This limit is raised.

For both the suggested reasons, then, I am of the opinion that the three mill levy provided by section 6945 must be made within the ten mill limit of the Smith law.

I cannot return an affirmative answer to your third question, although I am compelled to reach a conclusion opposite to that reached by you. Section 6950 of the General Code being a part of the original Gehrett law, provides as follows:

> "The proceeds of such bonds shall be applied and used exclusively for the payment of the expenses and cost of construction of such stone or gravel road improvement, and the levy for the payment of the principal and interest of such bonds may be in addition to any levy now authorized by law."

I need no more than refer to the fact that the improvement of a road and its

repair and maintenance are two separate and distinct matters in the theory of our road improvement laws. For example, under section 7422, General Code, it is the duty of the county commissioners to repair all improved roads in the county and for this purpose they must make a levy upon the grand duplicate of the entire county. Therefore, while the improvement of the road is a matter which may be paid for by any of the plans offered by the statutes and by levies and assessments in limited territories, the repair and maintenance of such road is a matter of county concern, the expense of which the taxpayers or property owners of any limited territory cannot be made to bear.

I note that you refer to a custom of many years standing in Lucas county, which is inconsistent with the interpretation which I have placed on the section; yet such a custom can be of no weight in the face of the plain provisions of the law. There never was any warrant of law for using a surplus remaining in a construction fund for the repair of a road. Whether or not such surplus money should, under the old laws, have been treated as provided in original section 5654, General Code, is to my mind a difficult question, in view of the peculiar nature of the levy made to pay Gehrett law bonds such levy being upon the taxable property of the township only, while the bonds were those of the county.

The question has never been determined but I should incline strongly to the view that inasmuch as the township was especially taxed for the purpose of the improvement, the money arising from an issue of bonds which would have to be paid by levies so made, cannot be devoted to county purposes. Under the old law, possibly, there was no way in which to dispose of such a surplus, and the custom which obtained in Lucas county was as equitable a solution of the difficulty as could be worked out under the circumstances.

Present section 5654, however, clearly applies to the proceeds of a Gehrett law tax or bond issue. A contrary holding might be made if the prior law had made any definite disposition of the proceeds of such a bond issue so that to make amended section 5654 applicable to a levy made before it took effect or to bonds theretofore issued might seem to give it a retrospective application. That question, however, is not present in this instance, because unless original section 5654 itself would govern the disposition of such surplus and action was taken thereunder, there was no way lawfully to dispose of the surplus of the proceeds of a bond issue under the Gehrett law until present section 5654 became effective.

I am of the opinion that present section 5654, which has just gone into effect, governs the disposition of all levies made and bonds issued under the original Gehrett law; so that if there is at present a surplus in a fund created by an issue of bonds under this law which has not been expended or transferred to the general fund, such surplus must be applied to the extinguishment of the bonds as therein provided, and may, under no circumstances be used to repair a particular road which has been improved.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

465.

OFFICES INCOMPATIBLE—MEMBER OF VILLAGE COUNCIL AND MEMBER OF SCHOOL BOARD—OFFICES COMPATIBLE—VILLAGE MAYOR AND MEMBER OF VILLAGE BOARD OF EDUCATION.

Under the provisions of section 4218, General Code, a member of the village council may not serve as a member of the village school board. The mayor of a village may serve as a member of the village board of education.

COLUMBUS, OHIO, September 11, 1913.

HON. OLIN M. FARBER, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Under date of August 26th you advise that two members of the village board of education of Lexington, Ohio, are also members of the village council, and that a third member of said board of education occupies the position of mayor of said village.

You state you have advised the members of council that under section 4218, General Code, they may not serve in both capacities. In this connection I beg to say that your advice has been in accordance with the established ruling of this department.

With reference to the mayor and his ability to serve both as mayor and as a member of the board of education, you state that under section 4255, General Code, it is provided that the mayor of the village shall be president of the council, shall be present at all regular meetings thereof, and shall have a vote in case of a tie; and you inquire whether or not these duties make a village mayor such a member of the village council as to cause his disqualification under section 4218, General Code, upon the acceptance of another public office such as member of the board of education.

Section 4218 of the General Code provides:

> "Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

The established principle of government, which calls for a separation of the distinct departments known as legislative and executive, clearly appears in the scheme of government provided by the statutes for villages. Thus, section 4215, General Code, provides that the legislative power of each village shall be vested in and exercised by a council composed of six members, whilst section 4248, General Code, prescribes that the executive power and authority of villages shall be vested in a *mayor*, clerk, treasurer, marshal, street commissioner and such other officers and departments thereof as are created by law.

The mayor and the council clearly occupy distinct offices and represent distinct departments in the village government. The statutes throughout recognize this distinction and treat of each office separately. Thus, under section 4218, General Code, the qualifications of a councilman are set out, whilst under section 4255, General Code, the legislature expressly provides for the qualifications of the mayor, to wit: solely that he shall be an elector of the corporation. Were it intended that the qualifications prescribed for councilman, under section 4218, should be considered applicable to a mayor, the qualification set out in section 4255, General Code, would be a useless and superfluous case of legislation. So, also, under section 4219, General Code, the salary

of councilman is provided; whilst under section 4257, General Code, an altogether different compensation is provided for the mayor. Furthermore, under sections 4237 and 4238, General Code, council is made the judge of election qualification of its members, and may expel or punish them on its own initiative; whilst under section 4268 an altogether different procedure is provided for the removal of a mayor, to wit: by the governor.

In none of these provisions is the mayor to be considered to come within the directions applicable to *members of council.* As a matter of fact, argument need not be presented to make manifest that the office of mayor is intended as a distinct supervisory and checking power over that of council. He is given power to protest expenditures, to make recommendations, and must preside over and guide their deliberations.

It seems clear, therefore, that the one duty wherein he shares in the obligations of the council, to wit: that of voting in case of a tie, may not be viewed as sufficient to constitute him a member of council, within the meaning of section 4218, General Code. I have been unable to find anything in the respective duties either of the office of mayor or of that of member of a village board of education which would make these offices incompatible. I am, therefore, of the opinion that the mayor of a village may also hold the office of member of a village board of education.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

470.

THE PROVISIONS OF THE STATUTE PROVIDING FOR THE PROBATE JUDGE APPOINTING EXAMINERS FOR AUDITOR'S OFFICE ARE NOT MANDATORY.

Section 2705, General Code, in reference to the probate court appointing examiners to examine the auditor's office at least once a year, are not mandatory. It is the duty of the bureau of inspection and supervision of public offices to examine the auditor's office at least once a year. However, the probate judge still retains the right to cause such examination to be made.

COLUMBUS, OHIO, September 9, 1913.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Under date of September 2nd you state that you would like a construction of section 2705 of the General Code as to whether it is mandatory for the probate judge to direct the examiners appointed by the probate judge to examine the auditor's office.

Section 2705, General Code, reads as follows:

> "At least once each year and oftener if he deems it necessary, the probate judge may direct such examiners to examine the auditor's office, including all records, books, accounts and vouchers therein, and make report thereof, as in the examination of the county treasury."

The sole question which arises is as to whether the word "may" as used in the above section is to be read as "must" or "shall." It is a recognized rule of law that the word "may" shall be construed as "shall" in cases where public interest or rights are concerned, and where something is directed to be done for the sake of justice or public good. This does not need citations of authorities.

Section 2705, General Code, is a codified section of part of section 1219, Revised

Statutes. Upon an examination of section 1129, Revised Statutes, we find that the probate judge is required to appoint two competent and trustworthy accountants of opposite politics to examine into the treasurer's office, and further provides in the following language:

> "The said probate judge is further authorized to direct said examiners at least once a year and oftener if he deems it necessary to make an examination of the auditor's office."

I do not construe such language as used in section 1129, Revised Statutes, as above quoted as mandatory upon the probate judge, and while section 2705, General Code, were it a new provision of law and not simply a codification of a prior provision of law, could well be construed to be mandatory, yet in codifying the laws it is not presumed that there was any intention on the part of the legislature to change the meaning of a statute as it existed prior to codification.

I am of the opinion that the provisions of section 2705, General Code, are not mandatory upon the probate judge, especially so in view of the fact that under section 284, General Code, it is made the duty of the bureau of inspection and supervision of public offices to examine the auditor's office at least once a year. There would, therefore, now by reason of the provision of section 284, be no necessity for such examination for the sake of justice or public good. If, however, the probate judge should desire, he still retains the power to cause such examination to be made.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

478.

COLLATERAL INHERITANCE TAX LAW IS AN ACT PROVIDING FOR TAX LEVY AND WENT INTO EFFECT IMMEDIATELY UPON ITS PASSAGE AND APPROVAL.

Sections 5331 and 5333, General Code, as amended in 103 Ohio Laws 463, in reference to collateral inheritance tax, is an act providing for tax levy and as such went into effect immediately upon its passage and approval. This law having been passed and approved May 8, 1913, would govern the taxation of an estate of a decedent dying on July 9, 1913.

COLUMBUS, OHIO, August 14, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of August 4th in which you request my opinion as to the status, under the initiative and referendum amendments to the constitution of the act appearing in 103 O. L. 463, which so amends sections 5331 and 5333, General Code, pertaining to the collateral inheritance tax as to change the exemptions thereto.

The sections amended and re-enacted are the operative sections of the law, i. e., section 5331 in particular is the one which provides for the levy of the tax.

I am of the opinion that within the tests laid down by the supreme court in the recent case of State ex rel. Schreiber vs. Milroy, in which we both participated, this act is "an act providing for a tax levy," and as such went into immediate effect. Having been passed and approved on May 8, 1913, its provisions would govern the taxation of the estate of a decedent dying in July of this year.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

481.

BUILDING AND LOAN ASSOCIATIONS NOT REQUIRED TO MAKE RETURN OF PERSONAL PROPERTY TO COUNTY AUDITOR.

Building and loan associations are not required to return any personal property to the county auditor, under section 5404, General Code.

COLUMBUS, OHIO, August 14, 1913.

HON. WILLIAM H. VODREY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 31st in which you request my opinion upon the following question:

> "Should a building and loan association list for taxation the personal property of the association other than the moneys held in its reserve fund and undivided profits account?"

You state that it is asserted by certain building and loan associations in Columbiana county that the case of Gruner, auditor of Defiance county vs. Home Savings & Loan Association, 85 O. S. 484, unreported, is authority for the proposition that no property belonging to a building and loan association is taxable to the association as such.

The decision in question was an affirmance of that of the circuit court of Defiance county upon grounds stated in the following journal entry:

> "It is ordered and adjudged by this court, that the judgment of said circuit court be, and the same hereby is, affirmed, upon the ground that a building and loan association is not required to separately list its surplus and profits for taxation, but the real estate owned by a building and loan association is subject to the laws relating to the taxation of real property, whether purchased by surplus and profits or not."

I cannot reach the conclusion that the case is authority for a proposition so broad as that upon which it is cited, yet I am not convinced that the proposition for which the building and loan associations in question contend is not correct. To be perfectly frank, the case in question is not decisive of the precise question which you raise. The journal entry states conclusions only and not reasons upon which they are based. The conclusion is limited to the statement that the surplus and profits of a building and loan association need not be separately listed for taxation; but this conclusion is even further qualified by the statement that when the surplus and undivided profits are invested in real estate, such real estate must be listed for taxation in the ordinary way.

As you will observe from a report of the case I participated in its presentation to the court, and I have no hesitancy, therefore, in advising you that the contention made by the building and loan association, which was the defendant in error, was based upon the joint construction of sections 5404 and 9675 of the General Code, it being claimed that the latter section contained a specific provision for the taxation of building and loan associations within the meaning of the former section. That is to say, it was asserted that the taxation, as "credits" of the shares of stock of non-borrowing member of a building and loan association provided for by section 9675, General Code, constitutes the equivalent of the taxation of the property of the corporation, the value of which is supposed to be represented by the value of the individual shares; so that

within the letter and spirit of the exception contained in section 5404, General Code, a building and loan association is not required to make any personal return to the county auditor.

Upon careful consideration of the question, which is by no means free from doubt, I have reached the conclusion that the court could have reached its decision only by acquiescing in the contention made by the building and loan assocation. The return to be made by all corporations subject to the provisions of section 5404 is a return of all the property of such corporations from which, when the value thereof is ascertained, the assessed value of the real estate is to be deducted. This return is not separable into different items for the purpose of the application of the statute. The sole question being as to whether or not section 5404 applies at all, it must follow that if it does not apply to a part of the personal property of a given corporation it does not apply to any of the personal property of such a corporation.

The seeming incongruity in the journal entry of the supreme court, arising from the qualification of the conclusion reached by the court in so far as real estate in which the surplus and undivided profits of an association may be invested is concerned is obviated by consideration of the fundamental principle of our tax laws. The return which must be made under section 5404 by corporations subject thereto is, as has already been stated, a *personal* return analogous to the personal list which each taxpayer is required by other sections of the General Code to make out and deliver to the assessor annually. Real estate, on the other hand, is separately valued and assessed every four years, whether it belongs to a corporation or to an individual.

Section 5404 does not affect the listing of corporate real estate; that is done by the real estate assessors in the quadrennial year. Therefore, if there were no such section as 5404, General Code, nevertheless, all corporate real estate, as well as other real estate, would be placed upon the tax duplicate and valued for taxation in the names of its owners. Therefore, a section such as section 9675, which by construction is held to constitute an exception to section 5404 and to relieve any class of corporations from the obligation to make a return under said section, would not relieve such corporations from the taxation of their real estate. In other words, the effect of exemption from the provisions of section 5404, is to relieve a particular corporation from taxation upon whatever is required to be returned by that section, but not from taxation upon real estate, which is assessed under other provisions of the law.

Having already stated that section 5404 is indivisible in its application to different classes of personal property, and requires all such property, or none, to be returned to the county auditor annually, I am of the opinion that on the authority of the case above cited, properly understood, a building and loan association is not required to return any personal property to the county auditor under section 5404. I may add that there were no opinions rendered in any of the courts in the case which I have been discussing.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

511.

QUESTION OF CENTRALIZATION OF SCHOOLS TO BE SUBMITTED TO A VOTE OF THE ELECTORS—SCHOOLS MAY BE CENTRALIZED BY THE ABOLISHMENT OF ALL SCHOOLS IN THE SUB-DISTRICTS AND THE ESTABLISHMENT OF NEW SCHOOLS AND CONVEYANCE OF THE PUPILS TO THE NEW SCHOOLS PROVIDED NO ELECTION IS HELD.

It is necessary for a township board of education to submit the question of centralization of schools to a vote, under the provisions of section 4726, General Code.

All the electors of the township are entitled to vote upon the proposition of the centralization of schools.

The abolishment of all the schools in all the sub-districts, by virtue of sections 3730 and 3731, General Code, the establishment of new schools and the conveyance of pupils to these schools, operate as a centralization of the schools of the township, provided that no election has been held upon the question of centralization which resulted adversely and provided that no petition may be filed for an election according to law.

COLUMBUS, OHIO, September 16, 1913.

HON. HOWARD F. CASTLE, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—On August 19, 1913, you submitted to this department a request for an opinion as follows:

> "Springfield township was composed of thirteen school sub-districts. In the past six years the township board of education has abolished ten of the thirteen sub-districts, the last three of which were abolished a few months ago, and all have been abolished by virtue of section 7730. The abolishment has been carried out by the board by resolution without submitting the question to a vote.
>
> "New schools have been established and provision made for the conveyance of pupils as required by law. A new school is now just completed at a large expense for the last three sub-districts abolished, and will be ready for use for school purposes at the beginning of the next school term. The three sub-districts in the township which have not yet been abolished are so situated that it would be impracticable to abolish them and convey the pupils to other schools.
>
> "A petition has been filed with the township board of education within the last few days by the required number of electors, asking for a vote on the question of centralization of the schools of the township under section 4726 of the General Code.
>
> (*1*) "Under the facts above stated, is it necessary for the township board of education to submit the question of centralization to a vote under section 4726?
>
> (*2*) "If so, are all of the electors of the township entitled to a vote on the proposition, or only the electors in the three sub-districts which have not as yet been abolished?
>
> (*3*) "Does the abolishment of school sub-districts in a township, by virtue of section 7730 of the General Code, the establishment of new schools, and the conveyance of pupils therein, operate as a centralization of the schools of the township?"

In reply to your inquiry, I desire to say that section 7730 of the General Code provides as follows:

"The board of education of any township school district may suspend the schools in any or all sub-districts in the township district. Upon such suspension the board must provide for the conveyance of the pupils residing in such sub-district or sub-districts to a public school in the township district, or to a public school in another district, the cost thereof to be paid out of the funds of the township school district. *Or, the board may abolish all the sub-districts providing conveyance is furnished to one or more central schools, the expense thereof to be paid out of the funds of the district.* No sub-district school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

Section 7731, of the General Code, provides as follows:

"No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place *in each sub-district of the township.* When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

Said section 7730 of the General Code was formerly section 3922 of Bates Revised Statutes and prior to the amendment thereof on April 23, 1908, (99 O. L. 203), was passed upon by the supreme court in the case of Bowers et al., vs. Board of Education of Fulton township (78 O. S. 443). Prior to the amendment of said section on April 23, 1908, said section 3922, Bates Revised Statutes, now 7730 of the General Code, provided as follows:

"The board of education of any township school district is authorized to suspend the schools in any or all sub-districts in the township district, but upon such suspension the board must provide for the conveyance of the pupils residing in each sub-district or sub-districts to a public school in said township district, or to a public school in another district, the cost of such conveyance to be paid out of the funds of the township school district; or the board may abolish all the sub-districts providing conveyance is furnished to one or more central schools, the expense of such conveyance to be paid out of the funds of the district. * * *"

The said case of Bowers et al. vs. Board of Education came up from Fulton township, Fulton county and involved the right of the board of education of Fulton township to centralize the schools of that township by means of total suspension of sub-district schools, although at an election, at which the question of centralization was submitted to the electors of Fulton township, the question of centralization was decided in the negative.

The decision in the common pleas court was rendered in May, 1906, wherein the court held that the board of education of Fulton township could centralize their schools by suspension under said section 7730 of the General Code (3922 Bates Revised

Statutes), notwithstanding the fact that the election held in such township prior to such centralization by suspension, by virtue of section 2938-2, Bates Revised Statutes (4726 of the General Code), had resulted against centralization.

The circuit court affirmed the judgment of the common pleas court and the supreme court without report in 78 O. S. 443, above cited, affirmed the two lower courts. The lower courts' decisions are likewise not reported. Said section as amended on April 23, 1908, was amended by attaching the following provision:

> "No sub-district school where the average daily attendance is twelve or more, shall be so suspended or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or when a petition has been filed thereunder and has not yet been voted upon at an election."

It therefore follows, under the circumstances which existed in the Bowers case, to wit, an election being held which resulted adverse to centralization, that the board would be without authority in that case to centralize the schools under the provisions of said section, 7730, but it also follows that such amendment would not alter or change the decision of the court in regard to the right of the township board of education to centralize their schools by suspension of sub-districts, provided that no election had been held which resulted adversely to centralization and provided that no petition had been filed thereunder and had not been voted upon at an election. In accordance with the decision of the supreme court in the said case of Bowers et al. vs. Board of Education, supra, it follows that a board of education of a township school district may centralize the schools of such township district by abolishing or suspending the sub-district schools, provided of course that no election had been held in such township school district resulting adversely to centralization or that no petition had been filed with the board of education, requesting an election upon the question of centralization and which had not yet been voted upon at an election.

Section 4726, of the General Code, provides as follows:

> "A township board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such township district, must submit such question to the vote of the qualified electors of such township district, at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such board of education shall proceed at once to the centralization of schools of the township, and, if necessary purchase a site or sites and erect a suitable building or buildings thereon.
>
> "If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such township district for a period of two years."

In construing said section 4726 of the General Code (3927-2 Bates Revised Statutes), the court in the case of State ex rel. Haines vs. Chester Township Board of Education, 15 C. D. (25 G. C. Rep.) page 424 held as follows:

> "The centralization of the township schools is a duty imperatively imposed upon the township board of education under act of April 16, 1900."

As above stated, it is to be noted that the last amendment made to section 7730 of the General Code as amended in 99 O. L. page 203, specifically provides that no sub-district school where the average daily attendance is twelve or more shall be suspended

or abolished, after a vote has been taken under the provisions of law therefor, when at such election a majority of the votes cast thereon were against the proposition of centralization, or *when a petition has been filed thereunder and has not yet been voted upon at an election.* That is to say, in other words, if a petition for an election upon the question of centralization is filed with the board of education, signed by not less than one-fourth of the qualified electors of such township district before centralization is actually accomplished by the suspension or abolishment of the sub-district schools in the township school district, then it is imperative that such election be held under said section 4726 in accordance with the rule laid down in the case of State ex rel. Haines vs. Chester Township, supra, and the centralization in that event cannot be carried to completion under the provisions of section 7730 of the General Code, supra.

In this respect you state that a petition has been filed with the township board of education of Springfield township within the last few days by the required number of electors, asking for a vote on the question of centralization of the schools of said township, under the provisions of section 4726 of the General Code, and that three of the sub-districts in said Springfield township have not as yet been abolished and at least to that extent the board of education has not as yet accomplished centralization of its schools by abolishing or suspending all the sub-district schools of said township.

Therefore, it follows for the foregoing reasons and under the circumstances as you state them in your letter of inquiry, in answer to your first question, that it is necessary for the township board of education to submit the question of centralization to a vote under section 4726 of the General Code. In answer to your second question, I am of the opinion that all of the electors of said township are entitled to vote upon the proposition of centralization for the reason that said section 4726 specifically provides that said proposition shall be submitted to the vote of the qualified electors of such township district, either at a general election or a special election called for that purpose. In answer to your third question, I am of the opinion that the abolishment of the schools in all the sub-districts in the township district, by virtue of sections 7730 and 7731 of the General Code and the establishment of new schools and the conveyance of pupils therein, operates as a centralization of the schools of the township, provided that no election has been held upon the question of centralization which resulted adversely to centralization and provided that a petition for such election has not been filed therefor in accordance with law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

516.

TAX LEVY MADE BY BOARD OF EDUCATION FOR THE PAYMENT OF BONDS ISSUED IN ANTICIPATION THEREOF MUST COME WITHIN THE LIMITATION OF THE SMITH ONE PER CENT. LAW AND WITHIN THE FIVE MILL LIMITATION.

A levy of taxes made by a board of education for the purpose of providing for the payment of bonds issued in anticipation thereof, under authority of section 7629, General Code, must be made within the limitations of the Smith One Per Cent. Law, and also within the five mill limitation, applicable to boards of education as such, and prescribed by section 5649-3a, General Code.

COLUMBUS, OHIO, August 14, 1913.

HON. HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 31st requesting my opinion upon the following question:

> "Is a levy of taxes made by a board of education for the purpose of providing for the payment of bonds issued in anticipation thereof, under authority of section 7629, General Code, subject to the 1910 limitation, so-called, of the Smith one per cent. law?"

At the outset of my discussion of this question, I may say that all tax levies of whatsoever kind or character, save and excepting only the emergency levies especially referred to in section 5649-4, General Code, are subject to the 1910 limitation whether they are the sinking fund levies referred to in sections 5649-2 and 5649-3 or not. (State ex rel. vs. Senzenbacher, 84 O. S. 506, unreported.)

Supposing, however, that you may be interested also in the application of the ten mill limit of the Smith law, I beg to advise that a levy of the kind referred to by you must be made within this limitation, and within the five mill limitation applicable to boards of education as such, and prescribed by section 5649-3a, General Code.

You will observe that sections 5649-2 and 5649-3, in speaking of the interest and sinking fund levies which are to be made outside of the 1910 limitation (and which have been held to be exempt from the five mill limitation prescribed by section 5649-3a, in the case last above cited) uses the following language:

> "Such levies for interest and sinking fund purposes, necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

It is apparent, therefore, that not *all* sinking fund levies are exempt under this provision but only those specifically referred to therein.

Although your letter is not explicit on this point, I have inferred from the facts stated by you that the particular levy made by the board of education in question was not made prior to the passage of the Smith law, viz., June 1, 1911, but has been made since that date. I also infer that the bonds were not issued upon a vote of the people. This would be true, if you are correct in stating that the proceedings have been had under section 7629, General Code, which provides as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion re-

quires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds 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. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

If, of course, you are in error in referring to the sections, and if, as a matter of fact, proceedings were taken under section 7625, General Code, which requires a vote of the people, then the levies in question could be made outside of the ten mill and five mill limitations of the Smith law, but must still be within the 1910 limitation thereof, plus nine per cent. If, however, the inferences which I have drawn from your letter are correct, and the bonds have been issued since June 1, 1911, without a vote of the people, then the levy to pay them, and in anticipation of which they were issued, must be made within all limitations of the Smith law.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

517.

SUITS BROUGHT BY HUMANE SOCIETY—COUNTY AUDITOR MAY BE MANDAMUSED TO COMPEL HIM TO ISSUE WARRANT FOR COSTS —COUNTY AUDITOR SHALL DRAW WARRANT FOR ATTORNEY EMPLOYED BY HUMANE SOCIETY WHEN HIS BILL IS PROPERLY APPROVED—COUNTY AUDITOR MAY NOT QUESTION GOOD FAITH OF PROCEEDINGS.

Where action is brought by the humane society and the magistrate before whom the action is brought certifies the cost bill to the county auditor under oath, the county auditor shall issue his warrant to the person in whose favor the bills are payable.

Where an attorney is employed by the humane society to prosecute the case referred to and the judge of the common pleas court approves the bill, the county auditor shall draw his warrant in favor of the attorney.

The county auditor has no authority to question the good faith of a prosecution, such as the one in question, where the society was in possession of all the facts.

COLUMBUS, OHIO, September 29, 1913.

HON. WILLIAM H. VODREY, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—I have your communication of August 30, 1913, in which you ask for a ruling regarding the costs incurred in trial brought by the humane society against defendants charged with cruelty to animals, your communication referring to a request for information regarding the same subject made by Mr. L. P. Metzger, who was your predecessor in office.

Mr. Metzger states that the humane agent of the society for the prevention of cruelty to animals at Salem, instituted a proceeding against Edward Jenkins for cruelty to animals, another prosecution of the same character having been instituted by the same officer against an employe of Jenkins. In the former case a trial was had which resulted in the acquittal of the defendant, and in the latter prosecution the defendant was also found not guilty.

After the conclusion of both trials, the magistrate before whom they were held, certified the cost bills of the proceedings to the county auditor, and the attorney for the humane society filed a bill for his services, which bill was approved by the common pleas judge.

Mr. Metzger requests answers to the following questions:

> "1. Is the auditor's duty to correct this bill and draw his warrant for the same so clear under the statute that he would be compelled to do so by mandamus?
>
> "2. Are the provisions of section 13440 of the General Code, sufficiently definite, and if so, what if any authority, would the county commissioners have to interfere with an allowance of attorney's fees already fixed by the judge of the court of common pleas?
>
> "3. Does the county auditor have any authority to question the good faith of a prosecution such as the one against Blyth was, when such society was in full possession of all of the facts in the case?"

(1) Among the objects of the humane society are the enforcement of laws for the prevention of cruelty to animals, and it is authorized to appoint agents for the purpose of prosecuting violations of laws for the prevention of cruelty to animals.

Section 13438 provides:

> "In such prosecutions, the jurrors and the witnesses shall be entitled to like mileage and fees as in criminal cases in the court of common pleas."

Section 13439 contains the following language:

> "In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. * * *"

For an understanding of the word "such" as used in the first line of section 13439, reference should be had to 95 O. L. 517, of part of which section 13439 is the embodiment. In codifying the act, the code commissioners separated the part appearing as section 13439 from the context of the original act, but, nevertheless, it is clear that this section applies to violations of the law relating to the prevention of cruelty to animals. It clearly and definitely states that the trial magistrate shall, under oath, certify to the county auditor the costs of the case, under the circumstances stated in your letter, and that the county auditor shall issue his warrant in favor of the persons to whom the costs are payable. There is a clear and manifest duty imposed upon the auditor in this section, which he must not disregard. The only authority he has under this section is to examine the cost bill and allow it if it is correct; and allow it after correction of errors, if it contains any such errors. Therefore, my answer to your first question is that, if the auditor fails to comply with this section, mandamus would lie to compel him to do so.

(2) Section 13440 provides in part that:

> "A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his services out of

the county treasury in such sum as the judge of the court of common pleas or the probate judge of such county or the county commissioners thereof may approve as just and reasonable.

"1. Violations of law relating to the prevention of cruelty to animals or children; * * *."

Under this provision if the attorney was employed by the humane society or its agent to prosecute the case referred to, and the judge of the court of common pleas approved the bill as just and reasonable, the county commissioners have absolutely nothing to do with the matter, and the county auditor should draw his warrant therefor in favor of the attorney and deliver the same to such attorney.

(3) I do not think that the county auditor has any authority to question the good faith of the prosecution, as his duty is clear under section 13439 and there is no authority vested in him to conduct any investigation into the good faith of the proceeding. If the society has manifestly abused its rights and privileges, another method of investigating this should be adopted. This theory is supported by the fact that the fees and costs are to be paid to the magistrate and witnesses, who have nothing to do with the institution of the prosecution. In case of acquittal the humane society can reap no financial benefit from the proceedings.

While this answers all of the questions which are asked, there is another matter which should be taken into consideration. You do not state whether part of the fees and costs in this case are claimed by the agent of the humane socirty under section 10076 of the General Code, which provides:

"For this service and for all services rendered in carrying out the provisions of this chapter, such officer, and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which must be charged as costs and reimbursed to the society by the person convicted."

Section 10072 was passed subsequent to the original act, of which 10076 is a part. It provides:

"Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the general revenue fund of the county, such salary as they deem just and reasonable. The commissioners and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section."

Under the foregoing section, it is mandatory upon the council to fix a salary for the agent, which shall not be less than the minimum amount provided for by statute, and for the commissioners to do the same thing. This section is, I think, capable of enforcement by mandamus. Therefore, the agent in your case, if he were not salaried, would have a right to require the commissioners and council to fix a salary not less than

the minimum amount provided for in this statute. This being true, he would not, in my judgment, be entitled to any fees, his salary being in lieu thereof; nor would the fact that the salary had not been paid him justify his drawing the fees, because he had a remedy to enforce the payment of the salary, and this is true even though it would cover services performed before the salary was fixed. In other words, the judgment, in a proper proceeding, would be to the effect that he was entitled to salary from the time of his appointment, provided he was appointed subsequent to the passage of the act in question, and from the time of the passage of the act, if he was appointed prior to the passage of the act. Of course his appointment would have to be approved in the manner prescribed by law in any event.

Upon the point which I am just discussing, I beg to call your attention to Fournier vs. Mayor, 42 N. W., 277.

I also wish to call your attention to an opinion rendered by this department on November 11, 1912, to the bureau of inspection and supervision of public offices, to the effect that in no event is the humane agent entitled to fees, costs or repayment of expenses out of the county treasury.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

520.

BOND OF PERSON WHO TRAFFICS IN INTOXICATING LIQUORS—DURATION OF SUCH BOND IS MEASURED BY DURATION OF TAX YEAR—SURETY OR GUARANTEE COMPANY MAY SECURE SUCH BONDS.

The bond required of persons who traffic in intoxicating liquors, referred to in section 6072, General Code, is measured as to its term of duration by the tax year, or by that part of the tax year remaining after the execution of the bond.

Where the bond is executed with a surety or guarantee thereon, as surety, the bond is sufficient without other sureties thereon.

When the principal of the bond provided for by section 6072, General Code, executes such bond, conditioned as therein provided, to the satisfaction of the county clerk, he has done all that is required of him.

COLUMBUS, OHIO, September 22, 1913.

HON. THOS. L. POGUE, *Prosecuting Attorney, Hamilton County, Cincinnati, Ohio.*

DEAR SIR:—Under date of August 9, 1913, I have letter from your office asking my opinion as to the construction to be placed on certain language in section 6072, General Code, as amended in 103 O. L. 441.

The language of section 6072 referred to in the inquiry, is as follows:

> "Any person who traffics in intoxicating liquors as a beverage at retail shall not be entitled to any rebate or refunder under the liquor tax law without giving a bond in amount equal to twice the amount of such rebate or refunder with securities acceptable to the county clerk that he will not traffic in intoxicating liquors without paying the liquor taxes provided by law."

The particular inquiries with reference to the construction of this language of the section are, first, whether the bond therein provided for is for the balance of the tax

year only, or for an indefinite time; second, whether in the event a surety company is given, more than one surety thereon is required; third, whether, in the event of the death or disqualification of a surety or securities on said bond, the principal thereon is required to rehabilitate said bond as a condition of his qualification to commence business on application therefor to the county auditor.

As to the first inquiry, it is to be noted that the statute makes no provision as to the term or duration of the bond therein provided for, and the same is to be determined by a consideration of the purposes of this bond as disclosed by the provisions of this statute when read in connection with other sections of the General Code standing in *para materia* with it. The bond provided for being statutory, it is to be considered with reference to the statute which authorizes its execution and prescribes its object, and as a statutory obligation, it is to be given that effect which in reason must have been intended by the statute.

Secrist vs. Barbee, 17 O. S. 426.
Cincinnati vs. Baumer, 12 C. C. (N. S.) 240.
O'Brien vs. Murphy, 175 Mass. 253.
Chaladek vs. Brown, 58 Ill. App. 379.

The bond provided for by section 6072 as amended, is to be executed as a condition precedent to the right of the person, corporation, or co-partnership who has paid the assessment on the business of trafficking in intoxicating liquors provided for by section 6071, to receive any rebate or refunder on the assessment so paid. Refunders on such assessments are authorized, first, when the person, corporation or co-partnership paying the assessment discontinues business (section 6074, General Code); and second, when such person, corporation or co-partnership paying such assessment is obliged to suspend business temporarily on account of civil or military orders, or on account of fire, flood, earthquake or other public calamity (section 6071-1 General Code; 103 O. L. 818.)

Sections 6071, 6072, 6073 and 6074, provide as follows:

"Section 6071. Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed yearly and paid into the county treasury as provided by sections 6072, and following, of the General Code, by each person, corporation, or co-partnership engaged therein the sum of one thousand dollars.

"Section 6072. Such assessment, with any penalty thereon, shall attach and operate as a lien on the real property on and in which such business is conducted, as of the fourth Monday of May each year, and shall be paid at the times provided for the payment of taxes on real or personal property within this state, to wit: One half on or before the twentieth day of June, and one half on or before the twentieth day of December of each year. * * *

"Section 6073. When such business is commenced after the fourth Monday in May in any year, such assessment shall be proportioned in amount to the remainder of the assessment year, except that it shall not be less than two hundred dollars, and such assessment shall attach and operate as a lien as provided in the next preceding section and be payable upon the date of such commencement.

"Section 6074. When a person, company, corporation or co-partnership engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order for the proportionate amount of such assessment so retained shall not be less than two hundred dollars unless such discontinuance

of business has been caused by an election under a local option law or a lawful finding of a mayor or judge or a petition filed in a residence district as provided in this chapter, in which case the proportionate amount of such tax shall be refunded in full."

By section 6071-1, General Code (103 O. L. 818), it is provided that the refunder therein authorized and provided for shall be a proportionate amount of the tax paid under the provisions of section 6071 and following sections of the General Code, the same to be based upon the number of days, or fraction thereof, of enforced discontinuance.

In the consideration of the concrete question presented, it will be noted that by the provisions of section 6071 an assessment is provided for on the business of trafficking in intoxicating liquors covering a certain definite period of time, to wit, the tax year. Sections 6072 and 6073 have operation with respect to this assessment. With respect to the bond in question, it is to be given with reference to the refunder on the assessment provided for by section 6071, and as a condition precedent to the payment of such assessment. Looking to the provisions of sections 6074 and 6071-1, it is noted that the refunders therein authorized and provided for are predicated on the assessment provided for in section 6071, covering, as it does, a certain period of time, to wit, the tax year, and the amount refunded under the provisions of both sections 6074 and 6071-1 represents a proportional part of such assessment based on the ratio existing between the period of discontinuance and the whole tax year.

On a consideration of the statutory provisions above noted, I am of the opinion that the bond provided for by section 6072 in legal effect is measured as to its term of duration by the tax year, or, more specifically, that part of the tax year remaining after its execution.

The bond in question bears some analogy to the bond of a public official indefinite as to term of duration, executed during his term of office, which has been held to be effective and obligatory during such term only.

State vs. Crooks, 7 Ohio, Part 2, p. 221.
Bryant vs. Bonding Co., 77 O. S. 90.
O'Brien vs. Murphy, supra.

As to the purpose of the bond in question, although the language of section 6072 providing for the same, is broad enough and specific enough to cover the refunders authorized and provided for by section 6071-1, yet it is reasonable to believe that section 6072 as amended, insofar as it makes provision for this bond, was enacted more particularly with reference to the refunders authorized and provided for by section 6074 and that the purpose of the bond is to provide against the trafficing in intoxicating liquors by one taking such refunder, during the balance of the tax year represented by the same.

As to the second inquiry above noted, I note that section 9571, General Code, provides as follows:

"When a bond, recognizance or undertaking is required or permitted by law, with one or more securities, its execution or the guaranteeing thereof, as the case may be, as sole surety by a company authorized to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed is sufficient, and when so executed and guaranteed, shall be a full compliance with every requirement of law, ordinance, rule or regulation that such bond, recognizance must be executed and guaranteed by one surety or two or more sureties, or that such sureties shall be residents or householders or freeholders."

By force of the provisions of this section I am of the opinion that if the principal executes a bond with a surety or guaranty company thereon as security, which is authorized to execute and guarantee all bonds required and provided for by law, the bond so executed is sufficient without other surety thereon.

As to the third inquiry made, I am of the opinion that when the principal on the bond provided for by section 6072, as amended, executes such bond conditioned as therein provided to the satisfaction of the county clerk, he has done all that is required of him.

As provided by the statute, he is required to give this bond before he is entitled to any rebate or refunder, under the liquor tax law, on his license to traffic in intoxicating liquors. The purpose of the bond is to provide against the traffic in intoxicating liquors by one who is not authorized so to do, and not to prescribe a condition as to one who is making application according to law for qualification to engage in the business. Your third inquiry must, therefore, be answered in the negative.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

524.

IN TRANSFERRING TOWNSHIP SUBDISTRICTS TO SPECIAL DISTRICTS THERE MUST BE EQUITABLE DIVISION OF PROPERTY—SPECIAL DISTRICT HAS NO INTEREST IN PROPERTY OF SUBDISTRICT—MEMBERS OF THE BOARD OF EDUCATION CONTINUING TO RESIDE IN TRANSFERRED TERRITORY FORFEIT THEIR OFFICE.

Where two township school subdistricts, formerly a part of a certain township district have been transferred to a special district therein, unless there has been an equitable distribution of the funds now in the school district and of the money in process of collection, there has been no valid transfer of territory and the territory involved is still a part of the township district.

The special district has no interest in the school land, buildings, furniture and fixtures, or any school property in the transfer. The legal title is unaffected by the transfer of the territory. The real estate should be disposed of at public sale and the funds derived from the sale should go to the present township district.

Where territory has been legally transferred from the township district to a special district, the members of the board of education residing in the territory so transferred and who continue to reside therein after the transfer is made, forfeit their office.

COLUMBUS, OHIO, September 24, 1913.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 12th, and to apologize for my inability to return an answer thereto before the time for opening the schools of the districts interested in the question. The pressure of business in this department has seriously impaired my ability to keep up with its advisory work.

You state in your letter that two subdistricts, formerly a part of a certain township school district in Lucas county, have been recently *transferred* to a special village school district therein; that in the school fund of the township district a certain sum has accumulated from the collection of taxes; that there are certain school lands, school houses, furniture and fixtures located in the territory thus transferred; and that certain members of the township board of education reside in the territory so transferred.

Under the foregoing statement of facts you submit for my opinion the following questions:

> "1. What, if any, part of the aforesaid $4,000 now in the school fund of the township, and the money in process of collection, is the special school district entitled to?
>
> "2. Has the special school district any ownership or interest in the school land, school houses, school house furniture and fixtures, or any of the school property in the territory so transferred to the special school district?
>
> "3. What is the status of the members of the board of education of the township elected to represent the territory so transferred, but whose terms have not expired?"

I assume that you have used the word "transfer" in its exact sense, and that the territory of which you speak has been severed from the one district and attached to the other, by the procedure outlined in section 4692, General Code, and not by annexation as provided in sections 4690 and 4691, General Code.

As it is, there are two separate proceedings by which territory may be technically "transferred" from one district to another. Section 4692, General Code, provides for the transfer of territory from one district to another "by the mutual consent of the boards of education having control of such districts." It would seem that if this be the proceeding which has been followed in the case concerning which you inquire, the details to which your first two questions relate should have been provided for in the resolution which, presumably, was passed by each of the concurring boards. In fact, I question whether or not the transfer was legally complete until some of these matters had been agreed upon between the two boards. I regard, for example, the first sentence of section 4696 as applicable to what may be termed this voluntary transfer. That sentence provides: "When territory is so transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer." The remainder of the section refers to the method of apportionment "when territory is transferred * * * by proceedings in the probate court."

The inference here is that the "equitable division of funds or indebtedness" is one of the elements of the contract, so to speak, upon which the "mutual consent" of the boards of education affected thereby must be secured under section 4692. And I am of the opinion that the disposition of property, as well as that of funds, is a matter which may lawfully be agreed upon in this manner. As to the effect of failure to agree as to either of these matters, I am of the opinion that such failure as to the apportionment of the funds and indebtedness renders the proceeding incomplete and void. That is to say, by force of sections 4692 and 4696, read together, as I think they must be, a voluntary transfer is incomplete and of no effect until the equitable division of funds has been determined upon.

It seems otherwise with respect to property. The statutes are silent in this particular, and while it may be lawful for the two boards to agree as to this matter it does not appear that they are required to do so.

I call your attention now to the fact that the procedure outlined in section 4693 et seq. constitutes a separate and distinct method of transferring territory from one district to another, as compared with that outlined in section 4692, and upon which I have just commented.

Section 4693, for example, provides that,

> "Territory may *also* be transferred from one school district to another, as follows: * * *"

The language here used indicates clearly that the method is in addition to that mentioned in section 4692. That portion of section 4696 which governs the probate judge in the discharge of his powers and duties in transferring territory from one district to another, upon petition, is as follows:

> "* * * When territory is transferred from one district to another by proceedings in the probate court or by the annexation of territory to a city or village, the proper division of funds in the treasury, or in process of collection, of the board of education of the school district from which the territory is detached, shall, upon application to the probate court of the county in which such territory is situated by either board of education interested, be determined and ordered by such court. If such board of education is indebted, such indebtedness, together with the proper amount of money to be paid to such board by the board of education of the school district to which the territory is transferred, annexed, or of the district created, shall be in like manner determined and ordered by the court."

The probate judge in so acting undoubtedly exercises judicial power. The proceeding is judicial in the highest sense. There are adverse parties; there is a hearing, after notice; there is a judgment for costs. Therefore, the question which you raise becomes one pertaining to the jurisdiction of a court. The principle here is that a court, in the exercise of special jurisdiction, is limited to the subject matters spes cifically mentioned in the statute providing for the special proceeding. I regard thi- principle as elementary. This particular transfer proceeding does not *ipso facto* result in the transfer of the title to the real and personal property located in the transferred territory. Then, it seems clear that the probate judge is without jurisdiction, by his judgment, finding and decree, to effect such transfer, or to compel appropriate conveyances or deliveries which would be necessary to do so.

That the mere transfer of territory does not have, *ipso facto* the effect of transferring property located therein seems to me clearly to follow from the provisions of other sections of the school code, considered in connection with the silence of the sections now immediately under consideration. Thus, section 4688, General Code, contains explicit provision as to the disposition of property in the case of the abandonment of a village school district. So, also, section 4690, General Code, contains another provision dissimilar to that found in section 4688, as to the disposition of property in case of annexation of territory to a city or village. There is here a peculiar provision, which is as follows:

> "When territory is annexed to a city or village, such territory thereby becomes a part of the city or village school district, and the legal title to school *property* in such territory for school purposes shall remain vested in the board of education of the school district from which such territory was detached, until such time as may be agreed upon by the several boards of education when such *property* may be transferred by warranty deed. In case of disagreement between such boards of education, like proceedings shall be had by application to the probate court as are provided by law in case of the transfer of *property* from one school district to another."

The last use of the italicized word in this context is an obvious error, as there are no proceedings in the probate court "provided by law in case of the transfer of property from one school district to another." Evidently, the word "property" here should be read "territory." At the very most no inference can be drawn from its seemingly accidental use in this context from which to construct jurisdiction in the probate court to dispose of the legal title of school property located in territory transferred from one district to another.

Other specific provisions might be cited in this connection. Suffice it to say that the general assembly has made various and differing provisions for the disposition of the legal title to school property located in territory belonging to one school district and which, by some process, becomes a part of another school district; but that it has failed to make any such provisions in the case of the transfer of territory upon petition, or otherwise, as between two school districts.

The question, then, is as to the rule in case of the silence of the statutes. I have not been able to find any decisions directly in point. I am of the opinion, however that the mere transfer of territory cannot have the legal effect of transferring legal title to the school property located therein from one board of education to another. The two boards must have an opportunity, in any event, as already pointed out, to agree between themselves as to the terms of transferring territory. If they fail to agree with respect to the transfer of the legal title of property located in the territory, as one of the terms of transferring territory, then, because the probate court has no jurisdiction over the property, as hereinbefore stated, the situation is just the same as it would have been if there had been no proceedings in the probate court, but the boards had acted under section 4692, so as to effect a voluntary transfer of the territory without transferring the property.

The effect of such voluntary transfer has already been discussed.

The foregoing discussion suggests the answers to your first two questions, as follows:

1. Unless the equitable distribution of the funds now in the treasury of the township school district and the money in process of collection in such district has been effected by some means or other, there has been no valid transfer of territory, and the territory involved is still a part of the township district, and will remain so until the distribution is made. The proceedings, whether voluntary or on petition, should be examined, for the purpose of ascertaining whether or not by inference possibly, this question cannot be answered as one of fact. In other words, does not the agreement between the boards, if any, or the findings of the probate court, provide what part of the school funds of the township district shall be apportioned to the village district. If such a provision is found your question is answered; if none is found, and the subject is simply omitted, then, the proceeding is incomplete and nugatory, and should be reopened and carried to completion.

2. I am of the opinion that the special village school district has no ownership or interest in the school land, school houses, furniture and fixtures, or any school property in the transferred territory. The legal title to all this property originally vested in the township district, and in the absence of contract between the two boards, entered into as a part of the process of transfer, this legal title is unaffected by the transfer of the territory as such. The fact that the transferred territory comprises exactly two subdistricts of the original township district, for which the buildings and property in question were originally used by the board of education of that district, makes the question a hard one (always assuming, of course, the validity of the transfer). It would be most equitable that the property intended for the use of the subdistricts should go with the subdistricts—or, at least, that a part of it should go. I have pointed out, however, the only method under the statutes by which the transfer may be affected. The board of education of the township district is at liberty to remove and use for its own purposes all the movable things formerly kept by it in the transferred territory; the real estate may and should be sold at public sale, as provided by law, for the enhancement of the school fund of the present township district.

The answer to your third question involves consideration of section 4748, General Code, which, in part, provides as follows:

> "A vacancy in any board of education may be caused by * * * non-residence * * *. Any such vacancy shall be filled by the board at its next regular or special meeting."

No statutes expressly require a member of any board of education to be a resident of the district for which he is elected; but the necessity for such provision is obviated by the one just quoted, the effect of which is to make non-residence—which I interpret to mean residence outside of the district—a cause of vacancy.

The effect of change of the boundaries of a district, where the incumbent of an office is required to be a resident of such district is established in the case of State vs. Choate, 11 Ohio Reports, 511. The syllabus in this case sufficiently states the facts and the conclusions:

> "The legislature may change the boundaries of a county, and when such change places an associate judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the county for which he was appointed, he forfeits his office.
>
> "A person who attempts to exercise the office of associate judge in a county wherein he does not reside, is guilty of intrusion and usurpation.
>
> "The legislature may fill a vacancy that has happened, or that is certain to happen, before the meeting of the next general assembly."

This principle controls, especially in the absence of any provisions of law to the contrary. There are no such provisions, the statutes being silent as to the effect of the transfer of territory, upon the tenure of office of members of the board of education of the original district, residing in such transferred territory.

I am, therefore, of the opinion that if the territory has been lawfully transferred from the township district to the special village district, those members of the board of education of the former district, residing in the transferred territory, and continuing to reside therein after the transfer, have forfeited their respective offices.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

527.

A TENANT RESIDING ON LAND IS THE PROPER PERSON TO PETITION FOR THE DETACHMENT OF SUCH LAND FROM A VILLAGE SCHOOL DISTRICT—THE FACT THAT A BONDED INDEBTEDNESS EXISTS ON THE FIRST DISTRICT IS NO OBJECTION TO THE DETACHMENT OF SUCH TERRITORY.

1. Where land is sought to be detached from a village school district, the tenant residing on said land is the proper person to petition for the detachment of the lands from said district. Such petition cannot be made by the owner of the land or by his trustee.

2. No objection can be interposed to the transfer of said territory from the village school district to the township school district on the ground that a bonded indebtedness had been created, which now exists against the first mentioned district.

COLUMBUS, OHIO, August 14, 1913.

HON. CHAS. F. CLOSE, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—On June 13, 1913, you submitted a request for an opinion as follows:

> "A land owner of Sycamore township, Wyandot county, whose lands are now within the Sycamore village school district, has, through his tenant,

petitioned the board of education of said village school district, to detach his lands from said village school district, to the end that such lands may be taken into Sycamore township and school attendance be had in one of the districts of the township.

"The buildings of the owner of the land sought to be detached from the village school district and attached to the township, are about two miles from the school building in Sycamore village school district, and about one mile and a quarter from the school building in the township district to which he seeks to be admitted.

"There is now a bonded indebtedness in the Sycamore village school district of considerable proportions, and which indebtedness was incurred while the lands sought to be detached were owned by the same gentleman as now owns them and were a part of said village school district.

"Queries: Is the tenant the proper party to petition for the detachment of the lands, or can such petition be made only by the owner of the land himself or his trustee, the land owner in this case being under trusteeship?

"Can the lands herein mentioned be detached in view of the fact that they were within the school district of the village at the time when the bonded indebtedness above referred to was contracted, and in view of the further fact that the lands were owned at that time by the present owner?"

In a subsequent communication of the date of August 1, 1913, you state that said tenant who petitioned for the detachment of the territory as set out in your inquiry of June 13th, is the only white male citizen who resides in the territory sought to be transferred and that he is an elector.

Section 4692 of the General Code provides that any school district or part thereof may be transferred to the adjoining school district by mutual consent of the boards of education having control of such districts, as follows:

"Any school district or a part thereof may be transferred to an adjoining school district by the mutual consent of the boards of education having control of such districts. To secure such consent, it shall be necessary for each of the boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred. The passage of such resolution shall require a majority vote of the full membership of each board by a yea and nay vote, and the vote of each member shall be entered on the records of such boards. Such transfer shall not take effect until a map, showing the boundaries of the territory transferred, is placed upon the records of such boards and copies of the resolution certified to the president and clerk of each board together with a copy of such map are filed with the auditor or auditors of the county or counties in which such transferred territory is situated."

Section 4693 of the General Code provides that territory may also be transferred from one school district to another by petition as follows:

"Territory may also be transferred from one school district to another as follows: A petition, signed by not less than one-half of the qualified male citizens who are electors, residing in the territory sought to be transferred and accompanied by a correct map of the territory, shall be filed with the clerks of the boards of education interested. If such boards of education fail or refuse to transfer such territory by mutual consent, as herein provided, within sixty days from the filing of the petition and map, the petitioner shall file a copy of the petition and map in the probate court of the county in which the

territory is situated, or, if it be situated in two or more counties, in the probate court of the county containing the largest proportionate share of the territory to be transferred. The petitioners shall give satisfactory security for the costs in the sum of one hundred dollars, conditioned that they will pay all the costs in case the transfer is not granted."

In the event that the transfer of such territory from one school district to another is refused by the boards of education of the respective districts interested, and a petition is filed in the probate court, section 4694 of the General Code provides that the probate judge shall fix the date for the hearing of the petition, as follows:

"Thereupon the probate judge shall fix a day for the hearing of the petition and cause to be published for four consecutive weeks in two newspapers of opposite politics printed and of general circulation in the county, a notice of the filing of the petition and of the time of the hearing. He shall also notify the clerks of the boards of education interested of the filing of the petition and the time of hearing."

Section 4695 of the General Code provides that the judgment of the probate court, either for or against said transfer, shall be final, and also provides for the payment of the costs of such proceeding as follows:

"The probate judge may hear and determine the case and give judgment for or against such transfer, and his judgment shall be final. In case the finding is against the transfer, judgment shall be rendered against the petitioners for the costs of the proceedings. If the finding is for the transfer, judgment shall be rendered against each of the boards of education interested for one-half of the costs, or, if more than two boards are interested, judgment shall be rendered against each for its equal proportionate share of the costs. A certified copy of the findings of the court, together with a copy of the map of the territory transferred shall be filed by the probate judge in the office of the county auditor."

Under the circumstances which you state in your communication of August 1, 1913, referred to above, to the effect that the tenant who petitioned for the detachment of the territory as set out in your inquiry of June 13th, is the only white male citizen who resides in the territory sought to be transferred and that he is an elector, leads me to the conclusion that the petition filed with the respective boards of education interested in the transfer of such school territory, is in conformity with section 4693 of the General Code above quoted, unless there are other qualified male citizens, other than white, who are electors and who reside in the territory to be transferred, besides the white male citizen whom you mention. Therefore, in direct answer to your question, I am of the opinion that the tenant is the proper party to petition for the detachment of the lands and that such petition cannot be made by the owner of the land himself or his trustee, the owner as you state in this case being under trusteeship.

In answer to your second question, section 4696 of the General Code provides that when territory is transferred from one school district to another, there shall be an equitable division or apportionment of the funds or indebtedness of the respective districts as follows:

"When territory is so transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer. When territory is transferred from one district to another by proceedings in the probate court or by the annexation of territory

to a city or village, the proper division of funds in the treasury, or in process of collection, of the board of education of the school district from which the territory is detached, shall, upon application to the probate court of the county in which such territory is situated by either board of education interested, be determined and ordered by such court. If such board of education is indebted, such indebtedness, together with the proper amount of money to be paid to such board by the board of education of the school district to which the territory is transferred, annexed, or of the district created, shall be in like manner determined and ordered by the court."

The provisions of section 3893 of Bates Revised Statutes, as passed March 8, 1892, was similar to the provisions now contained in section 4696 of the General Code. Said section 3893, Bates Revised Statutes, provided in part as follows:

"Section 3893. A part or the whole of any district may be transferred to an adjoining district by the mutual consent of the board of education having control of such districts; but no such transfer shall take effect until statement or map, showing the boundaries of the territory transferred, is entered upon the records of such boards, nor, except when the transfer is for the purpose of forming a joint subdistrict, until a copy of such statement or map certified by the clerks of the board making the transfer, is filed with the auditor of the county in which the transferred territory is situated; and any person living in the territory so transferred may appeal to the county commissioners, as provided in section 3967, and the commissioners, at their first regular meeting thereafter, shall approve or vacate such transfer."

The case of Eckstein et al. vs. Board of Education of Chicago Junction at el. 10 C. C. Report, page 480, was an appeal from the judgment rendered by the court of common pleas. Said section was brought to test the legality and validity of certain proceedings had in the probate court of Huron county, whereby it was sought to detach certain territory from the townships of Richmond and New Haven, and to attach the same to the village school district of Chicago Junction.

In construing said section 3893, Bates Revised Statutes, supra, the court on page 487 of the opinion says:

"If it be shown that it is sought to take, by certain lines, a certain defined territory from one township or one village school district, or from a township school district, and to attach that territory to an adjoining school district, it would seem, as I have just stated, to follow evidently that the change that was sought to be made in the township from which the territory was to be taken would require a corresponding change in the township to which the territory was to be attached.

"There seems to be some difficulty as to what may be the result of a change like this as to the power of taxation in a school district as newly constituted, with the territory detached and the territory from the adjoining township attached to it; as to whether or not the officers of the district as so enlarged, for example, in this case, the authorities of the Chicago Junction village school district, have the authority to levy a tax upon the property of the territory which is detached from the other two townships and added to Chicago Junction school district, or whether the parts formerly belonging to the old township districts are to be taxed by the authorities of those districts, and the fund certified under the statute, so as to be expended by the authorities controlling the Chicago Junction district. We have found some difficulty about that. We are not entirely clear in our minds in regard to it."

And again at page 489 of the opinion, the court holds the proceeding to detach territory from one school district and to attach the same to another, under statutory provisions similar to the provisions contained in sections 4692 to 4696 of the General Code, inclusive, as being valid in the following language:

> " * * * and if these proceedings in the probate court be effectual to the end had in view in taking them, so that the territory detached from each of these townships adjoining Richmond and New Haven, and attached to Chicago Junction village school district, constitutes with that of the former village district, a village school district, and if it is treated in that view, then the property embraced therein may be taxed by the authorities of the Chicago Junction village school district, and it is not subject to the power of taxation by the old directors or board of education of the districts from which those parcels are detached, because they no longer form any part of them.
>
> "Now, although as I say we are not satisfied entirely with this view, *this construction of the statute, yet our conclusion is that that is the view to be applied to this case, and it results from that that these proceedings are to be regarded as legal and valid.* * * *"

In my judgment no objection can be interposed to the transfer of said territory from the Sycamore school district to the township school district on the ground that a bonded indebtedness had been created and which now exists against the first mentioned district for the reason that section 4696 of the General Code as above quoted takes care of such objection *by providing for an apportionment or division of the funds or indebtedness when territory is so transferred from one school district to another.*

Therefore, in direct answer to your second question, I am of the opinion that the land mentioned in your inquiry can be detached from the village school district and attached to the township school district, even though during the time that said lands were a part of the village school district the latter district created a bonded indebtedness, as stated in your inquiry, and at that time owned by the present owner of such land.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

532.

WHEN THE COUNTY COMMISSIONERS WISH TO ESTABLISH A SOCIAL CENTER THEY MUST SUBMIT AN ESTIMATE OF THE COST TO THE BUDGET COMMISSION—THE COUNTY COMMISSIONERS ARE WITHOUT AUTHORITY TO PAY THE SALARY OF A DIRECTOR OR OTHER NECESSARY EXPENSES FOR SUCH SOCIAL CENTER.

1. The county commissioners do not have authority to expend money in the public treasury for the purpose of establishing social centers. If the county commissioners desire to establish such institution they must at the proper time submit to the budget commission an estimate of the amount of money needed for this purpose.

2. The county commissioners have no authority to pay the salary of a director and other necessary expenses connected with these social centers.

COLUMBUS, OHIO, September 30, 1913.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Under date of September 24, 1913, you state that your board of

county commissioners has asked you for an opinion regarding House Bill 41, providing for civic and social centers; and you ask the following questions:

> (*1*) "Has the board of county commissioners authority to appropriate money now in the public treasury for this purpose, or will it be necessary for them to request the budget commission to levy a tax and create a fund for the payment of these expenses before any money can be expended?
>
> (*2*) "Has the board of county commissioners authority to pay the salary of a director and other necessary expenses, as light and fuel, to establish these social centers in the school houses under the control of the board of education, if the board of education gives them their consent and co-operation?"

1. An act to provide for, aid and encourage the civic, social and moral development of the local communities throughout the state is to be found in 103 Ohio Laws, 830. Section 1 provides that school houses and grounds may be used for social centers, upon application of any responsible organization, or a group of at least seven citizens. Section 2 provides for the responsibility and liability of the said organization for damages, and the payment of the actual extra expenses. With these two sections we are not especially concerned. Section 3, in part, reads as follows:

> "Boards of county commissioners shall be and are hereby authorized at their discretion to provide for the organization and maintenance of civic and social centers throughout the county, to employ an expert director who shall superintend and administer the same, and to levy a tax and create a fund for the payment of all expenses involved in the social and educational work contemplated in this act; * * *. The board of county commissioners at their option may, or, upon petition of ten per cent. of the qualified school electors of the county, shall refer the question of providing for this social, educational and recreational work to a vote of the aforesaid electors of the county or of such portions of the same as are affected by this act."

In order properly to answer your question, it is necessary to refer to those sections of the General Code governing the levying of taxes by the county commissioners.

Section 5627, General Code, imposes upon the commissioners the duty of determining the amount to be raised for ordinary county purposes, public buildings, the support of the poor, interest and principal of the public debt, and for road and bridge purposes.

Section 5630 prescribes the maximum levy that may be made for county purposes.

Section 5649-3a, in part, reads as follows:

> "On or before the first Monday in June, each year, the county commissioners of each county * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth:
>
> (*1*) "The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year."

Section 5649-3d expressly states that at the beginning of each fiscal half-year the various boards mentioned in section 5649-3a shall make appropriations for each of the several objects for which money has to be provided, from moneys known to be in the treasury from the collection of taxes and all other sources of revenue, "and all expenditures within the following six months shall be made from and within such appropria-

tions and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

These statutes make clear the fact that levies shall be made for certain specific purposes and that such purposes shall be clearly set forth. When the moneys come into the treasury such moneys shall be appropriated for the objects for which the money has to be provided, and all expenditures must be kept within such appropriation.

It will not be disputed that the only fund out of which the expenses of maintaining social and civic centers could, at the present time, possibly be paid would be the fund raised for ordinary county purposes. At the time, however, such fund was provided for, the county commissioners did not and could not take into consideration the establishment of the civic centers. Expenditures for this purpose were not in contemplation of the commissioners, nor was the organization of such centers a proper function of county government at the time the levy for ordinary county purposes was made. This would clearly indicate that the legislature did not contemplate the expense of the maintenance of these centers as one that should be paid from the levy or appropriation for ordinary county purposes. When the commissioners made such levy and appropriation they took into consideration the ordinary and necessary county expenses as they existed and were in contemplation at the time of the levy and appropriation. New objects, so foreign to usual county expenditures as are those provided for by the act in question, were not thought of, and consequently to say now that such expenditures should be made would be to infringe upon the necessary contemplated expenses which the commissioners had in view when they levied and appropriated, as we cannot assume that the commissioners extravagantly and carelessly required the taxpayers to pay for county purposes a greater amount than was necessary.

In addition to this, we find in the act referred to a clear and manifest expression of legislative intent that these centers should not be maintained out of the general county fund, in that the act itself unequivocally provides for the levying of a tax and the creation of a fund for the payment of the expenses of the social and educational work contemplated in the act. This should demonstrate beyond cavil that the legislature has treated this work as something entirely distinct from an ordinary county purpose, and that in providing for a special tax and a separate fund for such purpose, the legislators did not intend that any of the moneys in the general revenue fund of the county should be used for this purpose. In this connection I beg to call your attention to an opinion of this department to you, dated June 28, 1913, relative to the Mothers' Pension Law. This opinion seems to me, in reasoning, fully to cover the question you now ask, and to determine it in the manner in which I have here held, viz.: a board of county commissioners has no authority to appropriate money at present in the public treasury for the purpose of providing for social centers. This, of course, carries with it the implication that if the county commissioners desire to establish such centers they must, at the proper time, submit to the budget commission an estimate of the amount of money needed for this purpose.

2. In view of what has already been said, in answer to your first question, I am of the opinion that the second question must be answered in the negative. If the county commissioners have no authority to appropriate money for the purposes referred to, they have no authority to pay the salary of a director and the other necessary expenses of establishing social centers in school houses.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

535.

WHERE A CHIEF OF POLICE GOES FROM OHIO TO INDIANA AND MAKES AN ARREST FOR NON-SUPPORT UNDER PROVISION OF SECTION 12970, GENERAL CODE, THE COST INCURRED IN MAKING THIS ARREST MAY NOT BE PAID FROM THE COUNTY TREASURY.

Where a charge is filed against a man for non-support of his minor children under provision of section 12970, General Code, and the chief of police from Ohio arrests a man in the state of Indiana, the expense of the chief of police in making the arrest cannot be legally paid from the county treasury.

COLUMBUS, OHIO, September 15, 1913.

HON. W. J. SCHWENCK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of July 22, 1913, in which you ask opinion of me as follows:

> "During the month of May an affidavit was filed with the mayor of this city charging the defendant with non-support of his minor children. This affidavit was filed by his wife, who was insolvent. The warrant on the affidavit was issued to the chief of police, Trautman, who subsequently arrested this party at Elwood in the state of Indiana. Thereupon the chief of police went to Elwood, and the defendant returned with him without a requisition. Thereupon the defendant was bound over to the probate court, and when arraigned, he plead guilty to the charge of non-support. Thereupon the probate court sentenced him to serve time in the work-house, which sentence was suspended upon the condition that he pay the sum of $15.00 per month for the support of his minor children, and to pay the costs of prosecution.
>
> "The chief of police used his own private money to make the trip to Elwood, Indiana, and return, and the question now is, can the chief be reimbursed out of the county treasury, or is he compelled to wait until the defendant has paid all the costs in the case ?"

You do not state specifically whether the charge filed against the defendant in the mayor's court was one under the provisions of section 13008, General Code—a felony —or one under the provisions of section 12970, General Code—a misdemeanor. Inasmuch, however, as it appears from your statement that the defendant was bound over to the probate court of the county, which court exercises original jurisdiction in making final disposition of the case, I infer that the offense charged was a misdemeanor only; for as appears from the provisions of section 13424 and 13425, General Code, it is only as to misdemeanors that the probate court has concurrent original jurisdiction with the court of common pleas.

As to persons charged with felonies, who have fled, sections 2491 and 13493, General Code, make appropriate provisions for payment out of the county treasury of the necessary expenses of the officer or authorized agent returning them to justice. Sections 3015, 3016 and 3017, General Code, further provide as follows:

> "Section 3015. The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country.
>
> "Section 3016. In felonies, when the defendant is convicted the costs of the justice of peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted

in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases when recognizances are taken, forfeited and collected and no conviction is had, such costs are paid from the county treasury.

"Section 3017. In no other case whatever shall any costs be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police or constable."

From a consideration of the sections of the General Code before noted, it is apparent that they do not authorize payment out of the county treasury of the expenses of an officer in the pursuit and arrest of a person charged with a misdemeanor; nor do I find any statute which does so. Section 3019, General Code, which, as originally enacted, was part of the same act with sections 3015, 3016 and 3017, already noted, provides:

"In felonies wherein the state fails, and in misdemeanors wherein the defendent proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowance to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

As to this provision, however, I note that it has been held that a chief of police is not entitled to fees for the service of processes issued by a mayor in state cases.

City of Delaware vs. Matthews, 13 C. C. (N. S.) 539.
Matthews vs. City of Delaware, 82 O. S. 423.

It follows, of course, that if the chief of police is not entitled to any fees for any particular service rendered by him, that section 3019 does not confer any authority upon the county commissioners to make any allowance to such officer in place of fees. Aside from this, however, it is apparent that expenses incurred by an officer in pursuing and arresting a person charged with a crime, are not "fees" in the sense of the term as employed in section 3019, but when allowed and paid to an officer are in addition to the fees to which he is entitled. In so far as the fees of a chief of police are covered by section 3019, I conclude the fees therein mentioned are such as are provided in section 4534, General Code, which provides:

"The fees of the chief of police or his deputies in all cases excepting those arising out of violations of ordinances, shall be the same as those allowed sheriffs and constables in similar cases."

The fees of constables and sheriffs in criminal cases are provided for by sections 3347 and 2845, General Code, respectively, neither of which make any provision as to expenses incurred in the pursuit and arrest of persons charged with crime. Therefore, aside from the fact that your letter to me does not state that the defendant is insolvent, I am of the opinion that section 3019, General Code, is of no assistance to the chief of police mentioned with respect to his right to be reimbursed for his expenses from the county treasury.

Section 13502, General Code, provides as follows:

"If the accused flee from justice, the officer holding the warrant may

pursue and arrest him in any county of the state and convey him before the magistrate or court issuing the warrant, or other magistrate or court of the county having cognizance of the case."

I note from your statement, however, that the arrest in this case was made in the state of Indiana. In the case of Smith vs. Commissioners of Portage County, 9 O. 25, where the court had under consideration the claim of an officer against the county on account of his services and expenses in making an arrest, on warrant, in another state, to wit, the state of Indiana, it held that the services rendered by the officer under such circumstances were both voluntary and without authority of law, and presented no legal foundation for an implied promise to pay for them.

As to the present inquiry, however, it is enough to know that there is no statute which authorizes the payment of the officer's expenses in making the arrest in question, from the county treasury. Section 4214, General Code, provides that the city council shall fix the salaries and compensation of all officers and on familiar principles, the salary or compensation so fixed for any officer is deemed to be in full for all services rendered by him except in so far as is otherwise provided by law; and if no provision is made by statute for paying out of the public treasury the expenses of an officer, incurred in the discharge of his duty, they cannot be so paid. (Richardson vs. State ex rel., 66 O. S. 108).

If, therefore, I am correct in my inference that the charge against the defendant was a misdemeanor, I am of the opinion that the expenses of the chief of police in making the arrest in question cannot be legally paid from the county treasury.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

536.

THE TERM "AS OTHER COUNTY EXPENSES" WHEN APPLIED TO ELECTION EXPENSES MEANS THAT SUCH EXPENSES ARE PAYABLE FROM THE COUNTY TREASURY UPON THE APPROVAL OF THE COUNTY COMMISSIONERS.

The use of the phrase "as other county expenses" as applied to election expenses means that election expenses not otherwise provided for shall be paid from the county treasury upon the order or approval of the county commissioners in the same manner they allow and pay other claims against the county.

COLUMBUS, OHIO, October 4, 1913.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of July 19, 1913, you inquire as follows:

"I desire to call your attention to an opinion given by you January 31, 1911, to Hon. A. E. Jacobs, City Solicitor, Wellston, Ohio, and reported in your 1911-1912 reports, volume 2, page 1504, relative to election expenses and ask your further opinion as to what you mean by the term 'as other county expenses.' In the next to the last paragraph of your published opinion you say in part 'provide that all expenses arising from such election shall be paid out of the county treasury *as other county expenses.*'"

The opinion to which you refer considered what political subdivision should pay

certain election expenses and not necessarily the manner of paying or allowing the same. The words quoted from the opinion allow the provisions of section 5052, General Code. Said section provides:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, *shall be paid from the county treasury, as other county expenses.*"

What is the proper construction of the phrase "as other county expenses"? The same phrase is used in section 4821, General Code, which reads:

> "All proper and necessary expenses of the board of deputy state supervisors *shall be paid from the county treasury as other county expenses,* and the county commissioners shall make the necessary levy to provide therefor. In counties containing annual general registration cities, such expenses shall include expenses duly authorized and incurred in the investigation and prosecution of offenses against laws relating to the registration of electors, the right of suffrage and the conduct of elections."

It is specifically provided by statute that certain items of expense of elections shall be paid from the county treasury upon vouchers of the board of deputy state supervisors of elections and certified by the chief deputy and clerk thereof.

For example, section 4822, General Code, provides:

> "Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. *Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof.* Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

The provisions of section 4821 and 4822, General Code, supra, were formerly parts of the same statute, to wit, section 2966-4, revised statutes, and said section contained the two methods of paying election expenses, that is, part were to be paid "as other county expenses" and part upon order of the board of elections.

If it had been intended that the general expense of elections provided for in section 4821, General Code, should be paid from the county treasury as other election expenses are paid therefrom, the legislature would not have used the phrase "as other county expenses," but would rather have used the phrase "as other election expenses."

The use of the phrase "as other county expenses" means that election expenses not otherwise provided for shall be paid from the county treasury upon the order or approval of the board of county commissioners, as they allow other claims against the county.

Section 2460, General Code, provides the manner of allowing claims against the county, as follows:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law.

Therefore, all proper and necessary expense of elections not otherwise specifically provided for, are payable from the county treasury upon the approval of the county commissioners.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

540.

WHERE A FAMILY HAS BEEN AFFLICTED WITH SMALLPOX AND THE CHILDREN OF THIS FAMILY HAVE BEEN KEPT OUT OF SCHOOL THEY MAY RE-ENTER SCHOOL ON RECEIVING WRITTEN PERMISSION FROM THE BOARD OF HEALTH.

Where a family has been afflicted with smallpox and all the members who have contracted the disease have recovered, and the board of health is of the opinion that those who have been exposed will not contract the disease, and that all danger of spreading the disease is passed, the children of such family may re-enter school on receiving written permission from the board of health.

COLUMBUS, OHIO, October 3, 1913.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—Under date of October 1st you state:

"In Franklin township of this county the local board of health have raised a quarantine on a family that have been afflicted with the smallpox. The mother and all the children have had the disease which lasted in the family for several weeks. The father being present all the time with the family and never having contracted the disease. The place was under quarantine for seven weeks and more than twenty days had elapsed from the time the last child had the disease until the premises were disinfected, which was thoroughly done by a competent, practicing pyhsician, and all of the subjects were given a bath and hair washed in chloride solution.

"On last Thursday the quarantine was raised and this disinfecting took place and the children sent to school. The teacher would not receive them into the school, basing his claim under section 4430 of the General Code of Ohio that seventeen days must elapse after such disinfection until the children would be admitted into the schools.

"I contend that if the teacher receives written notice of the raising of the quarantine from the board of health, accompanied by a certificate of the attending physician that such disinfection has been complete, and that no danger exists of the spread of the disease that he must allow the children

admission into the school. The father of said children being practically immune from the disease after so long a time since the last child became sound and well. Of course the pyhsician's statement would cover that."

Section 4430 of the General Code is as follows:

"Each physician attending a person affected with any such disease shall use such precautionary measures to prevent the spread of the disease as is required by the board of health. No person quarantined by a board of health on account of having a contagious disease, or for having been exposed thereto, shall leave such quarantined house or place without the written permission of the board of health, *and where other inmates of such house have been exposed to and are liable to become ill of any such disease, for a period thereafter counting from the completion of disinfection, as follows.* In diphtheria or membranous croup, fourteen days; *in smallpox, seventeen days;* in scarlet fever, ten days; in cholera or yellow fever, seven days; in typhus fever, twenty-one days. In cases of measles, chickenpox and whooping cough, or either of them, the board of health may require the same report of cases and may enforce the same quarantine and other preventative measures as are provided for in this chapter in cases of scarlet fever or diphtheria."

I am of the opinion that the language of this statute sustains your position. The statute prohibits any person from leaving a quarantined house without the written permission from the board of health, and this prohibition includes those who have had the contagious disease as well as those who have been exposed thereto. The statute then extends a further prohibition to other imnates of such house as have been exposed to and are liable to become ill of any such disease for a period, in a case of smallpox, of seventeen days. Whether an inmate who has been exposed to such disease is liable to become ill of the disease is undoubtedly left to the judgment of the board of health, and such board should guide its conduct in the granting of permission to leave the house in the manner required by the statute.

In the case presented the facts clearly establish that the only person who was an inmate of the house and who was exposed to the disease may be considered immune and in no danger of becoming ill of that disease. I am of the opinion, therefore, that the seventeen day limitation does not apply in this case if the board of health is of the opinion that the only exposed inmate, viz.: the father, is not liable to become ill of the disease, being immune therefrom.

The teacher is clearly not permitted to judge of the facts and should receive the children into the school, provided the permission of the board of health is obtained.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

543.

THE COUNTY SHERIFF HAS NO AUTHORITY TO EMPLOY A CHAUFFEUR AT THE EXPENSE OF THE COUNTY.

There is no authority conferred upon the sheriff by section 2927 to employ a chauffeur or care-taker for his automobile at the expense of the county, even though the automobile is used by the sheriff in the discharge of his official duties. The payment of such expense out of the county treasury is illegal.

COLUMBUS, OHIO, October 4, 1913.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I have your letter of July 8th in which you inquire:

> "Are the county commissioners authorized by section 2997, General Code, to pay out of the county treasury, a salary to a chauffeur or care-taker of an automobile owned by the sheriff, the same being used, at least in part, in the discharge of the official duties of the sheriff?"

Section 2997, General Code, provides:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare, and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

There is no authority conferred by the foregoing section upon a sheriff to employ a chauffeur or care-taker for his automobile at the expense of the county, even though the automobile is used in the discharge of official duties.

I am therefore of the opinion that payment out of the county treasury for such purpose would be illegal.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

560.

TRAVELING EXPENSES OF ENGINEERS INCURRED IN THE CONSTRUCTION OF A JOINT COUNTY DITCH SHALL BE ALLOWED BY THE COMMISSIONERS OF EACH COUNTY IN JOINT SESSION.

In joint county ditch proceedings the traveling expenses of those employed in the construction of such ditch shall be allowed by the county commissioners of the counties jointly. The commissioners should investigate the amounts charged in the bill in order to see that no illegal expense is allowed.

COLUMBUS, OHIO, September 29, 1913.

HON. JAMES A. TOBIN, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—In your letter of August 27th you say:

"That the commissioners of Fairfield and Perry counties are entertaining joint proceedings for the deepening, widening, etc., of a natural watercourse, to wit: Rush Creek, the proceedings being had under the chapter governing joint county ditches.

"Engineers were appointed by the board in joint session, Fairfield county selecting its own county surveyor and Perry county appointing one from Newark, Licking county (instead of its own county surveyor).

"Thereupon, these engineers proceeded upon the route of the improvement, and under the plea of not being able to secure boarding in any of the nearby towns set up housekeeping for themselves, and when their bill for services was presented to the commissioners for the first twelve days of their services the following items appeared thereon:

One tent	$ 21.00
Cooking utensils	4.45
Railroad fare	11.25
Groceries	45.00
Ten cots	17.50
Hotel bill for draftsman	6.25
12 days automobile hire	48.00

"This last item was for auto for the engineer from Newark to come and go to his work each day he was employed."

And you ask whether these items may be permitted as legal expenses. Sections 6563-38 and 6563-44 of the General Code are as follows:

"Section 6563-38: All of the costs and expenses connected with ordering and granting said improvement shall be taken as a part of the cost thereof and shall be included in the amount ordered to be paid by each county, except their costs of arbitration as provided in section 29.

"Section 6563-44: Said surveyors named in section 8 (G. C. Sec. 6563-8) shall meet with the joint board of county commissioners whenever required by said board and said surveyors and auditors shall be paid their necessary expenses while employed under this act and shall be allowed the same fees as are allowed in ditch work generally and said commissioners shall receive the sum of three dollars a day and their actual expenses while employed under this bill."

Under the plan provided by these statutes the cost of the proceedings is proportioned among the counties, either by agreement of the various county boards or by decision of arbitrators appointed by the governor. Under section 6563-38, above quoted, the costs of surveyors' expenses are proportioned in like manner. Under section 6563-42, General Code, the joint board of commissioners is given power to pay the various costs and expenses from the moneys received from the sale of bonds in the respective counties; the moneys to be paid from the county funds in the order provided by section 6563-43, General Code.

Under section 6563-44, above quoted, surveyors are allowed for *necessary* expenses when employed under the act. Under the statutes referred to the joint board of county commissioners are alone empowered to allow these expenses, and are therefore constituted the tribunal in whose discretion rests the allowance of such claims. Whether or not claims for expenses are reasonably necessary is a question depending for its solution upon the judgment of the joint board of county commissioners.

It is impossible to lay down any hard and fast rules for the allowance of such expenses. It is well settled that a board permitted to rule upon the same is vested with a wide discretion, and that the decision of such board will not be interfered with in such cases in the absence of clear and flagrant evidence of abuse of such discretion.

The facts stated in your letter do not make it possible to even venture a suggestion as to the reasonability or necessity of the expenses incurred. Whether or not the items set out were necessary expenses depends upon the surrounding facts and circumstances, to wit: the difficulty of procuring board in the nearby township; the distance of the nearest place to procure board; and the comparative expense of adopting other methods of support while engaged in the work.

My opinion is, therefore, that the solution of your question rests primarily with the joint board of county commissioners. They may allow or disallow the claims, as they judge them reasonable or necessary under the circumstances.

There is a clear and definite limitation upon the exercise of this discretion, however, which must not be overlooked, namely: that only such expenses may be allowed as are *reasonably necessary.* The purchase of a tent and sleeping and cooking equipments, and the hire of automobiles are circumstances which might well raise such doubt in the mind of a supervisory authority as would impel close scrutiny. On their face they present a strong suggestion of unreasonability. Circumstances might be imagined where such expenses would be the most economical and efficient, and therefore reasonably necessary. Whether such circumstances exist in this case, however, the facts presented do not disclose. At any rate, I am of the opinion that the question of their allowance rests, first of all, with the county commissioners, under a careful scrutiny and investigation of the surrounding facts and circumstances. Until they have acted in the matter it would be impossible to in any way control the allowance.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

565.

IN TRANSCRIBING RECORDS IN THE RECORDER'S OFFICE A PERSON SHOULD BE HIRED FOR THIS PURPOSE AND PAID DIRECTLY FROM THE COUNTY TREASURY AS OTHER CLERKS AND RECORDERS ARE PAID.

When the county commissioners so direct the records of Erie county now recorded in Huron county may be transcribed by some person appointed or hired by the recorder for this purpose. The person performing such work is to be paid from the county treasury as other employes in such offices are paid. It is not necessary that the county recorder personally do this work.

COLUMBUS, OHIO, October 16, 1913.

HON. HENRY HART, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Under date of October 4, 1913, you state that prior to 1838 Huron and Erie counties were one, and the records pertaining to the latter were, prior to that date, recorded in Huron county. Erie county now desires to have copies of the records and maps which were recorded in Huron county before that time. You inquire if it is necessary that the county recorder personally do this work; or may he employ some one to do it for him?

It is elementary that the ministerial work of an official may be performed by one employed by him for that purpose, and consequently you are correct in your assumption that the county recorder may hire some one to copy the record. From your letter, however, I infer that you are of the opinion that the recorder might pay such clerk or employe the fees which the statute fixes for the performance of this work, and consequently I desire to call your attention to certain provisions of the statute concerning this phase of the question.

Section 2780, General Code, provides in part that:

> "For services directed to be performed by the county commissioners in transcribing the records of other counties * * * the recorder shall receive not exceeding six cents for each hundred words, each figure to count as one work for transcribing defaced or injured records of plats, not exceeding fifty cents for the first six lines and three cents for each additional line. * * * All compensation provided for in this section shall be paid out of the county treasury upon the allowance of the county commissioners and the warrant of the county auditor and shall be paid into the county treasury to the credit of the recorder's fee fund. The commissioners shall allow the recorder his necessary expenses in transcribing records in other counties."

The clear and express intent of this statute is to require the payment of these fees into the county treasury to the credit of the recorder's fee fund, and therefore the recorder is not entitled to these fees in addition to his salary. From this it necessarily follows that he could not pay this money to him who should do the work for him. This is in conformity with section 2996, General Code, which is to the effect that the salary allowed the recorder shall be in lieu of all fees and other perquisites.

Section 2980, General Code, provides for the filing with the county commissioners of a detailed statement of the probable amount necessary to be expended for deputies, assistants, clerks and other employes; whereupon, the county commissioners shall fix the aggregate sum to be expended for such deputies, etc.

Section 2980-1, General Code, limits the aggregate sum so to be fixed by the county commissioners to an amount to be ascertained by computing thirty per cent. on the

first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof, and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in such office, for official services during the year ending September 30th next preceding the time of fixing such aggregate sum.

This would indicate that the purpose of paying the fees you have referred to into the county treasury is to authorize them to be used as a basis for the increasing of clerk hire, etc.

Therefore, it would seem proper for the recorder to take into consideration, in filing his statement of the probable amount necessary to be expended, the amount that he estimates will be necessary for the payment of the clerk who transcribes the Huron county records. Should this allowance be insufficient for that purpose, he can proceed under section 2980-1, General Code, to make application to a judge of the common pleas court for additional allowance. This is in harmony with section 2981, which authorizes the recorder to appoint and employ necessary assistants, clerks, employes, etc., and fix their compensation.

I would recommend, that the employe who is to do the work be hired by the recorder for that purpose, and that he be paid directly out of the county treasury, as the other clerks of the recorder are paid, and that the commissioners make allowance for this purpose, as provided in the foregoing statute.

You must remember that in writing the foregoing opinion I am doing so upon the assumption that the county commissioners have directed the recorder to transcribe these records. If they have not done so, he is not authorized to have the transcript made.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

567.

JOINT TOWNSHIP DITCHES MAY BE RE-APPORTIONED AS OFTEN AS THE COUNTY DITCH SUPERVISORS DEEM IT NECESSARY IN ORDER TO COMPLETE A GENERAL CLEANING.

Township ditch supervisors may re-apportion township ditches that have been apportioned. This general apportionment may be made as often as the county ditch supervisors deem it reasonably necessary in order to complete a general cleaning. The procedure outlined in section 6393, General Code, for apportionment in two or more townships applies also to one single township.

COLUMBUS, OHIO, August 26, 1913.

HON. E. L. SAVAGE, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—Under date of August 8th you request my opinion as follows:

> "Owing to certain conditions relative to joint township ditches located in this county, that have heretofore been apportioned by the township ditch supervisors, acting jointly, there has now arisen the question whether said township ditch supervisors may reapportion such joint township ditches. And, as a corollary thereto, the further question has been presented whether a township ditch supervisor having once apportioned the township ditch can again reapportion the same.

"These questions have been presented to this office and we are in doubt what construction should be placed upon section 6691 of the code and the other sections of the statute governing the duties of township ditch supervisors; and we will greatly appreciate the favor of your opinion upon the questions presented."

I am enclosing a copy of an opinion rendered by this department to the bureau of inspection and supervision of public offices, under date of June 4, 1913, which is quite relevant to the question presented by you. In that opinion I held that the proceedings prescribed by section 6691, et seq, General Code, for the apportionment of township ditches by the township ditch supervisor for the purpose of cleaning said ditches, are available only for the purpose of completing a general cleaning, and that such apportionment affords no authority for compelling individual owners to clean or keep in repair the apportionment allotted to them after said general cleaning has been completed in accordance with the statutes set out.

I can find nothing in said statutes to prevent township ditch supervisors from making such general apportionment as often as it may be deemed reasonably necessary to complete such a general cleaning.

The procedure outlined in section 6693, General Code, for apportionment in two or more townships, being the same as that prescribed for apportionment in a single township, the answer would be the same in either case. I believe that the enclosed opinion will afford an explanation to the answers here given to your questions.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

571.

AN OFFICIAL STENOGRAPHER RECEIVING AN ANNUAL SALARY IS NOT ENTITLED TO EXTRA COMPENSATION FOR TAKING TESTIMONY BEFORE A REFEREE WHERE A CASE IS REFERRED TO A REFEREE BY THE COURT.

Where a case is referred to a referee and tried and an official stenographer who is receiving an annual salary, is called to take the testimony, the case is one before the court and the stenographer is not entitled to a per diem for this employment. This per diem of $4.00 per day as provided in section 1549, General Code, is to be collected and paid into the general fund.

COLUMBUS, OHIO, October 15, 1913.

HON. L. T. CROMLEY, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have your letter of October 11, 1913, in which you inquire whether an official stenographer who is under an annual salary, payable from the county treasury, and who takes the testimony in a cause sent to a referee, is entitled to $4.00 per day or any other compensation for the time so served, and in reply desire to say: Section 1549, General Code, to which you refer, reads:

"In every case so reported, there shall be taxed for each day's service of the official or assistant stenographers a fee of four dollars, to be collected as other costs in the case. The fees so collected shall be paid quarterly by the clerk of the court in which such case was tried, into the treasury of such county, and credited to the general fund."

Section 1548, the next preceding section and referred to in section 1549, General Code, reads:

> "Upon the trial of a case in any of such courts, if either party to the suit, or his attorney, requests the services of a stenographer, the trial judge shall grant the request, or such judge may order a full report of the testimony or other proceedings, in which case such stenographer shall cause accurate shorthand notes of the oral testimony or other oral proceedings to be taken, which notes shall be filed in the office of the official stenographer and carefully preserved."

From these sections it is apparent that in all cases reported by the stenographer a fee of $4.00 per day is to be taxed as part of the costs in each case.

Section 1550, General Code, provides that the court shall fix the compensation of stenographers and also that, *"such compensation shall be in place of all per diem compensation in such courts."*

Section 11475, General Code, reads:

> "All or any of the issues in the action or proceeding, whether of fact or law, or both, may be referred by the court, or a judge thereof in vacation, upon the written consent of the parties, or upon their oral consent in court entered upon the journal."

Section 11478, General Code, reads:

> "A trial by referees shall be conducted as if by the court; and in like manner, they may summon and compel the attendance of witnesses, administer necessary oaths, and grant adjournments."

Section 11479, General Code, reads:

> "Referees must state the facts found, and conclusions of law, separately. Their decision must be given, and may be excepted to and reviewed, as in a trial by the court. Their report upon the whole issue shall stand as the decision of the court, and judgment shall be entered thereon as if the court had tried the action."

Section 11480, General Code, reads:

> "When the reference is only to report facts, the report of referees shall have the effect of a special verdict in the action."

Section 11481, General Code, reads:

> "If the court so directs, but not otherwise, referees shall reduce the testimony of witnesses in either form of reference to writing, and have each witness subscribe to his testimony."

From these sections, I think it clear that the trial by the referee is one of substitution for the court in all referred cases. And when the stenographer acts in a referred case, the action is for the court, just as much as in cases triable by the court, whether in equity, or at law and a jury is waived.

I am of the opinion that when a case is referred to a referee and tried and a stenog-

rapher is called to take the testimony, that the case is one before the court and the stenographer is not entitled to a per diem for time employed, notwithstanding the fact that under section 1549, General Code, four dollars for each day's service is to be taxed as part of the costs, "to be collected as other costs in the case."

Under section 11486, General Code, the compensation of the referee is made part of the costs of a referred case and is payable to the referee when collected while under section 1549, General Code, the per diem of the stenographer is, when collected, to be paid into the county treasury, and credited to the general fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

572.

WHERE A VILLAGE ISSUES BONDS FOR THE IMPROVEMENT OF THE STREET AND INCLUDES IN THIS BOND ISSUE THE COST OF PAVING BETWEEN THE RAILS OF A TRACTION RAILWAY, THE INTEREST ON SO MUCH OF THE BOND ISSUE COVERING THIS PAVING MUST BE COLLECTED IF POSSIBLE FROM THE RAILWAY COMPANY.

Where a village in improving its streets by assessment on the benefited property makes a single issue of bonds in anticipation of collection of assessments but includes in the assessment the cost of paving between the rails of an electric railway, which under contract between the railway and the city is to be paid for by the railway company, and the city has sold the bonds and must now pay interest on them, it must recover this interest, if it can, from the railway company itself for so much of the amount as represents interest on the bonds issued covering the property of the railway company.

COLUMBUS, OHIO, October 29, 1913.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 5th wherein you state facts which raise the following question:

> "If a village in improving its streets by assessment on the benefited property, etc., makes a single issue of bonds in anticipation of collection of assessments, but includes in the 'assessment,' so in theory anticipated, the cost of paving between the rails of an electric railroad, which under a contract between the village and the railroad company, is to be ultimately paid by the latter, should the interest on the entire issue of bonds be included in the amount assessed upon the owners of abutting property, or should the interest on so much of the issue as anticipates the payment of the obligation of the railroad company be omitted from such assessment and charged against the railroad company?"

You refer in your letter to my opinion of July 12, 1913, addressed to Hon. Clinton H. Stoll, village solicitor of London. The question submitted by Mr. Stoll was quite different from the one submitted by you. I assumed at the out-set of the opinion given to Mr. Stoll that the entire bond issue concerning which he inquired was in "anticipation of the collection of the special assessments alone, and that the money to meet the village's * * * costs * * * is separately provided for by a different bond issue."

The question which you now submit is to be answered by considering whether or not the portion of the improvement represented by the paving between the rails is a part of the improvement, the cost of which may be assessed against abutting owners. Of course it is assumed that the railroad company is to pay this obligation and the question just suggested must be amplified by the further assumption that the railroad company is, so to speak, an abutting owner and its obligation to the village may be enforced by assessments. This assumption is erroneous. The subject matter of the question is governed by section 3776, General Code, which provides as follows:

> "The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders, wooden or asphaltic pavement shall not be required."

Under this statute, or rather under a franchise ordinance of similar import, it is held in Columbus vs. Street Railroad Co., 45 O. S. 98, that the municipal corporation had the right from time to time to provide for the improvement of a street in which a street railroad was located and to require the street railroad company to pay for that portion of the cost thereof represented by the cost of paving between the rails; and that if the company failed to make the improvement itself when called upon to do so by the council of the municipal corporation the latter might do the work and charge the cost thereof to the company; and that the charge so made could be enforced by action at law.

The case of Cleveland vs. Railroad Co., 4 Dec. Re-print, 315, holds that the municipal corporation may enforce its authority under section 3776, General Code, by levying assessments on the property of the railroad, on the theory that the same constitutes "lands abutting, adjacent and contiguous or other specially benefited lands." Ordinarily I am disposed to follow the decisions of our lower courts, but in this particular instance I feel impelled to deviate from this rule as to the decision last above cited or at least to apply the decision in a very qualified way. The very facts which you state show the reason which leads me to this conclusion. It seems that after the village's bonds had been issued and after the assessments had been made, the street railroad company engaged contractors, as it had the right to do, and did its own paving, thus leaving for solution the question of the interest on the bonds which the village had issued in anticipation of so much of the assessment as was charged against the railroad company.

The very fact that a railroad company has a right under section 3776 to do the paving itself precludes the thought that council may include the charge against it in the assessment generally made upon abutting property to meet the expense of the whole improvement, which may be levied before the work is done. If any assessment is to be made on account of the failure of the railroad company to discharge the duty cast upon it by action of council under section 3776 the procedure should at least be similar to that provided in section 3857, General Code, for the construction of sidewalks. This section provides as follows:

> "If such sidewalks, curbing or gutters are not constructed within fifteen days, or not repaired within five days from the service of notice, or completion of the publication, the director of public service in cities may do or have it done at the expense of the owner, and all such expenses shall be assessed on all the property abounding or abutting thereon. Such assessments shall be collected in the same manner with a penalty of five per cent. and interest for failure to pay at the time fixed by the assessing ordinance, as in case of improvements."

The fact that there is nowhere any such provision as this with respect to assessing street railroad property for its part of the costs of paving between the rails militates against the correctness of the decision in Cleveland vs. Railroad Co., supra.

Furthermore, ordinary abutting property is assessed in proportion to the benefits or according to the foot front, or in proportion to the tax valuation, and the public is required to pay one-fiftieth of the cost and the cost of intersections. This, however, is not the case as to a railroad company. It is not assessed as benefited property if it is assessed at all; its assessment is not limited to the benefits conferred, nor is it in proportion to the tax value; nor is it in proportion to the "feet front;" nor does the city bear any part of the cost of the improvement charged against it. In fact the paving which a street railroad company is required to do is no part of the paving which the city does. That is, it may be no part of that paving because the railroad company may choose to do the paving itself.

Accepting, however, the decision in Cleveland vs. Railroad Co., supra, for what it is worth and assuming the right of council to collect an obligation created by the failure of the company to do its own paving, and its subsequent failure to pay for the paving between the rails when done by the municipal corporation, I am, nevertheless, of the opinion that the village's right to assess does not arise until the work has been done and the railroad company has refused to pay for it. There is nothing in the Cleveland case inconsistent with this conclusion. I am further of the opinion that the paving between the rails is no part of the improvement for which assessments generally are levied, but is a separate and distinct improvement so far as methods of paying for it are concerned.

From these conclusions it follows that even if the village had the right to assess the street railroad company's property, and to issue bonds in anticipation of such assessment, the issuance of such bonds would have to be made separately from the issuance of bonds in anticipation of the remaining assessments.

In the case submitted by you this does not seem to have been done, yet under the facts as they have actually arisen, it would be most equitable, at least, to separate the bonds issued in anticipation of the payment of the alleged assessment by the street railroad company from the remainder of the bonds if this can be done.

At all events, I am clearly of the opinion, in direct answer to your question, that the interest on so much of the bonds as anticipates the collection of so-called assessments upon the property of the railroad company, which assessments can never be collected because that work has been done, and the expenditure on account of which will never be made by the village for the same reason, cannot be lawfully included as one of the items of cost entering into the assessments made against other abutting property. If the village has sold the bonds and must now pay interest on them by virtue of following the procedure which I have outlined, it must recover this interest, if it can, from the railroad company itself.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

586.

A PUPIL RESIDING IN ONE DISTRICT AND ATTENDING SCHOOL IN ANOTHER MAY NOT CONTINUE TO DO SO AND DEMAND TRANSPORTATION AFTER THE SCHOOL IN THE DISTRICT HAS BEEN CENTRALIZED.

Under the provisions of sections 7735 and 7736, General Code, a pupil residing in a district and attending schools of another district, under section 7735, General Code, cannot continue to attend the schools of said latter school district and demand transportation after the schools of the district which such pupils have been attending have been centralized, and transportation provided for.

COLUMBUS, OHIO, August 13, 1913.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of July 19, 1913, you submitted the following request for an opinion, to wit:

> "Under sections 7735 and 7731, General Code, may a pupil, residing in a district and attending the schools of another district under authority of said section 7735, General Code, continue to attend the schools of said latter district and demand transportation, after the schools of the district such pupil has been attending have been centralized and transportation provided for; and will the board of the resident district of such pupil be compelled to pay such pupil's tuition?"

You further state in substance in your inquiry, that the school which the pupil has been attending and which is now centralized, is not a "nearer" school than the school which is located in the pupil's residence school district.

Section 7731, of the General Code, provides for the centralization of schools of a township, as follows:

> "No township schools shall be centralized under the next preceding section by the board of education of the township until after sixty days notice has been given by the board, such notices to be posted in a conspicuous place in each subdistrict of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

Section 7735, of the General Code, provides that pupils living more than one and one-half miles from the school to which they are assigned may attend a "nearer school, as follows:

> "When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a

board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

Section 7736, of the General Code, specifies how the tuition of such pupils shall be determined and paid, as follows:

"Such tuition shall be paid from either the tuition or the contingent funds and the amount per capita must be ascertained by dividing the total expenses of conducting the elementary schools of the district attended, exclusive of permanent improvements and repairs, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. An attendance any part of a month will create a liability for the whole month."

Section 7737 provides that when the schools of a district are centralized, etc., the provisions of the next two preceding sections shall not apply, as follows:

"When the schools of a district are centralized or transportation of pupils provided, the provisions of the next two preceding sections shall not apply."

In construing said section 7735, of the General Code, (4022-a B. R. S.) the court in the case of Boyce vs. Board of Education, 76 O. S. 365 held as follows:

"Section 4022-a, revised statutes, does not require the board of education of a school district to admit children to a school outside of the district in which they reside unless the school in their own district is more than a mile and a half from their residence and more remote from their residence than the school to which admission is sought."

The plaintiff in error in the above case brought suit in the court of common pleas for a writ of mandamus to compel the defendants in error to admit his children of school age to the school located in Mount Carmel special school district. He alleged that the children resided with him in Beechwood special school district in Union township; that there is but one school in the district in which he resides, which is located more than a mile and a half from the relator's home and that is the school to which his children are assigned. He further alleges that the school controlled by the defendants is the nearest school to his residence outside of his own school district and in an adjoining school district, and the petition of the plaintiff in error admitted that the school to which his children are assigned is nearer his residence than that to which he sought to have them admitted. In the opinion of the above entitled case, the court held as follows:

"Notwithstanding a manifest want of care to express with precision the purpose of this legislation it is quite clear that the legislature did not contemplate any of the reasons assigned in the petition as a sufficient cause for the transfer of attendance by children from the school in the district in which they reside to that of another district. It is equally clear from the language which the legislature has employed that the only purpose to be accomplished by the section is to relieve school children from the necessity of attending a school in their own district which is more than one mile and a half from their residence if there is a nearer school in another district. *Since the petition admits that the school which is under the control of the defendants is more remote*

from the residence of the relator than is the school of the district in which he resides, the circuit court correctly determined that the statute does not authorize the transfer."

It is disclosed in your letter of inquiry that the schools of the township which said pupil has been attending have been centralized and it also appears as above stated, that the schools of said township district since having been so centralized, are now more remote from the residence of said pupil than the school in his own school district. It would seem to follow, therefore, that said pupil is now within the rule laid down by the court in the case of Boyce vs. Board of Education, supra. In addition to the foregoing, it is to be noted that section 7737, of the General Code above quoted, specifically provides that when the schools of a district are centralized or transportation of pupils provided, *the provisions of sections 7735 and 7736 shall not apply.* Inasmuch as the schools in the township school district of the township in which said pupil formerly attended have been centralized and transportation of pupils provided, it would seem to follow that the provisions of sections 7735 and 7736, supra, no longer apply to the pupil in question by virtue of the provision contained in said section 7737.

Therefore, in direct answer to your question, I am of the opinion under the circumstances which you state, that under sections 7735 and 7736 of the General Code, a pupil residing in a district and attending the schools of another district, under section 7735 of the General Code, cannot continue to attend the schools of said latter school district and demand transportation after the schools of the district which such pupils have been attending have been centralized, and transportation provided for. Said pupil not being able to attend such school, it of course follows that the board of education of the district wherein said pupil resides, cannot be compelled to pay said pupil's tuition.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

599.

A POLICE OFFICER OF THE CITY IS ENTITLED TO WITNESS FEES IN THE COURT OF COMMON PLEAS OR PROBATE COURT.

A police officer of the city is entitled to witness fees when he testifies before the grand jury or in a trial of a criminal case in the probate court or in the court of common pleas.

COLUMBUS, OHIO, October 24, 1913.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Under date of October 7th you submit for my opinion the following question:

"Is a police officer of the city of Springfield entitled to witness fees, when he testifies before the grand jury, or in the trial of a criminal case in the probate court or the court of common pleas?"

and you refer me to sections 3014 and 3024 of the General Code.

Section 3014, General Code, provides:

"Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the

following fees: For each day's attendance one dollar; and five cents for each mile, the same as in civil causes, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, fees under this section shall be paid from the county treasury."

Section 3024, General Code, provides as follows:

"No watchman or other police officer is entitled to witness fees in a cause prosecuted under a criminal law of the state, or an ordinance of a city before a police judge or mayor of such city, justice of the peace, or other officer having jurisdiction in such causes."

In the codification of section 3015 revised statutes by the enactment of section 3024, General Code, it will be noticed that a comma is omitted before the word "before," but since it is a rule that statutes shall receive the same construction after codification which would have applied to such statutes before codification unless the intent of the legislature is clear to the contrary. I do not believe that the mere elimination of the comma in question would be considered as an intentional change in the statute, and therefore that it should receive the same construction in the codification that it would have received prior to codification.

One of my predecessors, the Hon. Wade H. Ellis, in considering section 1315 revised statutes, which read as follows:

"No watchman or other police officer is entitled to witness fees in any cause prosecuted under any criminal law of the state, or any ordinance of a city of the first or second class, before any police judge or mayor of any such city, justice of the peace, or other officer having jurisdiction in such causes."

on a request for opinion as to whether police officers are entitled to witness fees in criminal cases tried in the common pleas court, states as follows:

"The grammatical construction of the statute and its punctuation both indicate the words 'before any police judge or mayor of any such city, justice of the peace of other officer having jurisdiction in such causes' limit the words 'any criminal law of the state' as well as the words 'any ordinance of a city of the first or second class.' If the limiting phrase 'before any police judge, etc.,' is read as though referring back to 'ordinance' only, no reason could have existed for mentioning justices of the peace in this connection. No criminal prosecutions for violations of city ordinances can be brought before justices of the peace. Furthermore the words 'police judge, mayor or other officer' comprehend all officers or tribunals before which prosecutions for violations of ordinances can be brought. Why should there have been an enumeration of certain officers if the statute was intended to prevent the allowance of witness fees to police officers in any criminal prosecution before any tribunal whatsoever? If such had been the intent of the legislature it would have been clearly expressed by so much of the statute as precedes the word 'before.' From the terms of the statute then, aside from any consideration of its purposes, it appears that the clause enumerating certain officers, refers to prosecutions for offenses under criminal laws of the state as well as under city ordinances, but was not intended to embrace all tribunals before which cases under such laws and ordinances might be tried. The court of common pleas, the chief tribunal before which prosecutions under criminal laws of the state are tried,

is not specifically mentioned in this statute. That the legislature would have specified justices' courts and left courts of common pleas to be comprehended under the term 'other officers having jurisdiction in such causes' is not probable if they intended prosecutions before such court to come within the purview of the statute. By the enumeration of certain officers of limited jurisdiction the phrase 'other officers' is limited to other officers of the same class as those enumerated.

"It seems to me that there is a basis in reason for the distinction apparently made between the right of police officers to receive witness fees in prosecutions before the officers enumerated, and their right to receive such fees in prosecutions in the court of common pleas. One purpose of the statute probably was to prevent police officers from making unnecessary arrests for the purpose of receiving witness fees. It is conceivable that there might be many instances of unfounded prosecutions before magistrates for the sake of the fees, but the same opportunity for commencing unfounded prosecutions before the court of common pleas does not exist.

"Local police officers are called upon to testify before the police judges and mayors much more frequently than in the court of common pleas; but the legislature may have considered that instances in which police officers would be summoned from other counties would arise more often in trials in the court of common pleas than before magistrates. In such cases it is just that the police officer should receive his witness fees and mileage.

"I am therefore of the opinion that section 1315 does not deny to police officers the right to witness fees in criminal cases tried in the court of common pleas." (See Attorney General's reports for 1906, page 230.)

This opinion was also concurred in by my predecessor, the Hon. U. G. Denman, in an opinion rendered on April 9, 1910, Attorney General's report for 1910, page 369, and Mr. Denman further stated that upon the reasoning of the opinion of Mr. Ellis police officers would also be entitled to witness fees in grand jury proceedings.

I concur fully in the opinion of my two predecessors, and therefore, am of the opinion that a police officer of a city is entitled to witness fees when he testifies before the grand jury or in the trial of a criminal case in the probate court or the court of common pleas.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

600.

WHEN A TOWNSHIP IS WITHOUT A JUSTICE OF THE PEACE AND NO ONE IS WILLING TO TAKE THE APPOINTMENT AS JUSTICE OF THE PEACE, THE VACANCY IN THE BOARD OF TRUSTEES CANNOT BE FILLED.

Under the provisions of the General Code a vacancy in the board of trustees of a township may be filled by the justice of the peace of said township holding the oldest commission. In a township where there is no justice of the peace, and no one is willing to accept an appointment as justice of the peace, the vacancy in the board of trustees cannot be filled.

COLUMBUS, OHIO, October 24, 1913.

HON. CHARLES H. JONES, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 12, 1913, wherein you submit for my opinion the following question:

> "How shall a vacancy in a board of township trustees be filled, when such township is without a justice of the peace?"

You state in your letter as follows:

> "Your attention is directed to General Code section 3262 which provides that vacancies shall be filled by the justice of the peace. The township in question has had no justice of the peace for several years, and no one in the township is willing to accept an appointment from the trustees under General Code, section 1714."

Section 3262, General Code, provides as follows:

> "When for any cause a township is without a board of trustees, or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

Section 1714, General Code, provides:

> "If a vacancy occurs in the office of justice of the peace by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township, to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred."

I am unable to find any other sections of the code which deal with the subject.

Section 3262, General Code, limits the right of a justice of the peace to appoint to a vacancy to the justice of the peace of the particular township and you state that there is no justice of the peace in such township, and further that no one in the town-

ship is willing to accept the appointment. If there is no one willing to accept the appointment at all in the township I am of the opinion that a vacancy in the board of trustees cannot be filled.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

604.

THE CLERK OF COURT IS LIMITED TO MAKING A CHARGE OF 25c FOR EACH HUNTER'S LICENSE IN ADDITION TO THE $1.00 CHARGED FOR THE LICENSE ITSELF.

Under the provisions of 103 O. L., 716, the clerk of court shall charge $1.00 for each hunter's license, and in addition thereto may make a charge of 25c for the license issued to each applicant, and he is furthermore empowered and required to administer the oath and to take and certify the affidavit therein required and to collect and receive the fee therein provided, to wit, 25c.

COLUMBUS, OHIO, October 22, 1913.

HON. CHARLES M. MILROY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of inquiry of the date of September 4, 1913, wherein you inquire as follows:

> "This office is in receipt of correspondence between John P. Kelly, clerk of courts of this county, and your office relative to fees allowed to be charged by him for the issuing of hunters' licenses. Mr. Kelly takes the position that in addition to the $1.00 to be charged resident hunters for license, under section 1 of an act of the general assembly as found in volume 103 of Ohio Laws, at page 716, and the fee of 25 cents for taking affidavit, issuing such license, and attaching his seal of office thereto, as provided in section 2 of said act, he is entitled to make the further charge of 25 cents for keeping record, as follows: 10 cents for entering, 5 cents for indexing, and 5 cents for noting, in accordance with the general provisions of the Code (sections 2900 and 2901) relative to county clerk's fees.
>
> "Kindly give us your opinion covering this matter, at your earliest convenience, and oblige."

In reply thereto, section 1 of an act entitled "Relative to resident and non-resident hunter's license and to repeal sections 1421, 1422, 1423 and 1424 of the General Code," 103 O. L., 716, provides in relation to hunters' licenses, as follows:

> "No person shall hunt, pursue or kill with a gun any wild bird or wild animal within this state without having first applied for and received a hunter's license and paid the fee, as required herein. Every applicant for a hunter's license who is a non-resident of the state of Ohio and who is a citizen of the United States of America, shall pay a fee of fifteen dollars ($15) to the officer issuing the same. Every applicant for hunter's license who is a citizen of the United States of America, and a resident of the state of Ohio, shall pay a fee of one dollar ($1), provided that the owner, tenant or children of the owner, manager or tennant of lands within this state may hunt upon such lands without a hunter's license."

Section 2 of said act provides, that such licenses shall be issued by the clerk of the common pleas courts and township clerks, as follows:

"Hunter's license shall be issued by the clerks of common pleas courts and township clerks. Every applicant for a hunter's license shall make and subscribe an affidavit, setting forth his name, age, occupation, place of residence, personal description, and citizenship, and the officer authorized to issue licenses may charge each applicant a fee of twenty-five cents (25c) for taking such affidavit, issuing such license and attaching his seal of office thereto, and clerks of common pleas courts to whom such application is made is hereby empowered and required to administer the oath and to take and certify the affidavit herein required *and to collect and receive the fees therefor* as herein provided * * * *."

Sections 2900 and 2901 of the General Code provide the fees to be charged by the clerks of the common pleas courts in the respective counties, in the general performance of their duties.

Said section 2900 of the General Code provides as follows:

For the services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more. For docketing each cause in appearance docket, ten cents; for docketing each execution in execution docket, ten cents; for docketing each transcript of judgment in execution docket, ten cents; for indexing each cause in the execution or appearance docket each plaintiff and each defendant, five cents; for filing each praecipe, pleading, subpoena, cost bill and other necessary document, five cents; for noting the filing of same, except subpoena and praecipe therefor, on the appearance docket, each, five cents; for taking each affidavit including certificate and seal, twenty-five cents; for issuing each writ, order or notice, except subponea, thirty cents; for noting the issue of same on appearance docket, each, five cents; for recording return of same on appearance docket, each, ten cents; for issuing subponea, each name, five cents; for taking undertaking bond or recognizance, twenty-five cents; for impaneling and swearing jury, each cause, fifty cents; for swearing each witness, five cents; for entering attendance of each witness, ten cents; for certifying fees of each witness, five cents; for entering each cause on the trial or motion docket and indexing same, each term, ten cents; for each entry on journal per one hundred words or fraction thereof, ten cents; for indexing same, five cents; for posting same on appearance docket, ten cents; for entering on the indictment any plea, ten cents; for poling a jury, twenty-five cents."

Said section 2901 of the General Code, provides as follows:

"For making cost bill to be taxed but once, forty cents; for making complete record in each cause, ten cents per hundred words; for indexing same, each cause ten cents; for recording plat the same fees as are allowed the county recorder for like service; for making copies of pleadings, process, record, or files, including certificate and seal, ten cents per hundred words; for indexing pending suits, each plaintiff or defendant, five cents; for indexing living judgments, each plaintiff or defendant, five cents; for noting on appearance docket papers mailed, each defendant, five cents; for certificate (on penitentiary cost bill) that execution was issued, twenty-five cents; for receiving and disbursing money, other than costs and fees, paid to such clerks in pursuance of an order of court or on judgements, and which has not been collected by the sheriff or

other proper officer on order of execution to be taxed against the party charged with the payment of such money, a commission of one per centum on the first one thousand dollars and one-fourth of one per centum on all exceeding one thousand dollars; for entering on cash book costs received in each cause, twenty-five cents; for acknowledging deed or other instrument of writing, forty cents; for recording commission of justice of the peace, mayor, notary public or railroad policeman, fifty cents; for cancellation of railroad policeman's commission, fifty cents; for issuing any license, fifty cents; for issuing certificates to receiver or order of reference with oath, seventy cents; for certificates of fact under seal of the court, to be paid by the party demanding same, thirty-five cents; for certificate of deposit on foreign writ, certificate of opening deposition, certificate for attorney's fees, certificate for stenographer's fee, each ten cents."

It is to be noted that section 2 of said act entitled "An act relative to resident and non-resident hunters' licenses, etc.," specifically provides that the officer authorized to issue licenses may charge each applicant a fee of 25 cents for taking such affidavit, issuing such license and attaching his seal of office thereto, and clerks of common pleas courts to whom such application is made, is hereby empowered and required to administer the oath and to take and certify the affidavit herein required, and *to collect and receive fees therefor as herein provided.*

By reason of said provision, other than the dollar to be charged for the license itself, the clerk of courts is specifically limited to making a charge of 25 cents for each hunter's license, issued to each applicant, and is furthermore empowered and required to administer the oath and to take and certify the affidavit therein required and to collect and receive the fee therein provided, to wit, 25 cents.

Ipso facto such clerk is not legally entitled to make a further charge of 25 cents for keeping the record, as follows: 10 cents for entering, 5 cents for indexing and 5 cents for noting, as provided in the general provisions of sections 2900 and 2901 of the General Code, supra.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

609.

THE COUNTY COMMISSIONERS MAY ALLOW POSTAGE FOR THE RETURN OF A DOCUMENT LEFT WITH THE RECORDER FOR THE PURPOSE OF BEING RECORDED.

Where it is for the best interests of the county, and an amount of money may be saved by so doing, the county commissioners may allow an amount sufficient to cover the cost of mailing back to the owners records left at the recorder's office for the purpose of being recorded.

COLUMBUS, OHIO, November 7, 1913.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Under favor of September 24th you submit the following:

"Our new county recorder has just taken office and he has a great many new ideas. One of them is that he wants to mail all papers left in his office for

record, to the owner so as to save people who take papers to his office to be recorded an extra trip and extra postage. He says that if he could do this, it would save the county considerable money, as he could dispense with at least one deputy. The way the business is done now, the deeds and other papers are left in his office for record and the owner is given a receipt. A great many papers accumulate and as they get old and are not called for, they are stored away and many months thereafter, when the owner calls for the paper, it consumes a great deal of time in looking for these papers, in order that they may give them to the owner. The recorder contends that if the county commissioners have authority to spend money for postage for the recorder for this purpose, that it would be a great accommodation to the public and a saving to the county. It is estimated that this expense for the county for extra postage would be approximately five hundred dollars, and that it would dispense with at least one employe in the office, and thereby save the county from five hundred to one thousand dollars a year. The question therefore is:

"Have the county commissioners authority to expend funds for the purpose of purchasing postage and stationery for mailing to the owners, deeds, mortgages and other papers left in the recorder's office for record? The county commissioners have the authority to pay for postage for the various public officials required in the transaction of county business, but does this come within the rule, or should the owners who leave these papers in the recorder's office pay the postage?"

The only expression of the statutes in relation to the matter which I am able to find is section 2758, General Code, which provides as follows:

"Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date and precise time of day of its presentation, and a file number. Such file numbering shall be consecutive and in the order in which the instrument of writing is received for record, except chattel mortgages which shall have a separate series of file numbers, and be filed separately, as provided by law. *Until recorded* each instrument shall be kept on file in the same numerical order for easy reference, and, if required, the recorder shall, without fee, *give to the person presenting it a receipt therefor*, naming the parties thereto, the date thereof, with a brief description of the premises. When a deed or other instrument is recorded, the recorder shall indorse thereon the time when recorded, and the number or letter and page or pages of the book in which it is recorded."

This statute makes absolutely no direction whatever with reference to any prescribed method of returning the instrument. The requirement is that the instrument shall remain on file *until recorded.* The disposition of the instrument subsequent to that time is not spoken of in the statute, yet it is clear that the person depositing the same for record is entitled to a return thereof as soon as it is recorded, and if he so desire he may require of the recorder a receipt evidencing such right.

I am of the opinion that the recorder may select the most expedient means of returning the instrument. From the facts stated in your letter it appears that the mailing of the instrument would save the county the expense of an extra clerk, and, viewed from all sides, would be the most economical, efficient and expedient means of accomplishing the return.

The principle is well settled that a county officer has such powers as are expressly granted and those which are necessary to carry the granted powers into effect. My ruling on this situation comes within this rule. Nothing having been provided by the statutes authorizing the charge of postage incurred in sending such instrument to the

person entitled thereto, I am of the opinion, that technically no charge may be compelled, and that the county commissioners may allow the recorder a sufficient amount to cover the postage incurred in the operation of this plan. I see no objection, however, to the plan of requesting the party entitled to the return of the paper to deposit the price of a stamped envelop upon which he may inscribe the proper address to which he desires the paper returned.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

621.

WHERE THE COURT ALLOWS AN ATTORNEY A FEE OF $50.00 IN A CASE OF FELONY, AND THE CASE IS CARRIED TO THE COURT OF APPEALS, THIS FEE MAY NOT BE INCREASED BY THE COURT OF APPEALS.

Where counsel is assigned in a case of felony and is allowed a certain fee by the court, and the case is carried to the court of appeals, the counsel so appointed may not receive more than the $50.00 allowed by statute, and the county commissioners have no authority to pay him more.

COLUMBUS, OHIO, October 20, 1913.

HON. H. F. CASTLE, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—In your letter of October 14, 1913, you state that one David Ruch was indicted for perjury; that he was indigent; that one T. W. Kimber was appointed to and did defend him; that Ruch was convicted; that the situation was such that he felt it to be important that the case be passed upon by the court of appeals; that Mr. Kimber, prosecuted error to the court of appeals; and you inquire whether the court of appeals can make an allowance in excess of fifty dollars, as provided in section 13618, General Code.

Section 13618, so far as important here, reads:

> "Counsel so assigned in a case of felony shall be paid for their services by the county and may receive therefor in a case of murder in the first and second degree such compensation as the court approves; in a case of manslaughter not exceeding $100; and in no other cases of felony not exceeding $50. * * *"

Without this and the preceding section there would be no statutory authority to either appoint or pay counsel for indigent prisoners, and, as the statute is clear and unequivocal, the authority of the commissioners in making the allowance is limited to the fifty dollars.

This appointment is made to defend the accused as to the indictment against him. The supreme court of New York, under a statute similar to ours, affirmed the reversal of an order allowing certain sums to counsel as compensation for expenses of expert witnesses in a murder case. People ex rel. Cantwell vs. Coler, 168 N. Y. 643.

The above case was affirmed on the opinion of the court below, which is found in 61 App. Div. 598. The statute allowed not to exceed $500, and personal and incidental expenses. The court allowed the $500 and $950 as expenses incurred in securing expert witnesses on handwriting. The appellate division reversed the allowance of the $950, which was affirmed as above.

The taking of a case to a reviewing court, as I view it, is no part of the duty of the counsel appointed to defend an indigent prisoner, however much he may be convinced of error in the trial, or interested in securing a reversal. Counsel so appointed in taking a cause to a reviewing court must do so with the understanding that he can only receive fifty dollars for his work in both courts, and also that if he secures a reversal he must go through a second trial with a limitation of $50 attached to his compensation. It is not a question of how much the services are worth, but how much the commissioners *are authorized* to pay.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

624.

THE COUNTY COMMISSIONERS MAY ENTER INTO A CONTRACT WITH A HOSPITAL FOR FURNISHING MEDICAL AND SURGICAL TREATMENT TO THE INDIGENT POOR OF THE COUNTY.

The county commissioners of Fulton county have a right to enter into a contract with the Wauseon Hospital Association for the purpose of procuring medical and surgical treatment for the indigent poor of Fulton county. The making of such contract is within the power of the county commissioners and is perfectly valid.

COLUMBUS, OHIO, November 15, 1913.

HON. J. B. TEMPLETON, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I have your letters of November 5th and 12th, 1913, in which you inquire as to the validity of a contract entered into between The Wauseon Hospital Association and the commissioners of Fulton county, Ohio, for furnishing medical and surgical treatment for the indigent poor of Fulton county, as provided in section 2502, revised statutes.

The contract recites:

> "Whereas, there does not exist in Fulton county, Ohio, a hospital supported by public funds, etc."

Section 2502, General Code, reads:

> "Except in counties containing hospitals supported by public funds, the commissioners of any county, in their discretion, may pay to a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive free of charge needed medical and surgical treatment, a sum not to exceed twenty-five hundred dollars each year. Such amount shall be paid from the county poor fund in equal payments on the first day of January and July, and shall be for the maintenance and support of such indigent poor and the reimbursement of such hospital for treatment thereof. Nothing herein shall authorize the payment of public funds to a sectarian institution."

It would seem from the language of this section and the recital in the contract submitted, that the contract presented brings itself directly within the provisions of the law.

The question you ask arises from the fact that the bureau of inspection and supervision of public offices has held to be invalid a ten year contract entered into between

these same parties on December 19, 1910, for the same purpose. A copy of this contract is attached to the report of the examination of Fulton county, Ohio, from October 1910 to December 1911, pp 54-5.

The conclusion of the bureau was based on an opinion of this department to Hon. C. A. Leist, prosecuting attorney of Pickaway county, Ohio, February 7, 1911, and found in the opinions of the attorney general for that year, p. 1067.

To my mind the opinion mentioned does not cover the contract in question, but as it appears to me, this contract comes squarely within the exception stated therein, to wit:

> "It is thus seen that the contract referred to is not a contract for the care of sick and disabled persons of the county, but rather an agreement to give a certain sum of money to such hospital for aid to the hospital. p. 1071."

The opinion referred to, although given when the provisions of section 2502, General Code, were in force, was in law and fact based on a question arising under the act of May, 2 1910, 101 O. L. 166, which was entitled, "An act to authorize the board of commissioners of any county to render assistance to a corporation or association, maintaining a hospital for charitable purposes," and while the constitutionality of the law was not passed upon (p. 1071) it was held that the contract of the commissioners of Pickaway to aid the hospital named in the contract was a diversion of public funds to a private purpose "however charitable" the objects of the hospital might be, and, therefore, invalid as against sound public policy.

That the above opinion is correct need not be questioned, neither is there any call for its modification. The question now presented is not one of aiding a hospital, but of procuring a hospital to furnish surgical and medical attention to the indigent poor of Fulton county, and is clearly within the exception in the opinion given to Mr. Leist, as above copied.

I am, therefore, of the opinion, assuming the validity and constitutionality of section 2502, General Code (concerning which no question is made), that the contract in question is within the powers of the commissioners and perfectly valid.

It is not deemed necessary at this time to discuss the question of the validity of the ten year contract, as the making of the contract in question must be construed as an abrogation of its terms by mutual consent.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

626.

FIVE REPUTABLE FREEHOLDERS OF A TOWNSHIP MAY MAINTAIN A SUIT AGAINST TRUSTEES OF THE CEMETERY ASSOCIATION TO COMPEL THE PLACING OF MARKERS OVER THE GRAVES OF DECEASED SOLDIERS AND SAILORS IN SUCH CEMETERY.

Where five reputable freeholders of a township, in which is located a cemetery owned and controlled by a cemetery association, have petitioned the board of county commissioners for funds as provided in section 2958, for the purpose of placing markers over the graves of soldiers, sailors and marines buried in such cemetery, and said cemetery trustees refuse to permit the placing of these markers, said five petitioners may, at their own cost, institute a suit in mandamus against said cemetery association to compel such association to permit the placing of markers over the graves of such deceased soldiers and sailors buried in said cemetery.

COLUMBUS, OHIO, November 13, 1913.

HON. JAMES J. WEADOCK, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of inquiry of the date of October 9, 1913, wherein you inquire as follows:

"Section 2958 of the General Code provides as follows:

"That the board of county commissioners in the several counties of this state, shall, upon the petition of any five reputable free holders of any township or municipality in their county, procure for, and furnish to said petitioners, a suitable and appropriate, durable marker for the grave of each and every soldier, sailor or marine, who served with honor in the military or naval forces of the United States, including those who served in the war of the American Revolution, buried in the limits of any such township or municipality. The name of such soldier, sailor or marine, also the company, regiment or other command in which he served, shall be inscribed upon said marker. *Such marker shall be placed on the grave* of each soldier, sailor or marine, by said petitioners for the purpose of permanently marking and designating said grave for memorial purposes, and said board of county commissioners shall provide for the payment of the necessary expense of placing and setting said markers.

"Five reputable freeholders of a township in this county, in which is located a cemetery owned and controlled by a cemetery association in accordance with sections 10093 to 10119 of the General Code, have petitioned our board of county commissioners to provide them the funds referred to in the foregoing section to pay this expense of placing and setting markers. The county commissioners have set aside a certain fund for this purpose. The petitioners have procured from the United States Government the markers which are designated by said government to go over the graves of deceased soldiers. The cemetery association in question has now refused to permit these markers to be placed over the graves of soldiers buried in said cemetery for the reason that they claim the markers do not comply with the rules and regulations of the association. Is there any method by which this association can be compelled to permit these markers to be placed over the graves of said soldiers?"

In reply thereto, section 10093 of the General Code provides that a company or association incorporated for cemetery purposes may appropriate or otherwise acquire and hold land for cemetery purposes as follows:

> "A company or association incorporated for cemetery purposes may appropriate or otherwise acquire and hold, not exceeding one hundred acres of land; also, take any gift or devise in trust for cemetery purposes, or the income from such gift or devise according to the provisions of such gift or devise, in trust, all of which shall be exempt from execution, from taxation and from being appropriated to any other public purpose, if used exclusively for burial purposes, and in no wise with a view to profit."

Section 10103 provides that such company or association may prescribe rules for inclosing and adorning lots and for erecting monuments in such cemetery, etc., as follows:

> "Every such company or association shall cause a plat of its ground and of the lots by it laid out, to be made and recorded, or filed in the recorder's office of the county in which situated; the lots to be numbered by regular consecutive numbers. It may inclose, improve and adorn the grounds and avenues, erect buildings for its use, prescribe rules for inclosing and adorning lots, and for erecting monuments in the cemetery, and prohibit any use, division, improvement or adornment of a lot which it deems improper. An annual exhibit shall be made of the affairs of the company or association."

Said section 10103 was passed March 8, 1888, and is found in the 88th volume of Ohio Laws, at page 76.

Section 2958 of the General Code, which you cite and quote in your inquiry, was enacted by the legislature May 10, 1910, and specifically provides that the county commissioners in the several counties of the state upon the petition of any five reputable freeholders of any township or municipality in their county, shall procure for and furnish to said petitioners a suitable and appropriate marker for the grave of each soldier, sailor or marine, who served with honor in the military or naval forces of the United States, and further provides that said petitioners shall place said markers on the graves of each such soldier, sailor or marine. You further state in your letter of inquiry, that the petitioners therein referred to, have procured from the United States Government the markers which are designated by said government to be placed over the graves of deceased soldiers.

While section 10103, supra, provides that every corporation or association, incorporated in accordance with section 10093, supra, for the purpose of appropriating or otherwise acquiring land for cemetery purposes, may prescribe rules for enclosing and adorning lots, and for erecting monuments in such cemetery and may prohibit any adornment of lots which it deems improper, nevertheless, section 2958, supra, places a limitation upon such corporations or associations in making such rules as prohibit the placing of markers upon the graves of soldiers, sailors or marines, who served with honor in the military or naval forces of the United States, including those who served in the war of the American Revolution, who are buried in such cemetery. Furthermore, as hereinbefore stated, section 2958, supra, was enacted subsequent to section 10103, supra, and this fact indicates that it was the intention of the legislature that the provisions of section 2958 should govern.

It would seem to follow, that the said cemetery association or corporation is without legal right or authority to object to the placing of the markers on the graves of said deceased soldiers, buried in said cemetery, provided said markers have been duly approved by the county commissioners, as provided by statute.

By reason of the foregoing, I am of the opinion that the said five petitioners, at their own cost, can institute and maintain a suit in mandamus against the said cemetery

association or corporation, to compel such association or corporation to permit the placing of said markers over the graves of such deceased soldiers, buried in said cemetery.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

631.

DITCHES — CONSTITUTIONALITY OF INTERSTATE DITCH LAW — COMITY—EXTRA-TERRITORIAL JURISDICTION OF STATES—POWER TO IMPROVE BRANCH DITCH IN SAME PROCEEDING—LIVING STREAMS NOT INCLUDED BY INTERSTATE DITCH LAW.

The government of a state may not be exercised out of the boundaries thereof. Extra-territorial jurisdiction of the state executive or legislative department may be exercised only on the grounds of comity, i. e., only insofar as the same is consented to by the state in which said jurisdiction is to be exercised. The interstate ditch laws in Ohio, as founded upon such comity, and the laws of the state of Indiana, are sufficient to authorize the jurisdiction conferred upon the joint ditch commission having representatives from both this state and that of Indiana. The provisions of the Indiana law are also ample to authorize representatives of this state to act on such commission.

Section 5 of the Indiana law and section 6567 of the General Code of Ohio intend that a decision of the joint board requires a majority vote of the representatives from each state, thereby imparting an equal voice to each jurisdiction in the proceeding. The authority of the joint board extends only to the determining of the route of the proposed improvement and to apportioning the cost between the states. All other prodecure must be accomplished by the commissioners of the respective counties by reference to the laws for providing for single and joint county ditches in Ohio.

A branch ditch may be improved in the single proceeding contemplating the improvement of the main ditch. Such branch ditch, however, must be described in the petition when application is made for such improvement. The interstate ditch law does not authorize the improvement of living streams, as this procedure is available only for the improvement of ditches, streams and water-courses.

COLUMBUS, OHIO, November 8, 1913.

HON. EMMETT L. SAVAGE, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your favor of October 7th you request my opinion as follows:

"I am writing to ask you to favor me with your opinion as to the constitutionality and legality of sections 6564 to 6595, inclusive.

"This is the interstate ditch law. There was recently filed with the county commissioners of this county, the county commissioners of Van Wert county, Ohio, and the ditch commissioners and circuit court of Allen county, Indiana, a petition for the location and construction of a ditch improvement, one branch of which heads in Allen county, Indiana, and flows thence easterly out of that county into Paulding county, and which throughout its course follows the line of a natural stream known as Flat Rock creek. This creek flows through parts of Benton township, Paulding township, Jackson township, Emeral township and into Auglaize township, all of Paulding county, where it empties into the Auglaize river.

"Another branch of the improvement heads in Van Wert county, and extends thence westerly into Allen county, Indiana, where it unites with the

first above described branch of the improvement. That is the branch heading in Van Wert county lies wholly within that county and Allen county, Indiana, and terminates in Allen county aforesaid.

"A question has arisen between the attorneys of Allen county, Indiana, and this office as to the constitutionality of the said statute.

"To point out the question in controversy we might say that it has been our view that said sections of the statute attempt to confer upon the ditch commissioners of another state, acting jointly with the county commissioners of this state, power to locate and establish ditches in this state. This power seems to be specifically mentioned in section 6570.

"Section 6584 provides the rules by which the joint board shall be governed.

"Section 6567 provides for a division of the vote of the joint board between the members of the foreign state and the state of Ohio and seeks to give to each an equal proportion of the vote. This we think is an attempt to confer on the ditch authorities of the foreign state limited judicial powers to locate ditches in Ohio. Can this be done? That is to say is it within the power of the legislature of Ohio to confer that jurisdiction upon persons who are not citizens of the state of Ohio.

"Another question presented by the ditch proceeding above indicated arises out of the two branches of the proposed improvement. The one branch arising in Van Wert county and ending in Allen county, Indiana, and not flowing through any part of Paulding county, Ohio. The other arising in Allen county, Indiana, and flowing directly into Paulding county and not touching any part of Van Wert county.

"The question is do these not constitute the interstate ditches; one between Van Wert county, Ohio, and Allen county, Indiana; the other between Allen county, Indiana and Paulding county, Ohio?

"The proposed improvement has not yet been located, that is the joint board consisting of the members of Van Wert county, Ohio, the commissioners of Paulding county, Ohio, and the ditch commissioners of Allen county, Indiana, has not yet made a finding either for or against said improvement. So far only such preliminary steps as are necessary in a ditch proceeding have been taken, that is to say the filing of the petition and the giving of notices to land owners whose lands are sought to be affected.

"On the 20th of this month another meeting of the joint board will be held at which it will be expected to take action on the petition and either grant or refuse the same. It is with a view to having the favor of your opinion upon the two questions above suggested, viz.: the constitutionality of the law and whether said proposed improvement shall not be deemed as two separate improvements. Jointly only between Van Wert county, Ohio, and Allen county, Indiana, in one case and only between Allen county, Indiana, and Paulding county, Ohio, in the other.

"The principal question, of course, is as to the constitutionality of the so-called interstate ditch law; and the second question only arises in case the said law shall be deemed to be constitutional.

"As prosecuting attorney of Paulding county, Ohio, I desire to request the favor of your opinion upon the questions presented."

Though I have made a thorough investigation of the decisions I have been unable to find any instance of a procedure similar to that set out for the improvement of interstate county ditches as the laws for the same are stated in sections 6564 et seq General Code.

A law very similar in substance to these referred to in the General Code of Ohio,

has been passed by the legislature of Indiana, and the same appears at page 884 of the acts of 1913 of that state.

It is clear that the plan presented by these laws contemplates extra-territorial jurisdiction on the part of the officers of either state. The statement of the rule as regards extra-territorial jurisdiction of a state is found in volume 7 of the Encyclopedia of the United States Reports, page 242 as follows:

> "As a general rule the jurisdiction of a state is co-extensive with its territory and extends to citizens and subjects of a foreign government within its territory as well as to its own citizens or subjects; and on the other hand it is well settled that as a general rule a state has no jurisdiction or power within the territory of another state."

In volume 4 of the same work, at page 344 the following is stated:

> "The legislative and judicial authority of each state is bound by its territorial limits and cannot be exercised with respect to persons or property within other states. No state tribunal can extend its process beyond the state limits so as to subject either persons or property; and state laws have no operation beyond state lines; *except so far as is allowed by comity.* Any exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such person or property in any other tribunal."

Under these statements of the law it is clear that if any force is to be given to the statutes in question the same must be based upon the arrangement between the states in the nature of comity. In this connection the following is said in volume 3 of the Encyclopedia of the United States Reports, at page 1030:

> "The extent to which the law of one nation as put in force within its territory, whether by executive order, by legislative act or by judicial decree, shall be allowed to operate within the domain of another nation depends upon what our greatest jurists have been content to call the comity of nations * * *, but it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to internal duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws."

Story in his work on Conflict of Laws sums up these rules as follows:

> "Section 20. Another maxim or proposition is that no nation can by its law directly affect or bind property out of its own territory or bind persons not residents therein, whether they are natural born citizens or others."
>
> "Section 23. From these two maxims or propositions there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depends solely upon the laws and municipal regulations of the latter: that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent."

It is clear that there has been a very special effort made by the legislature of both the state of Indiana and the state of Ohio to provide a foundation for this exercise of extra-territorial jurisdiction in interstate county ditch procedures along the lines of the principles above stated. With but slight exceptions the law of either state with reference to joint procedure in these matters is a substantial duplication of the law of the other.

It is to be noted that in the Indiana law the details are more fully set out and more amply and precisely provided for than they are in the Ohio law. Sections 2 and 3 of the Indiana law provide in detail the steps which must be taken with reference to the filing of the petition, the notice to land owners, the procedure to be undertaken by the Indiana authorities in full as a foundation for taking up the matter of joint action with another state.

In Ohio, however, all preliminary matters are based upon pre-existing laws providing for ditch procedure in the single counties. The Ohio law presents a mere skeleton wherein provision is made for joint action in the matter of interstate county ditches. All other matters are provided for by a general reference to the single and joint county ditch laws of the state existing at the time these interstate ditch laws were enacted. This will be readily seen by observation of section 6595 of the interstate county ditch law of Ohio, which provides as follows:

> "In all matters pertaining to the location and construction of such improvement, *not herein expressly provided for*, the county commissioners shall be governed by the provisions of law providing for the location and construction of *county ditches*."

Section 6585 of these interstate ditch laws in a similar spirit provides as follows:

> "The further proceedings of the joint board shall be in conformity with the laws for the location of county or joint county ditches taken at this stage of the proceedings. * * *"

The stage of the proceedings referred to in this statute relates to the time when the joint board have come to an agreement with respect to the location and establishment of the route and general scheme of the ditch, and have further agreed upon the apportionment of the expense which is to be borne by each state. By this statute the further procedure rests solely with the counties of the state as the same is set out in joint and single county ditch laws. In brief, by reference to the joint county ditch law, sections 6536 to 6538, General Code, the apportionment of the expense among the counties in this state must be made by joint agreement and further proceedings as to application for damages, levying of assessments, letting of contracts, etc., must be attended to by the commissioners of each single county by reference to the single county ditch laws, after the manner provided for joint county procedure, when the ditch is to be located wholly in this state. The intention of the statutes in this respect is clear, and the sole work, therefore, of the interstate county board is that of making provision for the location and establishment of a ditch, and for the apportionment of the expense to be borne by each state.

For proper proceedings under the law, therefore, before a petition may be filed which will provide a foundation for interstate county ditch procedure under section 6564, General Code, the conditions of section 6442, General Code, and following sections in the chapter providing for single county ditches with reference to notice to land owners and provisions for hearing, must be complied with.

Where more than one county in Ohio is affected, before the proper foundation is made for interstate county ditch procedures, the conditions of section 6536 and following sections of the joint county ditch chapter must be complied with. This conclusion is inevitable in the light of the established rule of law that such procedures are unconstitutional in the absence of the provision for notice and opportunity for hearing to the land owners effected by the improvement.

Sessions vs. Crunkilton, 20 O. S. 349.
Zimmerman vs. Canfield, 42 O. S. 463.

A similar conclusion follows with reference to the right to make application for damages and with reference to the procedure for the letting of contract, the apportionment of assessments upon the property-holders, levying of taxes, issuance of bonds, etc.

What difficulties may be presented in attempting to conform these procedures in the accomplishment of an interstate ditch improvement I am not prepared to say. It is clear that the legislature has left much to be desired, in this general and rather loose method of direction in this regard. The general intent is clear, however, and all work must necessarily be conducted with a view to harmonizing the different statutory directions to this end.

Assuming, therefore, that the statutes set out may be harmonized, and the working plan prove feasible, we may investigate the statutes of both Ohio and Indiana with a view to ascertaining whether or not a sufficient foundation has been established for the existence of the principle of comity in these matters.

In the Ohio law there appear several sections in the interstate ditch law which are absent from the provisions of the Indiana law. These sections are as follows:

> "Section 6572. The joint board may determine upon the necessary capacity of the part of said improvement located in this state."
>
> "Section 6576. The engineer, so appointed, shall file a bond, with the auditor of each county in this state affected by said improvement, in the sum of one thousand dollars, with two approved sureties, conditioned to the faithful performance of his duties.
>
> "Section 6584. The proper authorities in the adjoining state, joining with the counties in this state, may enter upon lands, or cause it to be done, in this state, along any portion of said located ditch or its tributaries, to perform work which may be assigned them to do by the joint board when in session.
>
> "Section 6587. The commissioners of any county in this state, in which are located lands affected and charged for the improvement or construction of a ditch, drain or watercourse, as provided by law, may cause to be performed any work which is assigned to them outside of the limits of this state, in a like manner as under the laws for similar duties, if the necessary privilege to do so has been granted by the legislature of the state where said lands are located through which such work is to be constructed."

The absence of the first of these statutes from the Indiana law does not appear to be in any way detrimental as the authority therein contained is undoubtedly conferred by section 6569 of the Ohio, conferring power upon the joint board to locate a ditch or to order the widening or deepening of the same and by kindred statutes conferring jurisdiction in the establishment and location of such ditches. The requirement that the engineer in this state shall file a bond, in the absence of such express requirement in the Indiana law with respect to the engineer selected by the Indiana board would not in any way effect the expressed consent of this state to permit such engineer to act.

The requirement of section 6584 of the General Code of Ohio permitting the authorities in the adjoining state to cause work to be done in this state in the establishment of such ditches seems unnecessary for the reason that in the plan presented it is not contemplated that the authorities of one state shall have anything to do with the work done in the other state.

The same may be said with reference to section 6587 authorizing officers in this state to enter upon lands in the other state for the purpose of accomplishing work therein assigned them, no such procedure being contemplated by its statutes.

I am, therefore, of the opinion that these slight differences in the provisions of the laws of the two states do not affect the operation of the principle of comity. A

slight discrepancy appears to be present in these statutes in that the laws of neither state provide for the sending of notices of the filing of a petition for such a ditch to the authorities of the other state. Each law provides that upon *receipt* of a notice from the other state, the commissioners may enter into an arrangement made for joint procedure. The intention, however, is so clear that the matter of notice may be readily founded upon the doctrines of implied power, and I would not consider such a slight omission detrimental to the operation of the plan presented.

A problem which must not be over-looked in the matter of such joint interstate operation is presented by the absolute want of appeal from the decisions of the joint board, and also the absence of any provisions in the event of disagreement by the joint board. The success of the plan rests altogether upon the existence of absolute harmony upon the part of the authorities of either state. The right of appeal in such case is not essential, however, and I am of the opinion that the absence of such would not afford ground of attack with respect to constitutionality. (Powersex vs. Seneca County Com. 20 O. S. 496; Engle vs. Defiance county, 25 O. S. 425.)

The consideration which seems to throw the gravest doubt over the matter, and which gives the greatest concern with respect to the legality of this procedure remains to be considered.

Section 6567 of the General Code provides that:

> "Without regard to the number of each board present the members from this state shall have the casting of one half of all votes on all questions, which vote shall be represented equally by the different members present of the board or boards from this state."

Section 5 of the Indiana law provides:

> "Without regard to the number of such joint board present, the members from this state shall have an *equal voice* on all questions, which votes shall be represented equally by the different members present from each state * * * *."

To my view this very important provision of these laws presents an ambiguity. I am of the opinion that it is equally susceptible, as regards its language, to the interpretations. One construction permitting the joint board to vote as a whole and authorizing a majority vote of such joint board to carry all questions voted upon. Each interpretation, granting, of course, that the representatives from each state would be entitled to the right of casting an equal number of votes upon all questions so considered.

Another interpretation would require each matter considered, before it is carried by the votes of the joint board to receive a majority sanction of the one half vote to be represented by each state.

It is clearly necessary, therefore, to choose the more logical and practical of these interpretations as the intent of the legislature of each state.

Under the plan presented by the first interpretation it is clear that a large majority of votes cast by authorities representing one state in such joint procedure favoring a proposition which has been voted against in such joint procedure by a majority of the authorities representing the other state, might be carried as a decision of such joint board, thereby substantially vesting the authorities of one state with a jurisdiction over matters concerning another state over the objection of the authorized representatives of said latter state. For example, if three county commissioners from this state met an equal number of ditch commissioners from another state, together with one county commissioner from this state voted in favor of the location of a ditch as against the vote of two county commissioners from this state against the location of such

ditch, the decision of the joint board would have to be regarded in favor of the establishment of such ditch, notwithstanding the objection thereto by the authorities elected in this state to represent the locality in question in matters of such public concern.

A similar difficulty was hinted at with reference to joint county ditch procedure in this state in the case of Chesbrough vs. Commissioners, 37 O. S. 508. It was therein objected that the procedure providing for joint county ditches was invalid by reason of the fact that the same conferred extra-territorial jurisdiction upon the respective boards of county commissioners. The court, however, sustained the validity of the provision by direct reference to the requirement of these statutes that a majority of each board taking part in the joint proceedings was required to carry any proposition presented for consideration. On page 515, in this connection the court used the following language:

> "A majority of each board, in joint session, and not a majority of the joint board, is required. Hence each board acts as an integral part of the joint body. The assumption that the commissioners of either county are acting and exercising authority over the internal affairs of the other county, is therefore not well founded."

It will be readily seen in the present connection, however, that such assumption is well founded, and that the objection must be considered in connection with the inquiry at hand. The question presenting itself, therefore, is whether or not, under rules of comity, the legislature has power, by consent, to permit the authorities of another state to thus exercise jurisdiction over matters concerning the citizens and property of Ohio. In the absence of constitutional provisions contrary thereto, I am of the opinion that such a consent would be within the power of the legislature.

I am of the opinion, however, that section 4 of article XV of the constitution of this state must be accorded deference upon this point. This provision is as follows:

> "No person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector."

While it may be doubted that the plan presented under the first construction would constitute an appointment of other than electors of this state to an office herein, it is clear beyond doubt that such a plan does operate to confer official duties and to grant official jurisdiction to persons other than electors of this state.

While the legislature of one state might, within the principle of comity, relinquish its jurisdiction over these matters to the extent contemplated by such an interpretation, I am strongly of the opinion that such an intent must not be attributed to this provision in the absence of clear and undoubted foundation therefor. Such an arrangement, if not actually in conflict with the constitutional provision above quoted, is clearly contrary to its spirit, and it is also a very inconsistent and inharmonious plan, when considered in the light of the legislative direction under kindred procedure with respect to joint county ditches. If the legislature has considered it necessary to safeguard the representation of the county in matters undertaken altogether by officers representing the state within which the matters are undertaken, there is clearly much stronger ground for the same sort of safe-guard when one state is intended to be represented as opposed to an outside jurisdiction.

Considering the second interpretation: Under this construction a majority of the representatives from each state would be required to constitute a sanction of the joint board in the consideration of any matter.

When this construction is made, the import given to the term "vote," which is required to be represented equally by the different members present of each board under the Ohio statute, and the import which is to be given to the term "voice" as

used in the Indiana statute, providing that the members from Indiana shall have an "equal voice" on all questions, is turned from the interpretation given these terms under the first construction. The "vote" referred to in the first construction has reference to a majority vote of the joint board, and the "voice" referred to in the Indiana statute, under the former interpretation, refers to such voice when considered in connection with a vote cast by all members of the joint board for the purpose of ascertaining a majority of such votes. Under the second construction, however, the import given is that there are really two votes, i. e., one by the Ohio board and the other by the Indiana board, and that upon each vote the authorities of each state must have equal majority representation.

On the ground that a state may not be considered to have an equal voice in such proceedings, or may not be considered to have been represented by an equal vote therein, when the authorities directed to represent it, have voted contrary to the final result. I am of the opinion that the second construction is the one intended.

While the legislature would perhaps have the power, under principles of comity, to so yield up its jurisdiction as to permit officers of other states to step in, should they so desire, and rule in matters of this kind, it would not seem feasible, practical or logical that such would be a likely intention. The extent which the legislature in these matters intended to yield up jurisdiction to the authorities of the other states must be confined to matters in which its own representatives by majority vote agree, and it is surely not to be calculated that authorities of another state are to be permitted to rule and judge in matters concerning this state, against the will of those directed by election in this state, to control matters concerning its property and its citizens.

I am of the opinion, therefore, that no measure may be passed, or no vote carried by the joint board, upon which the authorities of either state have not voted in the majority, for the reason that when such is not the case, the state refusing such majority of its authorized representatives, has not been accorded an actual representation or an equal voice in the matter considered.

My final conclusion, therefore, is that conceding the work ability of the Ohio provisions, and the ability to harmonize the general provisions with those referring to single and joint county ditches, there exists no constitutional objection to these laws.

Taking up your second question: You state that there are two branches to the improvement contemplated and you desire to know whether or not both branches may be improved in one proceeding or whether it is necessary for separate proceedings to be instituted for each branch.

To use your own language of description these branches are as follows:

> "One branch heads in Allen county, Indiana, and flows thence easterly out of that county into Paulding county and which throughout its course follows the line of a natural stream known as Flat Rock creek. This creek flows through parts of Benton township, Paulding township, Jackson township, Emerald township and into Auglaize township, all of Paulding county, where it empties into the Auglaize river.
>
> "Another branch of the improvement heads in Van Wert county, and extends thence westerly into Allen county, Indiana, where it unites with the first above described branch of the improvement. That is the branch heading in Van Wert county lies wholly within that county and Allen county, Indiana, and terminates in Allen county."

The chapter pertaining to single county ditches provides that a petition for a ditch shall include, "a side, lateral, spur or branch ditch, drain or water course necessary to secure the object of the improvement whether it is mentioned therein or not." (Section 6442, General Code.)

The chapter with respect to interstate county ditches, however, has no such reference. The question arises, therefore, as to whether or not the section above referred to connecting single county ditch procedure with interstate county ditch procedure, to wit, section 6595, General Code, is sufficient to justify this inclusion of branch ditches. While it would seem that this hinging of the interstate ditch procedure upon the single county ditch provisions and the incorporation of the latter provisions into the interstate provisions would relate only to matters of procedure rather than to the matters of substance intended to be covered by the interstate laws, I am, nevertheless, of the opinion that the intention to include a branch ditch should be accredited to the interstate laws. I base this conclusion upon the very apparent necessity of including all parties concerned in an improvement of this nature. It is clear at a glance that where branch ditches are involved in the improvement of a ditch it is only by including all parties concerned and by taking up at the same time the matter of the branch improvement that the end can be accomplished. It is a very apparent fact that the improvement of a branch ditch must have in view the necessity of making consequent changes in the main ditch, and also that improvements made in a main ditch or out-let ditch which accrued to the advantage of the property holders along a branch ditch, must be taken into consideration in making the assessments for such proposed improvement.

Under the doctrine of implied powers, therefore, and in view of the very apparent necessity of the improvement, I am of the opinion that one procedure may contemplate the improvement of a branch ditch as well as the improvement of a main or outlet ditch.

My conclusion does not go so far, however, as to hold that the improvement of a branch ditch may be included without specific mention thereof in the petition, as is specifically provided in the case of single county ditches. If such a branch is intended to be improved or if its condition depends upon the improvement of the main stream, specific mention thereof, and a description of the route of such branch must be set forth in the petition filed for procedure with respect thereto.

In this connection, however, we cannot lose sight of the necessary conclusion that the provisions for interstate county ditches do not include the improvement of a natural stream or water course. This chapter authorizes the improvement only of ditches drains and water courses, and it is a settled fact, beyond dispute, that the use of these terms cannot be extended to include natural streams or natural water courses.

I have similarly held with reference to joint county ditches in an opinion rendered to Hon. Homer E. Johnson, and Hon. Charles F. Close, prosecuting attorneys respectively of Marion and Wyandot counties, under date of April 2, 1913. The principles considered therein have application here, and I am enclosing for you a copy of that opinion.

From your statement of facts I would conclude that the branch of the improvement which heads in Allen county and flows into Paulding county, contemplates the improvement of a natural stream known as Flat Rock creek. If my interpretation of your statement of facts is correct this improvement may not be made under the laws provided for interstate ditches. If, on the other hand, such improvement does not contemplate the improvement of a natural stream, I am of the opinion, in accordance with what I have before stated, that both of the improvements may be included in the petition, and their accomplishment be culminated by a single proceeding.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

633.

A DEPUTY SHERIFF WHOSE TIME IS ONLY PARTIALLY TAKEN UP WITH HIS WORK, AND WHO IS ONLY PAID FOR SO MUCH WORK AS HE PERFORMS, MAY ACT AS PROBATION OFFICER AND RECEIVE COMPENSATION THEREFOR PROVIDING THERE IS NO CONFLICT BETWEEN THE TWO POSITIONS.

Where a deputy sheriff is paid for such service as he performs during the year, and his time is only partially taken up with his work as deputy sheriff, such an officer is eligible to appointment as probation officer, where the duties of both will not require all the time of the appointee, and there will be no conflict between the two positions. This does not apply to deputy sheriffs under a regular salary whose entire time is covered by his compensation.

COLUMBUS, OHIO, November 15, 1913.

HON. HARRY T. NOLAN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter of August 29th, in which you inquire:

> "In Lake county practically all the work of the sheriff's office is done by the sheriff, personally; there is set aside by the commissioners at the beginning of the year the sum of $300 to compensate deputy sheriffs for services rendered during the year; each deputy sheriff performs such items of service as he is specifically directed to perform by the sheriff and is paid for his services out of the amount set aside.
>
> "May a deputy sheriff so employed and compensated be appointed probation officer by the probate court and be allowed compensation out of the county treasury for his services as such probation officer? The entire time devoted to both offices does not exceed two or three days a month."

and you further state:

> "Neither does it seem possible that there could be an evasion of the salary law because the officer is compensated as deputy sheriff only for specific items of service rendered by him as such, and is compensated as probation officer only for specific duties performed, as such, by him at the direction of the probate court."

From this I understand that the deputy sheriff is not on a salary either yearly or monthly, but is paid out of the $300.00 allowance for work actually performed, or as it might be said, his payments are upon the piece price-plan. Under these circumstances, it is inconceivable how there can be any incompatibility between the two offices, nor evasion of the salary law.

You call attention to the opinion of my predecessor, Mr. Denman, found on page 446 of opinions of 1910, in which it is held that a sheriff may not act as probation officer, with which opinion I fully concur, not only for the reasons stated in the opinion, but also because of the fact that the sheriff is upon a salary compensating him for his time, and he would not be authorized to devote a portion thereof to the duties of probation officer.

However, none of the reasons applicable to sheriffs apply to deputies whose employment and compensation are, as stated in your letter. I am therefore of the opinion, that deputy sheriffs appointed and paid, and whose time is only partially taken up,

as you state, are eligible to appointment as probation officers where the duties of both will not require all the time of the appointee, are limited, as you state, and are not conflicting.

This opinion, it must be understood, applies only to deputy sheriffs under the conditions you state and must not be construed as applying to deputy sheriffs generally, nor to deputy sheriffs under a regular salary, whose entire time is covered by his compensation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

637.

IN PARTITION PROCEEDINGS, IN THE ABSENCE OF AN ORDER FROM THE COURT FOR THE PAYMENT OF MONEY TO THE SHERIFF AND THE RECEIPT OF SUCH MONEY BY THE SHERIFF, THE SHERIFF IS NOT ENTITLED TO COMPENSATION EITHER AS COSTS OR EXPENSES FOR RECEIVING AND DISTRIBUTING FUNDS PAID HIM IN PARTITION PROCEEDINGS WHERE THERE IS AN ELECTION TO TAKE.

Under partition proceedings where one of the heirs elect to take the property at the appraised value thereof, and the same is awarded, the money so paid in on election to take in partition proceedings is not made on a writ of partition, and the sheriff is not entitled to poundage on money so paid, but where the court orders moneys paid to the sheriff, under section 12039, the court, not as costs, but as expenses in the case, may make an allowance to the sheriff for compensation for services in complying with such order of court. In the absence of such order, the sheriff is not entitled to compensation, either as costs or expenses for receiving and distributing funds paid him in partition cases where there is an election to take.

COLUMBUS, OHIO, November 2, 1913.

HON. CHARLES C. HALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have your letter of May 31, 1913, in which you inquire:

> "Under partition proceedings where one of the heirs elects to take the property at the appraised value thereof, and the same is awarded to said party electing to take the same, what if any poundage is the sheriff entitled to under the provision of section 2845, General Code, relating to fees of sheriff, when only a part of the appraised value is paid into his hands for distribution?"

The portions of section 2845, applicable to the question you ask are:

> "Poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per centum; on all sums over ten thousand dollars one-half of one per centum, but when such real estate is bid off and purchased by a party entitled to a part of the proceeds, the sheriff shall not be entitled to any poundage except on the amount over and above the claim of such party, except in writs of sale in partition he shall receive one per cent. on the first two thousand dollars, and one-third of one per cent. on all above that amount coming into his hands."

I am informed that it has been held in Hamilton County that a sheriff is not entitled to poundage in partition cases where there is an election to take, but am not advised as to whether the ruling was made in a case where no money came into the hand of the sheriff, or in a case like you put, where a portion is paid.

The rule is general and strictly followed that where no provision is made to compensate an officer, he is not entitled to any, also that an officer to be entitled to fees must receive same under a provision clearly showing a right to the same.

The above clause, except in *writs* of partition, etc., does not include money paid into the hands of the sheriff on any election to take. The statute authorizing elections to take, reads:

> Section 12035. If one or more of the parties elects to take the estate at the appraised value, unless on good cause shown by special order, the court directs the entire payment to be made in cash, or all the parties in interest agree thereon, the terms of payment shall be one-third in one year and one-third in two years, with interest, the deferred payments to be secured to the satisfaction of the court. On payment being made in full, or in part, with sufficient security for the remainder, as above provided, according to the order of the court, the sheriff shall make and execute a conveyance to the party electing to take it."

This section does not authorize payment to the sheriff, nor does it devolve upon the sheriff to see to the distribution of the proceeds of sale. The payment unless directed by the court to be made in cash, shall be one-third cash and one-third in one, and one third in two years with interest; the deferred payments to be secured to the satisfaction of the court.

The question of how and to whom payments are to be made rests with the court. If the cash payment is ordered to be made to the clerk, such clerk is entitled to poundage under section 2901, General Code. If ordered paid to the sheriff, his fees, if he gets any, must be allowed by the court under section 12050, General Code, and in the absence of direction by the court to pay to the sheriff, he cannot by receiving the money from the party electing to take, become entitled to poundage under section 2845.

Section 12039, General Code, reads as follows:

> "The money or securities arising from a sale of, or an election to take the estate, shall be distributed and paid, by order of the court, to the parties entitled thereto, in lieu of their respective parts and proportions of the estate, according to their rights therein. All receipts of such money or securities by the sheriff are in his official capacity, and his sureties on his official bond shall be liable for any misapplication thereof."

The latter part of this section inferentially, at least, recognizes the right of a sheriff to receive moneys or securities for distribution to parties entitled, when an election to take has been approved by the court. I also am of the opinion when it is considered that in the adjustment and apportionment of costs and expenses that the court in a partition case must be governed by the principles of equity, that the power of the court under section 12039 to order distribution of moneys and securities, is not limited to a perfunctory order to pay or turn over to parties entitled but must be construed to include the right on the part of the court, when deemed for the interest of all parties, to order such payment made by or through any of the court officers, and the sheriff would certainly be a proper selection, and when so done the sheriff is not

entitled to poundage as such under section 2845, but may be allowed for his services such sum as the court deems just and equitable, in virtue of section 12050, General Code, which reads as follows:

> "Having regard to the interest of the parties, the benefit each may derive from a partition, and according to equity, the court shall tax the cost and expenses which accrue in the action, including reasonable counsel fees, which must be paid to plaintiff's counsel unless the court awards some part thereof to other counsel for service in the case for the common benefit of all parties; and execution may issue therefor as in other cases."

Inasmuch as I am of opinion that money paid in on election to take in partition proceedings is not made on writ of partition, the sheriff is not entitled to poundage on money so paid, but, where the court orders moneys paid to the sheriff under section 12039, I am of opinion that, the court, not as costs, but as expenses in the case, may make an allowance to the sheriff for compensation for services in complying with such order of court. In the absence of such order, and payment made under it, the sheriff is not entitled to compensation, either as costs or expenses for receiving and distributing funds paid him in partition cases where there is an election to take.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

643.

THE FACT THAT AN ERROR IN PRINTING BALLOTS WAS MADE AND THE BALLOTS INSTEAD OF READING FIVE MILLS FOR THREE YEARS, READ TWO MILLS FOR THREE YEARS, AND WERE VOTED ON, DOES NOT MAKE THE ELECTION INVALID, AND THE TAXING AUTHORITIES MAY LEVY TWO ADDITIONAL MILLS FOR A PERIOD OF THREE YEARS.

Where the electors of a certain village voted to levy taxes in excess of the Smith law, the amount of five mills for three years, and a mistake was made in printing the ballots providing for the levy of two mills for a period of three years, the proceeding is not invalid, and the taxing authorities are authorized to levy two additional mills for municipal purposes during a period of three years.

COLUMBUS, OHIO, December 4, 1913.

HON. I. H. BLYTHE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—In your letter of November 5th, receipt whereof has already been acknowledged, you state that the council of a certain village in Carroll county, passed a resolution under section 5649-5 General Code, for the submission to the electors of the village of a proposition to authorize the levying of taxes in excess of the Smith law limits, the number of mills specified being five, and the number of years during which the additional levy was to be permitted being three. The resolution was properly certified to the board of deputy state supervisors of elections, and proper notice of submission of the question was given according to law. In all proceedings preliminary to the election itself, including publication of notice, the number of mills and number of years referred to in this resolution were correctly stated.

The ballots printed under the direction of the deputy state supervisors of elections

erroneously stated the proposition as being the authorization of an additional levy of *two* mills for the period of three years. The ballots so prepared were used at the election, no one observing the discrepancy, and a majority of the electors voted affirmatively upon the question so submitted.

You ask my opinion as to whether the proceedings are void because of the discrepancy above referred to; whether the proceedings are valid as authorizing the additional levy of two mills for the period of three years or whether the proceedings are valid as authorizing an additional levy of five mills for a period of three years.

There is nothing in sections 5649-5 et seq., General Code which throws any light upon the solution of the question which you submit. They merely provide for the requisite steps in the submission of the question as to increasing the tax levy, all of which were complied with fully by the authorities required to act in the premises for the village in question, except for the unfortunate error which crept into the ballots.

It will be observed that the error was such as to make the affirmative ballots cast favor a proposition less extensive, so to speak, than they would have favored if cast upon the proposition originally designed to be submitted. That is to say, a vote in favor of authority to levy two mills for a given period confers *pro tanto* less extraordinary authority upon the taxing officers than one favoring a levy of five mills for the same period.

This being the case, I am of the opinion that the whole proceedings are not invalid as there is no excess, so to speak, of authority attempted to be conferred upon the taxing officers in addition to that sought by them. As between the proposition actually voted upon by the electors and that submitted by the resolution and published in the notice, I am of the opinion that the former controls. It certainly cannot be said, in law, that the electors have approved a proposition to authorize a levy of five additional mills by depositing affirmative ballots calling for the authorization of a levy of two additional mills only.

I am, therefore, of the opinion that as a result of the election aforesaid, the taxing authorities are authorized to levy two additional mills for municipal purposes during the period of three years.

The question is not free from difficulty, and in such search as I have made I have been unable to find any authorities upon it. I believe, however, that the general principles above outlined are correct, and that they lead to the conclusion expressed.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

646.

WHERE SEVERAL LEGATEES ENTERED INTO A CONTRACT IN REFERENCE TO THE DISTRIBUTION OF AN ESTATE, AND THIS CONTRACT IS FILED IN THE PROBATE COURT, THE INHERITANCE TAX MAY BE ASSESSED AND COLLECTED IN ACCORDANCE WITH THE TERMS OF THE CONTRACT FILED IN THE PROBATE COURT.

Under the terms of a certain will five cash legacies in the sum of $1,000 were bequeathed and one legacy of $2,000, and in addition thereto five legacies of $50 each were bequeathed. A contract was entered into between the persons receiving the legacies wherein it was agreed to pay the $50.00 legacies and the debts of the estate and the expenses of the administration, and to divide the remainder of the property equally between the remaining persons receiving the bequests. This contract was filed in the probate court. In this case the inheritance tax should be assessed and collected on the five legacies for $1,000 and the one for $2,000 in accordance with the agreement filed in the probate court, if the probate court authorizes the distribution of the estate as such in accordance therewith.

COLUMBUS, OHIO, December 19, 1913.

HON. THOMAS L. POGUE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Receipt has already been acknowledged of a letter under date of October 29th from Mr. Charles A. Groom, Assistant Prosecuting Attorney, submitting for my opinion the following question:

"Under the will of Theresa Braunstein, cash legacies of one thousand dollars were bequeathed to each of two sisters and three brothers and a legacy of two thousand dollars to another brother.

"In addition to the above, five legacies of fifty dollars each were bequeathed to nephews and nieces of the testatrix.

"All of the residue of the property of the testatrix was bequeathed to a brother in trust for the sisters, they to receive the income in equal shares during their natural lives and upon the death of either, the income which the sister so dying would have received is distributed to all of the brothers and surviving sister in equal parts.

"After the death of the two sisters for whom the trust was created, the entire principal of the trust fund is ordered converted into cash and the net proceeds divided equally among the four brothers share and share alike, and in the event any of said brothers be dead at the time of the distribution, leaving issue surviving, the issue is to take the deceased parent's portion.

"The estate is small, consisting entirely of personal property, and all of the brothers and sisters of the testatrix are elderly and their children are of full age.

"All the brothers and sisters and their children have entered into an agreement filed with the probate court to pay the $50.00 legacies to nieces and nephews, the debts of the estate and expenses of administration and to divide the property remaining equally between the six brothers and sisters and determine the trust.

"Our local probate court has correctly held that the tax becomes due immediately upon the death of the ancestor and that whatever private agreement may be made between the parties, their inheritance is nevertheless determined by the will or the statutes of descent and distribution.

"In the present case the remainder after termination of the trust is contingent, dependent upon survivorship of brothers or death of brothers with

issue surviving, so that the tax in accordance with the terms of the will cannot at present be assessed. The carrying out of the agreement to terminate the trust and divide the residue of the estate equally among the brothers and sisters will, in this instance, carry the property to the persons entitled had the testatrix died intestate, with the exception of the bequests to nephews and nieces of fifty dollars each.

"Will you kindly advise me whether under the facts stated, the tax should be calculated upon the pro rata share each brother and sister will receive by the contract for distribution in equal parts, or whether I should treat the provision for distribution of the trust fund as an acceleration and tax the bequests of one and two thousand dollars respectively, plus the increase thereof from a pro rata distribution of the proceeds of the trust fund to such brothers and sisters as the parties now entitled thereto by virtue of the waiver and renunciation of each and their issue."

The present collateral inheritance tax law is found in section 5331, General Code, as amended, 103 O. L. 463. A tax is thereby imposed upon "all property * * * and any interests therein * * which pass by will or by the intestate laws of this state" to certain persons, including brothers, sisters, nephews and nieces upon the value thereof above the sum of five hundred dollars.

The same section also provides that:

"Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

Other provisions of the related statutes seemingly bearing upon the question submitted by you may be cited as follows:

"Section 5335. Taxes imposed by this subdivision of this chapter shall be paid into the treasury of the county * * * within one year after the death of the decedent * * * and if not paid at the expiration of eighteen months after such death, the prosecuting attorney of the county * * * shall institute the necessary proceedings to collect the taxes, * * * after first being notified in writing by the probate judge of the county of the non-payment thereof * *."

"Section 5336. An administrator, executor or trustee, having in charge or trust, property subject to such law * * * shall not deliver any specific legacy or property subject to such tax to any person until he has collected the tax thereon."

"Section 5342. When for any reason the devisee, legatee or heir who has paid such tax relinquishes or reconveys a portion of the property on which it was paid * * * the tax, or the due proportional part thereof shall be repaid to him by the executor, administrator or trustee."

Under the laws of other states it has been held that in the case of contingent legacies which do not pass at the death of the testator, when the amount of the legacy ultimately payable to a given beneficiary cannot be ascertained at the time of the testator's death, his separate interest is taxable, but the amount of the tax not being ascertainable, the same cannot be collected until the estate actually vests in him. If this were the law of the state of Ohio, it might have applied to the case you submit in the absence of the agreement described by you, because at the death of the two sisters, if preceded by the death of one or more of the four brothers, each surviving child of one of such deceased brothers might receive a distributive share, amounting

to less than five hundred dollars, in which event his inheritance would fall within the exempted class and would not be taxable. In other words, the amount which each surviving child of each of the four brothers might take ultimately under the will, could not be ascertained at the death of the testator and, therefore, the amount of the tax, cannot be determined at that time because of the chance that some of the ultimate legacies may fall within the exemption.

That being the case, section 5333, which I have not quoted, and which provides for the appraisal of remainders and of life estates, and the apportionment of the tax in such cases, probably cannot be applied.

Whether the doctrine of the foreign decisions to which I have referred, but which I have not cited, would apply under the Ohio law is extremely doubtful, because of the provision of section 5335, supra, to the effect that the tax shall be collected within eighteen months after the death of the testator. I do not find it necessary to determine any of these questions, however, for reasons which will appear.

Section 5331, which is the real operative portion of the collateral inheritance tax law imposes a tax upon property (or to be more accurate in the light of the decisions upon inheritance of property) passing by will or by the intestate laws of the state. In other words, it is a prerequisite of a valid assessment of the tax that the estate taxed shall be one devolving upon the person subject to the tax, by will or by operation of the laws of descent and distribution (omitting from mention the case of deed of gift also referred to in the statute). Broadly speaking, then, there must be an "inheritance" before there is a subject of taxation. Or, as pointed out in a former opinion which was, I think, given to you, it has been the holding of courts of this state in answering constitutional objections to inheritance tax laws that the real subject of taxation is not the property passing by inheritance but the privilege of inheriting. Therefore, in order to sustain the tax at all, it must be based upon the fact of inheritance as distinguished from other methods of acquiring title to real or personal property.

The question is, therefore, directly raised by your query, as to whether or not the beneficiaries of the will mentioned by you, in entering into the agreement referred to and in receiving the shares of the estate which would ultimately come into their respective possession, under that agreement would acquire their respective titles by inheritance or by voluntary acts *inter vives*. For, if in spite of the modifications of the terms of the will by the agreement, the distributive shares under the agreement are still "inheritances," then they are taxable as such; if, on the other hand, the titles to the distributive shares apportioned by the agreement, would vest in the six brothers and sisters by act of the parties, then, although there was a *previous* inheritance, a tax cannot attach to the shares determined by the agreement *as such*.

Now, in the case stated by you, it appears that the brothers and sisters and their children have entered into an agreement, which is filed with the probate court, to pay the specific legacies to nephews and nieces, and then to divide among themselves, in certain proportions, the remainder of the estate. Such action by them is necessary in order that the *estate* as such, may be divided as they have agreed. I assume from your statement that the estate is in probate, and that the object of this proceeding, which is not specifically authorized by any statute, is to secure an order of distribution from the court based upon the agreement. I shall first assume that the court has jurisdiction and power to make such an order of distribution, and to direct the administrator or executor to distribute the assets of the estate in the manner provided by the agreement. That is to say, I shall not give any great weight to the question as to whether or not an administrator or executor distributing the estate, and being discharged by order of court, may be held liable in any way. It is sufficient, I think, for the present purpose, to take into account the fact that the *estate* has been or is to be divided in accordance with the terms of the agreement. That is to say the various parties who are to receive distributive shares under the agreement are not intending

to divide up their several legacies after distribution of such legacies to them, but they intend their agreement to have the effect of producing a certain distribution of the estate.

Putting it in another way, if the agreement is to be efficacious at all, its effect will be to divide the estate itself and to authorize the probate court and the executor or administrator to recognize those entitled to shares under the agreement as distributees of the estate as such.

That being the case, I am of the opinion that the takers of the distributive shares under the agreement will receive them as inheritance. Whoever, being other than a creditor of the estate, receives a distributive share of the estate of a deceased person under the orders or with the approval of a court of probate having jurisdiction to administer such estate, takes his share as if from the decedent himself, and, broadly speaking, acquires his title by inheritance. That is to say, as a sharer in the estate of the deceased person, he exercises and enjoys the privilege of inheritance which is secured to him by the laws of the state, indeed, created by those laws. There is, to my mind, an essential distinction between receipt by a person of a distributive estate, as such, on the one hand, and his use of such distributive share after it has passed out of the estate and become his property on the other hand. In the former, the devolution of title is by operation of law, whether the statute of wills, the statutes of descent and distribution or the proper orders of a court of proper jurisdiction. In the other case the operation of the law has extended itself and the party is dealing with that which is already his.

Assuming then, that the parties are to secure or have secured an order of court entitling them to share in the estate in accordance with the terms of the agreement entered into by them, whether that agreement be called renunciation or by any other name, I am of the opinion that these shares will fall to the respective parties as "inheritances" and will be taxable as such. In this view of the case it is immaterial to determine whether the various shares be regarded as passing "by will" or "by the intestate laws of this state;" although from a technical view point, I am of the opinion that they are shares passing by will, in that the will and its administration gives rise to whatever right the legatees may have to secure an order of distribution on the basis of their agreement.

This view of the case is sustained, inferentially at least, by some authority. Thus in Page vs. Rives, 1st Hughes, 297, Federal Case No. 10666, it was held that money received by claimants under a deceased person's will by reason of a compromise contract between them and the executor, sanctioned by the court having jurisdiction of money so received, does not constitute "distributive shares in an intestate's estate" for the purpose of a federal revenue tax. This decision merely establishes the rule that money so received is not received by virtue of intestacy and does not conflict with the holding that it may be regarded as received under the will, or, more broadly speaking, that its receipt may be regarded as due to inheritance.

Under the English statute where the testator directed a certain estate to be sold and the proceeds to be divided between his two sons, but they preferred to take the property themselves under an amicable arrangement, it was held that the duty was imposed upon the value of the property notwithstanding the deviation from the strict terms of the will. (Attorney General vs. Holford, 1 Price 426.)

Similarly, it is held in Pennsylvania, under a law quite like that in Ohio in its essential aspects, that where devisees and legatees have compromised with the contestors of the will, or with persons claiming title adversely to the decedent, and such compromise is approved by the court before distribution is ordered, the devisees and legatees are taxable only upon the shares actually received by them after deducting the amounts paid to the adverse claimants. (In Re Pepper's Est. 159 Pa. St. 509; In Re Kerr's Est. Id. 512.)

It is a fair analogy from these decisions, all under laws which rest the right to tax

upon the privilege of inheritance, as such, that where the course or amount of the distributive shares deviates from those fixed by the will itself under authority of the administering court, the title of the ultimate takers is one of inheritance, and is derived from the will.

In short, although the terms of the will are not observed strictly because of the intervention of the agreement, yet it is the *will* which the court is administering when it authorizes the distribution according to the agreement.

I am, therefore, of the opinion, in the case you submit, that the tax should be assessed and collected on the shares distributed to the six sisters and brothers in accordance with the agreement filed with the probate court, if the probate court authorizes the distribution of the estate as such in accordance therewith.

Of course, all the foregoing is, as already stated, upon the supposition that the probate court will order distribution in accordance with the terms of the contract. If, on the other hand, the court should find itself without jurisdiction to make such an order of distribution or would decline to make the order under the facts of this case then I take it your question would not arise at all. Therefore, I have not considered the consequence of the court's failure to so act.

I think I have made it clear that I do not intend to pass upon the court's authority to order distribution in accordance with the terms of the agreement.

Yours very truly,

TIMOTHY S. HOGAN,
Attorney General.

(To the City Solicitors)

9.

TAXES AND TAXATION—BONDS, OUTSTANDING—EXEMPTIONS—CONSTITUTIONAL AMENDMENTS.

Inasmuch as bonds, for which an ordinance declaring it necessary to sell the same, was passed prior to January 1, 1913, when the same were not sold until after that date, are not "at present outstanding" at the time of the constitutional amendment, to wit: Section 12, article 2, became effective, such bonds are not exempt from taxes as provided by the terms of that amendment.

COLUMBUS, OHIO, January 9, 1913.

HON. J. C. ADAMS, *City Solicitor, Coshocton, Ohio.*

MY DEAR SIR:—I have before me your letter of November 16, 1912, in which you inquire:

> "1. In your opinion, does the ordinance declaring it necessary to issue bonds in anticipation of special assessments have to lay over, under the initiative and referendum, for a period of sixty days before it becomes effective? and,
>
> "2. If the ordinance declaring it necessary to sell bonds is passed before January 1, 1913, but the bonds are not sold until after January 1, 1913, would the provision of the new constitution operate on such bonds and render them taxable?"

The first inquiry was answered some time ago by mailing you copy of an opinion of this department, dated November 18, 1912; and as to the second inquiry I desire to say that section 2 of article XII, as amended reads:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, except all bonds at present outstanding of the state of Ohio or of any city, village, hamlet, county or township in this state or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds so at present outstanding shall be exempt from taxation; but burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value five hundred dollars, for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property, so exempted, shall, from time to time, be ascertained and published as may be directed by law."

So far, without exception, the words "now," "now in office" and other terms expressive of the time when any of the constitutional amendments should take effect have been held as referring to January 1, 1913.

It will be observed that the words, "at *present outstanding*" are used twice in this section referring to bonds which may be exempt from taxation.

It is not thought necessary under the plain reading of this section to refer to the rule requiring exemptions from taxation to be construed strictly, and I hold that all

bonds outstanding, that is, sold and in the hands of buyers may be exempted, while others, which will include all bonds sold and delivered after January 1, 1913, whether the necessity for issuing was determined before or after January 1, 1913, are subject to taxation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

15.

INITIATIVE AND REFERENDUM ACT—ORDINARY EXPENDITURES—ORDINANCE OF COUNCIL PROVIDING FOR PURCHASE OF MAP AND BLUE PRINT INVOLVING EXPENDITURE.

It has been the policy of the courts to construe the initiative and referendum act strictly, and therefore an ordinance of council providing for the purchase of a map and blue print for a village, for the sum of $200.00, since it involves an expenditure of money, is within the purview of the initiative and referendum act and the clerk is required to hold up such expenditure for thirty days after the passage of said ordinance.

COLUMBUS, OHIO, January 2, 1913.

HON. O. H. STEWART, *City Solicitor, Pomeroy, Ohio.*

DEAR SIR:—Under date of December 4th, you request my opinion on section 4227-2 General Code, as follows:

> "Does not this law, by application, require the clerk to hold up all expenditures for thirty days after their regular passage by council, in order to fully protect himself?"

In an opinion heretofore rendered by me I have given it as my opinion that the approval of the bills by a village council of the ordinary expenditures incurred by such council could not be considered as within section 4227-2, General Code, as an ordinance involving the expenditure of money. However, you state that the question arose on account of a controversy about spending $200.00 for a map and blue print of the village, and that upon the passage of the appropriation resolution, one of the members of council notified the clerk not to pay the bill, as he was going to circulate a petition for a referendum vote on the matter in question.

The courts of this state have been giving strict construction to the initiative and referendum act, and as undoubtedly the buying of a map and blue print of the village for the sum of $200.00 would be an expenditure of money, and since the statute in question covers ordinance, resolution, and other measures, I am of the opinion that it might well be held that the resolution appropriating the money for such purpose was one within the initiative and referendum act, and that the same would not become effective in less than sixty days.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

24.

ASSESSMENTS—STREET IMPROVEMENTS MAY BE ASSESSED FOR ONLY ONE-HALF OF PORTION WHICH WAS FORMERLY ASSESSED FOR PLANK ROAD IMPROVEMENT—PAVING AND RE-PAVING—CURBING.

When a street two miles in length and thirty-six feet in width, is being paved for a width of eight feet, partly in brick and partly improved for the same width by a plank road, and it is now desired to pave the entire width of such street, held:

That the construction of a plank road constituted a paving or repairing, within the meaning of section 2832, General Code, and that for the new improvement, under this statute, that portion of said road which had been so paved and planked could not be again assessed for more than one-half the costs and expenses of the new paving.

As regards the twenty-eight foot strip on such road, which had not been formerly improved, the assessment must be the same as upon original improvements.

The curbing and gutters, insofar as they have heretofore been provided and assessed against the abutting property can be assessed upon re-improving the same, for not more than one-half of the cost thereof, and where no curbing had heretofore been provided and assessed, such curbing and gutters may be assessed as in the case of an original improvement.

COLUMBUS, OHIO, December 16, 1912.

HON. D. F. DUNLAVY, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—Under date of December 5, 1912, you submit the following to this department for an opinion:

"In the city of Ashtabula, Ohio, there is a street known as Lake street, and for the purpose of this opinion we will say that it runs from Aunger avenue, in the city of Ashtabula, to Bridge street, in the city of Ashtabula, and is a street of about two miles in length between those points. It is a thirty-six foot street, but has never been improved the entire width, and at this time the purpose of the council is to improve the street the full width of thirty-six feet, and to assess the costs, as much as may be done, upon the abutting property owners.

"Some years ago, and there is yet to be paid two or three assessments, a plank road was put in upon said street of a width of eight feet; that the costs of said plank road was assessed upon the abutting property owners on both sides of the street and has been paid for under the said assessment regularly and in accordance with said assessment, and there remains, as stated above, two or three assessments yet to be paid. This was for a portion, we will say at this time, of said street, perhaps of a length of three-quarters of a mile. There has also been an improvement on the same street, and in the place of a plank road, and connecting with said plank road, an eight foot paving, together with curb on one side, and this improvement has been assessed against abutting property owners on both sides of said street.

"The question now is: What portion of the costs of improvement can be legally assessed against abutting owners?"

Section 3822, General Code, to which you refer, provides:

"When a special assessment for the improvement of a street or other public place has been levied and paid, the property so assessed shall not again

be assessed for more than one-half the cost and expense of repaving or repairing such street or other public place unless the grade thereof is changed."

This section has been construed in two recent decisions of the courts.

In Page vs. City of Columbus, 15 Cir. Ct. N. S. 40 (Ohio Law Reporter of June 3, 1912), it is held:

"The provision of section 3822, P. & A. Anno., G. C., limiting reassessments for repaving improved streets to one-half the cost, does not violate the constitutional inhibition as to retroactive or retrospective legislation, and applies to improvements made before and after the enactment of the said act.

"No distinction is made by this act as to material used or cost of the original improvement, but the restriction applies generally to all improvements whereby an unimproved street has been transformed into an improved one and the cost assessed specially against the abutting property."

This decision was affirmed by the supreme court without report in 86 Ohio St. 333. Rockel, J., in the opinion of the circuit court says at page 45:

"The second question that is raised is that the graveling of a roadway or surfacing it with crushed gravel is not within the statute. In other words, that what is meant to be included in the statute is that when a street has been once paved with brick or something of that character, and is thereafter repaved or repaired, that then it comes within the meaning of the statute. It is possible that this was chiefly what the legislature had in mind, but the statute must be construed according to the meaning of the words used in the statute.

"It may be true that a person might receive the benefits of this limitation, who had not been taxed very heavy for some prior improvement, but as the statute draws no lines of distinction between whether the original improvement shall be a gravel, cobble, plank, brick or stone roadway, or one of some other description, we must hold that it applies to all improvements of the character to which it might apply."

By virtue of this decision an improvement of a street by making a plank roadway, as in your case, would constitute an improvement thereof as contemplated by section 3822, General Code.

In case of Baldwin vs. Springfield, 20 Ohio Dec. 265, it is held:

"Macadamizing" a street, formerly improved by graveling pursuant to municipal direction, constitutes a 'repaving' within the meaning of section 53, Municipal Code of 1902 (General Code 3822) for which not more than one-half the cost may be assessed against the abutter.

"The limitation of section 53, Municipal Code of 1902 (General Code 3822) as to 'repaving' assessments does not apply to assessments for curbing and guttering if the former improvement did not include and the property were not assessed therefor either as part of a street or sidewalk improvement."

This case was affirmed by the circuit court on May 19, 1910, and is followed and liberally quoted from in the opinion in the case of Page vs. City of Columbus, supra.

In this case the graveling of a street is considered an improvement of a street as contemplated by section 3822, General Code.

Following the lead of these two decisions it may be held that the improvement of the eight foot strip of the street now in question, both that part which was improved

by plank and that which was paved, would be considered, under section 3822, General Code, as an improvement of such eight foot strip and that said section 3822, General Code, would apply to an assessment made for repaving or repairing said eight foot strip and would limit the amount to be assessed against the abutting property for repaving or repairing such eight foot strip to one-half of the cost of such improvement.

In your case you desire to not only improve the eight foot strip but also to pave the remainder of said street, which remainder is twenty-eight feet wide. This width of twenty-eight feet has not been improved at any time by paving or by making a plank road therein, or by any other kind of paving material. It cannot be said that this part of the street is to be "repaved" or "repaired" because it has never been improved or paved in any way.

Section 3822, General Code, applies when the grade of the street is not changed. It makes no specific provision as to a case where only a part of a street has been improved and an assessment levied and paid therefor.

In Baldwin vs. Springfield, supra., it is held that "repairing" as used in section 3822, General Code, does not apply to an assessment for curbing and gutters if the former improvement did not include such curbing and guttering.

When a street is paved from curb to curb with brick there is no definite distinction between the main part of the street and the part where the water flows and which may be termed the gutters. In improving streets with gravel, or by macadamizing, or by laying asphalt therein, it is customary to lay brick or other hard material next to the curb and in such case this part is termed the gutters. The width of the gutters varies and is sometimes as wide as four feet on each side of the street. It is in fact a part of the improvement of the street between the curb lines. It is a part of the roadway.

The court in Baldwin vs. Springfield, supra, when it excepted the gutters from the limitation of section 3822, General Code, must have contemplated that only the central part of the street had been formerly improved by placing gravel therein, and that the part next to the curb line which would constitute the gutters, had not been improved. The reasoning upon which the court based its conclusion must necessarily have been that only a part of the street had been improved by the former improvement and that the improvement thereafter of that part which had not theretofore been improved would not fall within the provisions of section 3822, General Code.

In Baldwin vs. Springfield, supra, Kunkle, J., says on page 271:

> "To constitute an original paving of a street there must have been a substantial paving of the part of the street improved. Page & Jones, Taxation, section 462; Brady, in re, 85 N. Y. 268.
>
> "A street includes sidewalks and gutters, and paving includes flagging; the work therefore of setting curb and gutter stones, and flagging the sidewalk of a street, which has once been done, is included in the phrase, repaving a street. Burmeister, in re, 76 N. Y. 174.
>
> "It is not claimed that the property owners in question have previously constructed or been assessed for any curbing and guttering on this street, either as a part of a street or of a sidewalk improvement. The only expense to which they have been subjected, relates to the grading and graveling of the portion of the highway in question."

Also on page 272, he further says:

> "As the plaintiffs have never constructed or been previously assessed for curbing and guttering, either as a part of a street improvement or as a part of a sidewalk improvement, I do not think the cost of the curbing and guttering in question would come within the repaving limitation."

In the case submitted the property owners have never been assessed for improving the additional twenty-eight feet of the street, which the city now proposes to improve. They have not improved this part of the street themselves. As to this part of the street it cannot be said that the proposed improvement will constitute a "repaving" or a "repairing" thereof. It has never been paved.

As to this twenty-eight foot strip, I am of the opinion that the limitation upon the assessment as provided in section 3822, General Code, does not apply and that the city, as to this part of the street, may levy the assessment, as if it were an original improvement.

It appears that in a part of the street one curb has been provided and the cost thereof assessed upon the abutting property. The improvement of a street contemplates two curbs. As part of the property owners have been assessed for one curb they cannot now be assessed in full for the cost of two curbs. The cost of one curb may be assessed as if it were an original improvement and the other curb would come within the limitation of section 3822, General Code.

In making the assessment for the improvement contemplated against the abutting property, not more than one-half of the cost of repaving the eight foot strip can be assessed against such abutting property. The cost of paving the remainder of said street may be assessed against such abutting property in the manner and amount as in an original improvement of a street. The curbing and gutters in so far as they have heretofore been provided and assessed against the abutting property, can be assessed on reimproving the same for not more than one-half of the cost thereof, and where no curbing or gutters have heretofore been provided and assessed, such curbing and gutters may be assessed as in the case of an original improvement.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

26.

COMPENSATION OF CITY SOLICITORS BY COUNTY COMMISSIONERS FOR SERVICES IN STATE CASES—"SHALL" IS DIRECTORY AND MEANS MAY.

Under section 4306, as amended, county commissioners may allow a city solicitor or assistant, or assistants designated by the solicitor, to act as prosecuting attorney, or attorney of the police or mayor's court, such compensation as they may deem advisable.

COLUMBUS, OHIO, December 7, 1912.

HON. F. G. LONG, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—Under date of December 3rd you request my opinion as to what construction may be given to sections 4306 and 4307, General Code, as amended May 5, 1911. You inquire specifically as follows:

> *1.* "Are the county commissioners authorized under said sections to allow a city solicitor compensation for his services rendered in state cases in the mayor's court.
>
> *2.* "Are the last two words of section 4307 'shall allow' directory or mandatory in their application or construction?"

You further advise that you have had a number of state cases within the last year and you inquire:

3. "Whether you should receive compensation, or may you receive compensation from the county commissioners for said cases."

Section 4306, General Code, provides as follows:

"The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

Section 4307, General Code, provides:

"The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys, of the police or mayor's court shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

Prior to the amendment of sections 4306 and 4307, General Code, under date of May 5, 1911, I gave it as my opinion in an opinion rendered to the Hon. Warren J. McLaughlin, city solicitor, Lima, Ohio, under date of May 12, 1911, that the language of section 4307, General Code, providing for compensation by county commissioners did not apply to a city solicitor but solely to *assistant city solicitor.* However, since the amendment referred to I am now of the opinion that the county commissioners are now authorized under said sections to allow city solicitors compensation for their services rendered in state cases in mayor's court.

Second. Section 4307, General Code, provides that the city solicitor shall receive for services as prosecuting attorney in the mayor's court such compensation as council may prescribe and such additional compensation as the county commissioners shall allow.

While it is true that there is a seeming difference in the language between "may" and "shall" yet I am of the opinion that it is optional with the county commissioners as to whether or not they allow any additional compensation to a city solicitor for the prosecution of state cases in the mayor's court. Or, in other words, that the words "shall allow" are simply directory in their application or construction.

Third. One of the meanings of compensation as given by the dictionary is:

"To recompense or compensate for work or labor done."

As you state that as city solicitor you have prosecuted a number of state cases in the mayor's court in the last year and as the law permits the county commissioners to allow additional compensation for such services I am of the opinion that you are entitled to receive compensation from the county commissioners for said cases should they see fit to allow you therefor. As I view it, the compensation provided for in section 4307, General Code, may be either fixed at a lump sum in advance, or as I view it, the more proper way by fixing the compensation after the services are performed.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

36.

SINKING FUND TRUSTEES MAY NOT PURCHASE CITY BONDS ON CREDIT—CASH SALES.

Under section 4514, General Code, trustees of the sinking fund are given power to invest all moneys received by them in specified bonds and under section 3922, General Code, a municipal corporation must first offer its bonds to said trustees before they may offer them for sale to other parties.

Their powers, under section 45414, General Code, are restricted to the investment in this manner of moneys received by them and such power cannot be extended so as to allow them the right to purchase such bonds other than by the immediate payment of the amount due.

Such board of trustees, therefore, may not purchase city bonds upon the agreement to pay for them at a future date.

COLUMBUS, OHIO, December 7, 1912.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Under date of October 7 you submitted for my opinion the following question:

> "The board of the trustees of the sinking fund have since its organization bought all city bonds issued and have paid for same as the money was needed by the city. By this practice ten or fifteen thousand dollars has been earned and placed to the credit of the general sinking fund. This you can see has been quite an item. Query: Can the board of trustees of the sinking fund continue such practice, or will it be necessary to pay in full for all bonds at time of purchase from the city."

Section 3922, General Code, provides that when a municipal corporation issues its bonds it shall first offer them to the trustees of the sinking fund and if said trustees decline to take the bonds the corporation shall then offer them to the board of commissioners of the sinking fund of the city school districts.

Section 3923, General Code, provides in part as follows:

> "Only after the refusal of all such officers to take all or any of such bonds at par and interest, bona fide for and to be held for the benefit of such corporation, sinking fund or debt, shall the bonds, or as many of them as remain, be advertised for public sale."

Section 3924, General Code, provides that:

> "Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest bidder after publication."

In your inquiry you state that it has been a custom of the board of trustees of the sinking fund of your city to buy all city bonds and to pay for them as the money was needed by the city. I do not believe that that is the intent of the statute. As I view it, the statute intends that the bonds shall be offered to such trustees and if accepted the money is forthwith to be paid. I am unable to view the matter in any other light. Section 3922, General Code, specifically provides that the bonds shall be offered to the

trustees of the sinking fund at *par and accrued interest*, which must necessarily mean accrued interest to the day it is offered; i. e., such interest as has accrued since the issuance of the bond up to the day of acceptance thereof by the trustees. The entire sections to which I have referred in this opinion confirm me in the view that it is understood that the sale to the trustees of the sinking fund or to the board of commissioners of the sinking fund of the city school district shall be a cash transaction.

This view is further strengthened by consideration of section 4514, General Code, wherein it is provided as follows:

> "The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be re-invested in like manner."

Such section provides that the trustees shall invest all moneys *received* by them in the bonds specified and hold in reserve only such moneys as may be needed. It contemplates, therefore, that it is the duty of the trustees in taking over bond issued to have the money on hand with which to pay for the same and not to lend the credit of the trustees to the city in return for the bonds of such city.

While it might be a saving to the city to permit the sinking fund trustees to hold the money which they should have paid for the bonds at the time of accepting the same until the money was needed by the city, yet, if such be the desire it will require legislative enactment so to provide.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

47.

HOME RULE—WHAT IS A "PUBLIC UTILITY"—AN ICE MANUFACTURER IS NOT SUCH A PUBLIC UTILITY AS MAY BE CONDUCTED BY A MUNICIPALITY UNDER THE AMENDMENT TO THE CONSTITUTION.

A manufacturer of ice does not require a use of public property nor the consent of the legislature, nor is such a business comprehended by the decisions defining utilities.

The manufacturer of ice is not such a public use as affects an entire community, so as to entitle such a business to be classed as a public utility, within the meaning of article 18, section 4, of the new Ohio constitution, providing for the ownership and operation of public utilities by municipal corporations.

COLUMBUS, OHIO, January 8, 1913.

HON. DAVID H. JAMES, *City Solicitor, Martins Ferry, Ohio.*

DEAR SIR:—Under date of December 4, 1912, you inquire of this department as follows:

> "Is an ice manufactory conducted for the purpose of supplying ice to the inhabitants of a city, a public utility within the meaning of article 18, section 4, of the constitution, as recently amended?
>
> "May the city council, out of funds raised by general taxation, legally appropriate money for the purpose of constructing and operating a municipal ice manufactory to supply ice to the inhabitants of the city?"

The provision of the new constitution to be construed is contained in the amendment granting municipal Home rule.

Section 4 of article 18 of the recently amended constitution of Ohio reads:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, *any public utility*, the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

This section of the constitution authorizes a municipal corporation to operate "any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants."

By virtue of this section a municipality is not authorized to operate any utility the product or service of which is to be supplied to the municipality or to its inhabitants, but its power to provide such service or product is limited to such utilities as are "public" in character.

It is necessary to determine, therefore, whether or not the manufacture and distribution of ice can be classed as a "public utility" within the meaning of this constitutional provision.

The courts and text writers do not lay down a rule by which a "public utility" may be tested in all cases. Each business or service must depend upon its own peculiar characteristics and the general principles as to what constitutes a "public use," or "public service" or "public utility" applied thereto.

The cases pertaining to the exercise of the right of eminent domain have determined various things to be a "public use." It is in this line of cases that the doctrine of a "public use" has been mostly applied.

The difficulties that have confronted the courts and the text writers in defining the term "public use" is stated by Cooley on page 766, 768 and 769 of his work on Constitutional Limitations, where he says:

> "We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use.
>
> "The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs or is furnishing facilities for its citizens in *regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the government to provide.*"

Dillon in his work on Municipal Corporations, 5th Ed. says at section 1293:

> "The politico-economical question of municipal ownership and operation plays an important part in all public utilities, but does not require to be discussed here. The funds of a municipality being derived from the people either by taxation, or by other revenue received for public purposes, there is, of course, the inherent condition attached to all public utilities constructed at the expense or on the credit of a municipality, *that they should be public in character.*"

He here lays down the condition that the utility must be "public in character." At section 1292, he further says:

"Whether the legislature in the United States can authorize a municipality to carry on a business for the benefit of its inhabitants must be determined by considering whether the carrying on of such business can be regarded as a *public service.* This inquiry underlies every attempt to confer upon a municipality the power to exercise trading functions. If such a business is to be carried on, it must be with money raised by taxation, and it is settled in the United States that the legislature can authorize a municipality to tax its inhabitants only for public purposes. This is the uniform rule of law in the United States. It is not easy to determine in every instance whether a benefit conferred upon many individuals in a community can be called a "public service" within the meaning of the rule that taxes can be laid only for public purposes. *In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service within the meaning of the constitution.*"

Pond in his work on Municipal Control of Public Utilities gives certain characteristics of a public use at page 89, where he says:

"The rule of law is now universally accepted that when private property is devoted to a public use, it is subject to public regulation and control. Property is clothed with a public interest and devoted to a public use when used in a manner to make it of public consequence, and to affect the entire community. When one devotes property to a use in which the public has an interest, he virtually grants to the public an interest in that use, and must submit to public control for the common good to the extent of the interest so granted."

In Massachusetts it has been held that the manufacture and distribution of gas and electricity to the inhabitants of a town is a public use. And it is also held in said state that the purchase and sale of coal and wood for the use of the inhabitants is not a public service. These cases are well considered and will be liberally quoted from.

In the case of Opinion of the Justices, 150 Mass. 592, it is held:

"The legislature has the power under the constitution to authorize the cities and towns within the commonwealth to manufacture and distribute gas or electric light for use in their public streets and buildings and for sale to their inhabitants."

On page 595 of the opinion, the justices say:

"It is impossible to define with entire accuracy all the characteristics which distinguish a public service and a public use from services and uses which are private. The subject has been considered many times in the opinions of the court of which we are now the justices, and Lowell vs. Boston, (111 Mass.454) is a leading case. It is there said, that 'an appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power,' that 'the promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of public welfare, is, in its essential character, a private and not a public object,' and the appropriation of prop-

erty for turnpikes and railroads 'can only be justified by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself.' *It is said that the essential point is that a public service or use affects the inhabitants 'as a community, and not merely as individuals.'* "

Also on page 597, the Justices further say:

"It is not necessarily an objection to a public work maintained by a city or town, that it incidentally benefits some individuals more than others, or that from the place of residence or for other reasons every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it, has the same right to use it as the other inhabitants. It must after all be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitute a public service or not. *But in general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them.*"

In Opinion of the Justices, 155 Mass. 598, it is held:

"By Field, C. J., Allen, Knowlton, Morton and Lathrop, J. J. The legislature has not the power, under the constitution, to authorize the cities and towns within the commonwealth to buy coal and wood for the purpose of sale to their inhabitants for fuel.

"By Holmes, J. The legislature has the power to give such authority.

"By Barker, J. The legislature cannot authorize towns and cities to engage in trade merely that it may be better carried on; but may authorize them to deal in fuel, if the necessities of the people can be met only in that way"

The majority of the justices deny the right of the legislature to grant to a municipality the right to engage in the business of buying and selling coal for the use of its inhabitants. One justice dissents in toto and another justice modifies the holding so as to permit the municipality to furnish coal and wood for fuel "if the necessities of the people can be met only in that way." This latter view was followed in a later case, to-wit, Opinion of the Justices, 182 Mass. 605, in which it was held that the legislature had the power to grant to municipalities the right to supply fuel to its inhabitants in case of a scarcity falling short of a famine, but creating widespread and general distress. Such a situation is not now presented in your inquiry.

In the opinion of the majority of the justices in 155 Mass. 598, supra., they say at pages 601 and 602:

"Whether the legislature can authorize a city or town to buy coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of this commonwealth, but of the states generally and of the United States.

"It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a public service within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service within the meaning of the constitution."

Also on page 602, they further say:

"There are nowhere in the constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the commonwealth of the 'towns, parishes, precincts and other bodies politic' to undertake what had usually been left to the private enterpriess of individuals."

On page 605 the justices further say:

"In the opinion given to the house of representatives on May 27, 1890, which is printed in 150 Mass. 592, the justices advised that the manufacture and distribution of gas and electricity for furnishing light to the inhabitants of cities and towns might properly be regarded as constituting a public service. It was there said: 'It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitute a public service or not.' Gas or electricity for furnishing light has in recent times become a most convenient means of lighting both public and private buildings, streets and grounds. It is impracticable that each individual should manufacture gas or electricity for himself, but this can best be done by some company or the municipality for a considerable territory, and for the use of both the municipality itself and the inhabitants. Everybody who chooses within that territory cannot be permitted to manufacture and distribute gas or electricity for the public use or the use of other persons, as it is distributed by means of pipes and wires, and the number who properly can be permitted to lay pipes or wires in a given territory must be limited to one, or at most to a few persons or corporations. The pipes or wires must be laid in or over the public ways; or in or over land taken for the purpose, which may require the exercise of the right of eminent domain."

On page 606 they further say:

"But when the constitution was adopted the buying and selling of wood and coal for fuel was a well known form of private business, which was generally carried on as other kinds of business were carried on; and is now carried on in much the same manner as it was then. It was and is a kind of business which in its relations to the community did not and does not differ essentially from the business of buying and selling any other of the necessities of life. Although all kinds of business may be regulated by the legislature, *yet to buy and sell coal and wood for fuel requires no authority from the legislature, and requires the exercise of no powers derived from the legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise.*"

These cases lay down certain rules and tests as to what constitutes a public service which the business of manufacturing and distributing of ice cannot meet.

It is not necessary to rely solely upon the decisions of one state.

In Baker vs. City of Grand Rapids, 142 Mich. 687, it is held:

> "A city has the right, through its board of poor commissioners, to provide fuel for needy citizens, and in emergency, when a coal famine seems imminent, is authorized to purchase such amount of fuel, in any market, as is necessary for that purpose; but it cannot enter into a commercial enterprise by buying and selling coal to its citizens as a business, thereby entering into competition with dealers in coal, since such a use of public funds is not for a public purpose."

While the term "public use" as used in the law of eminent domain may not in all cases be synonymous with the term "public utility" as used in the municipal ownership provision of the constitution, yet there is sufficient similarity in their meaning and application that it is safe and proper to look to the definition of "public use" as used in the law of eminent domain to ascertain the principles which will apply to determine whether or not a certain service or product can be considered a public service, of the means of supplying the same a "public utility."

At section 252 of Lewis on Eminent Domain, 3 Ed., he says:

> "It is easily determined, as has been shown in the two preceding sections, that private property can be taken only for public use, and that what is a public use is a question for the courts. When, however, we come to seek for the principles upon which the question of public use is to be determined, or to define the words 'public use' in the light of judicial decisions, we find ourselves utterly at sea. 'No question has ever been submitted to the courts,' says one authority, 'upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use," as found in the different state constitutions regulating the right of eminent domain.' A perusal of the cases cited in this chapter will verify this statement. Courts have generally avoided and wisely so, the enunciation of general principles or the giving of general definitions which might prove stumbling blocks in subsequent cases or work mischief in their practical application. It is the duty of courts simply to apply the law to the case in hand. But every decision necessarily proceeds upon the basis of certain general principles, which whether expressed or not, are capable of being discovered and applied to future cases."

Also at section 257, he further says:

> "The different views which have been taken of the words 'public use' resolve themselves into two classes; one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage."

And at section 258:

> "It is of course impossible to reconcile these different views, and the question is, which is correct.
>
> "The use of a thing is strictly and properly the employment or application of the thing in some manner. The public use of anything is the employment or application of the thing by the public. Public use means the same

as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

"If the constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use and the act of appropriation is void.

"On the other hand, if the constitution means that private property may be taken for any purpose of public benefit and utility, what limit is there to the power of the legislature?"

In Farmers Market Co. vs. Philadelphia and Reading Terminal Co., 10 Pa., circuit court, 25, this test of a public use is given:

"Not every use from which the public may incidentally and temporarily derive an advantage or benefit or convenience during the pleasure of the owner of the property and from which they may be excluded at the mere caprice of the owner is a public use. The test whether a use is public or not is whether a public trust is imposed upon the property—whether the public have a legal right to the use which cannot be gainssaid or denied or withdrawn at the pleasure of the owner."

This decision is not by the highest court of Pennsylvania, but is it quoted with approval in Amsperger vs. Crawford, 101 Md., 247, where it is held:

"A public use of property means, not a use that will be to the interest or to the advantage of the public, but a use of the property by the public."

Pearce, J., says on page 253:

"We agree with the Pennsylvania court (Farmers Market Co. vs. Phil. R.T. Co., 10 Pa. Cr. Ct. 25), that 'the test whether a use is public or not, is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn at the pleasure of the owner.' And we held with the New York court (Matter of Niagara Falls, 108 N. Y. 375) that 'the expressions, public interest and public use are not synonymous, that the establishment of mills and manufactories, the building of churches and hotels and other similar enterprises are more or less matters of public concern and promote in a general sense the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings."

In order for a utility to be public it must have certain inherent characteristics. Not every utility which is of benefit or interest to the public can be considered a "public

utility." Every individual in a community is interested in securing the necessities of life, and any service which permits him to secure these is of public benefit. But that alone does not make the means of supplying such necessity of life a "public utility."

In the law of eminent domain the following have been generally held to be public uses: Highways and roads; railroads; telegraph and telephone lines; water works; canals and waterways; drains; levees and sewers; ferries; oil pipe lines; electric light plants and gas works. All of these have certain characteristics which distinguish them from uses which are considered private. In order to carry on the most of these the consent of the government must be first secured. Many of them use the public highways for their pipes, poles, wires and tracks. In all of them the government retains the right to regulate and control. The corporation or persons who supply any of these things must supply them to all who care to use their facilities.

In order for a person or corporation to manufacture or distribute ice it is not necessary to first secure the consent of the government. An ice manufacturer does not use the streets of a city in the same manner as a water works, or electric light or gas company, or a street railway uses them. The ice manufacturer uses the streets for his wagons but he has no property permanently in the streets as the others have. The state or city does not exercise the same control over the manufacturer and distributor of ice that it exercises over street railways, electric light and gas plants.

The business of manufacturing and distributing ice has the characteristics of a private business and it has not the characteristics of a public service.

It is, therefore, my opinion that a municipality cannot engage in the business of manufacturing and distributing ice to its inhabitants. Such a business is not a "public utility" within the meaning of section 4, article 18, of the new Ohio constitution.

With this construction of this section it is not necessary to determine whether or not this provision of the constitution is self-executing.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

60.

CIVIL SERVICE COMMISSION—TEMPORARY APPOINTEE IN THE DEPARTMENT OF PUBLIC SERVICE DOES NOT OBTAIN PERMANENT POSITION BY MERE PASSAGE OF EXAMINATION.

Under section 4481, General Code, appointments to position in the classified service in municipal corporations, must be made from a list of three candidates, certified by the commission to the appointing authorities.

Under section 44881, General Code, however, when there are no eligible names for certification to the vacancy, upon the list of the commission, a temporary appointment may be made. A person so temporarily appointed, however, does not acquire a right to permanency in the position by the mere fact of a certification from the civil service commission, that he has successfully passed their examination; on the contrary a permanent position must be filled in accordance with section 4481, General Code, by selection from eligible names certified by the civil service commission.

COLUMBUS, OHIO, December 30, 1912.

HON. FRED S. SCOTT, *City Solicitor, Nelsonville, Ohio.*

DEAR SIR:—Under date of December 4, 1912, you submit the following inquiry to this department:

"On the first day of January, A. D., 1912, the director of public service appointed E. P. to the position of water-lineman (water works department), of the city of Nelsonville, Ohio, the water-lineman having resigned, January first, A. D., 1912, and there were no applicants to certify from on the roster of the civil service commission of said city.

On the first of November, A. D., 1912, a civil service commission for the city of Nelsonville was held, and said E. P. took the civil service examination, and was notified by the said civil service commissioners, that he had passed a successful examination.

"On the first of December, A. D., 1912, the director of public service forwarded to the said civil service commissioners a certificate of appointment, a copy of which I hereunto attach and make a part of this communication.

"I request your opinion as to whether or not, it is necessary for the director of public service to certify to said civil service commission a vacancy in the position of water-lineman; or is said E. P. an incumbent duly there in the said position."

The certificate of appointment enclosed is dated December first, 1912, but states that the appointment was made on January first, 1912. This was before the appointee took the civil service examination. It is conceded that the position in question is in the classified service of the city.

Section 4481, General Code, provides the manner of appointment when a vacancy occurs in a position in the classified service. Said section reads:

"Appointments shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times."

Before an appointment can be made to a position in the classified service the appointing officer must notify the civil service commission of the vacancy and thereupon the commission shall certify three candidates from the proper list.

In your case it does not appear that any notice was given to the commission of any vacancy. Neither does it appear that the civil service commission certified any names eligible for appointment.

It appears that when the vacancy first occurred there was no name upon the eligible list to be certified. Thereupon the director of public service made a temporary appointment under section 4488, General Code, which provides:

"To prevent the stoppage of public business or to meet extraordinary exigencies, as provided in this title, the mayor may make temporary appointments."

Such temporary appointee could only hold the position until such time as the civil service commission could certify the candidates from its classified list. After his appointment the temporary appointee took the civil service examination and became eligible for appointment to the regular position. After such eligibility a certificate of appointment was made to the civil service commission, but this certificate attempts to have the appointment date back to January first, which date was before the time

when such appointee took the civil service examination. It is evident that the name of such appointee was not certified to the appointing officer after the appointee took examination. This is essential in order to make an appointment other than a temporary appointment. The appointee in question may not have been one of the three highest in grade on the eligible list, and may not have been one of the three to be certified.

It is contended that because there was no name upon the eligible list on January 1, 1912, when the appointment was made, such appointment was legal and the appointee would have the protection of the civil service law as to removal. The statutes do not make an exception as to the manner of appointment when no name is upon the eligible list. On the contrary section 4488, General Code, provides for temporary appointments until such time as eligible names can be supplied and the appointment made in the regular way. Such temporary appointees are not subject to civil service regulation and they do not come within the protection of said laws.

The fact that no person has ever taken an examination for a particular position does not dispense with the necessity of making the appointment thereto after examination and certification by the civil service commission as required by sections 4480 and 4481, General Code. The purpose of the civil service law to apply a test of merit to appointees cannot be evaded because no name is upon the eligible list. When a vacancy occurs and there is no name upon the eligible list, an examination should be held to supply such names.

The director of public service should notify the civil service commission that there is a vacancy and thereupon the civil service commission should certify three names if it has such on its eligible list for such position. As held heretofore by this department, if there are less than three names on the eligible list the commission may certify the names they have, and the director of public service may make an appointment from such name or names, but he is not required to make an appointment from such name or names unless three names are certified to him.

Unless the person in question has been certified for appointment by the civil service commission after examination, and the appointment thereafter made he is not appointed to the regular position, and he is not protected by the civil service laws.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

69.

PUBLIC SERVICE DIRECTOR—EMPLOYMENT OF ENGINEER FOR PREPARING PLANS FOR MUNICIPAL WATER WORKS PLANT—FIXING OF COMPENSATION BY COUNCIL.

The work of preparing plans, specifications and estimates for municipal water works plant, must be conducted by the director of public service, in accordance with section 4326, General Code. The employment of an engineer for said work, in accordance with section 3428, General Code, need not be authorized by council. The compensation of such engineer, however, must be fixed by council, in accordance with section 4314, General Code.

COLUMBUS, OHIO, February 11, 1913.

HON. J. F. NEILAN, *City Solicitor, Hamilton, Ohio.*

MY DEAR SIR:—I beg to acknowledge receipt of your letter of January 3rd, in which you request my opinion upon the following question:

"Should the council or should the director of public service employ an engineer for the purpose of preparing plans, specifications and estimates of cost, and supervising the work in connection with the making of certain improvements in municipal water works plants?

If the director of public service should exercise the power, to what extent is his authority limited by the provisions of section 4328 of the General Code?"

I quote the following provisions of the law, most of which are cited by you in your letter:

"Section 4324. The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, * * *

"Section 4325. The director of public service shall supervise the improvement * * * of streets * * * and the construction of public improvements * * * except those having reference to the department of public safety, or as otherwise provided in this title.

"Section 4326. The director of public service shall manage municipal undertakings * * * and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

"Section 4327. The director of public service may * * * determine the number of * * * engineers * * * necessary for the execution of the work and the performance of the duties of his department.

"Section 4211. The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided by this title. * * *"

"Section 4328. The director of public service may make any contract or purchase supplies or material * * * for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, certain formalities shall be observed. * * *"

In my opinion, it is perfectly clear from these sections that the work of preparing the plans, specifications and estimates for a contemplated improvement of the kind you mention is within the department of public service, so that council has nothing more to do with the matter after it has authorized the improvement than to require the director of public service through the engineering department to have the necessary services performed. It is immaterial, so far as council is concerned, whether the director did this by use of his regular force or by the employment of additional men or consulting experts.

In my opinion, a consulting engineer employed on work of this sort is, in contemplation of law, a member of the department of public service specially employed as such. That being the case, his employment is not to be regarded as a contract within the meaning of section 4328, but as an arrangement for the compensation of the person employed in the department. That being the case, it is not necessary for council specifically to authorize the employment in case it involves an expenditure of more than five hundred dollars.

However, such employment may not be made unless the council has, in pursuance of the power vested in it by section 4314 of the General Code (which I do not quote), fixed the compensation pertaining to the position of the person specially employed. Such compensation may be fixed by council in any reasonable way, either by prescribing the amount to be paid per diem or by fixing a monthly or annual salary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

84.

DIRECTOR OF PUBLIC SERVICE AND THE COUNCIL—LATTER MUST DETERMINE MATERIALS FOR STREET IMPROVEMENT—NO POWER IN DIRECTOR OF PUBLIC SERVICE TO CHANGE SAME.

Under section 3825, General Code, in the ordinance determining to proceed, council must set forth, the character and materials which may be bid on for the street improvement. This power is legislative and the director of public service is not permitted to make a change as to the materials specified by council.

Council may select several materials, however, and allow the director of public service to choose between them.

Section 4331, General Code, providing that the director of public service may make alterations or modifications in a contract under certain conditions, when it becomes necessary, can be construed only to allow changes in plans and specifications when emergency requires.

COLUMBUS, OHIO, February 3, 1913.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Your favor of January 27, 1913, is received in which you inquire:

> "Every step so far has been taken for the improvement of a street. The plans were made by the council as provided in section 3815 and approved, and the ordinance passed as provided in section 3825, setting forth in specific terms and of what *materials* this street should be built.
>
> "A member of the board of public accounting called the notice of the director of public service to section 4331, General Code, and I am informed that it is contended that the director of public service can change the plans and materials without the consent of council or any one else.
>
> "If section 4331 will bear that construction, then sections 3616, 3629, 3815 and 3825 are of no avail, and all the power council has is to order the street improved and furnish the funds to do it with.
>
> "Section 4331 might mean, if the construction given it by the 'learned adviser' was the law, that the city council, after causing to be made and approved, plans and specifications for a paved brick street and ordering it constructed, then the director might conclude (without the intervention of council, the law making power), that a concrete or asphalt street was a better street, and change the contract and build some kind of street to suit his idea of a better street than the brick street the council ordered constructed."

You refer to and quote from a number of sections of the General Code. These with others will be referred to in this opinion.

The questions involved in your inquiry are:

First—Has council the power to determine the particular material with which a street may be paved?

Second—Can the director of public service select a material for the paving of a street other than that prescribed by council in the ordinance to proceed with the improvement?

Section 3616, General Code, provides:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3629, General Code, provides:

> "To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts and market places within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation."

Section 3714, General Code, provides:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

These sections give some of the general powers of council, but do not go so far as to authorize council to select the material with which a street may be improved.

Section 4324, General Code, provides:

> "The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."

Section 4325, General Code, provides:

> "The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title."

By virtue of sections 4324 and 4325, General Code, the director of public service is authorized to supervise the improvement and repair of the streets. They do not, however, specifically authorize him to select the material with which the streets are to be improved.

Section 3814, General Code, provides:

"When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication."

Section 3815, General Code, provides:

"Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to ten installments at such time as council prescribes."

Sections 3814 and 3815, General Code, have reference to the preliminary resolutions of council for the improvements.

Your question is to be determined by a proper construction of the provisions of sections 3825 and 4331, General Code.

Section 4331, General Code, provides:

"When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

By virtue of this section the director of public service is authorized to make alterations or modifications of a contract when in his opinion such changes become necessary, "in the prosecution of any work or improvement under contract." This provision contemplates changes which become necessary after the contract for the improvement has been entered into. It does not contemplate a complete change in the materials to be used in the improvement.

It often occurs that as work progresses upon an improvement changes in the plans and specifications become necessary. Certain contingencies may arise that will require a more or less alteration in the plans. Section 4331, General Code, covers such contingencies.

By virtue of section 3825, General Code, certain matters must be contained in the ordinance to proceed with the improvement. Said section reads:

"If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution theretofore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance

with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement."

This section authorizes council to set forth in such ordinance "the character of the materials which may be bid upon therefor."

I do not find any case which decides the proposition submitted by you, but this section has been construed by the courts and these decisions will aid in reaching a conclusion in reference to your inquiry.

In case of Emmert vs. City of Elyria, 74 Ohio St., 185, the first syllabus reads:

"A statement in an ordinance, providing for the improvement of a street by paving, that the paving material shall be asphalt, brick or other material as may thereafter be determined, meets the requirement of section 55 of the municipal code (1536-215, Revised Statutes, Bates 5th ed.), that the ordinance shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor."

In that case the selection of the material was in effect left to the board of public service.

In Scott vs. Hamilton (City), 19 Cir. Dec. 652, it is held:

"A board of public service, where required by a street improvement ordinance to choose one of three materials after bids were received, performs only a ministerial act, and as the agent of the city council executes its legislative command.

"There is no statutory provision requiring that the discretion of the board of public service in the selection of material for the improvement of a street shall be controlled by the wish of the property owners, and where the board exercises its discretion in good faith, its decisions cannot be interfered with by the courts."

On pages 653 and 654, Giffen, J., says:

"The question to be considered is, whether the city council is required by statute to designate the particular material of which the street is to be constructed before bids can be received. Section 53 of the municipal code (Lan. 3606; B. 1536-215), as passed October 22, 1902, provides as follows:

"At the expiration of the time limited for filing claims for damages, * * * the council shall determine whether it will proceed with the proposed improvement or not, * * * and if it decides to proceed therewith, an ordinance * * * shall contain a statement of the general nature of the improvement and the character of the materials thereof.

"The same section as amended April 19, 1904, (97 O. L. 122), provides that:

"The ordinance shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor.

"The intention of the legislature as expressed either in the original section or as amended, was evidently to authorize council to designate, not the particular material with which the street should be paved, but to state the general character of the same. It is said, however, it is the policy of the municipal code to keep separate and distinct legislative and executive function;

that the former was conferred upon the city council and the latter upon the board of public service; and that by the ordinance directing the board of public service to receive bids on three different kinds of material for the improvement, the council delegated its authority to the board of public service without legal sanction."

On page 655, he further says:

"Under these decisions we think that the board of public service, although required by the ordinance to choose one of these materials after the bids were received, only performed a ministerial act and as the agent of the city council executed its legislative command.

"After council had determined what materials would be suitable for the particular improvement, the wisdom of receiving bids upon more than one kind is found in the fact that greater competition is hereby secured, and that the relative amount of the respective bids, may determine the particular material to be used."

In the same case the common pleas court as reported in Scott vs. Hamilton (City), 16 Ohio Dec. 660, held:

The powers of a city council are legislative and those of the board of public service administrative. But where a council passes an ordinance for the paving of a street and names the materials to be used therefor in the alternative, the board of public service may receive bids in the alternative and select the materials it prefers. This is a carrying out of the will of the council, as its agent, and is not the exercise of legislative power illegally delegated.

"The law of Ohio confers upon the members of the board of public service of a city, acting as a board, the power to select the material with which the streets shall be paved. The members of the board need not consult the property owners on this point and the court will disturb their selection only for fraud or collusion, or such gross negligence as amounts to fraud."

On page 666, Belden, J., says:

"Now the question in this case is, whether council has acted. Undoubtedly if council would pass an ordinance declaring East High street should be paved, and name no material, that would not give the board of public service power to select the material. But here they have named three materials, in the alternative. Council has named them—not simply the board of public service—but the legislative body has named the three materials, and the question is whether delegation of power to select one of three materials named is delegation of legislative authority".

On page 668, he further says:

"So in this case when the city council designated the kind of materials to be used, in the alternative, its agents, the board of public service, had the right to make a selection, and when made, such selection became the material chosen by the city council. The contract is binding upon the city, because the city council, the local legislature, authorized the selection of the material.

"The contract required the authority of council, but after that authority was given the execution of the contract devolved upon the board of public service.

"The voice which speaks the will of the municipality is the council, but the hand which records that expression is the board of public service."

In each of the above cases council named more than one material in the ordinance. The final choice was left to the board of public service. Where council named certain materials the choice of the board was confined to those particular materials.

Council did not, in either of the above cited cases, limit the board to one certain kind of paving and the right of council so to do was not determined.

Council is the legislative body of the municipality. The director of public service is an administrative officer. It is seen that when the director of public service selects one of three materials named by council he is performing a ministerial act and not a legislative act. His choice, however, is limited to the materials named by council in the ordinance. If he selects a material other than that named by council, where council specifically names certain materials, he would be performimg a legislative act and would be encroaching upon the power of council.

By virtue of section 3825, General Code, council is authorized to determine the character of the materials which may be bid upon for the improvement. Under this authority council could select one specific material, or it could name two or more kinds of material and leave the final choice to the director of public service. The director of public service has no power to change the material where council has named a specific kind of paving to be used in the improvement.

Therefore, where the council of a city determines in the ordinance to proceed with an improvement, that a street shall be paved with a certain kind of paving, the director of public service is not authorized to contract for a different kind of paving for such street.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

94.

BOARD OF EDUCATION—DISTRIBUTION OF EXCESS FUNDS RAISED BY BOND ISSUE—PAYMENT INTO CONTINGENT FUND FROM SINKING FUND—PREMIUM AND ACCRUED INTEREST.

Section 2295, General Code, provides that all moneys from both principal and premiums on the sale of bonds (by a board of education) shall be credited to the fund on account of which the bonds are issued and sold. Such premiums and accrued interest must be applied to the fund created by the sale of bonds and not to the sinking fund.

Section 7603, General Code, provides that "moneys coming from sources not enumerated herein shall be placed in the contingent fund." This is the only section in any way bearing upon the distribution of an unexpended surplus in a fund raised by a bond issued by a board of education, and therefore, under the technical construction of the statute, such unexpended surplus must be paid into the contingent fund. Such a procedure, however, is in conflict with sound business principles and with the procedure outlined by the statutes, with reference to the disposition of such funds in other taxable districts, and the better course would be to credit such surplus to the sinking fund, for the purpose of devoting the same to the reduction of the bonded indebtedness upon the theory that specific provision therefor has been mistakenly omitted from the statutes.

COLUMBUS, OHIO, February 17, 1913.

HON. W. J. TOSSELL, *City Solicitor, Norwalk, Ohio.*

DEAR SIR:—I regret that pressure of business due to the legislative session has

retarded my consideration of the questions asked in your letter of November 19th, receipt whereof is acknowledged. The questions are as follows:

> "(1). May not the premium and accrued interest of school bonds be applied to the payment of the bonded indebtedness of the school district notwithstanding the last sentence of General Code 2295, providing that such proceeds should be credited to the fund on account of which the bonds are issued and sold?
>
> "(2). What should be done with excess funds raised by a bond issue to build a school house? May not the excess be used to reduce the bonded indebtedness?"

These questions, which may be considered together, invite comparison of the statutes relating to the exercise of the borrowing power by school districts with those of a similar character relating to municipal corporations. You have yourself referred to the only section which contains any express provisions respecting the powers and duties of school district officers in relation to the management of a fund created by a sale of school district bonds. The sentence to which you refer is as follows:

> "All moneys from both principal and premiums on the sale of such bonds, shall be credited to the fund on account of which the bonds are issued and sold."

Referring to the previous section, section 2294, General Code, it is ascertained that the antecedent of the word "such" is "bonds issued by boards of county commissioners, boards of education, or commissioners of free turnpikes." It is very clear, therefore, that the last sentence of section 2295 defines the duty of the clerk of a school district with relation to the disposition of the premiums and accrued interest received by a board of education from the sale of an issue of the bonds of a school district.

The comparison which I have already suggested is extremely interesting in this connection. Section 2295 above quoted is the only section relating in any way to the subject-matter of either of your questions. Neither the statutes authorizing the school districts to issue bonds nor those prescribing the machinery of payment of bonded indebtedness of a school district through the agency of a sinking fund commission contain any other provisions whatever upon the general subject. I invite your attention now to the provisions of sections 3932 and 3804, General Code, which are as follows:

> "Section 3932. Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustee of the sinking fund to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no other.
>
> "Section 3804. When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of the bonds are still outstanding, unpaid, and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

You will observe that these sections make complete disposition of all moneys arising from a sale of bonds by a municipal corporation, in excess of the needs of the fund created thereby, with the possible exception of depository interest. It is obvious, then, that the legislature has failed to make complete provision for the handling of

proceeds of bond issues by boards of education in the manner in which it has provided as to municipal corporations. That is to say, the case of the premiums and accrued interest is evidently provided for, but that of the surplus is not provided for. This is the conclusion which would have to be reached unless section 7603 of the General Code controls. This section, in full, is as follows:

> "The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the 'tuition fund' and be appropriated only for the payment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purpose, except that, when a balance remains in such fund after all expenses incident to the purpose for which it was raised have been paid, such balance will become a part of the contingent fund and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. *Moneys coming from sources not enumerated herein shall be placed in the contingent fund.*"

It is not clear that this section applies to the disposition of unexpended proceeds of a bond issue for a specific improvement. Nevertheless, it must be conceded that the last sentence might be construed so as to apply to that subject-matter without doing violence to its terms. Perhaps a strict and technical interpretation of this section might require a holding to the effect that unexpended surpluses in funds raised by a school district through an issue of bonds must be credited to the contingent fund of the district.

Such a conclusion, however, does violence to sound business principles. While there is no escape, in my opinion, from the conclusion that under section 2295 of the General Code the premiums and accrued interest received from a sale of bonds must be credited to the fund created by the sale, and not to the sinking fund, there is strong temptation to ignore the provisions of section 7603, and to regard the disposition of the surplus mentioned by you in your question as a *casus omissus*, to be worked out administratively in the exercise of sound business judgment.

My conclusions, then, specifically, are as follows:

Under the last sentence of section 2295, General Code, the premium and accrued interest arising from the sale of school bonds must be applied to the fund created by such sale, and not to the sinking fund.

The unexpended surplus in such a fund may be regarded, strictly, as belonging to the contingent fund. This conclusion being doubtful, under the peculiar language of section 7603, however, the better business course would be to credit such surplus to the sinking fund, upon the theory that specific provision therefor is omitted from the statutes.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

111.

INTEREST OF PUBLIC OFFICER IN PUBLIC CONTRACTS—MEMBER OF PARK COMMISSION MAY NOT ACT AS LEGAL COUNSEL FOR MUNICIPAL CORPORATION—RECOMMENDATION AS TO FINDING.

Under section 12912, General Code, which prohibits an officer of a municipal corporation from being interested in the profits of services for such corporation, under penalty of fine and imprisonment, a member of the park commission may not be employed to assist the city solicitor in behalf of such corporation in the case of special litigation. In view, however, of the ability to distinguish the Ohio court decision relative to the question, and of the looseness of the proposition of law, where such employment was made in good faith and valuable services were rendered, the finding shall be withheld and the matter be regarded as a closed incident.

COLUMBUS, OHIO, March 11, 1913.

HON. VAN A. SNIDER, *City Solicitor, Lancaster, Ohio.*

DEAR SIR:—I have your favor of February 27, 1913, which is as follows:

> "As city solicitor of Lancaster, I respectfully ask your opinion on the legality of my employment of legal counsel to assist me in conducting litigation in which the city of Lancaster is a party and deeply interested.
>
> "At an expense of almost $40,000.00 the Hocking River is being deepened, widened and straightened through the city and for several miles both above and below the corporate limits. The improvement became involved in litigation, and the city council in its annual appropriation set out $____ to enable me to employ assistant counsel, the appropriating ordinance providing that the same should be paid out on my order as solicitor. I engaged a lawyer to assist me, as instructed, who rendered the required legal services, and he was paid out of the moneys so appropriated on my warrant. Now the lawyer I employed happens to be a member of the park commission, but as you know, does not receive any compensation as such park commissioner.
>
> "The questions I submit to you are two in number:
>
> "*First.* May I not under the circumstances employ any reputable lawyer to assist me?
>
> "*Second.* Does it render the employment and payment illegal because the lawyer employed happens to be a member of the park commission?"

Section 4054 of the General Code provides for the appointment by the mayor of three electors of the city as members of the board of park commissioners. Under said section the members of the board shall serve without compensation.

Section 3808 of the General Code provides:

> "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

Analyze the first sentence of this section: "No member of the council, board,

officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation." It means no member of the council shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation; no member of any board of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation; no officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation.

The two preceding sections referred to in section 3808 are as follows, to wit, section 3806 and 3807. Section 3808, taken in connection with the two preceding sections, discloses the fact that the primary purpose of section 3808 is the prevention of abuses by boards of which the officer is a member. However, the purpose is not strictly limited to these, but prohibits any member of any board of the corporation or any officer or commissioner of the corporation from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation, whether the expenditure is made by a board of which he is a member or otherwise.

The circuit court of Hamilton county, in the case of State ex rel. Winn vs. Wichgar, Aud. 17, C. C. D., page 743, held:

> "A member of a municipal board of health is an officer of the municipality, and as such ineligible to the office of district physician during his term and for one year thereafter, and he cannot therefore recover for services rendered in such capacity."

The decision of the circuit court is based on section 6976 of the Revised Statutes, which is as follows:

> "An officer or member of the council of any municipal corporation or the trustee of any township who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation or township, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed, or for one year thereafter, shall be fined not more than one thousand dollars nor less than five hundred dollars, or imprisoned not more than six months nor less than thirty days, or both, and shall forfeit his office."

Section 12910, of the General Code, is as follows:

> "Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education, or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Counsel who did the legal work you referred to was not interested in a contract for the purchase of property, supplies or fire insurance for use by the city of Lancaster or any public institution with which he was connected, therefore section 12910 does not apply.

Section 12911, of the General Code, is as follows:

> "Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or

fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned * *."

You can readily see that this section does not apply. Section 12912, of the General Code, is as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work, or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined, etc. * * *"

There seems to be a difference between section 6976 of the Revised Statutes and section 3808 of the General Code in this, that the former prevents an officer or member of the council of any municipal corporation or trustee of any township from becoming interested directly or indirectly in the profits of any contract, job, work or services for the corporation or township, and prevents such persons from acting as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation or township during the term for which he was elected or appointed or for one year thereafter. There is no reference in this to compensation of such officer. The latter—section 3808 of the General Code, prevents a member of the council or a member of a board of the corporation or an officer or commissioner of the corporation from having any interest in the expenditure of money on the part of the corporation, other than his fixed compensation. In other words, the element of compensation enters into section 3808, but not into section 6976 of the Revised Statutes of Ohio. As the criminal statutes are strictly construed, it might be doubtful whether an officer who served without compensation may not lawfully be interested in a contract with the corporation, especially if his own board had not let such contract.

The member of the board of health referred to in the case of Winn vs. Wichgar, supra, was an officer appointed by the mayor and confirmed by council. A park commissioner is an officer appointed by the mayor of a municipal corporation and following the decision in the Hamilton county case, a member of the park commission is an officer of the municipality. Now, then, a member of the board of health may not be appointed a district physician. Under the statutes (section 4408)

" * * * The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

But such district physician may not be a member of the board of health.

Now, then, may one employed as counsel to assist a city solicitor be a member of the board of park commissioners? A surface view would leave the impression that a park commissioner who accepts employment to assist the city solicitor is within the inhibition, but let us see. The circuit court of Franklin county, in the case of State of Ohio ex rel. Attorney General vs. Frank Gebert, 12 Ohio circuit court reports, (new series) page 274, held in an opinion by Judge Dustin:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

A district physician, under the statutes, is an officer, and the inhibition upon his being a member of the board of health cannot rest upon the theory of employment, because such officer is not an employe in the true sense. It seems to me that the real gist of the decision of the circuit court is to be gathered from a consideration of the proposition that a district physician is the appointee of the board of health itself. It would certainly seem to be against public policy to permit a man to accept an office the very existence of which depends upon the discretion of the board of which he is a member, because the board of health appoints as many physicians as it deems necessary, and I can see every reason against the idea that a board of health would first deem it necessary to appoint two ward or district physicians through the vote of member "A" with member "A" holding the deciding vote, and thereupon appoint member "A" a ward or district physician. It seems to me that the circuit court would come to the same conclusion it did upon the application of general principles of law, nevertheless, it bases its decision upon section 6976 of the Revised Statutes.

I find it difficult to agree with the circuit court so far as its reasoning is concerned and regret that the decision is not explained by an opinion rather than a percuriam. A short percuriam, such as the one given, indicates that the court may not have been quite satisfied itself, but following this decision, which I am bound to do until the same be reversed, it is my conclusion that a park commissioner may not lawfully accept employment from the city council to assist the city solicitor, but the question, in my mind, is a very close one, and certainly under the circumstances neither crime nor personal interest is to be imputed to a lawyer who accepts service from a city solicitor and renders valuable service, nor, in my judgment, should there be any finding against one who has rendered such service. Where all the parties concerned are cognizant that a certain employment is within the inhibition and then accepts such employment, finding should be made in a case like this, but where all parties to the transaction acted in good faith, and valuable services were rendered, the matter in my judgment, should be regarded as a closed incident.

I shall forward a copy of this opinion to the bureau of inspection and supervision of public offices accordingly for its guidance.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

132.

CITY FIREMEN—WHEN SALARY FIXED, COMPENSATION MAY NOT BE INCREASED FOR EXTRA WORK ON ACCOUNT OF FLOOD.

When council has fixed the salary of city firemen, under section 4214, General Code, and such firemen on account of a flood, are compelled to perform extraordinary services by the chief of the fire department, the city auditor is not authorized to pay out money in excess of their salaries for such services.

COLUMBUS, OHIO, March 7, 1913.

HON. CLIFFORD L. BELT, *City Solicitor, Bellaire, Ohio.*

Your favor of February 7, 1913, is received in which you inquire:

> "The fire department of Bellaire is not strictly a regular or full paid department, there being but one man devoting his entire time and receiving full pay. However, all members of the department are paid monthly salaries ranging from $3.00 for privates to $5.00 for lieutenants, and $7.00 for captains.

"During a recent flood in this city, the lower sections thereof were inundated, causing a dangerous condition by reason of leaking gas pipes in said section. The chief of the fire department designated a number of the firemen to patrol the flooded section with skiffs, so as to be ready in case of an explosion or fire, to give immediate succor. Bills were presented for this extra service by the firemen, which is claimed in addition to the regular salaries of said firemen, and payment thereof has been refused by the city auditor.

"Are, or are not said claims legal charges against the city, payable from the safety fund?"

Section 4214, General Code, gives the council of a city the sole right to fix compensation for employes of the city as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

In Smith vs. Lotschuetz, 20 Low. Dec. 390, it is held:

"A director of public service of a city has no power, either under sections 139, 140 or 141 of act 99 O. L. 563 (General Code 4324, 4325, 4326), the Payne law, giving him the management and supervision of his department to fix salaries or compensation of employes therein but the exclusive right to fix salaries and compensation thereof is resposed in the city council by section 227 of such act (General Code 4214).

It does not appear that council has fixed any compensation for the alleged extra work for which the bills have been rendered.

The firemen in accepting the positions at the compensation fixed therefor, accepted them knowing the compensation and they cannot claim extra compensation for services performed within the line of their duty.

In case of Clark vs. County Commissioners, 58 Ohio St., 107, it is held:

"To warrant the payment of fees or compensation to an officer, out of the county treasury, it must appear that such payment is authorized by statute."

In case of The Somerset Bank vs. Edmund, 76 Ohio St., 396, it is held:

"Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by law."

It appears that the work in question was performed at the direction of the chief of the fire department.

In Halpin vs. Cincinnati, 3 Low. Dec. Re., 58, it is held:

"A citizen who takes upon himself the burden of an office, can recover no fees except such as are prescribed by law or ordinance. Fees are a subject of legislative discretion entirely.

"If no compensation is attached to the office, he can recover none, although at the request of a superior, he performs services not obligatory upon him."

Section 4376, General Code, prescribes the duties of the chief of the fire department, as follows:

"The chief of the fire department shall have exclusive control of the stationing and transferring of all firemen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes. In case of riot or other like emergency the mayor may appoint additional firemen and officers for temporary service who need not be in the classified list of the department. Such additional officers or firemen shall be employed only for the time during which the emergency exists."

Section 4378, General Code, provides:

"The police force shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council by ordinance prescribes. The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision."

Section 4393, General Code, provides:

"The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against the damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, establish the hours of labor of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any firemen to be on duty continuously more than six days in every seven, and provide such by-laws and regulations for their government as is deemed necessary and proper."

The chief of the fire department has no authority to employ any one for the city. He has no authority to contract for the city. It appears further that the services performed by the firemen were performed under the direction of the chief and was for the protection of property against fire which was imminent under the circumstances. This was in the line of the duties of the firemen.

The city auditor is not authorized to pay out money without authority therefor There is no authority of statue or ordinance to pay the claims in question and they are not legal charges against the city.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

157.

INITIATIVE AND REFERENDUM—ORDINANCE PROVIDING FOR COMPROMISE PAYMENT OF JUDGMENT MAY NOT BE DECLARED EMERGENCY.

Under section 4227-3 of the General Code, an ordinance of council may not be declared an emergency measure so as to go into immediate operation except where the facts constitute an actual emergency in the general sense of the term. An ordinance, therefore, providing for the payment of a certain sum to compromise a suit brought by a public utility against the city, in the absence of special facts and circumstances, constituting an emergency may not be declared an emergency measure.

COLUMBUS, OHIO, April 4, 1913.

HON. H. W. HOUSTON, *City Solicitor, Urbana, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 1st directing my attention to an ordinance of the city of Urbana which you enclosed with your letter, which ordinance was declared by your city council to be an emergency measure. It appears from an examination of said ordinance that it is an ordinance authorizing and directing a compromise settlement in the case of The City of Urbana, Ohio, vs. The Urbana Light Company. The ordinance recites that the city of Urbana has brought suit against The Urbana Light Company to recover eight thousand five hundred and twenty-six dollars and forty-two cents ($8,526.42) with interest, which amount the city claimed as indemnity from The Urbana Light Company by reason of a judgment paid by the city and costs incurred in an action brought by one A. M. against said city, and further recites that The Urbana Light Company has offered to settle and compromise the above action by the payment of forty-five hundred ($4,500.00) dollars in toto and that the city council deemed it to the best interest of the city to settle said action on said basis. After the recitals the ordinance ordains:

> "By the council of the city of Urbana, State of Ohio, three-fourths of all members elected thereto concurring."

The ordinance is declared to be an emergency measure, and section 1 thereof accepts the offer of The Urbana Light Company, and section 2 thereof provides that upon payment of the sum of forty-five hundred ($4,500.00) dollars, as set forth in said ordinance, the case of The City of Urbana against The Urbana Light Company be settled and dismissed, and the auditor is directed on behalf of the city to execute a release in favor of the Light Company, and section 3 thereof provides that the ordinance shall take effect from and after the earliest period allowed by law.

Your inquiry is as to whether such ordinance can be classified properly as an "emergency measure" or whether it is an ordinance which must be submitted to a vote of the electors under the Municipal Initiative and Referendum Law.

Section 3615, General Code, provides that "each municipal corporation shall be a body politic and corporate" and may "sue and be sued."

Being, therefore, a body politic and the right having been given by the legislature to such corporations to sue and be sued, I am of the opinion that it is proper since the municipal corporation can sue, to compromise any suit which it has once instituted through action of council.

Section 4227-2, General Code, provides that any ordinance, resolution or other measure of a municipal corporation, granting a franchise, creating a right, involving the expenditure of money or *exercising any other power* delegated to such municipal corporation by the general assembly shall be subject to referendum.

Section 4227-2 further provides that no resolution, ordinance or measure of any municipal corporation, creating a right, involving the expenditure of money, granting a franchise, conferring, extending or renewing a right to use of the streets, or regulating the use of the streets for water, gas, electricity, telephone, telegraph, power or street railways, or other public or quasi-public utility shall become effective in less than sixty days after its passage.

Section 4227-3, General Code, provides:

> "All other acts of city council not included among those specified in section 2 (General Code 4227-2) of this act, shall also remain inoperative for sixty days after passage and may be submitted to popular vote in the manner herein provided, except that any act, not included within those specified in section 2 (General Code, section 4227-2) of this act, as remaining inoperative for sixty days, and which is declared to be an emergency measure, and receiving a three-fourths majority in council of such municipal corporation may go into effect immediately and remain in effect until repealed by city council or by direct vote of the people as herein provided."

It is to be noted that the ordinance in question cannot be considered as an ordinance which under section 4227-2 remains inoperative for sixty days. The ordinance may, therefore, under section 4227-3, General Code, go into effect immediately provided it can be considered to be an emergency measure. The ordinance in question received three-fourths majority of council and was declared to be an emergency measure.

I do not believe, however, that the mere declaration of council that an ordinance is an emergency measure is sufficient under section 4227-3, General Code, to permit it to go into effect immediately upon receipt of a three-fourths majority of council. It seems to me that there must be a real emergency arising sufficient in law to constitute an emergency. If it were held otherwise council could declare each and every ordinance passed by it to be an emergency except those which under the provisions of section 4227-2, General Code (paragraph 2) would not go into effect in less than sixty days, and thus thwart the will of the people and nullify to a great extent the intent of the referendum act. This, however, is more a matter of fact than one of law. If there are any facts existing which would create an emergency in the settlement of the claim set forth in the ordinance then the ordinance would go into effect immediately and remain in effect until repealed by the city council or by direct vote of the people. If the facts as they exist are such as not to create a real emergency then the ordinance should be permitted to lie at least thirty days as required by section 4227-2, General Code for filing a petition of referendum in order that the electors may exercise their rights thereunder. It is necessary to leave the matter of fact to you as this department cannot pass upon the same. I would say, however, that council having declared the ordinance to be an emergency measure the court would, I believe, be inclined to take the expression of council in the matter practically as conclusive.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

159.

MUNICIPAL CORPORATION—MAY NOT SUPPLY ELECTRICITY TO PRIVATE CORPORATION FREE OF CHARGE.

Under article 8, section 6, of the constitution, a municipal corporation may not raise money for, or in aid of any private corporation. An ordinance of council, therefore, providing for the supply of free electricity or light and power in order to aid such corporation in rebuilding a plant destroyed by fire, is unconstitutional and void.

COLUMBUS, OHIO, March 28, 1913.

HON. J. M. MCGILLIVRAY, *City Solicitor, Jackson, Ohio.*

DEAR SIR:—Your favor of March 18, 1913, is received, in which you inquire:

> "The C. P. & F. Company property burned last fall; and there have been two, three or probably more meetings of the citizens, insisting that the city furnish electricity to aid in the rebuilding of the plant, without cost to the corporation. This was not at the instigation of The C. P. & F. Co., but independent of them, and largely by what is known here as the Boosters Club.
>
> "Council first passed a resolution authorizing the furnishing, and then revoked it, and since then the matter has been assuming a very acute form.
>
> "The director of public service has asked my opinion in writing as to whether he will be either criminally or civilly responsible if he furnishes the electricity under the ordinance, and because of the intense feeling on the subject here, and at the request of the mayor and director of public service, I submit to you the following question:
>
> "Is the director of public service of a city authorized under the latter part of section 3992 of the General Code, when so directed by council, to furnish a corporation whose property has been destroyed by fire, electricity for light and power without cost, to aid it in rebuilding its plant?"

You call attention to section 3992, General Code, which provides:

> "When a municipal corporation is the owner of a natural gas plant to supply the citizens thereof with natural gas for fuel, the council of such municipal corporation may provide for supplying natural gas at rates to be determined by it, to persons living outside of and in the vicinity of such municipal corporation, and to county infirmaries, children's homes and other public institutions within or without such municipal corporation. To encourage the location or establishment of manufacturing industries within such municipal corporation, council may reduce the price of gas to be used to operate such manufacturing, or donate it for a term of years for such purpose, but this section shall be inoperative if the municipal corporation or the citizens thereof are thereby deprived of a full supply of such gas."

This section has reference to gas plants owned by a municipal corporation. It cannot be construed to apply to electric plants or to the furnishing of electric current.

Section 6, article VIII, of the constitution of Ohio, as adopted in 1912, provides:

> "No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money

for or to loan its credit to, or in aid of, any such company, corporation or association provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state for profit."

In case of Markley vs. Village of Mineral City, 58 Ohio St., it is held:

"A municipal corporation is without capacity to acquire land by purchase for the purpose of donating the same to a corporation or person as an inducement to build and operate manufacturing plants within the municipality.

"Corporate funds paid out in the attempted purchase of land for such purpose are unlawfully expended, and a deed purporting to convey such land is without legal effect."

In your case the electric light plant is owned by the city. It is maintained and operated by means of taxation, or from public funds. If the city were to furnish electric current free of charge to a private corporation, it would be giving aid to such corporation. This is prohibited by the foregoing provision of the constitution.

A municipal corporation is not authorized to furnish to a private corporation electric current from its municipal plant, free of charge.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

174.

MUNICIPAL CORPORATION—POWER OF COUNCIL TO REFUND BONDS ISSUED FOR PURPOSE OF PAYING COMPROMISE CLAIM.

Under sections 3916 and 3917, General Code, when council has validly entered into an agreement of compromise of a claim against the city and has issued bonds for the purpose of paying such claim, which bonds they are unable to pay on account of taxation limitations, they may either issue notes or bonds for the purpose of extending the time of payment of such indebtedness.

COLUMBUS, OHIO, April 11, 1913.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of February 20th, submitting for my opinion thereon the following statement of facts:

"Prior to June 13, 1911, The Chillicothe Electric Railroad Light & Power Co. had a suit, pending in the Common pleas court of Ross county against the city of Chillicothe for $13,339.70. An amount claimed to be due said company for what is commonly known as 'extra lights.' On June 19, 1911, an entry of settlement and dismissal was filed in said court and no judgment was rendered in the case, as a settlement was effected out of court in the following manner:

"The company submitted a proposition of settlement for $11,000, which proposition was accepted by the city council by resolution on June 13, 1911, and later approved by the mayor. At the same time a resolution was passed and then approved by the mayor authorizing and instructing the mayor and auditor of the city of Chillicothe to borrow money in the sum of $11,000, in anticipation of the general revenue fund of the city of Chillicothe, Ohio, in order that funds might be provided to pay said company for electric current.

"The company was paid and a resolution has been passed by the city council every six months since authorizing and instructing the mayor and auditor to borrow the amount above stated as the auditor pays off the note at each semi-annual settlement.

"Query—Can the city issue bonds to extend the time of payment as provided in section 3916 of the General Code? If not, how can this indebtedness be legally paid?"

Section 3916, of the General Code, provides that:

"For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation a corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds * * * or borrow money so as to change but not increase the indebtedness * * *."

Section 3917, General Code, provides:

"No indebtedness of such municipal corporation shall be funded * * * or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. * * *"

While the claim of which you speak did not go to judgment I assume that the city was actually indebted to the company in something like the amount agreed upon as a settlement. If the claim had gone to judgment, of course, the satisfaction thereof would have fallen upon the sinking fund and an entirely different procedure would have been followed. Inasmuch as the claim was settled, however, and there is no question as to the obligation of the city to pay the electric light company, I am of the opinion that if council passed a proper resolution under section 3917 it had authority to borrow the money originally.

Having had authority to borrow the money originally, council clearly had authority, under section 3916, to extend the time of the payment of the indebtedness when it found that the city was unable to pay the same at maturity. This might be done, as has been done, by a simple exercise of the borrowing power, i. e., the issuance of a note to take up the outstanding note.

Section 3917, however, provides two methods of securing funds for the purposes referred to therein, viz.: The issuance of bonds, and the simple borrowing of money. It is my opinion that council has a choice of these two methods. If one of the renewing notes of which you speak in your letter is due, or is about to become due, and the municipality finds it is unable to pay the same at maturity by reason of its limits of taxation, or for any other good and sufficient reason, council clearly has authority to issue bonds bearing the rate of interest specified in section 3916 and subject to the restrictions of section 3917. Such bonds must be offered for sale and sold in the manner in which municipal bonds are sold, and the proceeds of the sale applied to the satisfaction of the debt. That is to say, bonds may not be issued to the holders of the notes in exchange for the latter, but the municipal corporation is entitled to the benefit of competitive bidding in the sale of the bonds.

I am aware of the dictum in Herrmann vs. Cincinnati, 6 circuit decisions, 151, to the effect that a provision like this section, in form, authorized only the refunding of an existing bonded indebtedness. This case was decided, however, upon other grounds and I am not disposed to give weight to this portion of the opinion, especially in view of the fact that it is entirely inconsistent with the language of the statute.

In adjusting the indebtedness by the issuance of any bonds care, of course, must be taken to avoid increasing the amount of indebtedness outstanding by virtue of the original transaction, as that would be a violation of section 3916, General Code. Altaffer vs. Nelson, 18 C. C. R. 145.

I am of the opinion, therefore, that if all of the provisions of the two sections which have been quoted are carefully observed, council may lawfully issue bonds to provide for funding the present floating indebtedness of the city, arising out of the facts set forth in your letter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

175.

INITIATIVE AND REFERENDUM—ORDINANCE DIRECTING PUBLIC SERVICE DIRECTOR TO PROCEED WITH SEWER IMPROVEMENT MAY NOT BE EMERGENCY.

Since an ordinance of council directing the director of public service to proceed with the construction of a sewer involves the expenditure of money, such ordinance may not be declared to be an emergency measure under section 4227-3, General Code.

COLUMBUS, OHIO, April 5, 1913.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Under date of January 14th you request my opinion on a state of facts submitted to this department on November 20th, 1912, after having read copy of an opinion sent you after receiving your letter of November 20th. Such facts are as follows:

> "Council has passed a resolution to improve a certain part of the city by the construction of sanitary sewers, the extent thereof being about six miles in length, and involving the expenditure of $40,000.00 or more. This sanitary sewer is in furtherance of a plan devised and approved about seven years ago. Some changes have been made in the general plan, but the changes are not material.
>
> "No sanitary sewers have ever been constructed in that part of the city, and it is contended by many of the tax payers who will be assessed for their construction that, by reason of the soil being gravel and naturally sewered that their construction is not necessary. This portion of the city is almost entirely a resident district of the city, with the exception that there is one of the large school houses and three factories."

and you inquire:

> "1. Shall the ordinance when passed ordering the director of public service to proceed with the construction of this sewer, which contains the

declaration of the council that this is 'an emergency' be conclusive and prevent any further steps preventing the construction of this sewer?

"2. Despite the declaration that its construction is 'an emergency' and a notice and demand should be made upon me as solicitor to bring an action to enjoin its construction until the people should have an opportunity to vote under the referendum, what would be the form of the action?"

In answer to your first question it seems to me that the ordinance passed ordering the director of public service to proceed with the construction of the sewer in question would be an ordinance which would involve the expenditure of money, and consequently could not under section 4227-3, General Code, be declared to be an emergency measure, since an ordinance involving the expenditure of money is expressly included in that class of ordinance which cannot be declared to be emergency measures, and therefore even though council should declare that such ordinance was an emergency measure and should pass the same by a three-fourths majority of council, it would in so far as it was declared to be an emergency measure be invalid.

"*Second:* You inquire what should be the form of action that should be brought should notice and demand be made upon you as solicitor to bring an action to enjoin the construction of the sewer until the people should have an opportunity to vote under the referendum.

It would seem to me that since the ordinance was one which ordered the director of public service to proceed with the construction of the sewer the action in injunction should be instituted against such director of public service.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

190.

MUNICIPAL CORPORATIONS—POWER OF CITY TO ISSUE CERTIFICATES OF INDEBTEDNESS—SINKING FUND TRUSTEES MAY NOT PURCHASE—REMEDIES IN CASE OF VIOLATION.

Under section 3913, General Code, a city is empowered to issue certificates of indebtedness in anticipation only of fund available from taxes and revenues at the next semi-annual settlement of tax collections.

The trustees of the sinking fund are not empowered by the statutes to invest their moneys in such certificates.

When, therefore, the sinking fund trustees have purchased such certificates and have failed to apply for their payment out of the fund secured at the next settlement of taxes, they have acted in excess of their powers. On equitable grounds, however, the expenditures of the sinking fund trustees may be viewed as a trust fund and by causing the city to issue refunding bonds, under sections 3916 and 3917, General Code, by selling the certificates to a third party, by purchasing the refunding bonds of the city and by causing the city to pay the third party holding such certificates, by means of the funds obtained from the sale of the refunding bonds, the matter may be adjusted.

COLUMBUS, OHIO, April 15, 1913.

HON. R. E. MYGATT, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 30th, submitting for my opinion, as to the proper procedure in the promises, the following statement of facts:

"The city of Conneaut issued certain notes in anticipation of the general revenue fund of the municipality. (This does not appear from your letter but, in the findings of the examiner of the bureau of inspection and supervision of public offices, to which you refer, I find a statement to the effect that the notes mentioned by you were lawfully issued in the first instance. Whether or not they were lawfully issued at the outset does not affect the conclusion which I have reached.) The notes were taken by the sinking fund trustees, who have held some of them for two years and some for three years. The certificates have not been paid by the city.

"How should the books of the sinking fund trustees be adjusted?"

Assuming that the notes were, in the first instance, lawfully issued, they would have been issued under authority of section 3913, General Code, which is in part as follows:

"In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. * * *"

The trustees of the sinking fund, in investing the moneys in their custody and under their control, are subject to the following:

"Section 4514. The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state * * *."

It is apparent, at a glance, that the investment made by the sinking fund trustees in the instance presented by your question was unlawful. Certificates of indebtedness are not bonds at all. Should any loss accrue to the city by reason of the unlawful investment, the sinking fund trustees would be personally liable therefor.

Under section 3913, supra., the notes issued should have been paid out of the next semi-annual settlement of taxes. It was the duty of the sinking fund trustees, even though they had made an unlawful investment of their funds, to present the notes for payment to the city auditor immediately after the semi-annual settlement. It was also the duty of the auditor to set aside and appropriate amounts sufficient to provide for the payment of the notes so issued immediately after the settlement. If any loss ensues the liability therefor would seem to fall in some degree, perhaps secondarily, upon the auditor, because of his failure so to set aside sufficient money to pay the notes.

I do not think that personal liability ought to be regarded as the solution of the question which you present. There have been mismanagement and unlawful conduct on the part of the officers of the city, but, undoubtedly, there was no intention to proceed in an illegal manner. Meanwhile, the city has obtained the benefit of the money which has been misapplied. The situation simply amounts to this: Trust funds, i. e., the moneys in the sinking fund, have been misapplied and devoted to the current uses of the municipal corporation, which has received the ultimate benefit of the misapplication. When the unlawful investment was made a personal liability arose as against the sinking fund trustees, and possibly the auditor. Technically, advantage might be taken of this liability and the sinking fund trustees might be held personally accountable for the money which they have applied otherwise than to the uses and purposes of the trust committed to them by the statute. Nevertheless,

looking at the matter from the broadly equitable point of view, it would be unjust to enforce this liability, because the city has obtained the benefit of the misapplication.

I do not see that it would help matters any to have the sinking fund trustees sell the notes of the city; the holders of these notes would still have to be paid, whether they be sinking fund trustees or not; and as the municipality is, as you state, unable to pay the notes from its current revenues, the burden of paying any judgment that might be secured would ultimately fall upon the sinking fund by virtue of section 4517, General Code.

At the time the municipality borrowed the money it had power to and did create a valid obligation against itself. That is to say, if the notes were lawfully issued in the first instance, there was thereby created a debt of the city. Unless the failure of the sinking fund trustees to present the obligations when due had the effect of extinguishing the debt, such debt would continue to exist until the notes were paid. In my opinion, the failure of the sinking fund trustees and city auditor to provide for the payment of the notes out of the succeeding tax settlement proceeds does not have the effect of extinguishing the obligation.

You state in your letter that the city of Conneaut is not now and, presumably, never has been able, by virtue of the limitations upon its taxing power, to pay these obligations out of current revenues. Inasmuch as you ask me for a convenient method of avoiding the difficulties in which the city authorities find themselves, I beg to suggest the following:

While the notes should have been paid, as already stated, out of the next succeeding tax settlement, yet, it is conceivable that for some valid reason this was impossible. Notes having been lawfully issued in the first instance, the city owes a debt which it must pay, even though the sinking fund trustees are not lawfully in possession of the evidences of indebtedness and have misapplied their funds in purchasing them. The case seems, therefore, to come under section 3916, General Code, which is as follows:

> "For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

This section must be read in connection with section 3917, General Code, which is as follows:

> "No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

I recommend that the council declare the outstanding notes to be a valid existing indebtedness of the municipality. Perhaps it might be best to have the sinking fund trustees sell the notes, so that they may be in the hands of third parties at the time this declaration is made. Then, let the council issue bonds to fund what is now a floating indebtedness, and let the bonds be offered to the sinking fund trustees under the general statutes. Out of the proceeds of the bonds the notes could be taken up

by the municipal corporation directly. The sinking fund trustees, having possession of the bonds, would then be authorized to provide for their redemption out of the levies for sinking fund purposes. This, it seems to me, is the proper manner in which to convert a floating indebtedness into a funded indebtedness, and that seems to be the problem which is before the authorities at Conneaut at the present time.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

191.

JUSTICE OF THE PEACE—WHEN CITY AND TOWNSHIP LIMITS SO EXTENSIVE—DUTY OF COUNCIL TO PROVIDE CIVIL DOCKET.

Under section 3512, General Code, when the city limits become identical with those of a township, the duties formerly resting upon the township trustees are transferred to the city council, and one of such duties is to provide a civil docket for the justice of the peace within the township, under section 1724, General Code.

COLUMBUS, OHIO, April 3, 1913.

HON. R. CLINT COLE, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—I hereby acknowledge receipt of your communication of January 9th, wherein you inquire as follows:

> "The last state accountant to inspect the books of this city, in his report, claimed that the justice of the peace here owed the city certain amounts for civil dockets, for which the city had paid.
>
> "This city, a number of years ago, extended the corporation limits until they were co-extensive with the township. Our council has never passed any ordinance with reference to justices of the peace. They have, however, always been elected at the regular elections.
>
> "My query is to know what the status of our justices of the peace is, and whether or not the city should furnish them with civil dockets. Section 3512 of the General Code is the statute to be interpreted."

In reply to your inquiry I desire to say that the justices of the peace about whom you speak hold their respective offices and exercise their official prerogatives by virtue of the constitutional provisions of article IV, section 1 of the constitution of 1851. Said article IV, section 1 was amended by the constitutional convention held in 1912, and said amendment was adopted at the election on September 3, 1912, but in this instance the amendment in nowise affects the justices of the peace who held office prior to January 1, 1913, and for whom the expense was incurred by the city solicitor, as stated in your letter.

Section 1719 of Bates' Revised Statutes, (2nd edition) enacted March 7, 1872 (69 O. L. 23) provided in substance, for the election of justices of the peace where the limits of a municipal corporation are co-extensive with the boundaries of a township, as follows:

> "When the limits of a municipal corporation are co-extensive with the limits of the township, and the township becomes merged in the municipal corporation, the corporate existence of such township shall, nevertheless,

continue for the purpose of electing the same number of justices of the peace and constables for such township, who shall be voted for on the same ballot, provided, that in cities of the second grade of the first class, and in cities of the second class, the corporate limits of which are co-extensive with the township, justices of the peace and constables for such township shall be voted for on the same ticket with officers for such city; and the municipal officers holding such election shall proceed in the same manner, and make like returns, as in case of election for justices and constables held by the trustees and clerks in the township."

Section 1623 and section 1625 of Bates' Revised Statutes (2nd edition) provide, respectively, as follows:

"When the corporate limits of a city or village become identical with those of a township, the office of township trustee, township treasurer and township clerk in such township shall be abolished; and all the powers and duties of trustees of townships, conferred or prescribed by law, shall vest in and be performed by the council, except as to binding out apprentices and administering relief to the poor; and if such corporation is not already provided with an infirmary, the council shall forthwith, except in cities of the first grade of the second class, and from year to year, appoint one or more and not exceeding three, directors of the infirmary, and prescribe their duties by ordinance, and in cities of the first grade of the second class, the board of public works shall appoint such director or directors.

"The duties of treasurer and clerk of such township shall be performed by the clerk and treasurer of the corporation; and all moneys collected or authorized by law to be paid to the township treasurer shall be paid to such corporation treasurer."

Said sections were originally adopted by the legislature as sections 475 and 477, respectively, of the municipal code, of the date of May 7, 1869 (66 O. L., 229). Said section 1623 was amended April 28, 18090 (87 O. L. 370), but making no material change in its provisions as originally enacted. In construing section 1719 Bates, Revised Statutes, the court in the case of McGill vs. State, 34 O. S., 228, at page 251 of the opinion ,says:

"The act of May 7, 1872 (69 Ohio L. 23), preserves the corporate existence of such township for the sole purpose of electing justices of the peace and constables, evidently to meet the constitutional requirement that justices of the peace shall be elected by townships. But for all other purposes the township organization in this class of cities and villages is abolished."

In construing section 1623 and section 1625 Bates' Revised Statutes, quoted above the court in the case of Curtiss vs. McDougal, 26 O. S., 66, held as follows:

"Where the corporate limits of a city or village become identical with those of a township, and the office of the township clerk is thereby abolished, as provided in section 475 of the municipal code (66 O. L. 229), the office of the clerk of such city or village, under the provisions of section 477 of the same code, becomes a depository for chattel mortgages."

When the legislature enacted the new municipal code, the provisions of said sections 1623, 1625 and 1719 Bates' Revised Statutes, supra, were condensed into one

act, which said act is now section 3512 of the General Code, and said sections 1623, 1625 and 1719 Bates' Revised Statutes were repealed. Said section 3512 of the General Code (section 1536-3 Bates' Revised Statutes) provides as follows:

> "When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the correponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

Section 1724 of the General Code provides as follows:

> "Each justice of the peace must keep a docket, which shall be furnished by the trustees of the township, in which must be entered by him."

The word "docket" as used in section 1724 evidently means a justices' civil docket, for the reason that section 1742 of the General Code specifically provides the manner in which a justice may provide himself with a *criminal* docket, as follows:

> "A justice of the peace may retain out of the fines or other moneys belonging to the county coming into his hands in criminal proceedings, the amount paid for a criminal docket * * *. A justice of the peace paying out money for such purposes shall file with the county auditor, at the expiration of his term of office, a sworn itemized statement thereof. In making the annual statement to the auditor as required by law, a justice of the peace, having made such expenditures or having such moneys in his hands contemplated for such purposes, shall include therein the moneys so paid or held by him."

By virtue of section 1724 of the General Code, above quoted, it is part of the official duty of township trustees to furnish justices of the peace with civil dockets, and by virtue of section 3512 of the General Code, above quoted, when the corporate limits of a city or village become identical with those of a township, the duties of the township officers devolve upon the corresponding officers of the municipality, which in this case would be the municipal council. Inasmuch as the court in the case of Curtiss vs. McDougal, supra, construed that the duties of the township clerk devolved upon the city or village clerk when the corporate limits of such city or village become identical with those of a township, by virtue of sections 1623, 1625 and 1719 of Bates' Revised Statutes, the provisions of which statutes are now contained in section 3512 of the General Code, but expressed in more concise language in the latter section, it follows by parity of reason that the duties of the township trustees devolve upon the municipal council when the corporate limits of a city or village become identical with those of a township.

Therefore, in direct answer to your inquiry, I am of the opinion that it is the legal duty of the city, through its council, to furnish the justices of the peace of your city with civil dockets.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

203.

DIRECTOR OF PUBLIC SERVICE—POWER TO FIX SALARIES OF EMPLOYES IN THE WATERWORKS DEPARTMENT RESTS WITH COUNCIL.

An ordinance of council dividing employes of the waterworks department into three classes and fixing the salaries of such employes in accordance with said classification, is a valid exercise of the powers of council as set out in section 4214, General Code.

Council has the right to appropriate bonds for waterworks purposes, under section 3960, General Code. Whether a certain power belongs to council or to the director of public service must be determined when the particular power is sought to be exercised by the nature of the power.

COLUMBUS, OHIO, March 27, 1913.

HON. G. B. FINDLEY, *City Solicitor, Elyria, Ohio.*

DEAR SIR:—Your favor of February 19, 1913, is received, in which you inquire:

"Does the director of public service have the exclusive right to make such regulations as he deems necessary for the efficient management of the waterworks?

"Is ordinance No. 1936 enclosed herewith, in so far as it relates to the waterworks, an interference by the council with the department of the director?"

The ordinance submitted reads as follows:

Ordinance Number 1936.

"To fix the salaries and bonds of the employes in the waterworks department and stenographer in the city auditor's office.

"Be it ordained by the council of the city of Elyria, state of Ohio:

"Section 1. That the employes of the waterworks department shall be classified into three classes A, B and C.

"Class 'A' shall consist of persons who have served two years or more continuously in one position, or in a lower position in the same department, from which they have been promoted.

"Class 'B' shall consist of persons who have served one year and less than two years continuously in one position or in a lower position in the same department, from which they have been promoted.

"Class 'C' shall consist of persons rendering their first year's service in said department.

"Section 2. That the following schedule of salaries be and it is hereby adopted."

Pumping Station—Engineers.

Class A	$1,200 per year
Class B	1,140 per year
Class C	1,080 per year

Firemen.

Class A	$1,080 per year
Class B	1,020 per year
Class C	960 per year

Office—Linemen.

Class A	$1,020 per year
Class B	960 per year
Class C	900 per year

Assistant Line and Meter Men.

Class A	$840 per year
Class B	780 per year
Class C	720 per year

"Section 3. That the salary of the assistant clerk in the waterworks office be and it is hereby fixed at $480.00 per annum, and the salary of the stenographer in the city auditor's office be and it is hereby fixed at $660.00 per annum, and said stenographer be and is hereby required to give bond in the sum of $500.00.

"Section 4. That the salary of the chemist at the waterworks plant be and the same is hereby fixed at $600.00 per annum.

"Section 5. That the salaries of the waterworks employes herein fixed shall be payable semi-monthly from the waterworks fund of the city, and the salary of the stenographer in the city auditor's office shall be payable semi-monthly from the general fund of the city.

"Section 6. All ordinances and parts of ordinances heretofore passed and inconsistent herewith be and the same are hereby repealed.

"Section 7. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

This ordinance divides the employes of the waterworks department into three classes, and then fixes the salaries of such employes in accordance with said classification. The only use made of the classification is to make a difference in the compensation to be received by the employes.

The ordinance fixes the salaries of certain employes and has no other purpose. In passing said ordinance council has acted under authority of section 4214, General Code, which provides:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

In State vs. Lothschuetz, 20 Ohio Dec., 390, it is held:

"A director of public service of a city has no power, either under sections 139, 140 or 141 of act 99 O. L. 563 (General Code 4324, 4325, 4326), the Payne law, giving him the management and supervision of his department to fix salaries or compensation of employes therein, but the exclusive right to fix salaries and compensation thereof is reposed in the city council by section 227 of such act (General Code 4214).

The ordinance submitted is not an interference with the power of the director of public service, but is within the power of council.

You ask further if the director of public service has the exclusive power to make regulations for the management of the waterworks. This is a very broad question and is one which will cover all the duties of council and the director of public service as to the waterworks department.

It is seen that council has the right to fix the compensation of the employes in the waterworks department and to that extent, at least, the director of public service has not the exclusive power.

Sections 3955, et seq., General Code, provide for the management of the waterworks department.

Section 3960, General Code, provides:

> "Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

The council has the right to appropriate the funds of the waterworks by virtue of this section.

It appears therefore that council has some power in reference to the waterworks department.. Whether a certain power belongs to council or to the director of public service must be determined when the particular power is sought to be exercised and by the nature of the power.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

205.

TAXES AND TAXATION—POLICE AND FIREMEN'S PENSION FUND—POWER OF COUNCIL TO MAKE LEVY FOR—DUTY OF BOARD OF TRUSTEES.

Under section 4605, General Code, council is empowered, where a municipality avails itself of the firemen's pension fund provisions, to make a levy as provided by law for other municipal levies, not to exceed three-tenths of a mill on each dollar of property valuation for such purpose; and under section 4606, General Code, if the board of trustees fails to furnish the mayor an estimate of the amount of money needed as provided for heads of the departments of municipalities, council may, nevertheless, make the levy.

These provisions, however, cannot be construed to give the right to compel council nor the board of trustees, nor any officer in authority, to make such levy.

COLUMBUS, OHIO, April 17, 1913.

HON. RODERIC JONES, *City Solicitor, Newark, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 12th in which you submit the following request for an opinion:

> "I beg to ask your opinion upon the construction of sections 4605 and 4606 of the Code. These sections relate to the firemen's pension fund, but somewhat relate also to the police fund, and the same questions arise in both.
>
> "I should like your advice as to two propositions: First, as to whether,

under these two sections, the council has the exclusive right to make the levy for the fund and, secondly, whether the council is required to make a maximum levy without reference to the needs of the fund or to section 4606 or such part thereof as is necessary to limit the pay roll to meet the necessities of the fund?"

Your letter refers to sections *4645* and *4646*, an obvious mistake, as these sections relate to the sanitary police pension fund and contain no provision whatever respecting the making of a levy, such provisions, as to that fund, being incorporated in sections 4637 and 4638, General Code. These sections are substantially similar to sections 4605 and 4606, and both groups of sections are, in turn, substantially identical with sections 4621 and 4622, General Code, which refer to the police relief fund. As you yourself suggest the construction of sections 4605 and 4606 necessarily affects that of sections 4621 and 4622 and 4637 and 4638, respectively.

I quote sections 4605 and 4606, General Code, in full:

"Section 4605. In each municipality availing itself of these provisions, to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municpal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property, as listed for taxation in such municipality. In the matter of such levy, the board of trustees of the firemen's pension fund shall be subject to the provisions of law controlling the heads of departments in the municipality, and shall discharge all the duties required of such heads of departments.

"Section 4606. A failure of such board of trustees to act in the manner required by law of the heads of departments in such municipality in the making of such levy shall not limit the power of council to make it. If the council fails in any year to make the maximum levy herein authorized, in addition to the amount realized therefrom, there shall be passed to the credit of the firemen's pension fund such portion of the annual tax on the business of trafficking in intoxicating liquors required by law to be passed to the credit of the general fund in the municipality, as when added to the amount realized from such levy for the firemen's pension fund, will equal the amount that would be realized from a full levy of three-tenths of a mill, or such part thereof as is necessary to meet the pension pay roll, but the portion used of such tax on the business of trafficking in intoxicating liquors shall not exceed sixteen-thirtieths of the amount of such tax required to be passed to the credit of the general fund in the municipality."

I cannot so read these sections as to reach the conclusion that council may be compelled to make the levy for the fund nor that any other board or officer has the right to make such levy.

In the first place, council is expressly vested with authority to make the levy, and the board of trustees of the fund is expressly given the powers and duties conferred by law upon the heads of departments in municipalities. This means, of course, that the board of trustees of the fund is to furnish the mayor annually an estimate, in itemized form, of the amount of money needed for its wants as required by section 3738. The mayor, then, may revise the estimate and include it in his annual budget, which is required to be submitted to council by section 3791. That section expressly provides that:

" * * * Any item of which (the budget) may be reduced or omitted by council, but the council shall not increase the total of such budget. In

> the making of the annual budget, the mayor may revise and change any and all items in the annual estimates furnished to him by the directors and officers as herein prescribed, but he shall not increase the total of any such estimate when including it in his annual budget to council."

It seems to me that section 4605 expressly makes the machinery just referred to applicable to the making of the levy for the firemen's pension fund. However, section 4606 modifies the effect of section 4605 in this particular to a certain extent; for it authorizes the council to make the levy even though the board of trustees has failed to submit its estimate of needs for budgetry purposes. It cannot be inferred from this, however, that the council can be compelled to make the levy or any part of it, nor that the board of trustees or any other officer has authority to act instead of council. The power to levy taxes is not to be raised by implication. It is, in a sense, the highest attribute of sovereign power. Unless the legislature has passed a tax-levying law, which is self-executing, express authority must be found in the statutes for some administrative officer or legislative tribunal to make the specific levy. The only authority which appears with respect to the firemen's fund is the authority of council.

Council's authority is a *power* and not a *duty*. This is clear because the possibility of council's failing to make the maximum levy is recognized by section 4606 and specifically provided for. If the power of council to make the levy were also a duty, then no such provision as that which is found in the last sentence of the section just cited would have been necessary.

I am of the opinion, then, that the council has the exclusive right to make the levy for the fund, and that council cannot be compelled to make the maximum levy authorized by section 4605. Whether or not council might be compelled to make *some* levy, i. e., to exercise its legislative discretion, is, perhaps, a more doubtful question, but I incline to the view that council cannot be compelled even to do this. If council fails to make the maximum levy, or such part of it as is necessary to meet the pension pay roll, then the proceeds of the tax on the business of trafficking in intoxicating liquors may be, and must be automatically transferred from the general revenue fund of the municipality to the firemen's pension fund in the amount and under the restrictions specified in section 4606, General Code.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

208.

CRIMINAL PROVISION WITH REFERENCE TO PLAYING OF POOL—CONDUCTING OF POOL ROOM—POWER OF MUNICIPAL CORPORATION TO REGULATE—COMMON LABOR ON SUNDAY—EXEMPTION OF HEBREWS.

Inasmuch as pool cannot be construed to be classified within the terms "other games of similar kinds," as described by section 13049, General Code, that section cannot be held to prohibit the playing of this game on Sunday. Pool, however, comes within the term "sporting" as used in section 12048, General Code, and it therefore follows, that a person over fourteen years of age is prohibited from playing such game on Sunday, by this statute. This statute does not include one who engages in the business of conducting a pool room on Sunday. Such person would be included within the terms of section 13044, General Code, prohibiting common labor on Sunday.

Persons who conscientiously observe the seventh day of the week as the Sabbath, however, are exempted from this statute, by section 13045, General Code.

Under section 3659, General Code, a municipal corporation has the authority and power to regulate the playing and conduct of billiards and pool.

COLUMBUS, OHIO, February 13, 1913.

HON. JOHN T. BLAKE, *City Solicitor, Canton, Ohio.*

DEAR SIR:—I herewith desire to acknowledge the receipt of an inquiry dated December 30, 1912, from Hon. Frank N. Sweitzer, former assistant solicitor of your department, requesting an opinion as follows:

> "Section 13049, sometimes called the Sunday Amusement Statute, makes it unlawful to engage in certain things on Sunday. After mentioning certain performances and games occurs the following phrase, 'other game of similar kind.' The legislature, no doubt, had in mind prohibiting certain games besides the ones specifically mentioned or this phrase would not have been added. Now, my question is: What games are included in this phrase? More specifically, does the conducting of an ordinary pool room on Sunday fall within this statute? Unless pool is included in section 13049 there seems to be no statute prohibiting the operation of a pool room on Sunday where the proprietor is a consistent Hebrew and observes conscientiously the seventh day of the week."

In reply thereto I desire to say that section 13049 of the General Code referred to in your inquiry provides as follows:

> "Whoever, on Sunday, participates in or exhibits to the public with or without charge for admittance, in a building, room, ground, garden or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing or sparring exhibition, variety show, negro minstrels, living statuary, ballooning, base ball playing in the forenoon, ten pins or other game of similar kind or participates in keeping a low or disorderly house of resort or sells, disposes of or gives away ale, beer, porter or spirituous liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or houses or place is kept, on complaint within twenty days thereafter, shall be fined not more than one hundred dollars or imprisoned in jail not more than six months, or both."

Said section does not specifically mention pool and does not, therefor, include the game of pool unless the same is included in the phrase "other game of similar kind."

Where specific words are followed by general words, the latter must be confined to and include only things of a same kind. This is known as the principle of ejusdem generis.

Lewis Sutherland on Statutory Construction, Vol. 2, Sec. 422.

Several instances of the application of the rule are given by Mr. Sutherland in his work on statutory construction, but I will content myself by merely citing the general rule as given above.

In the case of ex parte Joseph Neet, 157 Mo. Rep., 527, the court holds as follows:

> "1. Playing Games on Sunday: Base Ball. The game of base ball cannot be classified as among the 'games' mentioned in the statute which says that 'every person who shall be convicted of horse racing, cock fighting, or playing at cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor.'
>
> "2. Sunday Base Ball. There is no law in this state which prevents the playing of base ball on Sunday."

This case overrules and reverses the decision of the Kansas City Court of Appeals in the case of State vs. Williams, 35 Mo. Appeals, 541. At page 536 of the opinion, the court says:

> "If the view of the Williams case had been adopted, this statute would have been elastic enough to cover every game that ever was or ever will be invented, no matter whether it was harmless, promotive of physical or mental development or deleterious to both. It would prevent games of chess, backgammon, jacks, authors, proverbs, faro, keno and poker alike, and when played on Sunday any one would have been as illegal as any other. Such a construction would have curtailed many of the pleasures of many of our people without elevating them or improving their moral tone. Until the lawmakers, expressly provide for such sweeping changes in the lives and customs and habits of our people, it is not proper for the courts by construction to impair their natural rights to enjoy those sports or amusements that are neither mala in se nor mala prohibita—neither immoral nor hurtful to body or soul. We therefore conclude that there is no law in this state which prevents playing a game of base ball on Sunday, and therefore the defendant is imprisoned for the doing of an act which is not unlawful, and therefore the imprisonment is wrongful."

The things specifically mentioned in section 13049 are all of them in the nature of performances, exhibitions or shows, except that "base ball in the forenoon" and ten pins, while they are exhibitions, are also generally regarded as being games of an athletic nature. The statute goes so far as to particularly and specifically prohibit base ball being played in the forenoon, and in as much as the legislature was so specific as to prohibit base ball being played in the forenoon surley the legislature would have specifically mentioned the well-known game of pool if it had intended to include such game within the prohibition of section 13049.

For the foregoing reasons and the further reason that penal statutes are to be strictly construed, I am of the opinion that section 13049 does not include the game of pool, and the conducting of the ordinary pool room on Sunday does not come within the provisions of said section.

In answer to your question: What games are included in the phrase "other game of similar kind?" I can only say that those exhibitions, performances or games are

included which are specifically mentioned and other like or similar exhibitions, performances or games, such as moving picture shows, which are in the nature of theatrical or dramatic performances; also horse shows or races, as being included in the term equestrain performances; also a circus performance would include the well-known side-show or a wild west exhibition. Without giving further examples of what exhibitions, performances or games might be included as similar in kind to those enumerated I wish to state that pool, which is played with small ivory balls and a cue or mace on a table made especially for the playing of said game and which has pockets in the corners and on two sides thereof and is covered with cloth, is not similar in kind to base ball, which is played out in the open field with a ball and bat by two teams composed of nine members on each team; and pool is not similar in kind to ten pins, which is played by rolling or bowling a large ball upon a long alley for the purpose of knocking over pins set upon end.

Section 12048 of the General Code provides as follows:

> "Whoever, being over fourteen years of age, engages in sporting, rioting, quarreling, hunting, fishing or shooting on Sunday, on complaint made within ten days thereafter, shall be fined not more than twenty dollars or imprisoned not more than twenty days, or both."

The term "sporting" contained in said section is defined by Webster as follows:

> "That which diverts and makes mirth; game; diversion; play."

and is defined by the Century dictionary as follows:

> "Amusement, enjoyment, entertainment, fun, a playful act, a pastime, merry making, a play, game."

Webster fails to define the term "pool" but does define a pool ball as follows:

> "One of several ivory balls about two inches in diameter and used in playing a kind of billiards."

Webster defines "billiards" as follows:

> "A *game* played on a rectangular table covered with a cloth, with small ivory balls which the players aim to drive into hazzard nets or pockets at the sides and corners of the table by impelling one ball against another with maces or cues, according to certain rules of the game."

Century defines the term "pool" as follows:

> "A game played on a billiard table with six pockets, by two or more persons."

It appears, therefore, that both dictionaries define the term "pool" as a game which, according to both of said authorities as above quote, comes within the term "sporting."

In the case of State of Nebraska vs. O'Rourk, 17 L. R. A., 830, base ball is held to be sporting, as follows:

> "1. Under the provisions of section 241 of the Criminal Code, any person of fourteen years of age or upwards who shall on Sunday engage in sporting,

etc., shall be fined in a sum not exceeding $20, or be confined in the county jail not exceeding twenty days, or both.

"2. Playing base ball on Sunday comes within the definition of 'sporting,' and renders the persons engaging therein liable to the punishment provided for in section 241."

The Nebraska statute on sporting on Sunday in substance follows the provisions of the Ohio statutes and reads as follows:

"If any person, of the age of fourteen years or upwards, shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person, of the age of fourteen years or upwards, shall be found on the first day of the week, commonly called Sunday, at common labor, (work of necessity and charity only excepted), he or she shall be fined in any sum not exceeding five dollars nor less than one dollar; provided, nothing herein contained in relation to common labor on said first day of the week, commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath, nor to prevent families emigrating from traveling, watermen from landing their passengers, superintendents or keepers of toll bridges or toll gates from attending and superintending the same, or ferrymen from conveying travelers over the water, or persons moving their families on such days, or to prevent railway companies from running necessary trains."

It necessarily follows that playing pool comes within the term "sporting," and whoever, being over fourteen years of age, engages in playing pool on Sunday is violating said section 13048 of the General Code as quoted above, including the proprietor of a pool room if he engages in said game. Said section does not, however, seem to be broad enough to include one who engages in the business or occupation of conducting and keeping a pool room on Sunday unless he actually joins or engages in the game of playing pool.

Section 13044 of the General Code provides as follows:

"Whoever, being over fourteen years of age, engages in common labor or opens or causes to be opened a building or place for transaction of business, or requires a person in his employ or under his control to engage in common labor on Sunday, on complaint made within ten days thereafter, shall be fined twenty-five dollars, and for each subsequent offense shall be fined not less than fifty dollars nor more than one hundred dollars and imprisoned not less than five days nor more than thirty days."

Said section 13044 of the General Code does not apply to those who observe the seventh day of the week as the Sabbath, as provided by the exception contained in section 13045 of the General Code, as follows:

"The next preceding section shall not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things herein prohibited on Sundays."

A proprietor of a pool room who is a consistent Hebrew comes within the exception contained in section 13045 above quoted.

Section 3616 of the General Code provides that municipalities shall have certain general powers as follows:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3659 of the General Code provides as follows:

"To regulate billiard and pool tables, nine or ten pin alleys or tables, and shooting and ball alleys; and to authorize the destruction of instruments or devices used for the purpose of gambling."

Section 3670 of the General Code provides as follows:

"To regulate and license manufacturers and dealers in explosives, pawnbrokers, chattel mortgage and salary loan brokers, peddlers, public ballrooms, scavengers, intelligence offices, billiard rooms, bowling alleys, livery, sale and boarding stables, dancing or riding academies or schools, race courses, ball grounds, street musicians, second hand dealers, junk shops and all persons engaged in the trade, business or profession of manicuring, massaging or chiropody. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

Under section 3659 of the General Code, a municipal corporation has the authority and power to regulate pool and billiards.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

214.

ELECTION OF COMMISSIONERS TO FORM CITY CHARTER—ADVERTISEMENT AS IN MUNICIPAL ELECTIONS.

Under section 14, article 18, of the constitution, the election of a charter commission by a city must be conducted by the election authority prescribed by general law. Under this provision, a notice of such election should be given in the same manner, for the same time and by the same persons required to give notice at municipal elections, under the general laws.

COLUMBUS, OHIO, April 23, 1913.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—I have your letter of April 15th, in which you say:

"We are about to hold an election to elect commissioners to form a new charter for the city of Ironton. Should the council or the election board advertise this election?"

In answer permit me to state that section 8 of article 18 of the constitution reads:

"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'shall a commission be chosen to frame a charter.' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon, it shall become the charter of such municipality at the time fixed therein."

Section 14 of the same article reads:

"All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total cast at the last preceding general municipal election."

I would consider the advertisement alluded to as a part of the "conduct of the election" and included in the language "conducted by the election authorities prescribed by general law."

I am, therefore, of the opinion that the notice of this election should be given in the same manner, for the same time, and by the same persons required to give notice of municipal elections under the general laws. I can find no law requiring either council or election board to do so.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

221.

DIRECTOR OF PUBLIC SERVICE—MERE APPROPRIATION BY COUNCIL DOES NOT AUTHORIZE CONTRACT IN EXCESS OF $500.

Under section 4328, General Code, a director of public service may not enter into any contract involving an expense of more than $500 without authorization of the council. The mere appropriation of funds for a general purpose cannot be construed to amount to a sufficient authorization to justify such a contract by the director of public service.

COLUMBUS, OHIO, March 28, 1913.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—Under date of March 19, 1913, you submit to this department the following inquiry:

> "I have from the bureau of inspection and supervision of public offices a statement of opinions rendered that pertain to the municipal code, and among them, under the head of 'Contracts' No. 22, January 11, 1913, I find the following:
>
> "When a director of public service advertises for bids for a contract in excess of $500.00, without authorization of council, in accordance with section 4328, General Code, such bids are illegal and void. The subsequent authorization of council for such contracts does not remedy the defect; bids must be reissued.
>
> "The following facts may be required to explain my conclusions:
>
> "We made, at the semi-annual appropriation period, an appropriation for 'water-main extension' $1,800.00.
>
> "The director of public service asked me this question: 'Must I have an ordinance to authorize the purchase of water pipe, the cost price of which is about $700.00, when I have in that fund appropriated for that purpose $1,800.00?'
>
> "My answer was that 'the council had appropriated for that purpose and under authority of the city of Akron et al. vs. Dobson, 81 Ohio St. Rep. 66, that no further action was required by council, but that he must advertise for bids, the amount being over $500.00 as required by section 4328, General Code.
>
> "I am anxious to know if I am right."

The holding of the bureau to which you refer was taken from an opinion of this department to the bureau of inspection and supervision of public offices, under date of January 11, 1913, a copy of which opinion is herewith enclosed.

Section 4328, General Code, provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

You call attention to the case of city of Akron vs. Dobson, 81 Ohio, St., 66, wherein it is held:

> "The council of a municipal corporation may, by ordinance appropriate money and authorize the directors of public safety to enter into contracts for an authorized purpose, and in such case the particular contract made by the directors to effect that purpose, if within the appropriation and the authority, does not have to be approved by council."

It appears that council in the above case not only appropriated the money but also authorized the directors of public safety to enter into contracts for the expenditure thereof.

On page 72 of the opinion, Summers, J., says:

> "Upon the 6th day of April, 1908, the council passed an ordinance authorizing and empowering the directors of public safety to expend the sum of thirty thousand dollars, realized from the sale of said bonds, for the purpose stated in the first mentioned ordinance. The last mentioned ordinance further authorized the directors to enter into contracts 'with the lowest and best bidder, after advertisement according to law.' "

On page 77, he further says:

> "The council provides the money for carrying on the government, either by a levy of taxes, or an issue of bonds, and it is proper that it should have some control over the expenditures, but considering these sections in the light of the purpose of the code we think their requirements are met by an ordinance making an appropriation and stating generally the purpose for which it is made, *and authorizing the directors to enter into contracts to effect that purpose.*"

In the case of city of Akron vs. Dobson, council not only appropriated the money, but it also authorized the directors of public safety to enter into contracts for the purpose authorized.

In the case you submit it appears that council has only appropriated the money. It must go further than that. It must authorize the director of public service to enter into contracts to expend the money so appropriated, if such contracts are in excess of five hundred dollars.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

224.

MUNICIPAL BONDS HELD BY SINKING FUND TRUSTEES NOT EXEMPT FROM TAXATION.

Since the statutes of the state do not make provision for the exemption of municipal bonds purchased by sinking fund trustees, the same must be held to be taxable in this state.

COLUMBUS, OHIO, March 31, 1913.

HON. CLYDE C. PORTER, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—I have your letter of March 20th, in which you request me to express my opinion as to the taxability of municipal street improvement bonds, issued after January 1, 1913, and taken by the trustees of the sinking fund of the corporation, while in the hands of such trustees.

You cite the case of Trustees of The Cincinnati Southern Railway vs. Roth, Treasurer, 13 N. P. n. s. 633. I have read the decision of Judge Oppenheimer in this case and I am of the opinion that it is absolutely correct in principle. The reasoning of the court is based upon the assumption that the constitutional authority to exempt public property used for any public purpose is not self-executing; a proposition so plain, it seems to me, as to require no argument. The court then proceeds to analyze the exemption statutes of the state, and, failing to find therein any provision authorizing the exemption of the particular kind of public property involved in the case before him, turns to section 5328 of the General Code, which creates a general rule that all property is to be taxed. This logic, which cannot be assailed, in my judgment, leads to the conclusion that under the laws of the state any public property which is not exempted from taxation is subject thereto despite its public character, and even despite its public use, although, in the case decided by Judge Oppenheimer, the question as to whether or not the use of the particular property was public was not involved.

Applying the reasoning of this decision and of the cases cited in Judge Oppenheimer's opinion to the hypothetical statement of facts submitted by you, it seems that the only answer which can consistently be returned to your question is the affirmative one. Bonds in which the trustees of a sinking fund invest their moneys constitute undoubtedly, "public property." They are also subjected to a public use. I do not believe any discussion of this point is necessary. However, they are clearly "investments in bonds * * * of persons residing in this state," as the word "persons," agreeably to section 5320, General Code, is construed in the case commented upon. Unless, therefore, their exemption from taxation is provided for in the chapter relating to such exemptions, they must be held taxable.

Sections 5349 to 5365-1, General Code, constitute a subdivision relating to exempt property. Not only does this subdivision contain no provision which might by any ingenuity be stretched to cover the case of municipal bonds held by sinking fund trustees, but also these sections do contain specific exemption of other kind of property owned by municipal corporations and put to a public use. Indeed, section 5358 exempts certificates of stock in a corporation or railroad company owned by a city. Evidently, therefore, the general assembly considered it necessary expressly to exempt the investments of a city, thus destroying the force of a possible argument to the effect that the word "corporation" in section 5328 means only a private corporation.

Therefore, inasmuch as the legislature has seen fit expressly to exempt some investments of a municipal corporation and has not exempted its investments in bonds, it must necessarily follow that such investments are not exempt.

I am quite aware of the ridiculous conclusion to which the statutes lead. This, however, is the fault of the legislature and not of the courts or of any other officer whose function it is to declare or interpret the law. My attention has more than once

been called to the archaic condition of our taxing statutes. Such results as that to which you call attention are inevitable in the absence of a general revision of our laws on this subject.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

225.

BOARD OF EDUCATION NOT EMPOWERED TO LEASE REAL PROPERTY HELD FOR SCHOOL PROPERTY.

Section 4749, General Code, which enumerates the power of the board of education with reference to acquiring, holding, possessing and disposing of real and personal property, does not include any provision for the leasing of such property by the board, and as the statutes nowhere prescribe the manner of executing such a lease, the board cannot be held to possess such power.

COLUMBUS, OHIO, March 24, 1913.

HON. STUART R. BOLIN, *City Solicitor, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of February 7, 1913, wherein you inquire as follows:

> "Will you kindly give us your opinion as to whether or not boards of education have power under the General Code to lease any part of their real property acquired by purchase and which is not used for school purposes?"

In reply thereto I beg to say that section 4749, General Code, provides for the corporate powers of boards of education as follows:

> "The board of education of each school district, organized under the provisions of this title, shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of the state."

It is to be observed that the board of education by virtue of said section has the power to dispose of real and personal property when such property is no longer required or used for school purposes. So long as such property is used for school purposes the boards of education of their respective districts hold such property in trust for the use of the public schools.

> "Under the act of May 1, 1873, entitled 'An act for the reorganization and maintenance of common schools' (70 O. L. 195), boards of education are invested with the title to the property of their respective districts in trust for the use of public schools, and the appropriation of such property to any other use is unauthorized."—1st Syllabus in Weir vs. Day 35 O. S. 143. See also page 146 of the opinion.

The term "dispose" as used in said statute according to Webster's dictionary means:

> "To exercise finally one's power of control over, to pass over into the control of some one else, to alienate, to bestow, to part with, to get rid of, as to dispose of a house."

The Century dictionary defines the term "dispose" as follows:

> "To make over or part with as by gift, sale or other means of alienation. Alienate or bestow."

The board of education of each school district being a body corporate, such board has only such powers as are specifically granted by statute. Said section 4749, *supra*, cannot be so construed as to include powers which are not therein specifically enumerated. In my judgment, section 4749, *supra*, gives the board of education the power to alienate, convey or sell its real property acquired by purchase, but does not give the board the right to lease such property.

Furthermore section 4756 of the General Code specifically provides how real property may be sold by a board of education as follows:

> "When a board of education decides to dispose of real or personal property, held by it in its corporate capacity, exceeding in value three hundred dollars, it shall sell such property at public auction after giving at least thirty days' notice thereof by publication in a newspaper of general circulation or by posting notices thereof in five of the most public places in the district in which such property is situated. When the board has twice so offered a tract of real estate for sale at public auction and it is not sold, the board may sell it at private sale, either as an entire tract or in parcels, as the board deems best. The president and secretary of the board shall execute and deliver deeds necessary to complete such sale."

Section 4757 of the General Code provides how conveyances made by the board of education shall be executed, as follows:

> "Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

If the legislature had intended to vest boards of education with power to lease real property acquired by purchase it would not only have specifically provided for such power by including it in said section 4749, *supra*, but would also have provided how such real property could be leased, and how the leases of such property should be executed as in the case of the sale and conveying of real property in accordance with sections 4756 and 4757 of the General Code above quoted.

Furthermore, section 4752, of the General Code, provides that the board of education, on motion, may adopt a resolution authorizing the purchase or sale of real or personal property, etc., as follows:

> "A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution

authorizing the purchase or sale of real or personal property or to employ a superintendent or teacher, janitor or other employe or to elect or appoint an officer or to pay any debt or claim or to adopt any text book, the clerk of the board shall publicly call the roll of the members composing the board and enter on the record the names of those voting 'aye' and the names of those voting 'no.' If a majority of all the members of the board vote aye, the president shall declare the motion carried. Upon any motion or resolution, a member of the board may demand the yeas and nays, and thereupon the clerk shall call the roll and record the names of those voting aye and those voting 'no.' Each board may provide for the payment of superintendents, teachers and other employes by pay roll, if it deems advisable, but in all cases such roll call and record shall be complied with; provided, that boards of education of township school districts may provide for the payment of teachers monthly if deemed advisable, upon the presentation to the clerk of a certificate from the director of the sub-district in which the teacher is employed stating that the services have been rendered and that the salary is due; the adoption of a resolution authorizing the clerk to issue warrants for the payment of the teacher's salary on presentation of such a certificate shall be held as a compliance with the above requirements."

If the legislature had intended to grant authority to the board of education to lease any of its real property acquired by purchase it would have included such right in section 4752 of the General Code by providing that such real property could be leased by the board of education upon a motion to adopt a resolution authorizing the making of such lease as in the case of the *sale* of real property.

For the foregoing reasons it is the opinion of this department that boards of education do not have the power under the General Code to lease any part of their real property acquired by purchase not used for school purposes.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

246.

SUPERINTENDENT OF SCHOOLS—APPOINTMENT BY BOARD OF EDUCATION PRIOR TO THE FOUR MONTHS' PERIOD PRECEDING THE COMMENCEMENT OF THE SCHOOL YEAR MADE BEFORE AMENDMENT OF STATUTE, IS VALID.

On April 20, 1911, section 7702, General Code, as it then existed, did not provide as it does in its present form, that the appointment of a school superintendent by the board of education in a city school district must be for a term beginning within four months of such appointment, and that such appointment must be made between May 1st and August 31st. An appointment made on that date, therefore, to take effect on July 1st of that year, is valid.

COLUMBUS, OHIO, May 10, 1913.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Under favor of April 24th, you wrote as follows:

"Will you kindly render me an opinion as to the question growing out of

the following state of facts, the question being whether or not Fred. C. Kirkendall has a contract as superintendent of the schools of this city good until July 1, 1914, or may the board elect a successor this year?

"On May 5, 1908, Kirkendall was first elected by the board of education of this city as superintendent of the public schools for one year. The minutes of the meeting at which he was elected show no date for the beginning of such service. Previous to that time, the board of education had elected superintendents for periods of one year and three years, there being several such elections, but in no instance is the period of service defined, nor is the phrase 'school year' or any similar or equivalent phrase used.

"On July 8, 1908, Kirkendal met with the board of education, as superintendent, and appointed teachers who were then confirmed and elected. He met with them again on July 16th; again on July 30th, and again on August 6th of the same year, in each instance as superintendent. On July 16th he asked for an additional high school teacher, which request was granted by the board. On July 30th he gave a list of desks needed for the various rooms and his request in that respect was favorably acted upon. At that meeting he also nominated high school teachers, who were then confirmed and elected. At the August 6th meeting he presented a request from one of the teachers asking to be excused from institute, recommending that the request be granted and the board granted the same.

"On May 20, 1909, the board of education elected Kirkendall as 'superintendent of the Chillicothe public schools for one year.' This is the language of the minutes. The minutes make no mention as to when the term of service shall begin. At a meeting of the board on July 3, 1909, Kirkendall's letter of acceptance as 'superintendent of schools for one year, 1909-10, at a salary of $2,100.00 for the entire term' was read and confirmed by the board. On June 3, 1909, Kirkendall met with the board, as superintendent, and nominated teachers for the school year beginning September 1, 1909, which the board confirmed and elected.

"The minutes of the board of education for April 7, 1910, show the following action:

" 'For the committee on education Mr. Roche moved that the rules be suspended and that the board proceed to elect F. C. Kirkendall superintendent of schools for one year from the *expiration of his present term* at the same salary he is now receiving.'

"The minutes also show that Mr. Boulger seconded the motion, which carried, all present voting yes upon roll call.

"On June 21, 1910, Kirkendall appointed teachers for the school year beginning September 1, 1910, and the teachers so nominated and appointed were confirmed by the board.

"At the meeting held on April 6, 1911, Mr. Roche moved that:

" 'F. C. Kirkendall be employed as superintendent of the public schools for a period of three years at a salary of $2,200.00 per year.'

"Mr Scott seconded the motion and on roll call it carried. The minutes of the subsequent meeting, held on April 20, 1911, read, in part, as follows:

" 'Acceptance of Mr. Kirkendall of his election as superintendent for the period of three years from July 1, 1911, at a salary of $2,200.00 per year, was received and placed on file.'

"At the next meeting of the board, held on May 1, 1911, Mr. Kirkendall nominated teachers for the school year beginning September 1, 1911, and the board confirmed the nominations.

"Outside the minutes of the board of education, the facts are that Mr. Kirkendall began the active performance of his duties as superintendent in July, 1908. The selection of teachers both for the grades and for the high school have been made, as shown by the minutes, and such appointment and approval by the board has necessitated the investigation of new teachers each year and recommendations of teachers each year, since the same corps of teachers has never been on duty in any two years. The orderly conduct of the schools require that the teachers shall be appointed by the superintendent confirmed by the board, assigned their grades and places of service and that the schools shall be ready for opening at the beginning of the school year, which in this city has always been on Tuesday following the first Monday of September.

"Kirkendall has drawn his salary in the same installments and at the same time as the teachers in the public schools, the first installment thereof being paid at the end of each school month during the active session of school and no installment of salary being paid for services rendered during the vacation months preparatory to the beginning of active school sessions for the school year.

"Examiner Godfrey has reported as follows:

" 'On April 6, 1911, the board employed Fred. C. Kirkendall as superintendent for a period of three years beginning on July 1, 1911; that action was illegal because it was taken more than four months before the school year began. Section 7702, General Code as it then stood was as follows:

" 'The board of education in each city school district shall appoint a suitable person to act as superintendent of the public schools of the district for a term not longer than five school years and to begin within four months of such appointment.'

"It is contended, on behalf of the superintendent, that his services as such began within four months of his employment, from the fact that he began his services after each of his successive employments for the next school year with the preparation and submission of a list of teachers to be elected for the school year beginning on the first Tuesday of September thereafter. Counsel for Kirkendall have advised him that his election is legal, that his employment began according to his acceptance, on July 1, 1911; that the contract made by the election and acceptance has been interpreted by the conduct of the parties and such conduct shows such interpretations to be that the term of employment began on July 1, 1911; that the statute does not require that the date of employment of the superintendent shall be co-terminous with the school year; that in this instance neither the board nor the superintendent contemplated that such employment should begin at the beginning of the next succeeding school year, and that the actual services rendered under such employment began with July 1, 1911.

"Under these facts, has Kirkendall a legal contract as superintendent, extending to July 1, 1914?"

I do not deem it necessary to go into details in this opinion. Our present statute on the subject, section 7702 of the General Code, to the effect that:

"The board of education in each city school district at a regular meeting, between May 1st and August 31st, shall appoint a suitable person to act as

superintendent of the public schools of the district, for a term not longer than five school years, beginning within four months of such appointment and ending on the 31st day of August."

did not become a law until the 31st day of May, 1911.

It seems that on the 20th day of April, 1911, the following motion was adopted by the board of education:

"Acceptance of Mr. Kirkendall of his election as superintendent for the period of three years, from July 1, 1911, at a salary of $2,200 per year, was received and placed on file."

If there was anything lacking in a meeting of minds between Mr. Kirkendall and the school board before this time, the passage of this resolution removed such defect, and when the board adopted the resolution just referred to the meeting of minds between the superintendent on the one hand, and the board of education on the other, was complete; and at the time the only requirement was that the superintendent should enter upon his duties within four months from the time of his appointment. This, he did.

It appears further that on May 1, 1911, Mr. Kirkendall nominated teachers for the school year, beginning September 1, 1911, and the board confirmed the nominations. Here was another confirmation of the entire act. The form of the resolution of the board of education of April 20, 1911, and its action on May 1, 1911, in confirming Mr. Kirkendall's nomination of teachers, both being prior to the adoption of the present statute, completed the contract, and in my judgment eliminated from consideration the other propositions presented in the case. Doubtless, the examiner was applying the present statute to a contract made before it became effective, which was misleading.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

255.

POWER OF COUNCIL TO BORROW MONEY FOR FLOOD EMERGENCY.

Under sections 4450 and 4451, General Code, council may borrow money for the payment of bills incurred by the board of health in pursuance of the prevention of disease, made menacing by recent floods, and levies made to cover such indebtedness will be exempt from Smith law limitations, by virtue of section 5649-4, General Code.

COLUMBUS, OHIO, May 16, 1913.

HON. ALLEN G. AIGLER, *City Solicitor, Bellevue, Ohio.*

DEAR SIR:—You inquire in your letter of May 3rd, receipt of which is acknowledged, whether there is any means of paying bills incurred by the board of health of the city of Bellevue, in connection with the recent flood, which manifested itself so peculiarly in your city, the current appropriation for such purposes having been exhausted.

I call your attention to the provisions of sections 4450 and 4451 of the General Code, which are as follows:

"Section 4450. In case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease, if funds are not otherwise available, the council of a municipality may borrow any sum of money that the local board of health deems necessary, to defray the expenses necessary to prevent the spread of such disease. Such money may be borrowed until the next levy and collection of taxes are made, at a rate of interest not to exceed six per cent. per annum. Thereupon the board may expend the amount so authorized to be borrowed which amount, or so much thereof as is expended, shall be a valid claim against the municipality from the sum so created.

"Section 4451. When expenses are incurred by the board of health under the provision of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

I am of the opinion that under these sections council may now borrow enough money to pay the bills which have been incurred and remain unpaid.

I call attention also to the fact that levies made under these sections are exempt from all limitations of the Smith law. See section 5649-8 of the General Code.

"Section 5649-4. Section 4. For emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine and seventy-four hundred and nineteen of the General Code, the taxing authorities of any district may levy tax sufficient to provide therefor, irrespective of any of the limitations of this act."

It seems therefore that the exercise of power under the sections which I have cited, should be a feasible and satisfactory method of meeting the situation which you describe. The only cost which this will involve is the interest on the amount which it will be necessary to borrow.

Of course, if the council has provided a contingent fund in accordance with the authority of section 3800 of the General Code, such a fund could be expended in the manner provided, for purposes such as described by you. It would not in my judgment, however, be in accordance with law to make a transfer at this time, from some other fund to the health fund and then to appropriate the amount so transferred to the health fund and expend the same. Inasmuch as you state in your letter that you realize that such a proceeding would not be in accordance with the law, I have not deemed it necessary to state my reasons for this conclusion.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

276.

BOARD OF EDUCATION—PUBLICATION OF NOTICE OF ELECTION ON QUESTION OF ISSUING BONDS FOR SCHOOL BUILDING—POSTING OR PUBLICATION IN ONE NEWSPAPER OF GENERAL CIRCULATION IN THE DISTRICT.

The statutes do not require or authorize publication of a resolution of a board of education passed for the purpose of submitting to electors the question of issuing bonds for construction of a school building.

Under section 7625, General Code, however, notices of the election shall be given in the manner provided by law for school elections, i. e., under section 4839, General Code, such publication may be made by posting written or printed notices in five public places in the district at least ten days before the holding of the election, or it may be published in a newspaper of general circulation in the district, once at least ten days before holding of the election.

COLUMBUS, OHIO, May 22, 1913.

HON. W. A. O'GRADY, *City Solicitor, Wellsville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 15th, requesting my opinion upon the following question:

> "What publication is necessary of a resolution passed by a board of education under section 7625, General Code, for the purpose of submitting to the electors of the district the proposition of issuing bonds for the construction of a school building?"

Section 7625, General Code, provides in part as follows:

> "When the board of education of any school district determines that * * * it is necessary to * * * erect a schoolhouse * * * , that the funds at its disposal * * * are not sufficient to accomplish the purpose and that a bond issue is necessary, the board shall * * * at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

Sections 7626 to 7628, inclusive, General Code, which are in pari materia with the section from which quotation has just been made, are silent respecting the question which you ask.

I do not find in any of the general statutes relating to the powers and duties of boards of education any provision requiring a resolution, such as would be required in order to carry out the authority vested in the board of education by section 7625, to be "published" in the sense that municipal ordinances, for example, are required to be published.

The only publication referred to in section 7625 is that of notice of the election, which is required to be given in the manner provided by law for school elections. The reference here is to the provisions of section 4839, General Code, which provides as follows:

> "The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district, or post written

or printed notices thereof in five public places in the district at least ten days before the holding of such election. * * *"

Under the above quoted section publication in a newspaper is not even required, it being optional with the posting of written or printed notices in public places in the district. In the event, however, that it is desired to have publication, such publication is required to be made in but one newspaper of general circulation in the district, and is complete by one insertion at least ten days before the holding of the election.

This is the only publication of the resolution which is authorized or in any sense required by law. As a matter of fact, the resolution itself, as such, is not required to be published, the notice being sufficient, in all probability, if it states the substance thereof; that is, enough of it to apprise the electors of the district of the nature of the proposition submitted to them.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

290.

MUNICIPAL BONDS FOR STREET IMPROVEMENTS, NOT OUTSTANDING JULY 1, 1913, ARE SUBJECT TO TAXATION.

COLUMBUS, OHIO, May 20, 1913.

HON. R. CLINT COLE, *City Solicitor, Findlay, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 12th submitting two questions:

"(1) Whether or not municipal bonds for street improvements are taxable.

"(2) Whether in the last legislature the provisions of section 3942, General Code, were in any way modified."

In answer to your second question I desire to say that we have had the question looked up and find that there were no modifications of section 3942, General Code, made at the recent session of the legislature.

In answer to your first question as to whether or not municipal bonds for street improvements are taxable, it would appear that proposal No. 32, which was duly adopted at the election held September 3, 1912, amends section 2 of Article XII of the constitution.

Proposal No. 41, which was likewise duly adopted at the same election provides that:

"The several amendments passed and submitted by this convention when adopted shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments."

There was no separate schedule attached to proposal No. 32, consequently such amendment went into effect on January 1, 1913.

Section 2 of article XII of the constitution as it now reads provides that:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, excepting all bonds at present outstanding in the state of Ohio or of any city, village, ham-

let, county or township in this state or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds so at present outstanding shall be exempt from taxation."

Municipal bonds for street improvements are as much bonds of the city as any other bond and since the constitution provides that all such bonds not outstanding on January 1, 1913 shall be taxable, and as this department has construed such amendment to be self-executing in that all bonds not so outstanding on January 1, 1913, shall be subject to taxation, I am of the opinion that municipal bonds for street improvements not outstanding on January 1, 1913, are taxable.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

323.

CITY MAY NOT SUBSTITUTE GAS LAMPS FOR ELECTRIC LAMPS IN CONTRAVENTION TO TERMS OF CONTRACT WITH ELECTRIC LIGHT COMPANY PROVIDING FOR THE USE OF ELECTRIC LAMPS BY THE CITY.

When a city has properly entered into a contract with an electric light company, which contract provided for the furnishing of certain lights to the city by said company and of power for the operation of the same and for the use of said lamps by the city, the city may not substitute gas lamps for such electric lights.

COLUMBUS, OHIO, April 16, 1913.

HON. EDWARD C. STITZ, *City Solicitor, Van Wert, Ohio.*

DEAR SIR:—In your letter of January 14, 1913, you say that on April 1, 1912, the city of Van Wert, Ohio, by its director of public service, entered into a contract with the Van Wert Public Service Company, "whereby said company contracts and agrees to light the public streets, alleys, public land, lanes, squares and other public places in the city of Van Wert, Ohio, with electricity for a period of ten years, beginning with April 1, 1912." Then follows a statement of the terms of said contract as to the number and kinds of lights, and the prices thereof.

You further state that the contract calls for "not less than ninety (90) 300 watt metallic flame arc lights and such number *as the said city may require* of 75 watt Tungsten incandescent lights."

That said contract was entered into in accordance with an ordinance of the city council authorizing the director of public service to make the same under section 3809, General Code; and that "the public service company *is complying with its part* of this contract."

You then say: "The city council is now preparing to light certain streets with gas and is about to authorize the director of public service to enter into a contract with the Van Wert Gas Light Company to light certain streets with gas lights and to remove the electric lights from the territory lighted with gas."

My opinion is asked as to whether this can be done.

Section 3809, General Code, provides that the council of a city may authorize a contract with any person, firm or company, for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, for a period not exceeding ten years.

Section 3994, General Code, provides:

> "A municipal corporation may contract with any company for supplying with electric light, natural or artificial gas, for the purpose of lighting or heating, the streets, squares and other public places and buildings in the corporation limits."

Either of the sections would authorize the city of Van Wert to enter into a contract to light its streets and other public places with electricity or gas, as the council may determine.

I have before me the ordinance, No. 388, of your city, "authorizing the director of public service of the city of Van Wert, Ohio, to make and execute a contract with the Van Wert Public Service Company, of Van Wert, Ohio, for lighting the streets, alleys, lands, lanes, squares and public places in the city of Van Wert, Ohio," of the 25th day of March, 1912. (Section 3 of said ordinance is as follows):

> "That said contract shall provide that said city shall use, and said company shall furnish, during the term of said contract, not less than ninety such arc lamps, in such lighting; and that said city shall have the right to add, from time to time, as many more as it may desire; and that said city shall use and said company shall furnish electricity and lamps of sixteen candle power for as many street arches as the city may from time to time require, and said company shall furnish the number of Tungsten lamps required by said city."

The contract of April 1, 1912, provides that the company shall keep and maintain its power plant at Van Wert with sufficient power to supply the electrical current necessary and required by the contract; and if it fails so to do, the same shall operate as a forfeiture of the contract, at the option of the city. The ordinance and contract are adopted and executed according to law, and the company accepted the terms of the same, entered upon its duties thereunder, and is still complying with all the terms thereof. This contract, then, being one the city had a right to make, under the statutes above quoted, is binding upon the city of Van Wert so long as the public service company performs all of its obligations thereunder; and said company has a *vested right* by virtue of said contract, which it can enforce, during the ten years specified therein, while it does all things imposed upon it by the terms thereof.

The company is required to keep its plant equipped so as to furnish all the electric lights the city may demand.

By virtue of said contract the company invests its capital, equips its plant for proper service to the city, and must keep and maintain it in such state of efficiency as will meet the requirements of the municipality, or forfeit its compansation under the contract.

It must be understood this is not an ordinance or franchise giving the company the right to furnish electricity to the *citizens of the city,* but it is a contract *with the city itself,* to light the streets, etc., thereof, for a definite and fixed *term at prices stipulated.*

In my opinion council has no authority to interfere with the vested rights of this company by substituting other kinds of light in lieu of electricity furnished under the contract, so long as the company is furnishing, or is able to furnish electricity according to its agreement with the city.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

343.

VACANCY IN OFFICE OF PRESIDENT OF COUNCIL IN CITIES FILLED BY APPOINTMENT OF MAYOR.

There being no other provision for the filling of a vacancy, occurring in the office of president of the council in a city, such vacancy may only be filled, under section 4252, General Code, through appointment by the mayor.

COLUMBUS, OHIO, June 17, 1913.

HON. ORA R. WADE, *City Solicitor, Fostoria, Ohio.*

DEAR SIR:—In your letter of June 10, 1913, you ask:

> "In case of the death of president of council in cities, how or by whom is the position filled?"

Your interrogatory raises, squarely, the question of where the appointing power rests in cities, when a vacancy occurs in an elective office, whether caused by death, or otherwise.

By section 4272, General Code, the president of the council is an *elective officer* of cities, and is the presiding officer of the legislative department of the city from which he is chosen. *He is not a member of council as other members are, and has no vote except in case of a tie.*

Section 4272, General Code, gives him power, in the absence from the city or inability of the mayor, to become acting mayor; but in such cases he cannot act as president of the council. If the mayor dies, resigns or is removed (section 4274, G. C.) the president of council becomes mayor for the unexpired term, and until his successor is elected and qualified.

Section 4210, General Code, provides for the election of a president pro tem in cities; but there is no provision that he shall succeed as president, if that office is vacant. Therefore, if the president of a city council dies, the office is *vacant;* and if it is desired to fill it, a successor must be named by some one vested with appointing powers in such cases.

Can the council make the appointment in cities in case of the death of the president? I think not. Section 4211, General Code, applying to cities, says:

> *"The powers of council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as otherwise provided in this title."*

The president, as I have said, is not a *member of council,* and does not fall within the exception above quoted, "except those of its own body."

There being no provision of the law referring to vacancies in the office of president of the council, *by name, specifically,* we must look to the general statute on the subject in the law applying to appointing persons in cities. In my opinion section 4252, General Code, covers the case, which reads as follows:

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

The president is an *officer in the legislative department of the city*, and therefore I am of the opinion that the mayor has the power to appoint a president of the council in the language of the statute above quoted.

Your other questions will be taken up very soon and answered seriatim.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

363.

DIRECTOR OF PUBLIC SERVICE—DAY LABORERS—BOND ISSUE.

The director of public service is not authorized to employ day laborers to make a public improvement to be paid for from a bond issue, where such improvement will cost to exceed $500.

COLUMBUS, OHIO, July 9, 1913.

HON. W. S. JACKSON, *City Solicitor, Lima, Ohio.*

DEAR SIR:—Under date of February 20, 1913, you submitted the following to this department for opinion:

> "The council of this city has just authorized a one hundred thousand dollar bond issue, for the purpose of improving and extending the waterworks system.
>
> "Some of the labor to be performed for this improvement can be done more economically and more advantageous to the city by employing men by the day, under the direction of our able superintendent of the waterworks than by the usual method of advertising for bids and letting a contract.
>
> "Query:—Can the director of public service, acting through the superintendent of the waterworks, employ day laborers to perform public work, without advertisement and receiving bids, and pay said laborers from the moneys arising from the sale of bonds?"

On April 4, 1913, we sent you an opinion given to the bureau of inspection and supervision of public offices, in which a similar question was considered in reference to street improvements.

You thereupon renewed your request and stated further that

> "The work contemplated will be paid for by money derived from the sale of bonds, and the bonds paid for by the revenue of the waterworks."

In your case the money to be expended has been raised by a bond issue. Although the bonds are to be paid ultimately from the revenues of the waterworks, the expenditure is not in fact a current expenditure from the current receipts of the waterworks. Your question will therefore be considered only as to the right of the city to employ laborers for laying water mains and extending the waterworks when the cost thereof is to be met by a bond issue, and not as to the right of the city to maintain a department for laying water mains when the cost thereof is paid from the current receipts of the waterworks department.

Section 3961, General Code, provides:

"Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, waterworks buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of waterworks."

Section 3965, General Code, provides:

"Before entering into any contract for work to be done, the director of public service shall require bond to be given, with good and sufficient surety, for the faithful performance of the work. In case of emergency, by a vote of two thirds of all the members elected thereto, the council may authorize such director to enter into such contract without advertising."

Section 4328, General Code, provides:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The case you submit is not an emergency as provided for in section 3965, General Code. The provision of this section in permitting advertising to be dispensed with in case of an emergency, shows that it was contemplated that the provisions of section 4328, General Code, as to advertising should be complied with. Section 3961, General Code, when it provides that "Subject to the provisions of this title, the director of public service may make contracts," contemplates that the provisions of section 4328, General Code, shall be complied with.

The expenditure in question is paid for in the first instance by an issue of bonds to be paid in the future. In order to protect the taxpayer and to prevent fraud and collusion the statutes require competitive bids for such expenditures.

I am therefore of the opinion that the director of public service is not authorized to employ day laborers to make a public improvement to be paid for from a bond issue, where such improvement will cost to exceed five hundred dollars.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

383.

ORDINANCE—MUST BE APPROVED BY MAYOR—VETO—MAYOR MUST GIVE REASON FOR HIS VETO—HIS REASON MUST BE RETURNED TO THE CITY COUNCIL WITH THE VETOED ORDINANCE—FORMATION OF CITY CHARTER.

It is necessary to submit to the mayor for his approval an ordinance for the city council, providing for the submission to the electors of the question "shall a commission be chosen to frame a charter" as authorized by section 8, article 18, of the constitution.

The provisions of section 4234, which require a mayor to return an ordinance with his objections when he disproves the same, are mandatory and a veto of such an ordinance without giving council his reasons therefor is invalid, and the ordinance remains in the same situation as if the mayor had taken no action whatever.

COLUMBUS, OHIO, July 17, 1913.

HON. H. M. RANKIN, *City Solicitor, Washington C. H., Ohio.*

DEAR SIR:—Under date of July 5, 1913, you inquire:

> "Ten per centum of the electors of this city petitioned the council to pass an ordinance to provide for the submission of the question to the electors, "Shall a Commission be Chosen to Frame a Charter?' as provided in article 18, section 8, of the constitution of the state. The council have passed such ordinance. Is it now necessary to present this ordinance to the mayor and have his approval before the same can go into effect?"

Section 8 of article 18 of the present constitution of Ohio, to which you refer, provides:

> *"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'shall a commission be chosen to frame a charter.'* The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein."

It is necessary to determine what is meant in this provision by the phrase "The legislative authority of any city."

Section 4206, General Code, provides:

> "The legislative power of each city shall be vested in, and exercised by a council, composed of not less than seven members, four of whom shall be elected by wards and three of whom shall be elected by electors of the city at large. For the first twenty thousand inhabitants in any city, in addition to the original five thousand, there shall be two additional members of council, elected by wards, and for every fifteen thousand inhabitants thereafter there shall be one additional member similarly elected, provided that the total number of members of such council shall not exceed thirty-two. When the total number of members of council is fifteen or more, one member of every five shall be elected at large, and the remainder from wards."

Section 4234, General Code, provides:

> "*Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval.* The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its passage or adoption return it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. The mayor may approve or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless council by adjournment prevents its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to the council with his objections, council may, after ten days, reconsider it, and if such ordinance, resolution or item, upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall then take effect as if signed by the mayor. The provisions of this section shall apply only in cities."

By virtue of section 4206, General Code, the legislative power of a city is vested in council. But by virtue of section 4234, General Code, a legislative act of council must be presented to the mayor for approval. An ordinance or resolution of council is not effective until presented to the mayor as required by section 4234, General Code.

By virtue of the power of veto the mayor performs duties which are legislative in character as distinguished from his executive duties.

At page 355 of volume 28 of Cyc. it is said:

> "Acts of legislation, whether of state or corporation, are not valid unless they receive the concurrent approbation of all the elements constituting the legislative department of government. Whenever, therefore, the charter of a municipal corporation makes the mayor a constituent element of its legislature, either directly or indirectly, by positive expression or necessary implication, his approval is essential to the validity of any ordinance enacted by the council."

At page 958 of 36 Cyc. it is said:

> "Under the system of government adopted in this country the chief executive, either the president or a governor, is a part of the law-making

power, and it is usually provided by constitution that a bill shall not become a law until presented to the executive for his approval or veto."

By virtue of the provisions of section 4234, General Code, the mayor of a city is a part of the legislative authority of a city. The mayor has the right to approve or disapprove an ordinance or resolution of council before the same can become effective.

Section 8 of article 18 of the constitution provides that the submission of the question shall be provided by ordinance. And by virtue of section 4234, General Code, an ordinance of council must be submitted to the mayor for approval.

The provision "by a two-thirds vote of its members" found in section 8, article 18, refers to the term "legislative authority," in said section. This phrase, however, can only apply to the body now known as the council, or some similar body. It does not and cannot apply to an individual, such as a mayor. This provision cannot be held to mean that council only should act upon such ordinance.

No reference is made in the constitutional provision to the council. Under the present plan of permitting cities and villages to adopt a charter, some of them may not have a council. The purpose of the provision is to permit the "legislative authority" of the municipal corporation to pass such ordinance. And it must be passed as other ordinances are passed.

The electors of a city or village have a right to have such question submitted to a vote upon the filing of a proper petition as provided in section 8 of article 18. The petition of the electors does not fix the date of the election or arrange the other details. This is left to the legislative authority and is to be provided by ordinance. It is this ordinance to arrange the details and to fix the date of the election that is to be passed upon, by the legislative authority. The mayor, under section 4234, General Code, has the same right as council to pass upon these questions.

The remedy in case of failure of the council and the mayor to act upon such petition need not be considered in your case.

The term "legislative authority" found in section 8 of article 18 of the constitution of Ohio includes all bodies or officers who are required to act when a legislative act is passed.

I am therefore of the opinion that an ordinance of the council of a city providing for the submission to the electors of the question "shall a commission be chosen to frame a charter," as authorized by section 8, article 18, of the constitution of Ohio must be submitted to the mayor as required by section 4234, General Code. This is true of an ordinance passed upon the initiative of council as well as one passed by virtue of a petition of the electors.

Since considering your foregoing question you have submitted under date of July 14, 1913, another inquiry arising from later developments on the passage of said ordinance.

You state that:

> "The ordinance was presented to the mayor for his approval. The mayor has since returned the ordinance to council.
>
> "On the bottom of the ordinance was added by the mayor the following: 'Vetoed July 8, 1913, Harve W. Smith, Mayor, City of Washington, Fayette county, Ohio.' No reasons whatever were given by the mayor explaining his action in the matter.
>
> "In addition to the question as to whether the mayor had the authority to veto such an ordinance we have the additional question as to whether the mayor did veto the ordinance."

You call attention to the case of Casey vs. Dadman, 77 N. E. Rep. (Mass.) 717. This same case is reported in 191 Mass. 370 as the Mayor of Lowell vs. Dadman. The syllabus in 191 Mass., 370, reads:

"Under R. L. c. 26, an attempt of the mayor of a city to veto an order of the city council without stating his objections in writing in returning it is of no effect.

"R. L. c. 26, section 9, giving a limited veto power to the mayor of a city contains the same requirement which the constitution of the United States and that of this commonwealth impose respectively on the president and the governor that he must return an ordinance of which he disapproves 'with his objections in writing."

Lathrop, J., says on page 370:

"No question is made as to the proper passage of the order by the city council. The mayor attempted to veto the order, and the only question is whether the veto had any force or effect. The veto in question was dated April 13, 1905, and was addressed to the city council of the city of Lowell, and signed by the mayor. It was in these words: 'I herewith return without my approval joint order entitled, providing for a new division of the territory of the city of Lowell into wards.' By the Rev. Laws, c. 26, section 9, the mayor was required, if he disapproved of the order to return it, 'with his objections in writing.' The s called 'veto' contained no statement of objections, and was of no effect ------The reason why it is necessary that the objections should be stated is plain. It is that the body passing the order should have an opportunity to weigh and consider the objections, and determine whether it is right or wrong. ------In this country the absolute veto is unknown; the qualified or limited veto is all that an executive has. ------ The attempt on the part of the mayor to return an absolute veto was of no effect."

In case of Truesdale vs. City of Rochester, 33 Hun. (N. Y.) 574, it was held:

"That the failure of the mayor to tate his reasons for disapproving the resolution, as required by section 48 of chapter 14 of 1880, rendered his objection thereto unavailing. and that the resolution took effect at the expiration of five days from the time it was presented to him."

The charter in this case provided:

"If he disapproves he shall return such transcript to the common council or the clerk thereof, with his objections and reasons for disapproval, in writing."

Dillon on Municipal Corporations, 5th Ed., says at section 578:

"It has been said that in this country the absolute veto is unknown; the qualified or limited veto is all that an executive has. In other words, the vesting of the mayor with power to disapprove an ordinance is intended to induce due consideration and to prevent haste and inconsiderate action, and upon disapproval the council usually has the power to pass the ordinance over his veto. *In approving or disapproving the ordinance the mayor must comply with the requirements of the statute or charter. Thus, when the statute requires the mayor, if he disapproves an ordinance, to return it with his objections in writing, a message returning the ordinance disapproved without stating any objection to it is not a valid exercise of the veto power.*"

It will be observed that in the foregoing cited authorities the law required that the ordinance should be returned by the mayor "with his objections in writing" if he disapproves.

In the statute of Ohio, section 4234, General Code, it is provided that the mayor shall return the ordinance "with his objections." The words "in writing," are omitted. It is provided further, however, "which objections council shall cause to be entered upon its journal."

In case of Erie vs. Parade Street Market Co., 37 Pa. Sup. Ct. 449, it was held that:

> "In such a case it is immaterial that the mayor does not state his objections."

Porter, J., says on page 452, of the opinion:

> "We find in the second sentence of the section of the statute above quoted, referring to the return of an ordinance by the mayor without his approval, this language, 'he shall return it, *with his objections*, to the branch of councils wherein it originated, which shall thereupon proceed to reconsider it.' The clause 'with his objections' is merely permissive and contemplates giving the mayor an opportunity to state his reasons for his official action. The vital thing is the return of the ordinance, by the mayor, to the councils, without his approval, in the manner required by the statute."

The provision of the charter under consideration in the last quoted case was that the mayor should return the bill "with his objections," as in our statute. The language of the statute as quoted by the court does not show that council was required to place said objections upon its journal. It appears that the cases in 33 Hun. 574 and 191 Mass. 370, supra, although previously decided, were neither cited or considered by the court.

Wallace, J., says at page 199 of Harpending vs. Haight, 39 Cal. 189:

> "and that as part of this return, the executive objections to the passage of the bill must be stated. For unless these things be effected by the return how can the senate enter the bill and executive objections upon its journal or what way proceed to the consideration of the objections themselves."

The constitution of California was under consideration and it provided:

> "If he approve it he shall sign it; but if not he shall return it with his objections, to the house in which it originated, which shall enter the same upon the journal and proceed to reconsider it."

This is very similar to the provision in the statute of Ohio now under consideration. The conclusion of the court, however, is dictum, as the governor, in that case, did submit his objections.

The decisions upon this question are not harmonious. Nor are the provisions governing the veto power alike in all the cases.

In the Massachusetts case the court say that the provision there under consideration was similar to that in the constitution of the United States.

In section 7 of article I of the constitution of the United States it is provided:

"If he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it."

Article II, section 16 of the constitution of Ohio provides:

"If he does not approve it, he shall return it *with his objections in writing*, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage."

It appears, therefore, that in some cases, the words "in writing" are included and in others these words are omitted.

The question to be determined is, is the provision of the Ohio statute, that the mayor, if he disapproves an ordinance, shall return it "with his objections," mandatory or directory.

I find no decision in Ohio directly upon this proposition. As to other provisions of the statutes, the courts have held that the provisions of the statutes providing the manner in which ordinances shall be passed are mandatory.

In Campbell vs. Cincinnati, 49 Ohio St. 463, it is held:

"The requirement in section 1694, that ordinances of a permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the members elected dispense with the rule, is mandatory."

Dickman, J., reviews on page 473, the different rule as applied to the legislature, and then says on page 474:

"But municipal corporations act not by inherent right of legislation, like the legislature of the state. They are governments of enumerated powers acting by a delegated authority. They are creatures of the statute, invested with such power and capacity only as is conferred by statute, or passes by necessary implication from the statutory grant, and their powers must be strictly pursued. * * * The rule therefore as stated in numerous adjudged cases is, that the mode of procedure to be followed in the enactment of ordinances as prescribed by statute must be strictly observed. Such statutory powers constitute conditions precedent, and unless the ordinance is adopted in compliance with the conditions and directions thus prescribed, it will have no force."

By virtue of section 4234, General Code, the mayor is required to return the ordinance "with his objections" if he disapproves the same. And council is required to enter such objections upon its journal.

If the mayor declined to make known his objections council could not enter the same upon its journal.

The purpose of requiring the mayor to state his objections is to permit the members of council to weigh and consider such objections upon their reconsideration of the ordinance.

It is, therefore, my opinion that the provisions of section 4234, General Code, which require the mayor to return an ordinance "with his objections" when he disapproves the same, are mandatory and that an attempted veto of an ordinance without giving to council his objections thereto is invalid.

The attempted veto in your case by the mayor was of no effect, as he failed to

give his objections thereto. The ordinance remains in the same situation as if the mayor had taken no action thereon.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

395.

MUNICIPAL ELECTIONS—ORDINANCE—RESOLUTION—MOTION—PUBLICATION OF ORDINANCE—HOW PLACE OF HOLDING ELECTION IS DESIGNATED.

Section 4844, General Code, which provides that elections shall be held for each municipal or ward precinct at such place as the council of the corporation may designate, does not mean that council must designate such place by ordinance or resolution. Council may designate such place by motion. Section 4227, General Code, providing for the publication of an ordinance does not apply.

When council in non-registration cities, designates the place of voting by ordinance, it is not necessary that the ordinance be published.

COLUMBUS, OHIO, July 14, 1913.

HON. JAMES L. LEONARD, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—Under date of June 3, 1913, you state:

> "In non-registration cities council designates the places for voting in the different precincts."

and inquire:

> "Does the ordinance for such have to be published?"

Section 4844, General Code, provides:

> "Elections shall be held for each township precinct at such place within the township as the trustees thereof shall determine to be most convenient of access for the voters of the precinct. Elections shall be held for each municipal or ward precinct at such place as the council of the corporation shall designate. In registration cities, the deputy state supervisors shall designate the places of holding elections in each precinct."

Section 4211, General Code, provides that the powers of the city council shall be legislative only.

Section 4224, General Code, provides that the action of council shall be by ordinance or resolution.

Section 4227, General Code, provides that ordinances of a general nature shall be published before going into operation.

Section 4234, General Code, provides that each ordinance or resolution of a city council shall before it goes into effect be presented to the mayor for approval.

All of these sections, however, are found in Title XII of the Code, which deals exclusively with municipal corporations and their general powers and duties.

Section 4844, General Code, *supra*, is found in Title XIV of the General Code, in

other words, in a title entirely separate and distinct from that in which sections 4211, 4224, 4227 and 4234 are found. The provisions of the last named sections, as I view the law, apply solely to the actions of council that are taken in relation to municipal affairs and found under Title XII, and do not relate to section 4844, General Code. Therefore, I am of the opinion that the provisions of section 4844, General Code, that elections shall be held for each municipal or ward precinct at such places as the council of the corporation shall designate does not mean that council must so designate such places by ordinance or resolution. In fact, council can designate the same by a mere motion, and, therefore, section 4227, General Code, providing for the publication of an ordinance of a general nature, does not apply.

I am further confirmed in this view by the fact that section 4844, General Code, further provides that in *registration* cities the deputy state supervisors shall designate the places of holding elections in each precinct. The designation of the places of holding elections by deputy state supervisors would not have to be published in any manner, and it would seem an anomaly that the action of council in designating places of election in non-registration cities would require publication, whereas the action of the deputy state supervisors in registration cities would not. I would, therefore, state it as my opinion that if council in non-registration cities designates the places of voting by ordinance such ordinance would not have to be published.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

396.

EMERGENCY COMMISSION—DIRECTOR OF PUBLIC SAFETY—MUNICIPAL CORPORATION—COMMON PLEAS COURT—EMERGENCY COMMISSION LIMITED TO EXPENDING MONEY.

An emergency commission acting in conjunction with the director of public safety has no control over the raising of revenues required for the use of his department. Its authority is limited to the expenditure of such funds as council in its legislative discretion may provide for its use.

In a municipal corporation in which an emergency commission has been appointed, the council has authority to apply to common pleas court for authority to expend money, under section 1, 103 O. L., 141, involving an expenditure of more than $500.00.

COLUMBUS, OHIO, July 17, 1913.

HON. J. F. NEILAN, *City Solicitor, Hamilton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 3rd requesting my opinion upon the following questions:

"1. May an emergency commission, appointed for a city under the provisions of the act found in 103 O. L. 206, acting in conjunction with the director of public service, compel the council of the corporation to provide funds necessary to make the repairs and replacements, for the purpose of making which the commission has been appointed?

"2. In a municipal corporation in which an emergency commission has been appointed under authority of the act above referred to, who is the proper party to apply to the common pleas court under section 1 of the act found in 103 O. L. 141, for authority to expend money for temporary repairs and replacements involving an expenditure of more than $500.00?

"May a municipal corporation, under the amended constitution establish and maintain a municipal ice plant, coal yard or a municipal furnishing house?"

The answer to your question is made absolutely clear by section 6 of the act to which I have referred in stating it.

Section 6 provides as follows:

"The emergency commission of any municipality shall have, in conjunction with the director of public service, all the powers and duties of the director of public service in such municipality in so far as they may extend to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913, and shall exercise and perform such powers and duties jointly with such director."

In connection with this section I have read the remaining sections of the act and find therein no provision in any way qualifying or enlarging the express and plain language thereof. It is clear that the only powers which the emergency commission has and which must be exercised, not independently, but in conjunction with the director of public service are those which the director himself has. The director of public service in a municipal corporation has absolutely no control over the raising of funds required for the use of his department. His authority is limited to the expenditure of such funds as council in its legislative discretion may provide for his use.

Therefore, your first question must be answered in the negative.

Your second question is rendered easy of solution, it seems to me, by the express language of section 1 of the act found in 103 O. L. 141, which provides in part as follows:

"* * * the council of any municipal corporation or the trustees of any township are hereby empowered to *authorize* or enter into contracts temporarily to repair, reconstruct or replace any public property or public way which such commissioners, council or trustees are authorized to repair, reconstruct or construct under any general law of this state * * * and to appropriate money * * * for such purposes. * * * Directors of public service or safety in cities shall not be required to advertise for competitive bids in entering into any contract authorized by this section.

"Provided, however, before such contract for temporary, reconstruction or replacement involving an expenditure of more than five hundred dollars is authorized or entered into such * * * *council* shall apply to the common pleas court of the county, etc."

It may be said of the foregoing section that the power of a city council is clearly limited to *authorizing* a contract which must be then *entered into* by the director of public service. The distinction is clearly observed throughout the section; both the council and the director are mentioned in the section. Therefore, there is no confusion of ideas, and no implication can be constructed by which any power conferred upon council by the express language of the section can be construed as intended to be conferred upon the director of public service. Now the duty to apply to the common pleas court for authority to authorize a contract involving more than five hundred dollars in a city is expressly imposed upon council. That being the case, in my judgment, the director of public service would not be authorized to make the application to the court; and it necessarily follows from what has been said in connection with the answer to your first question that the emergency commission, having only the powers of the director of public service, is not authorized to make the application to the common pleas court on its own behalf or in conjunction with the director of public service, nor may it compel the council to make the application.

Your third question is perhaps sufficiently answered by the enclosed copy of an opinion to Hon. David J. James, City Solicitor of Martins Ferry, Ohio.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

413.

A MAJORITY VOTE OF THE CITY COUNCIL IS REQUIRED IN ORDER TO PURCHASE LANDS BY THE CITY.

When property is purchased for the use of a corporation and within its powers, a majority vote of the council is required to authorize the purchase.

COLUMBUS, OHIO, August 7, 1913.

HON. E. N. FAIR, *City Solicitor, New Philadelphia, Ohio.*

DEAR SIR:—I have your letter of July 23, in which you inquire:

> "There seems to be no statute directly authorizing the purchase of real estate for city purposes. We have purchased real estate without appropriation proceedings approved by your predecessor. A proposition has been made by a freeholder to council for the sale of a small tract of land for street purposes. Council is divided as to the advisability of purchasing said tract and stand four to three in favor of its purchase. Now the question arises, does it take a majority vote or a two-thirds vote. I think it takes the latter. It takes a two-thirds vote for the sale of real estate, section 3699, General Code of Ohio, and to pass an ordinance authorizing the proceedings to appropriate property for city purposes requires a two-thirds vote, section 3680, General Code of Ohio."

Judge Dillon lays down the rule applicable to the acquisition of property by municipalities as follows:

> "In the absence of express prohibitory statutes, or of statutes which in terms confer and limit, and therefore define and measure, the power, the capacity to acquire and hold property, real or personal, must be fairly incidental to some power expressly granted or absolutely indispensable to the declared purposes of the corporation."

Section 3615, General Code, reads:

> "Each municipal corporation shall be a body politic and corporate, which shall have perpetual succession, may use a common seal, sue and be sued, and acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any municipal purpose authorized by law, and hold, manage, and control it and make any and all rules and regulations, by ordinance or resolution, that may be required to carry out fully all the provisions of any conveyance, deed or will, in relation to any gift or bequest, or the provisions of any lease by which it may acquire property."

Section 3680 to which you call attention, applies to appropriation of property and

3699 to the sale of property owned by the corporation, but no longer needed for municipal purposes. That these sections are mandatory and must be followed cannot and need not be questioned. To do either requires a vote of two-thirds of the council.

When it comes to purchasing property for city use, no such restriction can be found and under the authority from Dillon on corporations cited above; section 3615, General Code, and 2 Abbott on Municipal Corporations 1697, where a similar doctrine is found, I am of the opinion that it does not require a two-thirds or more than a majority vote of the council to authorize the purchase of property, always limited, as stated by McAbbott "to the purposes of the organization of the particular corporation and never construed as including those enterprises involving speculation or profit"; in other words, the purchase must be for the use of the corporation and within its powers—never beyond them.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

418.

CITY COUNCIL MAY FIX THE RATE OF BOTH ELECTRIC LIGHT AND POWER—THE RATE SO FIXED SHOULD BE THE MAXIMUM.

When a municipality grants a franchise to a light or power company granting the use of its streets for the business of the company, a valuable right is granted. This right is ample consideration for a stipulation in the ordinance fixing the rate for both electric light and power. The contract formed by the acceptance of the ordinance, forms a binding contract.

The rate so fixed by council should be the maximum rate that may be charged by the company receiving the franchise for light and power.

COLUMBUS, OHIO, August 2, 1913.

HON. WILLIAM L. HUGHES, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 8, 1913, in which you request my opinion on inquiry stated therein as follows:

> "Applications have been made to our council by George E. Milligan and the Cleveland Southwestern & Columbus Railway Company for franchises for furnishing electric heat, light and power to the city of Lorain and the inhabitants thereof. In the franchise ordinances it is undertaken to fix the prices to be charged therefor.
>
> "That the city, in a franchise ordinance granting the use of streets, alleys and public grounds to an electric company, may specify the amounts to be charged the public or private consumers for the lighting, to be readjudicated each five years under the code, is beyond question; but I seriously doubt the power of council to regulate the price to be charged for power.
>
> "Have you any data on this?"

Section 9195, General Code, provides as follows:

> "A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city or village, may manufacture, sell and furnish the electric light and power

required therein for such or other purposes, and with the consent of the municipality, under such reasonable regulations as it prescribes also construct lines for conducting electricity for power and light purposes, through the streets, alleys, lanes, lands, squares and public places of such city or village, by the erection of the necessary fixtures, including poles, piers and abutments neccessary for the wires. All wires so erected and operated shall be covered with a waterproof insulation, and the poles, piers, abutments and wires so located and arranged so as not to interfere with the successful operation of existing telegraph and telephone wires. (83 vs. 143.)

Excepting the provisions authorizing and governing the application of telegraph and telephone companies to the probate court for direction as to the mode in which lines of such companies shall be constructed along the streets and public ways of a municipality in case of disagreement, all the provisions of the chapter of the General Code applying to telegraph and telephone companies are by section 9192 made applicable to companies organized for supplying electric light and power.

As will be noted, section 9195, provides that a company organized for supplying electricity for power and lighting purposes, with the consent of the municipality and under such reasonable regulations as it may prescribe, may construct lines for conducting electricity for such purposes through the streets and alleys and public places of such city or village. This section manifestly confers on municipalities no express power or rate regulation of electricity for either light or power purposes and, it is likewise clear that the right of regulation conferred by this section on municipalities with reference to electric light and power companies refers solely to the proprietary right and power of the municipal corporation to direct the mode and manner of the use of its streets and public places by such companies in constructing their lines, and confers no legislative authority to regulate the rates on the sale of electricity for any purpose.

"State ex rel. vs. Sheboygan, 111 Wis. 23.
"Lewisville Gas Co. vs. State, 135 Ind. 49.
"Wabaska Electric Co. vs. Wymore, 60 Neb. 199.
"Old Colony Co. vs. Atlanta, 83 Fed. Rep. 39.
"St. Louis vs. Bell Telephone Co., 96 Mo. 623."

With respect to the question at hand sections 3982 and 3983 of the General Code provide as follows:

"Section 3982. The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas, light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance shall provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them."

"Section 3983. If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years, and the company or person so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years."

Section 3982 expressly confers on the municipality legislative power of rate regulation as to electric lighting companies and as to charges for electric light, but is silent as to electric power companies and charges for electric power. This section in so far as electric lighting companies are therein mentioned was enacted about three years after the enactment of what is now section 9195. As a matter of construction as far as section 3982 is concerned, the rule *expressio unius est exclusio alterus* would seem to obtain and exclude the power of the municipality to regulate rates as to electricity for power purposes. Telephone Company vs. Cincinnati 73 O. S. 64, 80; Richards vs. Bank Company 81 O. S. 348, 363. I am unable to see that as a matter of construction this section is within the rule announced in the case of State vs. Cleveland, 83 O. S. 61, and the grant of power in this section being legislative in character, the established rule that a municipal corporation has only such legislative power as is expressly granted or clearly implied leads to the same conclusion that this section grants no power to regulate rates on electricity for power purposes. Ohio Elec. Ry. Co. vs. Ottawa, 85 O. S. 237; Ravenna vs. Penna. Co., 45 O. S. 118; Townsend vs. Circleville, 78 O. S. 133.

Section 3983 is more general in its terms than is section 3982, but, as I view it, this section is to be considered as a limitation on the legislative power granted by section 3982 rather than as independent grant of such power. Chillicothe vs. Logan Gas Co., 8 N. P. 88, 93, 95.

The power granted by section 3982, as to regulation of rates is, as before stated, legislative in character (8 N. P. 88, 47 O. S. 35) and on the considerations before noted, I am of the opinion that such power of regulation does not extend to rates on electricity for power purposes.

There still remains, however, the question whether a municipality may not as a matter of contract by ordinance in consideration of the grant therein to an electic power company of a franchise, in the use of the streets and public ways and places fix rates as to electric power to be supplied within the municipality, which on acceptance by the company would become a valid and enforcible contract on the part of the company obligating it to furnish electricity for such purposes at the rate fixed. This is a question not free from difficulty, though it is clear that the power of a municipality to contract and its power to legislate are matters fundamentally distinct in their application to the question at hand.

"The power to regulate as a governmental function and the power to contract for the same end are quite different things. One requires the consent only of one body, the other the consent of two."

"Noblesville vs. Noblesville Gas Co. 157 Ind. 169.

With respect to the question as to the power of a municipal corporation to fix rates as to charges made by public service companies the rule seems to be that where such municipality by ordinance grants to such company the use of its streets in which

to lay or construct its mains, pipes or lines by virtue of valid legislative authority authorizing it to grant such franchise, it is authorized to prescribe in the ordinance granting the franchise the conditions upon which the rights and privileges granted by the ordinances are to be exercised, and it has been held that rates for service by such companies are matters having a proper relation to the franchise granted, and that stipulation as to such rates are binding on such companies upon acceptance.

"Boerth vs. Detroit City Gas Co., 152 Mich. 654.
"Noblesville vs. Noblesville Gas Co., supra.
"Muncie Gas Co. vs. Muncie, 160 Ind. 97.
"Long Branch vs. Water Co., 70 N. J. Eq. 71, 71 N. J. Eq. 790.
"Rochester Tel. Co. vs. Ross, 125 App. Div. 76, 195 N. Y. 429.
"White Haven vs. Water Co., 209 Pa. 166.
"People vs. Telephone Co. 192 Ill. 307.
"Zanesville vs. Gas Co., 47 O. S. 1, 31.

I am unable to see any reason why the principle recognized in these cases should not apply to the question at hand. By express legislative enactment municipalities in this state are authorized to grant to an electric power company a franchise covering the use of its streets and other public ways and places in constructing its lines for the purpose of conducting electricity to consumers within the city or village, and without such franchise such company has no right to the use of the streets of the municipality for such purpose. While the right to produce and sell electricity as a commercial product is open to all persons without legislative authority, still the right to use the streets of the city for the purpose of transmitting electricity with wires is not common to all citizens, but is a franchise which can only be granted by the state or municipality acting under legislative authority. Purnell vs. Lane, 98 Md. 589; New Orleans G. L. Co. vs. Louisiana L. & H. Co., 115 U. S. 659; State ex rel. vs. Cinn. G. L. Co., 18 O. S. 262.

In the case of Farmer vs. Tel. Co., 72 O. S. 526, it was held that a stipulation fixing a rate of telephone service in an ordinance permitting a telephone company to use the city streets for its poles and wires was not a valid and enforcible contract though the ordinance had been accepted by the telephone company. In this case the court followed the case of Macklin vs. Home Telephone Co., I. C. C. (n. s.) 373, 70 O. S. 507, where the same question was involved. In neither case, it will be noted, was the decision placed on the ground of any want of power in the municipality to contract as to rates for telephone service by reason of the fact that it had no legislative power to fix or regulate such charges, but in each case the decision as to the invalidity of the contract was placed on the ground that the telephone company took its right to the use of the streets and public ways of the municipality by legislative grant from the state, and that the municipality possessed nothing in the way of a valuable right to bestow upon the telephone company as a consideration for its agreement to maintain the rates fixed by the ordinance.

The relation of a city or village to an electric light or an electric power company is quite different in this respect from its relation to a telegraph or telephone company. As to the latter named companies, as before noted, they take their right to use the the streets of a city or village directly from the legislature of the state, "and it is not made to depend upon any consent or agreement on the part of the municipality" (64 O. S. 81) electric light and electric power companies are granted the right to use such streets with the consent of the municipality and under such reasonable regulations as it may prescribe.(Sec. 9195.) This legislative provision gives municipal authorities the right to refuse the privilege of constructing electric wires and appliances in the streets and other public ways, and without their consent no such company can lawfully enter upon and occupy the streets for purposes of its business (76 O. S. 330, 331).

It is manifest, therefore, that a municipality does have a valuable right to bestow in granting to an electric light or electric power company a franchise covering the use of the streets for the purpose of its business; and I see no reason why the valuable right thus bestowed is not ample consideration for a stipulation in the ordinance granting the franchise fixing the rates as to both electric light and electric power nor why the the contract formed by the acceptance of an ordinance containing such stipulation as to rates is not valid and enforcible.

"Van Wert vs. Van Wert Public Service Co., 11 N. P. (n. s.) 91."

As to electric lighting companies and as to charges for electric light, the municipality, within the limitations of section 3983, has the additional power to regulate rates, but as to electric power the municipality can govern rates only by making stipulation therefor in the ordinance granting the franchise which on acceptance by the company would become an enforcible contract and obligation against it, subject only to the power of the public service commission, on proper complaint, to investigate the rates so fixed and, if need be, revise the same.

The conclusion here reached as to the power of the municipal council to fix rates for electric light and electric power are consonant with the provisions of the acts provided for the public service commission and defining and regulating its powers and duties (102 O. L. 549, sections 614-I to 614-84 G. C.; 103 O. L. 804). Under the provisions of the act first above noted, any person, association, firm or corporation furnishing electric light or power is a public utility (sections 614-2, 614-2a G. C.) Provision is made in the act granting to the commissioners power to investigate and revise rates charged or chargeable by public utilities under municipal ordinances. By force of section 614-47 G. C., rates fixed under sections 3982 and 3983, (including rates as to electric light) can be investigated and revised by the commission only as provided in sections 614-44 to 614-46 of the General Code; that is on written complaint as to the rate, made by the public utility itself, or by a certain percentage therein stated of the electors of the municipality. As to rates charged by other public utilities (with certain exceptions not here important) the commission has power to investigate and revise the same as provided in sections 614-21 to 614-23 inclusive; that is, on the written complaint of any person, firm or corporation, of the public utility itself, or on the initiative of the commission.

As to the rates both for electric light and electric power to be fixed by the city council, the rates so fixed should be the maximum. That is, the ordinance should provide that the person or corporation receiving the franchise should not charge or receive *more* than certain rates therein named for electric light and electric power respectively.

In conclusion, I assume that the corporation mentioned in your inquiry as the proposed recipient of the municipal franchise as to light and power is one organized under the laws of the state of Ohio, as required by statute (section 614-73 G. C.)

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

424.

CONTRACT FOR STREET PAVING AND ALSO FOR WATER PURIFICATION PLANT SHOULD BE APPROVED BY BOARD OF CONTROL.

1. When a contract is let for public improvement, such as street paving and when such work exceeds $500.00, such expenditure of council should also be approved by the board of control.

2. A contract for a water purification works, which is ordered by the state board of health and which has been authorized by ordinance of the council, directing the director of public safety to enter into a contract with the lowest and best bidder, should also be approved by the board of control.

3. Sections 12946-1, 12946-2, General Code, which provide for the payment of wages at least twice in each calendar month, does not apply to municipalities.

COLUMBUS, OHIO, July 17, 1913.

HON. GEORGE C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Under date of July 15th you request my opinion upon three questions:

> "*First*: Whether or not contracts for public improvements, such as street paving, when such work exceeds $500.00, such expenditure first having been authorized and directed by ordinance of council under section 4328, must also be approved by the board of control in accordance with section 4403."

Section 4328, General Code, provides in part:

> "When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Section 4403, General Code, provides in part:

> "No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract."

An examination of section 4328, General Code, discloses that when council has so authorized and directed the director of public service shall make a written contract with the lowest and best bidder after advertisement, and section 4403, General Code, provides that no contract in the department of public service in excess of five hundred dollars shall be *awarded* except on the approval of the board of control. There is no doubt in my mind that a contract entered into under the provisions of section 4328, General Code, would be considered as a contract in the department of public service and that after the director of public service had received bids, having been authorized and directed by council to make the expenditure, he shall not award a contract for the particular work in hand until the approval of the board of control is obtained.

Section 4403, General Code, was intended to give the board of control the supervision of the awarding of contracts after advertisement for bids had been properly made. Therefore, I am of the opinion that contracts for public improvements exceeding five hundred dollars, the expenditure having been authorized and directed by ordinance of council, should be approved by the board of control.

Second: You next inquire:

> "Whether or not a contract for water purification works, the installation of which is ordered by the Ohio state board of health and which has been authorized by ordinance of the Council directing the director of public service to enter into a contract with the lowest and best bidder, must be approved by the board of control."

The mere fact that the installation of a water purification works is ordered by the state board of health would not, as I view it, change the conclusion to which I have reached in answer to your first inquiry above. As before stated the board of control is simply to *approve* the awarding of the contract.

Third: Your next inquiry is whether or not Senate Bill No. 132, 103 Ohio Laws 154, known as sections 12946-1 and 12946-2, General Code, applies to municipalities.

Senate Bill No. 132 is an act to provide for the payment of wages at least twice in each calendar month.

Section 1 of said act provides that every individual, firm, co-partnership, association or corporation *doing business* in the state of Ohio who employs five or more regular employes shall pay as provided therein, and

Section 2 provides that no such corporation, contractor, person or partnership shall by a special contract exempt himself or itself from the provisions of the act.

A municipality cannot be considered as *doing business* in this state. It is solely a political subdivision of the state and not in any sense an individual, etc., as set forth in section 1 of the act.

I am, therefore, of the opinion that said section would not apply to municipalities.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

443.

THE MAYOR OF A CITY HAS NO AUTHORITY TO DISMISS CHIEF OF POLICE OR FIRE CHIEF BETWEEN AUGUST 10, AND JANUARY 1, 1914, WITHOUT FIRST SUBMITTING THE CASE.

When section 4281, General Code, was repealed by the civil service act, it was re-enactede and since section 4250, General Code, was not repealed, there never was an instant of tim, when the provisions of section 4381, were not in force, nor when there was any change of the law from that in force at the time the case of Karb vs. State was decided. Consequently there will be no power on the part of mayors to remove chiefs of police or of fire departments between August 10, 1913, and January 1, 1914, without forthwith certifying such facts and the cause therefor to the civil service commission of the city.

COLUMBUS, OHIO, August 14, 1913.

HON. HOWARD E. MACGREGOR, *City Solicitor, Springfield, Ohio.*

DEAR SIR:—In your letter of June 10, 1913, you say:

> "I respectfully request your opinion upon the question, whether, by reason of the recent enactment of the new civil service law (amended senate bill No. 7) there will occur a period of time between August 10, 1913, and January 1, 1914 (or until the new civil service law goes into complete operation) during which mayors of municipalities may arbitrarily remove chiefs of police and fire departments without preferment of charges or hearings before the municipal civil service commission?"

The question submitted by you must be analyzed and determined in the light of the old laws governing civil service in cities, together with the act on the same subject (amended senate bill No. 7) passed by the general assembly April 28, 1913, and filed in the office of the secretary of state May 10 thereafter (103 O. L. 698).

The old statute (General Code 4381, applying to chiefs of police and fire departments) reads as follows:

> "The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. If either the chief of police or the chief of the fire department is so suspended the mayor forthwith shall certify such fact, together with the cause of such suspension, to the civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon, which shall be final."

The supreme court of Ohio, in the case of Karb, Mayor, vs. The State, ex rel. Cartre, O. L. R., January 20, 1913, page 113, decided that chiefs of police or fire departments in cities, are not subject to summary removal by the mayor, notwithstanding the provisions of section 4250, which reads as follows:

> "The mayor shall be the chief conservator of the peace within the corporation. He shall appoint and have the power to remove the director of public service, the director of public safety and the heads of the sub-departments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law."

The court held that a chief of such departments, when suspended or removed, had the right to be heard by the civil service commission of the city, whose decision is final.

Under the supreme court decision in the above case, if the law remains unchanged on and after August 10, as to chiefs of police and fire departments, then such chiefs are still protected the same as when that decision was rendered. We must now compare amended senate bill No. 7, effective August 10, 1913, with the old law, and see what changes, if any, are made affecting chiefs of police and fire departments, and the power of mayors in cities relative to such officers.

The new act above referred to is entitled: *"An act to regulate the civil service of the state of Ohio, the several counties, cities and city school districts thereof, and to repeal sections 4412, 4477,"* (and 36 other sections named in the title). This act consists of 32 sections and many sub-divisions thereof, and is, in effect, a codification of all the laws relating to civil service in Ohio; and when effective supplants existing laws as to that subject. There is nothing in the act extending the time of its taking effect, so that by operation of law under the new constitution, all parts thereof would become effective August 10, 1913.

One of the most important questions confronting us on the threshold of the inquiry, is: Was section 4381, above quoted, repealed? If we look at section 32 of the act, we find that said section 4381 is among the enumerated ones repealed. This is the only place in the act where said section is referred to; but if we look at the *title of the act* we find section 4381 is *not mentioned at all as one of the sections to be repealed.* We are then driven to ascertain what the *intention* of the legislature was, in the enactment of this new law, and *what in fact, it did, along the lines aforesaid.*

The mere use of language in *one section* of the act, is not decisive of the question. If this were not so, the fact that section 32 enumerates section 4381 as *repealed,* would settle the question, and we would look no further. But there are higher and broader rules to be applied in determining the *intention* of the law-making body.

> *"The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature.* 36 Cyc. 1106.
>
> *"In construing a statute, the legislative intent is to be determined from a general view of the whole act, with reference to the subject matter to which it applies and the particular topic under which the language in question is found.* 36 Cyc. 1128.
>
> "It is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, *and to give a sensible intelligent effect to each.* 36 Cyc. 1129."
>
> "Statute law is the will of the legislature; and the object of all judicial interpretation of it is to *determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it."* Endlich on interpretation of statutes, section 1.

Lord Coke, in section 27 of Endlich, says:

> *"To arrive at the real meaning, it is always necessary to take a board general view of the act, so as to get an exact conception of its aim, scope and object."*

The same section further provides:

> *"The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law * * *."*

Section 35 of the same author, under the heading, *"All parts of statute to be compared,"* says:

"Passing from the external history of the statute to its contents, it is an elementary rule that *construction is to be made of all the parts together, and not of one part only by itself.* A survey of the *entire statute* is almost always indispensable, even when the words are the plainest; for the true meaning of any passage is that which *best harmonizes with the subject, and with every other passage of the statute.*"

Section 43, same author, says:

"When there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs.

"The first and all important rule to be regarded in construing a statute is, to have respect to its spirit, rather than its letter."—Spicer vs. Giselman, 15 O. 339, 341.

"A code of statutes relating to one subject, is presumed to be governed by one spirit and policy, and intended to be consistent and harmonious, and all of the several sections are to be considered in order to arrive at the meaning of any part, unless a contrary intent is clearly manifest.—60 O. S. 353.

"In gathering the meaning of an act of legislation, *the whole act must be taken together.*——Horton vs. Horner, 16 O. 145, 147.

"We must endeavor to get at the legislative intent by a consideration *of all that has been said in the law, and not content ourselves with partial views, by selecting isolated passages, and holding them alone up to criticism.*—State vs. Roach, 47 O. S. 485, 35 O. S. 288.

"The court must look through the whole statute, and if possible construe it so that the whole may have effect, and that one part shall not defeat another."—Michies Ohio Digest, volume 12, page 896, citing numerous Ohio authorities.

Judge Ranney, in 3 O. S., 53, speaking of statutory construction, says:

"It must not be dissected, and its parts construed separately, but the intention of the law-giver is to be deduced from a view of the whole, and every part taken and compared together."

"A statute must be reasonably construed.—Ampt vs. Cincinnati, 5 N. P. 98; 8 N. P. 335; Henry vs. Trustees, 48 O. S. 671.

"Where the question is one of construction, the court should adopt that one which is most reasonable and consistent with the purview of the act.—Michie Digest, volume 12, page 897, citing numerous Ohio authorities.

"It is a well known rule in the construction of statutory laws that every word therein contained is to be given a meaning where it is possible to be done and preserve good sense; and that a construction which would leave without effect any part of the language used should be rejected, if any interpretation which will give it effect can be found.—23 Am. & Eng. Ency. of Law, 311."

So much on the subject of construction in general.

Let us now see whether section 4381, General Code, was *in fact repealed* by the

repealing clause, section 32, of amended senate bill No. 7, when construed with the *whole of said act.*

The last part of section 19 of the act known as senate bill No. 7, provides as follows:

> "The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. If either the chief of police or chief of the fire department is so suspended the mayor forthwith shall certify such fact, together with the cause of such suspension, to the civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon, which shall be final."

This language is an exact copy of section 4381, General Code, in words and punctuation; and forms *a part* of the *whole act,* the title of which I have heretofore given, and which will be effective on the 10th day of August, 1913. This raises the question squarely, whether section 32 of the act which *purports* to repeal section 4381, General Code, *did repeal the same as a matter of law.*

Under the title *"Re-enactment not a Repeal in Spite of Express Repealing Clause,* Endlich on the interpretation of statutes, section 490, lays down this doctrine:

> *"It seems, indeed, to be the general understanding that the re-enactment of an earlier statute is a continuance, not a repeal of the latter, even though the later act expressly repeals the earlier.* The mere re-enactment of an existing law, in the same or substantially the same terms, without words of repeal, and in the absence of conflict, or an intention to supersede, does not, of course, necessarily repeal the old law. But even a repealing act re-enacting the provisions of the repealed statute, in the same words, is construed to continue them in force without intermission; the repealing and re-enacting provisions taking effect at the same time. So, it was held, that, where an act repealing another which provided for the appointment of certain officers, instantly, by the second section, re-enacted the repealed act, the repeal was rendered inoperative, the former law left in force, and the officers appointed under the same, whose term of office had not expired, remained in office. So the repeal of the general corporation law by a statute substantially re-enacting and extending its provisions, does not terminate the existence of corporations formed under it, but is to be regarded as a continuance, with modifications, of the old law. *The principal has been applied also to a revision which repealed the acts collated and consolidated, but immediately, in its own provisions, re-enacted them literally or in substance, so that there was never a moment when the repealed acts were not practically in force.* So the repeal and re-enactment, in a revision of laws, of a statutory provision authorizing a town to make a certain by-law was held not to affect the validity of the by-law. And it has been applied to criminal statutes so as to permit a conviction for an offense against the re-enacted old law, even where the re-enacting law undertook to repeal it; the re-enactment being construed a continuance."

A law cannot be *repealed* and *re-enacted* in the same act. The one act neutralizes the other, and the law retains its validity, and stands untouched.

What is a *repeal?* In 36 Cyc., page 1038, the text says:

> "The primary meaning of the word 'repeal,' as used in speaking of the

repeal of a statute, is, as its etymology imports, the recalling or revoking of a statute."

In the notes the definitions are:

"The abrogation of one statute by another."

"A repeal removes the law entirely."

"A repeal puts an end to the law."

"A clause in a statute *purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent must prevail over literal interpretation.*"

"The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed, not as an implied repeal of the original statute but as a continuation thereof".—Cyc. volume 12, page 1084.

"When there is an express repeal of an existing statute, and a re-enactment of it at the same time, * * * the re-enactment neutralizes the repeal, so far as the old law is continued in force."—Sutherland Stat. Construction, section 134.

In view of the rules of construction given above, and reading the new statute and section 4184, General Code, in the light thereof, I am of the opinion that said old section 4184 is not in fact repealed, and is now, and will be on August 10, 1913, effective and in full force.

The object of the new act was to strengthen and extend the civil service system in Ohio, and not to render a part of it inoperative from August 10 to January 1, next, This new act, under the authorities cited, must be construed as a *whole*, with a view of arriving at the *true intention* in the minds of the legislature. Each word, phrase, clause and section thereof must be considered *together, in pari materia*, and not taken up separately and picked to pieces. This act, as a *whole*, is "to regulate the civil service of the state of Ohio, the several counties, cities, etc., thereof," and amounts to a codification of the laws relating to this subject, and must be read in the light of all the laws pertaining thereto. In other words, a fair, practical, sensible view, must be taken of the act, so as to bring out the intention of the law-makers. There surely was no intention on the part of the legislature that any hiatus in the civil service law should exist on August 10 or at any other time, for section 19 of the new act says: *"That members of existing municipal civil service commissions shall continue in office for the term for which they have been appointed."*

The further intention of the legislature not to disturb the existing state of civil service laws and appointees thereunder, is shown in the language used in section 31 of the new act, which is as follows:

"All officers and employes in the classified service of the state, the counties, cities and city school districts thereof holding their positions under existing civil service laws, shall when this act takes effect, be deemed appointees under the provisions of this act."

This fixes the status of chiefs of these departments, and they come within the provisions of section 4381 as re-enacted in the new act, and are entitled to all the right thereunder of a hearing before the civil service commission within five days after removal or suspension by the mayor.

While enough, we think, has been said to warrant the conclusion herein arrived at, we might aid the following considerations:

Where a new statute repeals an old one and at the same time re-enacts the provisions of the old law as part of the new, the repeal and re-enactment go into effect at the same time. One court has said:

> "In our judgment it is clear that the effect of this repeal and re-enactment was to continue the uninterrupted operation of the statute. There is no change in the law, and the re-enactment of the new is simultaneous with the repeal of the old provision. It is said in the argument that there was an instant of time between the taking effect of the new statute and the expiration of the old, but it is difficult to perceive by what process such instant of time could be estimated. The new statute took effect at the same instant with the repealing statute. When the legislature re-enacted the same provision and provided for its taking effect at the same time with the repealing of the old statute, it is clear that they intended to continue such provisions in force without interruption."—(Fullington vs. Spring, 3 Wis., 667).

(Where the legislature repeals an existing statute, and by the same act makes a different provision for the matters included in the old act, and provides that the new provisions shall take effect in the future the repeal does not become effective until the provisions of the new act which supplant the old become effective).

A situation very similar to the one under consideration was presented in Connecticut, when the legislature of that state passed an act by the first section of which so much of the general statutes of the state as provided for the appointment of commissioners for New Haven county was repealed and the office was abolished, and by the second section of which a board of commissioners for said county was created, and they were given all the powers provided for county commissioners by the general laws of the state. In other words, by section 1, it repealed the general laws applicable to commissioners for New Haven county, and by the second created the same office and granted to it the same powers possessed by the old officers under the old laws. Concerning this, it was stated:

> "We have this condition of things; an act of the legislature repeals by its terms a certain section of the general statutes and abolishes a board of officers appointed under it, and the same act creates precisely the same board and clothes them with the same powers and duties enumerated in the section repealed. Can this be done? We think not. The act in question contains the elements of its own destruction. It attempts to kill and make alive at the same instant—an impossibility. There must be some appreciable space of time between the repealed act and the re-enactment of the same act. In this case not a second intervened and there never was a moment when the relators were out of office or when the office of county commissioner of New Haven county was abolished."—(State ex rel. vs. Baldwin, 45 Conn., 144).

So in this case, while section 4381 was repealed by the civil service act, it was re-enacted, and inasmuch as section 4250 of the General Code was not repealed, there never was an instant of time when the provisions of section 4381 were not in force, nor when there was any change of the law from that in force, when Karb, Mayor, vs. The State of Ohio was decided.

Therefore, I am of the opinion that there will be no power on the part of mayors of cities to remove and suspend chiefs of police or fire departments, between August 10, 1913, and January 1, 1914, without forthwith certifying such fact and the cause therefor to the civil service commission of the city.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

445.

CITY COUNCIL MUST PROVIDE BY ORDINANCE FOR CHARTER ELECTION WHEN PETITION OF 10% OF THE ELECTORS OF THE CITY REQUEST THE SAME.

The council of a city, upon petition of 10% of the electors of the city shall provide by ordinance for the submission to the electors of the question "Shall a commission be chosen to draw a charter." *Council has power to examine the petition to see that it is in proper form and also to see that it contains ten per cent. of the voters. When this is done, council should prepare and pass an ordinance submitting the question.*

COLUMBUS, OHIO, August 15, 1913.

HON. G. T. THOMAS, *City Solicitor, Troy, Ohio.*

DEAR SIR:—I have your letter of August 9, 1913, in which you inquire:

> "At the last session of the council of our city there was presented a petition signed by ten per cent. of the voters of this city requiring the city council to inaugurate by ordinance a commission form of government. This petition was presented by authority of section 8 of article 18 of the constitution of Ohio, which reads as follows:
>
> "Section 8. The legislative authority of any city or village may be a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question 'shall a commission be chosen to frame a charter?'
>
> "The remainder of the section I do not need to quote.
>
> "The question is, is it the duty of council upon presentation of this petition to order an election?
>
> "There is a great diversity of opinion as to just what this means, and I cannot find any two men who take the same view. If it is intended that the ordinance for submission shall automatically go to the electors, why is it required that two-thirds of council shall vote for it? My opinion is that it requires both the two-thirds majority and the ten per centum of the electors in order to submit it to the people."

As I read section 8 of article 18, the two-thirds vote of members of council applies only to the submission by the council note the language: "The legislative authority of any city or village *may by a two-thirds vote of its members*, and upon petition of ten per centum of the electors *shall forthwith provide by ordinance, etc.* A two-thirds vote of the council may make the submission, but upon a petition of ten percentum of the electors, the council, *legislative authority* shall provide by ordinance, etc.

Taking this view of the matter, when a proper petition is presented, it is mandatory upon the council to provide by ordinance for the submission of the question "shall a commission be chosen to frame a charter?"

Therefore, the two-thirds vote, not applying when a petition is filed, only a majority of the council is necessary; they are commanded to act and have no discretion in the matter. The council, of course, has power to determine whether the petition is in proper form under this amendment, and carries with it the ten per cent. of the electors of the municipality and once these two questions are answered affirmatively, there is nothing left with the council but the preparation and passing of an ordinance submitting the question.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

454.

UNION CEMETERY AT IRONTON NOT UNDER CONTROL OF CITY COUNCIL AND TOWNSHIP TRUSTEES.

Under the provisions of section 4189, General Code, as amended in 103 O. L., 272-273, the Union Cemetery, known as the Woodland Cemetery, at Ironton, is now under the control of the township trustees and the city council of the city of Ironton. The law providing for cemetery trustees of union cemeteries has been repealed.

COLUMBUS, OHIO, August 15, 1913.

HON. A. J. LAYNE, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—In your letter of August 14, 1913, you say:

> "Upper township and the city of Ironton elected three cemetery trustees for a union cemetery known as Woodland cemetery and their term of office, under the old law, would expire on the first Monday of January next. Under House Bill No. 478 found at pages 272 and 273 of 103 Ohio Laws, the law providing for the election, organization and power of said cemetery trustees has been repealed, and said law became effective on or about August 1, 1913.
>
> "In view of the above, have said cemetery trustees any power to transact any business now?"

By the repeal of sections 4184, 4185 and 4189, of the General Code, the legislature abilished the office of cemetery trustees of union cemeteries; and legislated out of office the present incumbents, and deprived them of any control or management of such cemeteries.

Section 4189 was amended, 103 O. L., pages 272 and 273, so as to read as follows:

> "The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

The latter act is now in full force, and your union cemetery is now under the control and management of the township trustees and the city council.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

471.

RAILROAD POLICEMEN ARE OBLIGED TO GIVE BOND IN ORDER THAT THEY MAY LAWFULLY CARRY CONCEALED WEAPONS IN THE DISCHARGE OF THEIR DUTIES.

Railroad policemen do not have the right given to the particular officers designated in section 12819, General Code, in reference to carrying concealed weapons. Their right to carry concealed weapons is conditioned upon their giving bond, provided for in the second provision of this statute.

COLUMBUS, OHIO, September 10, 1913.

HON. R. E. MYGATT, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of August 12, 1913, in which you state that the Bessemer & Lake Erie Railroad Company have in their employ certain special railroad policemen, appointed by the governor under authority of section 9150, General Code, who have taken the oath of office and given bond to the city of Conneaut in the sum of $500, and you ask opinion of me as to whether railroad policemen are required to give the bond provided for in section 12819, General Code, as amended (103 O. L. 553), as a condition to their right to carry concealed weapons in the discharge of their duties as such railroad policemen, or whether they are exempted from the obligation of giving such bond by the provisions of section 9151, General Code, providing that railroad policemen shall possess and exercise the powers of city policemen.

Section 12819, General Code, as amended, (103 O. L. 553) provides as follows:

> "Whoever carries a pistol, bowie knife, dirk or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed when on duty. Provided, further, that it shall be lawful for deputy sheriffs, and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

Prior to its recent amendment section 12819, General Code, made it an offense—a misdemeanor—for any one to carry concealed the weapons therein named and designated. The terms of the statute did not except any one from its operation, whether he might be an officer of the law or otherwise. Nor, prior to the recent amendment of this section, was there any other statute which gave anybody an absolute right to go armed with concealed weapons. Sections 13693, General Code, however, provided, and still provides, that on the trial of an indictment for carrying a concealed weapon, the jury shall acquit the defendant if it appear that he was at the time engaged in a lawful business or employment and that the circumstances were such as to justify a prudent man in carrying such weapon for the defense of his person, property or family.

Strictly and legally speaking, therefore, prior to this amendment no particular person or persons had an absolute right to carry concealed weapons, but every person did so at his peril, to be determined by the question whether or not at the time of the alleged offense he was in the pursuit of a lawful business or employment and the circumstances justified him in carrying such weapon for the defense of person, property or family (3 C. C. 660.) The effect, however, of section 13693 has been to allow police officers and, generally speaking, all other officers of the law to carry concealed weapons with impunity and practically to allow them to do so.

The enacting clause of Section 12819 as amended, makes it an offense—a felony—for any one to carry concealed the weapons therein named and designated. The enacting clause is followed by a proviso excepting from its operation all sheriffs, regularly appointed police officers of cities and villages, and regularly elected constables, and the special officers provided for by sections 2833, 4373, 10070, 10108 and 12857 of the General Code. The effect of this first proviso is to give the particular officers therein named and designated an absolute right to go armed with concealed weapons when in the discharge of their duties as such officers. None of the officers named and designated in this first proviso include railroad policemen. Railroad policemen not being expressly excepted by this first proviso from the operation of the enacting clause the question is, are they excepted from the operation of the enacting clause by implication. It is a rule of construction that the designation of particular persons or things in the language of a statute is an implied exclusion of all other persons or things (Telephone Co. vs. Cincinnati, 73 O. S. 64, 80).

By force of the expressed terms of this proviso, I am of the opinion that railroad policemen are not within its meaning, and that they do not have, as far as this statute is concerned, the absolute right to go armed in the discharge of their duties.

The first proviso in section 12819, as amended, is followed by a second proviso that it shall be lawful for deputy sheriffs and specially appointed police officers, other than those designated in the first proviso, to go armed if they give the bond provided for therein. The right of the officers named and designated in the second proviso to go armed is not absolute, but conditioned upon their giving the bond prescribed.

In my opinion, railroad policemen come clearly within the second proviso. Section 9150 makes special provision for the appointment of such officers, and they are therefore special police officers other than those provided for in the sections of the general act designated in the first proviso herein before noted.

It is true that now, as before the amendment of section 12819, by virtue of the provisions of section 9151, General Code, railroad policemen possess and may exercise the powers of city policemen. In the consideration of the question here presented, however, it is to be borne in mind that section 12819 does not confer the absolute right to go armed on persons having powers of city policemen or on persons having any other particular powers or special duties to perform. This section does confer such absolute right on police officers of cities and villages and upon sheriffs, by name, and likewise confers this right upon other officers designated in the first proviso in this statute, not including railroad policemen; while deputy sheriffs and all other specially appointed officers are provided for with respect to their right to go armed by the second proviso in the statute above noted, giving them such right upon condition that they execute the bond therein provided for. In this connection it may be questioned whether or not the provisions of section 9151, conferring upon railroad policemen the powers of policemen in cities, does not have reference to powers expressly granted to city policemen by other statutory provisions. (See section 4378 G. C.; section 1536-687; section 1934 R. S.; 72 O. S. 347, 354.) However, were it to be considered that section 9151, standing alone, would be effective to give railroad policemen an absolute right to go armed in the discharge of their duties in view of the fact that city policemen, by the provisions of section 12819, are given such right, yet it appears that by this section special provision is made as to specially appointed police officers, including

railroad policemen, making their right to go armed conditional on their giving the bond prescribed. It follows that effect must be given to the later special provision.

"State ex rel. vs. McGregor, 44 O. S. 628, 631.
"Cincinnati vs. Holmes, 56 O. S. 104, 114.

Personally, I see no reason why the legislature in this act should not have given railroad policemen the same absolute right to go armed as it did to city policemen. There is a good deal more reason why they should have this absolute right than some of the officers provided for by the special sections of the General Code designated in the proviso in section 12819. It would have been an easy matter to have given this right to railroad policemen by simply adding section 9150 to the list of General Code sections designated in the first proviso. What were the reasons which actuated the legislature in not including railroad policemen in the list of those having such absolute right, I do not know, but to my mind, this section cannot be construed to give railroad policemen this absolute right without by construction incorporating in effect section 9150 in the list of other code sections specially designated in this first proviso, and this would be pure legislation and not admissible in construing the statutes.

In the consideration of the concrete question here presented, the further question arises as to what, if any, effect the enactment of section 12819 as amended, has on the operation of section 13693, which, as already noted, does not purport to confer an absolute right on any one to go armed with concealed weapons, but which provides for their justification in so doing under certain circumstances therein named, on trial of an indictment charging the offense.

After careful consideration, without here discussing the reasons which lead me to the conclusion, I am of the opinion that there is nothing in the provisions of section 12819 as amended, which has the effect of repealing, by implication, section 13693, and that this much may be safely concluded as for the law on the subject matter: First, that sheriffs, city and village police officers, constables and special officers provided for in the sections of the General Code designated in the first proviso in section 12819, have an absolute right to go armed with concealed weapons while on duty; second, that deputy sheriffs and all other special officers lawfully appointed (including railroad policemen) have a right to go armed with concealed weapons on condition that they execute the required bond; third, that no other persons have a right to go armed with concealed weapons, but that such persons do so at their peril, the same to be determined by the question whether the prohibited act was done while about a lawful business or employment, and whether, further, the weapon was carried under circumstances justifying a prudent man in doing so for the protection of his person, property or family.

In the consideration of the question presented by your inquiry, as to the *right* of railroad policemen to go armed with concealed weapons, the question arises whether or not the legislature, in making special provisions as to the right of deputy sheriffs and other special officers, including railroad policemen, to go armed, has excepted them from the protecting care of section 13693. In other words, whether or not the legislature intended both the right of a railroad policeman to go armed, and also his justification for the act, to depend on the condition that he has given the bond required.

However, the question made by your inquiry is one going simply to the *right* of railroad policemen *to go armed* with concealed weapons in the discharge of their duties, and on the considerations before noted, I am of the opinion that they do not have the absolute right given to the particular officers named and designated in the first proviso in section 12819, but that the right to do so is conditioned upon their giving the bond provided for in the second proviso in this statute. Although the statute does not specifically so state, I am of the opinion that this bond should be filed with the clerk of the common pleas court, he being the officer who must approve the bond.

In conclusion, I note what you say with reference to the policemen of the Bessemer & Lake Erie Railroad Company having given bond to the city of Conneaut in the sum of $500. I know of no statutory provision which directs or authorizes railroad policemen to give bond to cities in or through which the railroads upon which they are employed may pass, and, although city policemen do not have to give bond as a condition of their right to go armed in the discharge of their duties, yet railroad policemen, in their capacity as such, are required to do so as a condition to their right in this respect, and they should be so advised.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

473.

THE FACT THAT A MEMBER OF THE BOARD OF EDUCATION WHO CONTRACTS FOR THE CONSTRUCTION OF A SCHOOL BUILDING IS A MEMBER OF THE FIRM THAT FURNISHES THE MATERIAL TO THE CONTRACTOR FOR THE CONSTRUCTION OF THE BUILDING, DOES NOT IN ITSELF INVALIDATE THE CONTRACT.

Where a board of education contracts for the construction of a school building, and a member of this board of education is also a member of a corporation that is furnishing supplies to the contractor for the construction of this building, the action is legal provided at the time the contract was entered into it was not understood that this particular corporation was to get the contract for supplies.

COLUMBUS, OHIO, August 26, 1913.

HON. C. B. FINDLEY, *City Solicitor, Elyria, Ohio.*

DEAR SIR:—Under date of August 13th you requested my opinion as follows:

> "A member of the board of education of the city school district of Elyria is also a stockholder and officer of a corporation that is furnishing building material and supplies to a contractor, to be used in the construction of a school building that is being erected by said contractor for said board, under a contract naming a lump sum to be paid for such completed building. The legality of this action has been questioned, and your opinion is desired.
>
> "My opinion is that such action is legally valid and not prohibited by section 12911 of the General Code, such materials being furnished for the use of the contractor and not for the use of the board of education."

I beg to refer you to the case of State vs. Pinney, 13 O. Dec. N. P. 210, the third branch of the syllabus of which is as follows:

> "A county commissioner is not liable to amercement under section 856 Rev. Stat., notwithstanding persons to whom contracts for the construction of public improvements have been awarded by the county commissioners, during his term of office, afterward purchase stone from a stone company, of which he is a stockholder and director, and where it does not appear that, at the time of the letting of the contracts, any agreement or understanding existed between him and the contractors that he should take any part in the subsequent carrying out of the contracts or derive any benefit therefrom."

The language of the statute in question was:

> "No commissioner shall, directly or indirectly, be concerned in any contract for work to be done or material to be furnished for the county."

The language of this statute is stronger, if anything, than the language of section 12911, General Code, so far as the same has application to the situation presented; and such statute extended to the prohibition of an *indirect interest* in a contract in behalf of the county.

The circumstances presented by your letter do not make clear whether or not, at the time the board of education entered into the contract with the contractor referred to, there existed an understanding between said contractor and a member of the board in question with reference to the supplies which were to be furnished.

I am of the opinion that the answer to your question, in the light of the decision above cited, which is the only authority which I am able to uncover, hinges upon this circumstance. In brief, if the interest of the official in question existed at the time the contract was entered into between the board and the contractor, the situation is covered by section 12911, General Code. If, on the other hand, no understanding existed between the official in question on the corporation of which he was an officer and member, with reference to the delivery of such supplies, at the time of the making of said contract, the subsequent purchase by the contractor from said corporation would not operate to bring the transaction within the prohibition of said statute.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

475.

PUBLIC UTILITIES MAY REFUSE TO COMPLY WITH ORDINANCE OF CITY COUNCIL—ATTORNEY GENERAL HAS NO AUTHORITY TO INSTITUTE PROCEEDING TO RECOVER PENALTIES AND FORFEITURES UNDER PUBLIC UTILITIES ACT.

It is not a violation of any provision of the public utilities act for a public utility to refuse to comply with an order of council, passed under section 63 of that act.

Under section 69 of said act, the attorney general has no authority to institute a proceeding to recover penalties and forfeitures provided for by the act, in the absence of an order from the commission requiring him so to do.

COLUMBUS, OHIO, September 9, 1913.

HON. ALFRED BETTMAN, *City Solicitor, Cincinnati, Ohio.*

DEAR SIR:—Answering yours of July 25th, in which you call attention to the passage of an ordinance requiring The Cincinnati Gas and Electric Company and The Union Gas and Electric Company to build extensions to their distributing plant for the distribution of gas to a certain section of Cincinnati, and suggest that under section 67 of the act appearing in 102 Ohio Laws, 570, the utility company is liable to forfeiture of $1,000.00 per day for failure to comply with this ordinance, I beg to call your attention to the following:

The city of Cincinnati, as I understand it, about a year ago, passed an ordinance, under the provisions of section 53 of the act just referred to, requiring the utility companies to build extensions for the distribution of gas to a part of the city not theretofore furnished by them with gas. The company refused to make these extensions and

failed to complain in writing, within the time prescribed by statute, to the public service commission. An action was brought by the city to compel the company to comply with the ordinance. By reason of the foregoing non-compliance with the ordinance, it is your contention that the company has violated the provisions of the act to which reference has just been made and is, therefore, subject to the penalty prescribed by section 67 of the act.

The question of the validity of the ordinance and its reasonableness is now before the court, with the city and the gas companies as litigants, the state not being a party; consequently, into the merits of that dispute, the state cannot enter. It is, however, concerned with the matter of the provisions of the public service act and the recovery of penalty for violation thereof; and it is this which I shall here consider.

Section 53 empowers municipalities to require of a public utility, by ordinance or otherwise, such additions or extensions to its distributing plant as may be reasonable and necessary in the interest of the public, and to designate the nature and time of the completion of such extension, as well as all of the conditions under which they must be constructed and operated. These requirements of council are subject to review by the public service commission.

Section 67 provides that "every public utility shall obey, observe and comply with every order, direction and requirement of the commission made under authority of the act, and that any public utility *'which violates any provision of this act'* or fails to comply with the order of the commission shall forfeit and pay to the state not to exceed $1,000.00 for each such failure, etc., and each day's continuance thereof, shall be deemed to be a separate offense."

The question here is "is it a violation of any provision of this act for a public utility to refuse to comply with an ordinance of council?" Section 53 makes it clear that council may *require* the public utility to make extensions, etc., subject, however, to review by the commission, this review being in the nature of an appeal. Whether failure to perfect such appeal renders the action of council final, and deprives a court of jurisdiction to review the ordinance, is not here under discussion, that being for the court to decide in the action now pending in Hamilton county.

Section 67 differentiates between violation of the provisions of the act, and failure to comply with the orders of the commission, thus showing that the legislature had in mind that these two delicts were distinct—one being the disobedience of an order of the commission, the other a breach of a positive statutory injunction. Now here the wrong consists in failure to obey an order of council. Can this be said to be a violation of the provisions of the act? I have called attention to the fact that the legislature treated violation of the act as something different from refusal to comply with an order of the commission for the purpose of showing that the phase "violates any provision of this act" does not comprehend non-compliance with the commission's orders. If such clause had covered both subjects, there would have been no necessity for the additional words, and it is a fundamental principle of statutory construction that every word inserted in a statute is intended for some purpose.

Therefore, if violation of the provisions of the act does not include disobedience of the orders of the commission, how can it be said that such violation does include failure to comply with the order of council? Besides this, the word "provisions" as here used means some actual expression in language and not conjecture or inference and it cannot be said there is any direct provision of the act *requiring public utilities to obey the orders of council.* The provision is that council *"shall have power to require the utility to make extensions, etc."* The vesting of power in council does not make the exercise of such power a legislative enactment—that is a provision of municipal ordinance rather than one of the public service act. Because council has been empowered by the act to require the extension and provision is made for an appeal from the ordinance, it does not follow that if no such appeal is taken, the action of council becomes the action of the commission, for that body has never considered the matter. Had the

act in clear language imposed upon the utility the duty of complying with the order of council, an entirely different question would arise, and the absence of such language is significant of the legislative intent not to penalize the utility under the facts stated by you. There can be no violation of a statute unless such statute imposes a duty, or entails an obligation; and as the law here sought to be invoked is penal in its nature, it must be strictly construed.

Section 69 adds some force to the foregoing, in that, under it, actions to recover penalties and forfeitures provided for by the act are to be commenced and prosecuted by the attorney general *when directed to do so by the commission.* This would indicate that the action of the attorney general should be based upon a state of facts that had been brought before the commission, either because it was in direct violation of a statute which the commission is required to administer or because there had been disobedience of its order made after a hearing before it in the manner prescribed by law. In other words, the delict should in formal way be brought before the commission, and this situation does not here exist.

I should like very much to be of some help to you in this matter and if you can suggest any other statute or make clear, any other construction of this act, I shall be very glad to hear from you and reconsider the matter.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

493.

CONSTRUCTION OF A FILTRATION PLANT—BONDS MAY BE ISSUED FOR SUCH PURPOSE WITHOUT SUBMITTING QUESTION TO A VOTE OF THE PEOPLE—PLANS SHOULD BE APPROVED BY STATE BOARD OF HEALTH.

Section 1259, General Code, provides the manner in which funds should be derived for the purpose of constructing a filtration plant. The question of the issuance of bonds for this purpose shall not be required to be submitted to a vote of the people. Council should immediately secure funds and the plans of the filtration plant should meet with the approval of the state board of health.

COLUMBUS, OHIO, September 18, 1913.

HON. BEN. L. BENNETT, *City Solicitor, East Liverpool, Ohio.*

DEAR SIR:—In your letter of August 28, 1913, you state that the state board of health has required an improvement of the water supply at East Liverpool on or before January 31, 1913, which requirement was approved by the governor and attorney general. In this order no suggestion was made as to the system of purification to be adopted. The council of your city has instructed its ordinance committee to prepare an ordinance to submit to the electors at the November election the question of whether a mechanical, crib, or well system of filtration should be installed, provided, that this ordinance would not conflict with the order of the state board of health, approved by the governor and attorney general. You ask:

> "Is there any provision in the election laws whereby such a question can be submitted to the electors of a municipality and does council have the authority to cause an election to be held for said purpose, or, is not council the sole judge of the method to be adopted, subject to the approval of the state board of health?"

It seems to me that there has been some claim that an ordinance of this kind is authorized by virtue of section 4227-1. This section provides in part as follows:

> "Ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution or now delegated or hereafter delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. * * *"

The ordinance to which you have reference has not been proposed by initiative petition, and therefore, this statute does not authorize it. Even if it had been proposed by initiative petition I am of the opinion that it is not authorized by law. You will observe that the only ordinance that may be proposed by the electors are those which provide for the exercise of powers granted by the constitution or delegated to the municipality by the general assembly. It does not appear to me that council has been granted or delegated the power to submit to the people a question of the character suggested by your inquiry. The kind of plant to be adopted is a legislative question for the determination of council, and council has no power to delegate its legislative power to the people. The right to delegate such power in cases like this would vest in the general assembly, but the delegation of power to the people by the legislature does not imply that the municipality may delegate it, and I can find no authority for such delegation.

In addition to this it must be remembered that a municipal corporation has only those powers which are expressly granted to it, and such as are necessary to carry out the powers so expressly granted, therefore we must look to the statutes to find authority for the submission of questions to the people and for the calling of elections for that purpose. I can find no statute authorizing council to call an election for the purpose stated in your question.

One reason that may be suggested for the fact that there is no provision for the submission of questions in this manner to the people, is that, by virtue of section 4227-1 et seq., they have the power to initiate measures and to reject ordinances passed by council. These methods accomplish exactly the same result as would be accomplished by allowing the people to determine the course to be pursued by municipalities. I do not desire, however, to be understood as saying that in the present instance the adoption of a plan by council would be subject to referendum. That is a question which it is not necessary here to determine, as your question may be answered without a decision upon that point.

I wish, in this connection, to call your attention to section 1259 of the General Code, which distinctly provides the manner in which the funds shall be derived for the purpose of constructing a purification plant. The question of the issuance of bonds for this purpose shall not be required to be submitted to a vote of the people. Council should immediately make provision for the procuring of funds under this section. It should also adopt some system of filtration that will meet with the approval of the state board of health.

I trust that this fully answers your question, but if it does not I shall be glad to be of whatever further assistance I can.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

495.

AT THE PRESENT TIME A HEALTH OFFICER OF A CITY IS NOT PROTECTED BY THE CIVIL SERVICE CLAUSE.

A health officer of the city of Zanesville is not at the present time protected by 103 Ohio Laws, 698, and may be removed by the board. Under the provisions of the laws as they exist at the present time, a health officer has no appeal to the civil service commission if he is discharged.

COLUMBUS, OHIO, September 11, 1913.

HON. T. F. THOMPSON, *City Solicitor, Zanesville, Ohio.*

DEAR SIR:—Under date of July 21, 1913, you inquire:

> "Can a health officer of the local board of health of the city of Zanesville, Ohio, be summarily removed without cause.
>
> "He has been appointed for a period of one year, which year will not expire until January 1, 1914."

There are three phases to your question and they will be considered in the order to be stated:

First:—The right of the appointing power to remove an officer at its will.

Second:—The rights of the health officer under the civil service law applicable to cities prior to the repeal and amendment thereof by the recent legislature.

Third:—The rights of the health officer under the civil service law enacted by the last legislature as set forth in 103 Ohio Laws, 698, et seq., in so far as it is now operative.

FIRST.

At page 1371 of 29 Cy., the rule is stated:

> "Furthermore, it is the universal rule that where the duration of an office is not prescribed by law, the power to remove is an incident of the power to appoint."

Also at page 1408 of the same volume it is said:

> "The powers of removal of the executive authorities are defined by the statutes upon which they depend, except that the power of removal is by the common law regarded as incident to the power of appointment. The executive power of removal is either an arbitrary or a conditional one. In case the power is an arbitrary one—and it is arbitrary when incident to the power of appointment—no formalities such as the presentment of charges or the granting of a hearing to the person removed are necessary to its lawful exercise. The appointment of a successor even is regarded as a removal of the prior incumbent. It is not necessary that the cau se assigned for removal shou ld be stated in the precise language of the statute."

A conditional power of removal would be such a power as is possessed in cases of officers and employes in the classified service.

The health officer is appointed by virtue of section 4408, General Code, which reads:

"The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary.

The statute does not fix the term of office for such health officer. The term in the present case was fixed by the appointing power, and this fixing of the term by the board of health would not deprive it of any power it may have to summarily remove such officer, if such power is incident to its power of appointment.

Section 4412, General Code, prior to its repeal in 103 Ohio Laws 698, 713, provided:

"The board shall have exclusive control of its appointees, define their duties and fix their salaries, but no member of the board of health shall be appointed as health officer nor shall a member of the board of health nor the health officer be appointed as one of the ward physicians. The board may suspend, but not remove, any member of the sanitary police now serving or hereafter appointed for cause authorizing the dismissal of any person in the classified service, and shall certify such fact together with the cause of such suspension, to the civil service commission, who, within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon and such judgment in the matter shall be final."

This section protected the sanitary police, but not the health officer, from removal without cause.

The appointing power, which in this case, is the board of health, would have the right to remove the health officer without cause, unless such health officer is protected by the civil service law which will be considered next.

SECOND.

The sections of the General Code quoted in this branch of the opinion will be as they existed prior to their repeal or amendment at the recent session of the legislature.

Section 4479, General Code, provided:

"The civil service shall be divided into classified and unclassified service. The unclassified service shall include the positions of officers elected by the people or appointed to fill vacancies in offices filled by popular election, ———; persons who as members of a board or, otherwise, have charge of any principal department of the government of any city, *the head or chief of any division or principal department relating to* engineering, waterworks, street cleaning, or *health*, the chief of the police department, the chief of the fire department, the superintendent of any workhouse, house of refuge, infirmary, or hospital, the librarian of any public library, private secretaries, deputies in the office of the city auditor and city treasurer, unskilled laborers, and such appointees of the civil service commission as they may by rule determine. The classified service shall comprise offices and places not included in the unclassified service."

This section places in the unclassfied service the "head or chief of any division or principal department relating to ————health." The only office in the department of health which will fit this designation is the health officer.

An examination of original sections 4411 and 4412 General Code, and the amendments thereof in 102 Ohio Laws 44, will determine the status of the health officer.

Section 4412, General Code, as amended in 102 Ohio Laws 44 is quoted above.

Section 4411, General Code, as amended in 102 Ohio Laws 44, read:

> "The board may also appoint as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of employes so to be appointed."

The legislature in amending section 4412, General Code, in 102 Ohio Laws 44, provided that the sanitary police should have the right of appeal to the civil service commission, but made no such provision as to the health officer.

Section 4411, as originally carried into the General Code read:

> "The board may also appoint, with the consent of council, as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police."

Section 4412, original General Code, read:

> "The board shall have exclusive control of its appointees, define their duties and fix their salaries, but no member of the board of health shall be appointed as health officer, nor shall a member of the board of health nor the health officer be appointed as one of the ward physicians. *All such appointees shall serve during the pleasure of the board.*

Under the last quoted sections the health officer was subject to discharge at the pleasure of the board of health and he had no right of appeal to the civil service commission. The specific mention of the sanitary police in section 4412, General Code, as amended in 102 Ohio Laws 44, and not of the health officer, shows that it was not intended to protect the health officer by the civil service law.

The health officer is therefore in the unclassified service.

Section 4484, General Code, provided:

> "Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

The health officer was not protected by this section.

Therefore, under the provisions of the civil service law, as it existed prior to the recent amendment and repeal, the board of health could remove the health officer at will and such officer was not protected by the civil service law.

THIRD.

The third phase of your inquiry requires a consideration of the civil service law as set forth in 103 Ohio Laws 698. This act is now effective, except that certain provisions do not come into operation until some time in the future.

Section 2 of the civil service law, 103 Ohio Laws 698, and to be known as section 486-2, General Code, provides:

> "Method of Appointment. On and after January 1, 1914, appointments to and promotions in the civil service of this state and the counties, cities and school districts thereof shall be made only according to merit and fitness to be ascertained as far as practicable by examination which, as far as practicable, shall be competitive; *and on and after January 1, 1914, no person shall be appointed, removed,* transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employee in the civil service under the government of this state, the counties, cities and city school districts thereof, *in any manner or by any means other than those prescribed in this act.*"

By virtue of this section persons in the civil service of a city, which includes the classified and unclassified service, cannot be removed on and after January 1, 1914, except in accordance with the provisions of the act of 103 Ohio Laws 698. This section does not, therefore, protect employes or officers at this time.

Section 8 of act of 103 Ohio Laws 698, to be known as section 486-8, General Code, provides:

> "Service—Unclassified. The civil service of the state of Ohio and the counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.
>
> (*a*) The unclassified service shall comprise the following positions which shall not be included in the classified service, except as otherwise provided in section 19 hereof:
>
> *1.* "All officers elected by popular vote.
>
> *2.* "*All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.*
>
> *3.* "All officers elected by either or both branches of the general assembly.
>
> *4.* "All election officers.
>
> *5.* "All commissioned, non-commissioned officers and enlisted men in the military service of the state.
>
> *6.* "All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library in the state supported wholly or in part at public expense.
>
> *7.* "Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.
>
> *8.* "Three deputies of elective or principal executive officers authorized by law to act generally for and in place of their principals and holding a fiduciary relation to such principals.
>
> *9.* "Bailiffs of courts of record.
>
> *10.* "Employees and clerks of boards of deputy state supervisors and inspectors of elections.
>
> (*b*) "The classified service shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof, not specially included in the unclassified service, to be designated as the competitive class.
>
> *1.* "The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be

made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, re-instatement, transfer or reduction, as provided in sections 15, 16 and 17 of this act and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of section 13 of this act."

Subdivision (a), branch 2, determines the status of the health officer under the new law. This branch places in the unclassified service "all heads of principal departments—appointed—by the mayor."

The health officer is not appointed by the mayor or by any similar chief appointing power. He is appointed by the board of health. Under the new law the health officer will be in the classified service.

The latter part of section 10 of 103 Ohio Laws 698, to be known as section 486-10, General Code, reads:

"The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. Reasonable notice of all such non-competitive examinations shall be given in such manner as the commission may require and all such non-competitive examinations shall conform in character to those of the competitive service."

By virtue of this section, or the provisions thereof above quoted, incumbents are required to take a non-competitive examination, as a condition of continuing in office.

Section 31 of 103 Ohio Laws 698, provides:

"Schedule. All officers and employes in the classified service of the state, the counties, cities and city school districts thereof holding their positions under existing civil service laws, shall when this act takes effect, be deemed appointees under the provisions of this act. All existing eligible lists shall continue in force for the term of eligibility to be fixed by the commission as provided therein; and all records of existing commissions shall become the property of the commissions appointed hereunder. Municipal civil service commissions now in office shall continue to perform their duties under the provisions of sections 4412, 4477, 4505, 7690-1, 7690-6, 12895 and 12896 of the General Code, and the rules prescribed thereunder until rules are provided in compliance with the provisions of this act."

The above section will be known as section 486-31, General Code. It protects officers in the classified service, that is those that have been appointed in accordance with existing civil service laws. It does not protect those in the unclassified service.

In order to answer your inquiry it is not necessary to determine the status of incumbents when the provisions of section 2, supra. of this act become effective. The health officer in question cannot now claim protection under this provision. He must be an incumbent on January 1, 1914, to claim such protection.

It is my opinion, therefore, that the health officer in question is not protected by the provisions of 103 Ohio Laws 698, and that he may be removed by the board of health under the provisions of the laws as they existed prior to the passage of the above act. The health officer, at this time, has no right of an appeal to the civil service commission if he is discharged.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

508.

COST OF REPLACING STREETS AND SIDEWALKS DESTROYED DURING THE FLOOD OF 1913, SHOULD BE PAID BY THE CITY GENERALLY.

Where property, such as streets and sidewalks, were destroyed during the flood of 1913, the abutting property owners should not be assessed to replace the improvement, but the cost should be charged to the city generally.

Council is without authority to assess any of the cost upon the abutting property owners.

COLUMBUS, OHIO, September 24, 1913.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—Answering your letter of August 23rd, receipt whereof has already been acknowledged, I note that you ask whether or not the owners of property which has been once assessed for a public improvement, and whose assessments have not yet been paid in the installments provided for in the assessing ordinance, may have their property again assessed for not more than half of the cost and expense of restoring the improvement, the same having been destroyed by the floods of March, 1913.

I note that you also submit the further question as to whether or not, in the event that your first question is negatively answered, the city may now provide, by resolution, to reassess the property when the present assessments are paid?

In my consideration of the questions which you have asked, I have encountered another and different question which seems to me to preclude consideration of the specific inquiries which you make. The public improvements which you mention being the replacement of streets and sidewalks destroyed by the floods of March, 1913, must, I think, be undertaken under the provisions of what is known as the "Snyder Emergency Law," found in 103 O. L. 141. Section 3 of that act provides, inter alia that:

> "For the permanent * * * reconstruction or replacement of * * * public ways destroyed or injured in the manner and at the time described in section 1 of this act (viz. by the floods of March and April, 1913) any * * * council of any municipal corporation * * * may issue bonds or notes of the corporation * * * as needed * * *"

Section 5 of the same act provides for the execution of the bonds to which section 3 refers.

Section 6 of the act provides for the payment of these bonds, which shall be by a special levy on all the taxable property of the municipal corporation outside of all tax limits. This section also contains another provision which is of vital importance in this connection, mention of which will be deferred for the present.

Section 9 of the act defines the term "public ways" as follows:

> "The term 'public ways' means and embraces streets, alleys, sidewalks, and public places * * * in municipal corporations, and the paving or other improvements heretofore constructed or made thereon, whether by assessment of abutting property or otherwise * * *."

The particular provision of section 6 which is of vital importance in this connection was amended by the same session of the general assembly, 103 O. L. 760-762, and in its final form reads as follows:

> "Except for purposes mentioned in section 1 and 2 of this act, and except when acting for such purposes under the general laws of the state, and not

under said sections, none of the taxing authorities mentioned in this section shall borrow money or levy a tax for any of the purposes mentioned in this act under the general laws of the state unless such tax is necessary to provide for the payment of notes or bonds issued for such purposes, and authorized prior to the passage of this act; but all moneys borrowed or taxes levied for the purpose of making repairs, reconstruction and replacement of public property and public ways destroyed or injured by the floods mentioned in section 1 of this act shall be borrowed or levied under the provisions of this act."

In this section the legislature evinces the intention that the replacement of all public property destroyed by the floods of March and April, 1913, shall be a burden upon the general tax duplicate. That is to say, regardless of whether or not assessments were paid out, the general assembly intended that the general taxpayers should pay for replacing property destroyed by the floods. The under-lying idea seems to be that a calamity of the nature of that which occurred in March and April of this year was so extraordinary as to make it unjust to require political sub-divisions to rehabilitate themselves out on their current revenues or to permit them to assess property as "specially benefited" for this purpose.

I do not hold that assessments may not be made, but section 6 expressly provides that no money shall be borrowed for any of the purposes mentioned except under authority of that act; and I take it that it would be useless to levy assessments without the power to borrow money in anticipation thereof, which is so denied.

The constitutionality of the emergency act, as a whole, has been sustained by the supreme court in a recent decision. The particular provision now under consideration was not passed upon by the court, as such. If there is any constitutional question here, it arises out of the fact that property which is actually specially benefited by an improvement, is not to be required to contribute to the expense of making the improvement. In other words, the general taxpayers are to confer special benefits upon particular property.

I do not regard this question as of much importance, however, because the public has an undoubted interest in the maintenance of the highways and streets. I believe it could also be established that the public is interested as such in the maintenance of sidewalks, although it has been customary to assess the entire cost of the construction of sidewalks upon the owners of the benefited property. See, for example section 3870, General Code, which permits a village to assume a portion of the cost and expense of constructing sidewalks, etc.

Now the legislation under discussion amounts to a legislative determination that in the particular instance the public necessity is paramount and that the mere restoration of public property originally constructed by assessment does not confer a special benefit upon the private property but merely discharges a public obligation. At any rate every presumption favors the constitutionality of the law, and its provisions being clear, I am of the opinion that the reconstruction and repaving of which you speak in your letter must be at the expense of the city generally, council being without authority to assess any portion of the cost and expense thereof upon the abutting property.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

518.

UNDER SECTION 4412, GENERAL CODE, BEFORE ITS REPEAL, THE ACTION OF THE BOARD OF HEALTH IN RAISING THE SALARY OF THE SANITARY POLICEMAN WAS FINAL.

Where the board of health raises he salary of a sanitary policeman, $10.00 per month, the action of the board is final, and such action imposes upon the city the obligation to pay the increased salary from the time when the same became effective.

Section 4412, General Code, under which this increase was granted, now repealed, was in effect May, 1913, when his increase in salary was granted.

COLUMBUS, OHIO, September 23, 1913.

HON. JAMES L. LEONARD, *City Solicitor, Mt. Vernon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 20th requesting my opinion upon the following question:

> "In May, 1913, our board of health raised the salary of the sanitary policeman $10.00 per month. The amount necessary to pay the increased salary had not been set forth in the annual budget for the year 1913, and further the moneys raised by the city from the collection of taxes, etc., are less than the amount of our appropriations for that year.
>
> "Can he force the city to pay the increased salary for the year 1913?"

The board of health, under section 4412, General Code, now repealed, but in effect during the period concerning which you inquire, has explicit power to fix the salaries of its employes. There is no limitation upon this power such as there is upon the power of council to fix salaries of other persons employed in the service of the municipality.

I am of the opinion that the action of the board of health in fixing the salary of the sanitary policeman in question was final and conclusive, and that such action imposed upon the city the obligation to pay the increased salary from the time when the same became effective.

I incline to the view, although my opinion is not invited specifically upon the question, that the order of the board of health in question was not subject to the municipal referendum and became effective immediately upon its adoption. Not being a regulation "intended for the general public" within the meaning of section 4413, but one "for the government of the board" within the meaning thereof, no publication of the same is required and it became operative from and after the date of its adoption.

I will now consider the effect of the failure of council to appropriate an amount of money for this salary sufficient to pay the increase.

I am of the opinion that the effect of this situation is to preclude the city auditor from issuing warrants for the health officer's salary in excess of the amount appropriated. Therefore, the health officer, though he is legally entitled to the increased salary, is not entitled to receive the actual money involved in such increase until an appropriation is made for this purpose. But when such an appropriation is made the same may provide for the payment of back salary unless the health officer by his conduct has waived his claim thereto.

Council is, of course, not legally obliged to appropriate for this salary at all. The effect of a failure to appropriate would be to subject the city to suit on the part of the health officer for the unpaid salary. A judgment recovered in such a suit would have to be paid out of the sinking fund.

As to the effect of the failure of the council in making up its annual budget to provide for such an increase, I should prefer not to express an unequivocal opinion. If the budget presented by council to the county auditor under section 5649-3a, General Code, merely estimated the needs of the health fund, then the fact that council may have had in mind a particular salary as one of the items comprising the needs of the health fund would not preclude the council from subsequently appropriating out of the health fund enough money to provide for the increased salary, if there were such moneys in the fund.

Section 5649-3d, to which you refer, prohibits council from appropriating in excess of the amount set forth in the annual budget; it does not, however, in my opinion, preclude council from appropriating a greater amount for a specific item within a general purpose set forth in the budget than had been originally contemplated, provided the aggregate of such specific appropriations does not exceed the amount set forth in the budget. For illustration, suppose that the council simply certifies to the county auditor that the needs of the health fund require a levy of one thousand dollars, and in so certifying intends to divide the one thousand dollars, five hundred for the salary of a health officer and five hundred for general contingent expenses of the board of health, unless the health fund levies are so estimated by specific items to the budget commission, the mere fact that council may have had such a division of the fund in mind in certifying to the auditor that the needs thereof required a levy of one thousand dollars, would not preclude the council, in making its subsequent appropriations from the proceeds of that levy when allowed by the budget commission, from setting aside six hundred dollars for the salary and four hundred dollars for the contingent expenses. The limitation of section 5649-3d, General Code, under the circumstances imagined would operate upon the aggregate of appropriations but not upon the specific appropriations as such; or in other words, the word "purpose" as used therein must necessarily refer to and mean the same thing as is meant by the same word in section 5649-3a so that if council considers that the health fund is a "single purpose" then the specific appropriations from that fund are limited by the provisions of section 5649-3d to the extent only that the aggregate of such appropriations may not exceed the aggregate allowance in the budget for the purpose of the health fund.

If, however, the salary of the sanitary policeman, as such, was one of the items of the budget, instead of the general purpose of the health fund, then, of course, council cannot even appropriate for the additional salary at any time during the current year, and if it desires to appropriate therefor, must provide a specific item in the next annual budget for the payment of back salary to the sanitary policeman. Without such an appropriation the health officer can only recover his additional salary by securing judgment against the city in the manner already pointed out.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

519.

PROPERTY MAY NOT BE RE-ASSESSED FOR STREET IMPROVEMENT FOR MORE THAN ONE-HALF THE COST OF THE REPAIRING OF SUCH STREET—MUNICIPAL CORPORATION MUST MEET DEFICIENCY WHERE ASSESSMENT IS NOT SUFFICIENTLY LARGE TO COVER COST OF THE IMPROVEMENT—JUDGMENT AGAINST THE CITY FOR SUCH DEFICIENCY TO BE PAID FROM THE SINKING FUND—LEGALITY OF BOND ISSUE DOES NOT DEPEND UPON THE LEGALITY OR REGULARITY OF THE LEVYING OF THE SPECIAL ASSESSMENT—BONDS MAY BE ISSUED TO MEET CITY'S SHARE OF SUCH EXPENSE WITHOUT VOTE OF THE PEOPLE.

Where a special assessment has been levied and paid, for improving a street by macadam, the property so assessed cannot again be assessed for more than one-half the cost and expense of repairing or repaving such street.

If a municipal corporation fails to make an assessment against abutting property sufficiently large to meet the bonds issued in anticipation of such special assessment, the municipal corporation must raise the deficiency and pay the same from its general funds.

If a final judgment is secured against the city for such deficiency, it should be paid from the sinking fund, if no other provision is made to take care of such deficiency.

The legality of the bonds issued in anticipation of the collection of special assessments does not depend upon the regularity or legality of the special assessments.

Under the provisions of the General Code, council may issue bonds to pay the city's share of the cost of the improvement without a vote of the people, provided the total indebtedness created by council does not exceed in any fiscal year one per cent. of the total value of the property listed for taxation.

COLUMBUS, OHIO, September 20, 1913.

HON. EDWARD C. STITZ, *City Solicitor, Van Wert, Ohio.*

DEAR SIR:—Under date of May 20, 1913, you submit the following inquiries:

> "*First.* If a street has been macadamized with stone and the cost thereof (except a part of the cost assessed against all the taxable property of the city) assessed against the abutting property, and the street is again improved by paving the roadway with brick, asphalt, concrete or other material, must the assessment be limited to one half the cost and expense of the improvement?
>
> "*Second.* If bonds are issued in anticipation of the collection of assessments and the assessments are in a different proportion than is provided by law and by reason thereof it becomes impossible for the city to pay the abutters' part as assessed and thereby there is not enough money collected of the assessments to pay such bonds, is the city liable to pay the bonds, insofar as the assessments fund is lacking in amount?
>
> "*Third.* If the city is unable to pay the balance of such bonds, after the assessment fund is depleted, by reason of there being no fund out of which to pay the same, and if the bonds are sued upon and judgment obtained against the city, must the city pay such judgment out of the sinking fund?
>
> "*Fourth.* If bonds are issued in anticipation of the collection of special assessments for a street improvement, and the assessment as made by the city for the payment of such bonds is irregular and not according to law, and by reason thereof there is not enough money raised, by assessments, to pay the bonds and interest when due, are the bonds legal bonds of the city, or are the bonds legal?

"*Fifth.* (*a*) Can the city issue bonds for the purpose of paying its part of proposed street improvements without a vote of the people?

(*b*) "If a vote of the people is necessary or desired, do the following sections of the General Code apply: 5912, section 4, and the following five sections, independent of any question of limitation?

(*c*) "Would such bonds be legal without a vote of the people?"

Your first question involves a construction of the provisions of section 3822, General Code, which provides:

"When a special assessment for the improvement of a street or other public place has been levied and paid, the property so assessed shall not again be assessed for more than one-half the cost and expense of repaving or repairing such street or other public place unless the grade thereof is changed."

It appears in your question that a special assessment has been levied and paid for macadamizing the street. Is the macadamizing of a street considered an "improvement of a street" under section 3822, General Code?

In case of Page vs. City of Columbus, 15 Cir. Ct., N. S., 40, it is held:

"The provision of section 3822, P. & A. Anno., General Code, limiting reassessments for repaving improved streets to one-half the cost, does not violate the constitutional inhibition as to retroactive or restrospective legislation, and applies to improvements made before and after the enactment of the said act.

"No distinction is made by the act as to material used or cost of the original improvement, but the restriction applies generally to all improvements whereby an unimproved street has been transformed into an improved one and the cost assessed specially against the abutting property."

The above case was affirmed without opinion by the supreme court in 86 Ohio St., 333.

In the foregoing case the first improvement was made by graveling part of the road bed, putting in a curb and a boulder gutter.

In case of Baldwin vs. Springfield, 20 Ohio Dec. 265, it is held:

"'Macadamizing' a street, formerly improved by graveling pursuant to municipal direction, constitutes a 'repaving' within the meaning of section 53 Mun. Code. of 1902 (General Code 3822) for which not more than one-half the cost may be assessed against the abutter.

"The limitation of section 53, Municipal Code of 1902 (General Code 3822) as to 'repaving' assessments does not apply to assessments for curbing and guttering if the former improvement did not include and the property were not assessed therefor either as part of a street or sidewalk improvement."

This case was affirmed by the circuit court May 19, 1911.

On page 271 Kunkle, J., says:

"There are a number of decisions to the effect that macadamizing is considered paving."

Also on page 272, he further says:

"Any material by which a hard, firm or smooth surface for travel is secured, constitutes a paving, and from the above definitions of paving and

repaving, we think macadamizing in question constituted a repaving, and that the limitation of section 3820, General Code, (B. 1536-213), as to repaving, applies to the improvement in question."

The macadamizing of a street is no doubt an improvement of a street as contemplated by section 3822, General Code. If a special assessment has been levied and paid for improving a street by macadamizing it, the property so assessed cannot be again assessed for more than one-half of the cost and expense of repaving or repairing such street.

Your second inquiry involves the obligation of a municipal corporation to pay in full bonds issued in anticipation of the collection of special assessments, when such special assessments prove insufficient to pay such bonds and the interest in full.

It is assumed that the bonds in question were issu ed for the improvement of a street.

Section 3914, General Code, provides:

"Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of such bonds."

It will be observed that the municipal corporation issues the bonds under this section.

Section 3918, General Code, provides:

"Bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance."

Section 3919, General Code, provides:

"Bonds, notes or certificates of indebtedness issued by a municipal corporation shall be signed by the mayor and by the auditor, or the clerk thereof, and be sealed with the seal of the corporation. When issued for street improvements, they shall have the name of the street or portion thereof so improved, and for which they were issued, legibly written or printed upon them."

These sections provide for certain recitals in the bonds and the manner of executing the same. There is no provision that they shall be paid solely from the fund raised by special assessment upon the abutting property.

In a note to section 3914, General Code, in Page & Adams Annotated Code, it is stated:

"The fact that the statute which authorized the assessment is invalid and that the assessment cannot be collected, does not prevent recovery on the bonds against the municipal corporation or the public quasi corporation which issued them: Loeb vs. Columbia Township, 179 U. S., 472."

In the case of State vs. Commissioners, 37 Ohio St., 526, it is held:

'The act of March 29, 1867, and the acts amendatory and supplementary thereto, commonly called the two-mile-road improvement laws, authorize

the commissioners of counties, for the purposes of raising money necessary to meet the expenses of road improvements, 'to issue the bonds of the county,' and thereby create a debt of the county in its quasi corporate capacity, notwithstanding they also require the commissioners to assess the cost and expense of the improvement upon the lands benefited thereby and situate within two miles thereof.

"When, from any cause, sufficient money be not calized from such ocal assessments to pay the debt so created, it is the duty of the commissioners to levy a tax therefor upon all the taxable property of the county."

On page 529, McIlvaine, J., says:

"The question of the power of the commissioners to obligate the county, is, however, raised on the statutes to which reference is made in the bond. The holder of the bond is notified by its face, that the power assumed by the commissioners is to be found in these statutes. Section 7 of the statute provides, 'that for the purpose of raising money necessary to meet the expenses of such improvement, the commissioners of the county are hereby authorized to issue *the bonds of the county*, payable in installments, or at intervals not exceeding in all five years, bearing interest at the rate not to exceed seven per cent. per annum, payable semi-annually, which bonds shall not be sold for less than their par value.' From the language of the statute here quoted, perhaps no one would deny that the debt evidenced by the authorized bonds is the debt of the county in its quasi corporate capacity—indeed, the language is not susceptible of any other meaning; but, inasmuch as the same section provides for an assessment upon the lands specially benefited and lying within two miles of the improvement, to meet the payment of the interest and principal of the bonds, it is contended that no other mode or manner of taxation can be resorted to for the purpose of paying the bonds. However plausible this contention may be, we think it cannot be maintained. That the legislature might have so provided, we do not deny, but if such was the intention, it should have been expressed in very clear and unmistakable terms. Such terms were not used, nor is such inference clear."

It will be observed that in the above case the commissioners were authorized to issue "the bonds of the county;" and under section 3914, General Code, the authority is that "municipal corporations may issue bonds in anticipation of special assessments." In both cases there is authority to levy the cost against the abu ting property.

In discussing improvement bonds payable by special assessments, Dillon says on page 1388 of his work on municipal corporation, 5th edition:

"Although such obligations do not constitute debt of the municipality in the constitutional sense of the word, or an obligation which is payable from its general funds, yet bonds which are issued in the name of the municipality, to be paid only from a special fund created by the enabling act, and so limited on the face of the obligation, are the bonds of the municipality. The municipality is the obliger in the bond, must fulfil the obligations imposed upon it, and is subject to appropriate action n r. spect thereof, notwithstanding the fact that it is not under any general liability, or, so to speak, liability *in personam* for the debt. If, however, the bonds do not purport to be the promise of the municipality, but are issued by certain persons or officers or commissioners designated by statute to make the improvement, and are expressly stated to be issued pursuant to the statute for the purpose of the improvement *payable only from the assessment therefor*, without liability

on the part of the municipality, such bonds, not being in form the obligation of the municipality, were regarded as simply the statutory promise or obligation of the commissioners, or agents selected by the state to make the particular improvement, and no action in such case was held to lie against the municipality in respect to the bonds, even if it be only to enforce the creation of the fund."

Also on page 1395, Dillon further says:

"In addition to the remedy against the municipality by mandamus, the holder of improvement bonds has a remedy by action against the city for the amount owing on the bonds or for damages in the event that the city has clearly neglected its duty in not taking steps to perfect the assessment, in consequence whereof the assessment cannot be enforced. "

On page 1256 of Dillon, it is further said:

"Local improvements, such as grading or paving streets, making sewers, and the like, are *public* improvements for the benefit of the city or public at large and are not the private improvements of the abutter. The mode of payment by a local assessment on the abutter for benefits is an exercise of the state's power of taxation, and the proceeding as to him is in *invitum*. The city alone has the *power* to make the assessment and to collect it, and the duty to exercise this power and to make and collect the assessment is a duty resting upon the city in the performance of which the contractor has a direct and immediate interest. It is an erroneous view that the city authorities in this matter are the agents of the contractors. They are agents, if agents at all, appointed by law, and their failure to do their duty cannot be imputed to the contractor as a fault on his part. The city is, we repeat, under a duty to the contractor—the contractor is under no duty in this respect to the city, but has a right to have the city's duty faithfully performed."

The last quotation was in reference to the rights of the contractor where he looked to the special assessment for his pay. The same principles would apply where bonds have been issued and the contractor paid from the proceeds of the sale thereof.

The improvement of a street is a matter which concerns not only the abutting property owner, but the city at large as well. Such improvement is of general benefit to municipal corporations. The method of paying therefor by levying part of the cost against the abutting property is the exercise of the power of taxation. It may be paid by general taxation as is the case when a street is repaved and only fifty per cent. of the cost can be levied against the abutting property. The city's portion must be raised by general taxation.

The bonds issued in anticipation of the collection of the special assessments are municipal bonds. They are obligations of the municipal corporation. It is the duty of the municipality to raise a fund sufficient to meet the bonds, and if it fails to do so by reason of its failure to make a sufficient assessment against the abutting property, the bond holders should not suffer thereby. It is the duty of the city to make such levy and not of the bond holder.

I am, therefore, of the opinion that where a municipal corporation fails to make an assessment against abutting property for the payment of the cost of an improvement of a street, sufficient to meet the bonds issued in anticipation of such special assessments he municipal corporation must raise the deficiency and pay the same from its general unds, and it is liable therefor.

In this connection I desire to call attention to the provisions of sections 3902 and 3909, General Code.

Section 3902, General Code, provides:

> "When it appears to the council that a special assessment is invalid, by reason of informality or irregularity in the proceedings, or when an assessment is adjudged to be illegal, by a court of competent jurisdiction, the council may order a reassessment, whether the improvement has been made or not."

Section 3909, General Code, provides:

> "If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitation prescribed for such assessment, make an additional pro rata assessment to supply the deficiency. In case a larger amount is collected than is necessary, it shall be returned to the persons from whom it was collected, in proportion to the amounts collected from such persons respectively. This section shall be subject to the limitations contained in other sections of this chapter."

It is intended that the part of the cost to be paid by the abutting property should be raised by special assessment and not by general taxation, and where possible this should be done.

Your third inquiry is as to the payment of such deficiency from the sinking fund after judgment on the bonds against the city.

Section 4517, General Code, provides:

> "The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon *and the payment of all judgments final against the corporation, except in condemnation of property cases.* They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

By virtue of the provisions of this section the trustees of the sinking fund shall provide for "the payment of all judgments final against the corporation, except in condemnation of property cases".

Therefore, if a final judgment is secured against the city for such deficiency it should be paid from the sinking fund, if no other provision is made to take care of such deficiency.

Your fourth inquiry is in effect answered in considering your second question.

The legality of the bonds issued in anticipation of the collection of special assessments does not depend upon the regularity, or the legality of the levying of the special assessments. The irregularity of the special assessment may be cured under the provisions of sections 3902 and 3909, General Code, supra.

Your fifth inquiry is in reference to the power of council to issue bonds for the part of the cost of a street improvement to be borne by the city, without a vote of the people.

Section 3821, General Code, provides:

"A municipality may issue and sell bonds as other bonds are sold to pay the corporation's part of any such improvement, and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon."

Section 3939, General Code, provides in part:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

" '22. For resurfacing, repairing or improving any existing street or streets as well as other public highways.' "

Section 3940, General Code, provides:

"Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation."

Council may under the foregoing provisions issue bonds to pay the city's portion of a public improvement without a vote of the people, provided the total indebtedness created by council under section 3939, General Code, shall not exceed in any fiscal year one per cent. of the total value of the property listed for taxation.

You inquire further as to the sections applicable if a vote of the electors is desired.

Section 3942, General Code, provides:

"In addition to the authority granted in section one (1) (General Code, section 3939) of this act and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent. *annum*, as it may determine upon for any of the purposes set forth in section one (General Code, section 3939), upon obtaining the approval of the electors of the corporation at a general or special election in the following manner."

This section will apply to bonds to be issued for the city's portion of the cost of a street improvement when it is desired or it is necessary to submit the question of the issue of such bonds to a vote of the electors.

The manner of such submission is set forth in the succeeding sections.

In answering your fifth inquiry, other limitations than those contained in section 3940, General Code, have not been considered, in fact you eliminate the question of limitations in submitting your inquiry.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

522.

COUNTIES TO PAY FOR CONFINEMENT OF PRISONER IN WORKHOUSE FOR MISDEMEANORS—MUNICIPAL CORPORATION TO PAY FOR SUCH CONFINEMENT WHEN THE PERSONS CONFINED ARE VIOLATORS OF MUNICIPAL ORDINANCES.

Under the provisions of section 12384, General Code, counties should make contract with workhouses and pay for the confinement of prisoners confined therein, where the prisoners are found guilty of misdemeanors, and sentenced to the workhouse.

Municipal corporations are to pay for prisoners confined for violations of municipal ordinances.

COLUMBUS, OHIO, September 26, 1913.

HON. MAURICE V. SEMPLE, *City Solicitor, Ashland, Ohio.*

DEAR SIR:—In your letter of August 21, 1913, you state that two parties, jointly charged with violating section 13225, General Code, pleaded guilty before the mayor of your city, were fined and committed to the Cleveland workhouse.

You further state that the county of Ashland, and the city of Ashland, each have contracts with said workhouse.

You then inquire whether the city, or the county, should pay the workhouse for the keeping of said prisoners.

Section 12384, General Code, provides as follows:

> "The commissioners of a county, or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors, or of the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the expenses incurred under such agreement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse."

It will be seen that the county contracts and pays for those convicted of misdemeanors; and the municipality for those convicted of the violation of municipal ordinances.

The convictions in the above cases were for violation of the local option law. The conviction was for a direct offense against a law of the state and liability against the municipal corporation would seem to arise when the mayor tried it on account of violation of a municipal corporation. The mayor of the village in this instance was acting as the agent and representative of the state as distinguished from those cases involving violations of municipal ordinances where he acts as the direct representative of the city. The city had nothing to do with the cases. The county should pay the bills at the workhouse.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

538.

WHERE BONDS ISSUED BY MUNICIPAL CORPORATIONS CANNOT BE SOLD BECAUSE RATE OF INTEREST IS NOT HIGH ENOUGH THE RATE OF INTEREST MAY BE INCREASED, AND THE ADDITIONAL AMOUNT NECESSARY TO BE RAISED MAY BE ASSESSED AGAINST THE ABUTTING PROPERTY.

Where a village council passed an assessing ordinance duly authorizing the issuing of 4% bonds in anticipation of an assessment against the property owners and these bonds could not be sold because they were taxable and the rate of interest would not be high enough, council may amend the assessing ordinance by increasing the rate of interest of such bonds, and the additional interest may be assessed against the abutting property.

COLUMBUS, OHIO, October 2, 1913.

HON. CHARLES H. DANFORD, *Solicitor of Matamoras, Marietta, Ohio.*

DEAR SIR:—Under date of July 7, 1913, you inquire:

> "On June 19, 1911, the village council passed a necessity ordinance to pave Main street. On January 6, 1912, the council passed the ordinance to proceed with the improvement. These two ordinances so passed provided for the issuing of four per cent. bonds in anticipation of the collection of deferred installments of assessments.
>
> "On February 19, 1913, the assessing ordinance was duly passed by the village council and authorized the issuing of four per cent. bonds in anticipation of the assessments against the property owners. You will notice this ordinance was passed after the constitutional amendment was adopted. These four per cent. bonds would not sell for the reason that purchasers claimed that these bonds are taxable and the return of interest therefore is not high enough. No doubt this situation has confronted other villages and cities and has been worked out in such manner as will stand the test of a suit on the part of a property owner to enjoin the collection.
>
> "First:—Are these bonds taxable?
>
> "Second:—Can the village council pass an assessing ordinance, amending the ordinance of February 19, 1913, and provide for issuing five per cent. bonds in anticipation of the assessments to be paid by property owners."

Your first question has been answered in an opinion given to Hon. J. C. Adams, city solicitor of Coshocton, Ohio, under date of January 9, 1913, in which it is held that "all bonds sold and delivered after January 1, 1913, whether the necessity for issuing was determined before or after January 1, 1913, are subject to taxation." A copy of that opinion is herewith enclosed.

Your second question involves the right of council to amend an ordinance fixing a rate of interest that bonds shall bear, by now increasing such rate of interest.

The bonds in question would not sell at par when bearing four per cent. interest because of the amendment to the constitution taxing such bonds. This constitutional amendment was adopted after the particular improvement in question had been determined upon by council and the rate of interest fixed. Council could not foresee at that time the present contingency.

Section 3914, General Code, provides:

> "Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost

and expense of the improvement for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of such bonds."

This section authorizes council to issue bonds in anticipation of the collection of special assessments. It does not specifically provide or limit the rate of interest, but for this purpose refers to the general provisions of the statutes.

Section 3939, General Code, provides in general for the issue of bonds and the rate of interest, and reads in part:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes."

The five per cent. bonds which are proposed to be issued by the amended ordinance are therefore within the limitation of six per cent. interest provided by the foregoing section.

In your case council fixed the rate of interest at four per cent. in the necessity ordinance of June 19, 1911, and also in the ordinance of January 6, 1912, determining to proceed with the improvement. Council again fixed the rate of interest at four per cent. in the assessing ordinance of February 19, 1913. This latter ordinance was passed after the constitutional amendment was adopted permitting the taxation of such bonds.

In case of Lippert vs. Toledo, 19 Cir. Dec. 345 (9 General Code, N. S. 455) it is held:

"It is not necessarythat the council should determine in advance of the assessing ordinance the proportion of the cost and expense of making a street improvement that is to be assessed upon the property abutting thereon.

"The fact that the council may have, in the resolution and ordinances adopted and passed preparatory to the making of the improvement, indicated the proportion it intended to assess upon the abutting property, does not bar it from designating a different proportion in the assessing ordinance, provided it is within the limitations fixed by statute."

This case was affirmed without report in 75 Ohio State 000. It will apply to the act of council in fixing the rate of interest in the ordinances of June 19, 1911, and of January 6, 1912, but will not apply as to the ordinance of council of February 19, 1913, which authorized the issuing of bonds, fixed the rate of interest and provided for the special assessment.

In making the special assessment the interest on the bonds is to be included in the cost of the improvement by virtue of section 3896, General Code, which provides:

"The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assess-

ment, and serving notices on property owners, the cost of construction, *interest on bonds*, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

Can council now amend the assessing ordinance and fix a different rate of interest to be charged against the abutting property?

At section 824, page 1765, of McQuillin on Municipal Corporations, the rule of amending improvement ordinances is stated:

> "Subject to the constitutional provision forbidding the impairment of the obligation of contracts, as explained elsewhere, improvement ordinances which are not wholly void may be amended, even after the contract is let and the work begun, in like manner as other ordinances. Thus an ordinance providing for street improvements which proves to be defective and insufficient to support an assessment, if not absolutely void, may be amended and reassessment made thereunder. So a division of special assessments into installments may be authorized by an amendment to the original ordinance providing for the improvement."

Council has power to issue bonds in anticipation of the collection of special assessments and to fix the rate of interest thereof. The rate fixed in the present case was not sufficient to sell the bonds and council would have authority, under the rule stated by McQuillin, to amend such ordinance by fixing a higher rate of interest.

The levying of a special assessment, or the amount thereof, is not contractual but is an exercise of the power of taxation. Council is authorized to levy an assessment sufficient to meet the cost to be borne by the abutting property and the interest on bonds issued in the anticipation of the collection of such assessments. The bonds are issued in order to enable the property owner to pay his assessment in installments. He has the privilege to pay the entire assessment and save the charge of interest. It is for his benefit that the bonds are issued.

Section 3909, General Code, provides:

> "If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitation prescribed for such assessment, make an additional pro rata assessment to supply the deficiency. In case a larger amount is collected than is necessary, it shall be returned to the persons from whom it was collected, in proportion to the amounts collected from such persons respectively. This section shall be subject to the limitations contained in other sections of this chapter."

This section authorizes a further assessment where the original assessment proves insufficient. If the assessment was contractual this section would be invalid as impairing the obligation of a contract. Also the decision in Lippert vs. Toledo supra, would not be good law.

Council may amend the assessing ordinance by increasing the rate of interest of such bonds and the additional interest may be assessed against the abutting property.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

559.

A CITY HAS NO AUTHORITY AT THE PRESENT TIME TO ENTER INTO A CONTRACT WITH A MAUSOLEUM COMPANY FOR THE ERECTION OF A MAUSOLEUM IN A CEMETERY FOR THE PURPOSE OF SELLING CRYPTS THEREIN.

At the present time there is no authority for a city acting through its director of public safety, or through its council, to enter into contracts with a mausoleum company for the erection of a mausoleum in a cemetery for the purpose of selling crypts therein.

COLUMBUS, OHIO, October 10, 1913.

HON. S. C. CARNES, *City Solicitor, Cambridge, Ohio.*

DEAR SIR:—In your letter of July 25, 1913, you make the following inquiries:

"1. Does the law permit the city, through its director of public service, or through its council, to authorize a company to erect a mausoleum on certain lots in the cemetery, for the purpose of selling crypts therein before or after the erection of the same, the title to the lots on which the mausoleum to be erected either be transferred to the company and after the mausoleum is erected transferred to the director of service, or the title to remain in the city with an agreement that the director of service shall control the same and receive an endowment fund from the company for the purpose of maintenance and embellishment of the same?"

"2. If the above is answered in the negative, can there be any arrangement by a private corporation with the director of service, by which the private corporation can erect a mausoleum on lots owned by the city and the private corporation to sell the crypts therein, before or after the erection thereof, and the endowment fund be furnished the director of public service by the private corporation for the maintenance and embellishment of the same?"

The solution of these questions involves a construction of the laws of Ohio relative to city cemeteries, and the title, control and disposition of lands and lots therein, for burial purposes. Let us take up the statutes applicable to city places of interment, in their order.

Section 4160, General Code, vests the title and right of possession of all city burial grounds, in the corporation where the same are located.

Section 4161, General Code, provides that:

*"The director of public service shall take possession and charge, and have the entire management, control, and regulation of public grave yards, burial grounds, and cemeteries located in or belonging to the corporation * *."*

This section further provides that he shall, when necessary, direct the laying out, numbering and naming of lots, avenues, walks, paths or other subdivisions; and keep a plat thereof in the corporation auditor's office for the use of the public.

Section 4326, General Code, also gives the director of public service the management of cemeteries.

Section 4162, General Code, says:

"The director of public service shall direct all improvements and embellishments of the grounds and lots, protect and preserve them * * *."

The director, under section 4165, General Code, fixes *the size and price of lots*, and gives to each purchaser a receipt for the amount paid by him and a description of the lot sold. This receipt entitles the purchaser to a *deed* for the lot purchased.

As to the price of lots, section 4166, General Code, provides:

> *"No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes, and to kee p in order and embellish the grounds * *."*

Section 4167, General Code, says:

> *"The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds."*

Section 4170, General Code, requires that the director to appoint a clerk and report quarterly *"all moneys received and disbursed by him in the management and control of the cemetery."*

In his annual report to council, the director is commanded, by section 4171, General Code, to set forth *"the number of lots sold, to whom sold, and the amount received therefor * *."*

From a careful reading and construction of the statutes above quoted, it seems clear to me that no such contract, arrangement, or understanding, directly or indirectly, can be entered into with any person, firm or corporation, for mausoleum purposes, as set forth in your questions. The title to all city cemetery lots is vested originally in the city; the director of public service is given *entire management, control and regulation of the same*; he lays the same out in lots, and fixes prices for their sale. *He alone can sell lots and give receipts*, which result in *deeds* to the purchasers.

In short, there is not a moment of time, when the director loses control, supervision and absolute management, of all lots and lands in the city cemetery. No improvements, embellishments, or sale of lots can be made, except through the director. He retains absolute control of every foot of land in city cemeteries; and there is no parting with his interests or powers, or delegation thereof to any one else. He makes by-laws and regulations for the management of the cemetery, and all who purchase lots therein are governed thereby. The statutes above quoted, having provided for the manner of acquiring title to cemetery lots for burial purposes, are exclusive on that subject of any other means in relation thereto. The legislature, having before it the subject of city cemetery lots, and the means of acquiring title thereto and the control thereof, is presumed to have expressed itself fully on the subject; and any other arrangement sought to be carried out, different from the statutes on the subject, cannot be enforced.

If the legislature intended to provide another means of acquiring the right or title to such lots, and give mausoleum companies the authority to sell crypts or other burial privileges to the public, it should have said so in plain language.

I take it that these statutes on the subject are *inclusive* of the manner and means referred to therein, and are *exclusive* of all others.

These statutes are generally old ones; and nearly all enacted at a time before such mausoleums as you speak of were in existence, or corporations therefor were formed. They are a modern means of interment, not contemplated by these statutes, which have reference to the individual ownership of burial lots, and the old fashioned way of burial in the ground.

There was no thought of acquiring title to portions of a cemetery, by a corporation, and selling crypts, spaces or other privileges therein, at a profit, in a mausoleum erected thereon.

The whole idea, on the part of our fathers in framing such laws, was to enable *families* and *individuals* to purchase, own and control a resting place for their *own dead*, at prices not speculative—but under the terms of section 4166 above quoted.

The officers having charge of these cemeteries are creatures of statute, and their duties are prescribed by law. They can do nothing along the line of cemeteries or lots therein, except what is specifically authorized by law. If the statute is silent on the subject, no authority exists, as all such officers have no implied authority.

If such an arrangement were carried out as you outline in your questions, we would have the agent of the mausoleum company selling crypts or other burial privileges in the cemetery, to various persons, at prices to be fixed by the mausoleum company. This would, while such an arrangement was going on, deprive the director of public service of the *exclusive* privilege of selling burial places, conferred upon him by statute. Other apparent conflicts of authority would exist, and the director would be deprived of his exclusive statutory control of the city burying ground.

I can readily see that such an arrangement as you suggest might be desirable, sanitary and convenient, but it will require additional legislation before it can be authorized. At present I am of the opinion that no such arrangement as you speak of can be made, either directly or indirectly.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

561.

WHERE A RAILROAD COMPANY IS GIVEN THE RIGHT BY CITY COUNCIL TO CONSTRUCT A SIDE TRACK ACROSS ONE OF THE PRINCIPAL STREETS AND A PETITION FOR REFERENDUM ON SAID ORDINANCE WAS CIRCULATED AND FILED IN DUE TIME, NOTICE OF THE ELECTION SHOULD BE GIVEN UNDER THE PROVISIONS OF SECTION 4672, GENERAL CODE.

Where a city council passes an ordinance granting to a railroad company the right to erect a side track across one of the principal streets in the city, and a petition for referendum in said matter was circulated and filed in due time, the notice of the election on the petition filed for referendum, which petition was filed under section 4627, General Code, should be given. Section 5018 does not apply to the election held on such petition for referendum.

COLUMBUS, OHIO, October 11, 1913.

HON. A. T. ULLMAN, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—Under date of September 20th, you submitted for my opinion the following:

> "Our city council passed an ordinance last fall granting to a railroad company the right to lay a side track across one of our principal streets. A petition for referendum in said matter was circulated and filed in due time and on November 18, 1912, said petitions were certified by the city clerk to the deputy supervisors of elections. All in accord with section 4227-2, General Code. (102 O. L. 521.)
>
> "Now, shall notice of election be given, as to this referendum, for thirty days, under said section 4227-2 as it stood at the time of filing said petitions;

or is notice to be given under section 5018-8 as enacted April 18, 1913, Vol. 103 O. L. 833?"

Section 4227-2, General Code, as it stood prior to amendment 103 O. L. 211 and as it stood at the time a petition for referendum in the matter in question was filed, provided in paragraph one thereof that within ten days after the filing of a petition for referendum with the clerk, the clerk should certify such ordinance to the board of elections who was required to submit such ordinance to the electors at the next general election. In paragraph two thereof it was provided as to certain ordinances, among which were ordinances creating a right, granting a franchise, conferring, extending or renewing a right to use the streets or regulate the use thereof that when a referendum petition was filed with the clerk petitioning for the submission of such ordinance the clerk shall certify the fact of the filing of such petition to the board of elections who was required to submit such ordinance at the next regular election, and then followed the provision which is material to consider in connection with your inquiry, as follows: "Provided, however, that at least thirty days notice of the election upon such ordinance, resolution or measure must be given when such election is to be held."

The entire Initiative and Referendum Act was repealed at the recent session of the legislature and a new act substituted therefor. That is to say, the act purports to amend section 4227-1 to 4227-6, General Code. There are, however, but five sections in such new act and six sections in the former act. However, the new act is an entire substitute for the former act.

In said new act, which is found in 102 O. L. 211, there is no provision made for the giving of notice of an election to be held on a referendum petition. At the end of section 4227-3 of the new act is found the following provision:

> "The provisions of this act shall apply to pending legislation providing for any public improvement."

This language, however, I do not believe to be in any way involved in the question you submit for the reason that the ordinance referred to by you was not one involving any public improvement, the ordinance being one simply granting a railroad company the right to lay a side track.

Section 5018-8, General Code, (103 O. L. 833) is found in a new act providing for publicity pamphlets relative to measures submitted through the Initiative and Referendum and is House Bill 638. I shall not give the substance of said act in this opinion further than to say that it provides for the mailing of pamphlets in reference to the Initiative and Referendum to the electors of the municipality, and further section 5018-8 provides:

> "When any constitutional amendment or other measure has been published in pamphlet form in accordance with the provisions of this act, the same shall be in lieu of any other method of advertising provided by law."

and section 5018-8, General Code, provides in part:

> "That the provisions of this act shall apply in every municipality in all matters concerning the operation of the initiative and referendum in its municipal legislation, unless otherwise provided for by the legislative authority of the municipality."

The question, of course, then arises whether by reason of the repeal of section 4227-2, General Code, (102 O. L. 521) and the enactment of House Bill 638, (103 O.

L. 831) the notice of election required by section 4227-2 (102 O. L. 521) is to be given, or whether the provisions of House Bill 638 is to be followed.

Section 26 of the General Code (formerly section 79 revised statutes) reads as follows:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The supreme court held in the case of commissioners of Union County vs. Greene, 40 O. S. 318, that the word "proceeding" as used in section 26 related to judicial matters and not to road improvements. Since then, however, the supreme court has taken a more liberal view of such act and has construed the word "proceeding" as used therein to include steps necessary to make a valid assessment and have even gone so far as to declare that the plans of a building commission for the construction of a court house constitute a proceeding within the meaning of section 26.

> See State ex rel. vs. Cass 13 O. C. C. n. s. 449.
>
> Affirmed without report in State ex rel. vs. Building Commission, 84 O. S. 443.

The court states in the journal entry in such case that the judgment of "affirmance" is based upon the proposition that the work of the building of a court house was "a proceeding" within the meaning of section 26 of the General Code, as illustrated by the reasoning of the circuit court in its opinion, 32 C. C. 208, and was not affected by the provisions of section 2338 of the Code."

In view of the fact that the supreme court has given a very liberal construction of section 26 of the General Code, I am of the opinion that the filing of a petition for referendum under section 4227-2, General Code, (102 O. L. 521) and the subsequent steps so taken would constitute "a proceeding" under said section 26, and consequently that no repeal or amendment should in any manner affect such pending proceeding.

If it were to be held that a referendum petition filed under section 4227-2 (102 O. L. 521) and the subsequent steps necessary to be taken thereunder to cause the ordinance in question to be voted upon was not a proceeding the effect might be that all referendum petitions filed under said law would by reason of the amendment of said law in the 103 O. L. 211, become a nullity. This I do not believe would be tenable in view of the liberal construction given by the supreme court in reference to section 26, General Code.

The enactment of section 6 of the act found in 103 O. L. 831, even should it be held it could apply to a petition filed under section 4227-2, General Code (102 O. L 521), nevertheless such provision although found in a different act would be, as I view it, an amendment of said section 4227-2, General Code, and consequently, would affect said pending proceeding, and by reason of section 26, General Code, could not be held to apply.

> See Railroad vs. Hedges, 63 O. S. 339.

In such case the act in question was a new act but did not purport to be an amendment or repeal of any existing statute. The court, however, on page 341 says:

"It is true that section 79, revised statutes, applies only in terms to the amendment or repeal of a statute, and the act of 1890 above referred to is neither. Still, we regard the principle of that section as declaratory of the policy of our law, which forbids giving to a statute retroctive effect, though remedial in character, unless the act contains an express provision to that effect."

I am, therefore, of the opinion that the notice of election on the petition filed for referendum which petition was filed under section 4227-2, General Code, as found in 102 O. L. 521, should be given, and that section 5018-8, General Code (103 O. L. 833) does not apply to the election held on such petition for referendum.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

562.

THE COUNCIL OF THE CITY OF ST. BERNARD HAS NO RIGHT TO PUBLISH ORDINANCES IN THE "ST. BERNARD OBSERVER," AS IT IS NOT A NEWSPAPER THAT COMPLIES WITH SECTION 6255, GENERAL CODE.

The "St. Bernard Observer" does not conform to the requirements of section 6255, General Code, because no part of it is printed in the municipality or within the county, and for that reason the council of the city of St. Bernard has no right to publish ordinances therein.

COLUMBUS, OHIO, October 9, 1913.

HON. C. A. HEILKER, *City Solicitor of St. Bernard, Atlas Bank Bldg., Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 14th, advising me that the legality of certain ordinances duly posted in five prominent places had been called in question on the ground that there has been established in your city a party newspaper called The St. Bernard Observer, and requesting my opinion upon the following questions:

"1. Has the council the right to publish ordinances, etc., in the Observer, assuming that it is a party newspaper published and of general circulation in the city, although no part is printed in the municipality, as required by Section 6255, General Code?

"2. If council has the right to cause ordinances, etc., to be published in the Observer, is it obligatory to do so, assuming that it is a publication published and of general circulation in the municipality, but no part of it is printed therein?"

In answer to your first question, I beg to state that in order to determine this question it is necessary to refer to the various sections of the General Code regarding the publication of ordinances, resolutions, proclamations, etc., of a municipality, and those sections of the General Code which relate to legal advertising in general.

Section 4227, General Code, requires that ordinances of a general nature or providing for improvements, shall be published as hereinafter provided, before going into operation.

Sections 4228 and 4229, General Code, prescribe how such ordinances shall be published and are as follows:

> "*Section 4228.* Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be; and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a bona fide paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council. (96 v 60, 124; 96 v 82, 196.)
>
> "*Section 4229.* Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality, and for the following times: The statement of receipts and disbursements required shall be published once; the ordinances and resolutions once a week for two consecutive weeks; proclamations of elections once a week for two consecutive weeks; notices of contracts and of sale of bond once a week for four consecutive weeks; all other matters shall be published once. (96v, 60124; 96 v 82, 196.)"

Section 4232 prescribes that when there is no newspaper published in the municipality that it will be sufficient publication of ordinances, resolutions, proclamations, etc., to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof; and I note from your letter that that provision of the statute has been complied with.

Sections 4228 and 4229, General Code, require that all ordinances, proclamations, orders, etc., of a municipality shall be published in two newspapers of opposite politics of general circulation therein, if there are such within the municipality, and shall be published in a newspaper printed in German language, if there is in such municipality a paper having a bona fide circulation of not less than 1,000 copies.

The definition of the word publish is "to make known publicly, to issue as from the press, to circulate". A consideration of sections 4228 and 4229, in connection with this definition of the word "publish" might load us to believe that it was the intention of the legislature only to require the issuing of such paper within the municipality and not that the mechanical operations of printing be performed therein, and if that were the case, the St. Bernard Observer, to which you refer, would come within the scope of this statute since it is published within the limits of that municipality.

Sections 6355, General Code, which should be read in connection with Section 4228 and 4229, is as follows:

> "For sufficient publication of a notice or advertisement, required by law to be published for a definite period, at least one side of the newspaper in which such publication is made shall be printed in the county or municipal corporation in which such notice or advertisement is required to be published."

The word "print" is defined to make a mark or marks upon, as by pressure; to impress types, letters or pictures, etc., on paper, cloth, etc. The legislature in this section in the use of the word "print" as distinguished from the word "publish" in sections 4228 and 4229 evidently had in mind the mechanical operations necessary in the publishing of a newspaper.

As you well know, a great many local newspaper companies print only one side of the newspaper they issue or publish; the other side consisting of what is commonly called "boiler plate". This section, I believe, was intended to bring local newspapers of that kind within the scope of the statutes in regard to legal advertising printed in the county and shows clearly that the legislature intended that the mechanical operation of printing at least one side of all newspapers in which ordinances, etc. are to be published, should be done within the county, municipality or state where such publication is made.

Therefore, I am of the opinion that, under the facts stated in your letter, the St. Bernard Observer does not conform to the requirements of section 6255, General Code, and for that reason the council of the City of St. Bernard has no right to publish ordinances, etc. therein.

In answer to your second question, I beg to state that it is obvious that if council had no right to cause ordinances, etc., to be published in the St. Bernard Observer, it could not be obligatory upon them to do so, for it could not be compelled to do that which it has no right to do.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

569.

AN ORDINANCE OR OTHER MEASURE NECESSARY FOR STREET IMPROVEMENT THAT HAS BEEN PETITIONED FOR BY OWNERS OF A MAJORITY OF THE FOOT FRONTAGE OF THE PROPERTY IS NOT IN ANY WAY SUBJECT TO REFERENDUM.

1. The resolution of necessity passed after council has been petitioned by a majority of the foot frontage to be assessed does not require more than a majority vote of council.

2. Section 3835, General Code, is not in any way affected by the provisions of section 4227-3, General Code. By reason of the provisions of section 4227-3, General Code, the ordinance or other measure necessary for a street improvement that had been petitioned for by owners of a majority of the foot frontage of the property to be assessed is not in any way subject to the referendum, having been by reason of such section specifically exempted from the operation thereof.

3. The reasons for such necessity in passing a resolution of necessity are not required to be set forth in such resolutions.

COLUMBUS, OHIO, October 22, 1913.

HON. D. S. LINDSEY, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—Under date of July 22 you submitted for my opinion five several questions, which I will take up in the order presented.

> *"First.* In the passage of the resolution by the city council, declaring the necessity of a street improvement, the cost of which is to be assessed against the abutting property in the ordinary way and which improvement has been petitioned for by the owners of a majority of the foot frontage of the abutting property, should the resolution receive more than a majority vote of the council?"

Section 3814, General Code, provides:

> "When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council

shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication."

Section 3835, General Code, provides as follows:

"No public improvement, the cost or part of cost of which is to be specially assessed on the owners of property, shall be made without the concurrence of three-fourths of the members elected to council, unless the owners of a majority of the foot frontage to be assessed, petition in writing therefor, in which event the council, a majority of the members elected thereto concurring may proceed with the improvement in the manner herein provided."

In section 3814, General Code, there is an exception stated as to the requirement of three-fourths of the members of council in passing the resolution of necessity in that it excepts "as otherwise herein provided."

Section 3835, General Code, is, as I take it, such an exception in that it states that if the owners of a majority of the foot frontage petition council in writing for a public improvement to be specially assessed "a majority of the members elected thereto concurring, may proceed with the improvement in the manner herein provided."

The manner of proceeding with the improvement after a petition has been presented to council is of course for council to pass the resolution of necessity provided for in section 5814, General Code, and the provision of section 3835, General Code, that council may proceed by the concurrence of a majority of the members elected thereto would seem to me to be a provision otherwise provided for in section 3814, General Code.

I am, therefore, of the opinion that the resolution of necessity passed after council has been petitioned by a majority of the foot frontage to be assessed does not require more than the majority vote of council.

"*Second*: Does section 4227-3, as amended by the act passed by the legislature April 17, 1913, in any way change the provisions of section 3835 of the General Code relating to such improvements? The resolution declaring the necessity of the improvement having been passed by the council, July 14, 1913, should the improvement proceed under section 3835, or should it proceed under section 4227-3 as amended?"

Section 4227-3, General Code (103 O. L. 212), is found in House Bill 499, which bill was declared by section 3 of said act to be an emergency measure, and, therefore, under section 1d of Article II of the constitution went into effect immediately upon the approval of the Governor, to-wit: April 28, 1913, and I assume from your letter that the entire proceeding concerning which you inquire was started subsequent to the going into effect of said act.

Section 4227-3, General Code (103 O. L. 212), provides in part as follows:

"Ordinances or other measures providing * * * for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute * * * shall go into immediate effect."

The provision that such ordinances or other measures shall go into immediate effect is used by the legislature, as I view it, in contradistinction from such ordinances

as are subject to referendum and does not mean that they must go immediately into effect but into effect as provided by statute had the Initiative and Referendum Act not been passed.

Therefore, I am of the opinion that section 3835, General Code, is not in any way affected by the provisions of section 4227-3, General Code (103 O. L. 212), and furthermore, that by reason of the provisions of section 4227-3, General Code, the ordinances or other measures necessary for a street improvement that had been petitioned for by the owners of a majority of the feet front of the property to be assessed are not in any way subject to the referendum, they having been by reason of such section specifically exempted from the operation thereof.

> "*Third:* Should the reasons for such necessity be set forth in the resolution ?"

I assume from your question that you refer to whether or not it is necessary to set out the reasons for the passage of the resolution of necessity.

There is no provision in section 3815, General Code, which states that the resolution shall determine, nor in any other section that I have been able to find requiring that the reasons of necessity shall be set forth.

I am, therefore, of the opinion that the reasons for such necessity in passing a resolution of necessity are not required to be set forth in such resolution.

> "*Fourth:* If it is necessary to set forth the reasons for the necessity, will it be sufficient to set that out in the ordinance directing to proceed with the improvement?"

From the answer given to your third question it is not necessary to give any answer to your fourth inquiry.

> "*Fifth:* If it is necessary to have a two-thirds vote of council will it be sufficient if the ordinance directing the improvement have a two-thirds vote, the resolution having been passed by a majority vote of council?"

By reason of the answer given to your first question it is not necessary to answer the fifth inquiry.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

579.

A PARTY EXECUTIVE COMMITTEE MAY NOT PAY THE REASONABLE VALUE OF THE SERVICE OF A CHALLENGER AT AN ELECTION.

A party executive committee may not pay the reasonable value of the services of a challenger and witness in each precinct in addition to the one paid worker allowed to prepare lists of voters. No provision was mad in section 26 of the Corrupt Practices Act for an expenditure of money for this purpose. Anything in this section not provided for or implied therein is a corrupt practice.

COLUMBUS, OHIO, November 3, 1913.

HON. H. STANLEY MCCALL, *City Solicitor, Portsmouth, Ohio.*

DEAR SIR:—In your letter of October 27th you ask:

> "May a party executive committee pay the reasonable value of the services of a challenger and witness in each precinct, in addition to the one paid worker allowed to prepare lists of voters?"

Section 5176-26, General Code, provides:

> "Any person is guilty of a corrupt practice if he, directly or indirectly, by himself or through any other person, in connection with, or in respect of any election, pays, lends or contributes, or offers or promises to pay, lend or contribute any money or other valuable consideration, for any other purpose than the following matters and services, at their reasonable, bona fide and customary value: * * * the preparation of lists of voters and payment of necessary personal expenses by a candidate. * * * No party organization or candidate shall compensate or hire in any one election precinct more than one person *to prepare lists of voters.*"

It has been the ruling of this department in former opinions that the enumerated list of things contained in section 26 of the so-called Corrupt Practices Act is exclusive, and that any payment, contribution or expenditure, or agreement or offer to pay, contribute or expend any money or thing of value, for anything not in said section provided for, or fairly implied therein, would be a corrupt practice.

My understanding of the provision for a party organization or candidate compensating or hiring in any one election precinct one person to prepare lists of voters is, that an organization or candidate may compensate or hire in one election precinct one person to prepare a poll of the voters in that precinct. This does not mean payment for a party worker, for in some way working at that poll on election day. The legislature knew the difference between polling a precinct prior to election day and the ordinary work of a worker at the polls on election day. They saw fit to make provision for the one, and conspicuously neglected to make any provision for the payment of the other. The amendment of the last legislature, striking out the provision for party representatives, was another step to do away with the so-called "paid party workers" at the polls.

Section 4922, to which you refer, is found in chapter five, which provides for "Registration of Electors."

Section 5058, General Code, provides for the appointment of party challengers.

Section 5059, General Code, provides that challengers appointed under authority of section 5058, shall serve without compensation from the county, city, village or township.

These provisions were parts of our election laws prior to the enactment of the so-called Corrupt Practices Act; and the legislature, with such provisions in mind, did not see fit to include any compensation for them in the list of permitted things and services. Not being found in section 26 of the Corrupt Practices Act, either expressly or by fair inference, it is my opinion that they cannot be paid for their services.

I am enclosing you copy of an opinion just rendered to the secretary of state, on another question, which may be of interest to you.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

581.

THERE IS NO PROVISION FOR FILLING A VACANCY IN THE CHARTER COMMISSION.

Where a vacancy occurs by resignation in the commission that has been elected to frame a city charter there is no officer who has authority to fill such a vacancy in the charter commission, and such vacancy must remain unfilled.

COLUMBUS, OHIO, November 6, 1913.

HON. GEORGE C. STEINMAN, *City Solicitor, Sandusky, Ohio.*

DEAR SIR:—Under date of October 1, 1913, you inquire:

> "Will you kindly give me your opinion on the question of filling a vacancy caused by resignation of a member of the charter commission elected to frame a charter?"

The charter commission is provided for by constitutional provision in section 8 of article XVIII of the constitution of Ohio, known as the home rule amendment. This section provides for the election of the members of the commission, but makes no provision for filling vacancies.

Section 4252, General Code, as amended in 103 Ohio laws 65, provides:

> "In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

This section will not apply to the charter commissioner, as the charter commission is not a department of the municipal corporation.

You call attention to the manner in which council fills a vacancy in the office of councilman. This is provided for by section 4236, General Code, which reads:

> "When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

The statutes do not provide a manner for filling a vacancy in the charter commission and I do not decide that the legislature has that power.

I am of opinion, therefore, that no officer has authority to fill a vacancy in the charter commission, and that such vacancy must remain unfilled.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

590.

THE DIRECTOR OF PUBLIC SERVICE MAY PROCEED UNDER AUTHORITY OF COUNCIL TO INVITE BIDS FOR THE PURPOSE OF INSTALLING WATER METERS IN CONNECTION WITH THE WATER WORKS.

The council of a city may pass an ordinance and the director of public service may lawfully proceed under authority already granted him to invite bids for the purpose of the installation of water meters in connection with the water works. These contracts will be valid obligations of the municipality against the water works fund.

COLUMBUS, OHIO, November 5, 1913.

HON. D. F. MILLS, *City Solicitor, Sidney, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 24th, in which you request my opinion upon the following question:

> "An expenditure within the department of public service, for the installation of water meters in connection with the waterworks of a city is contemplated by an ordinance, already passed, directing the director of public service to enter into the necessary contract. The intention is to use surplus moneys in the fund derived from the operation of the waterworks plant. These moneys have not been appropriated by council to this or any other purpose.
>
> "Is it necessary that the auditor of the city certify that the money required for the contract is in the treasury, as required by section 3806; and should this certificate have been issued prior to the passage of the ordinance?"

Although you do not request my opinion upon the question, I beg leave to point out that section 3960, General Code, provides that money collected for waterworks purposes, though it must be kept as a separate and distinct fund, shall be subject to the order of the director of public service only "when appropriated by council."

As a consequence of this provision, it would not be competent for the fund of which you speak to be drawn upon until after the next semi-annual appropriation ordinance. This seems to be your opinion, but I mention it in what may be an excess of caution.

This conclusion, however, is aside from the main question submitted by you; that question being as to the necessity of the issuance of an auditor's certificate when a given contract is to be met out of revenues of the waterworks. I am of the opinion that the case cited by you, viz: Kerr vs. Bellefontaine, 59 O. S. 466, is in point, as well as other cases of similar import, like Comstock vs. Nelsonville, 61 O. S. 288.

The doctrine of these decisions, and others like them, is that despite the general language of section 3806, which was originally section 45 of the municipal code, and had its prototype in old section 2702, revised statutes, because these sections have always been found among the sections relating to the exercise by a municipality of the delegated power of taxation, and the expenditure of the proceeds of taxation, thei

operation should be by interpretation limited to cases in which the expenditure involved is that of moneys raised by taxation.

On the authority of these decisions, with which I assume you are familiar, I advise, therefore, that the director of public service may lawfully proceed, under the authority of council, already granted to him, to invite bids for the purpose stated, and to enter into contracts for the doing of the work contemplated. These contracts will be valid obligations of the municipality against the waterworks fund, which is, by the express provisions of section 3959, General Code, properly applicable to such purposes. When the time comes to make payments under these contracts, such funds may lawfully be drawn upon for that purpose, when regularly appropriated by council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

611.

CHILDREN BETWEEN THE AGES OF FOURTEEN AND SIXTEEN YEARS MUST ATTEND SOME RECOGNIZED SCHOOL FOR THE FULL TERM THE SCHOOL IS IN SESSION.

Under section 7773 of the General Code, it is the duty of every parent, guardian or other person in charge of children between fourteen and sixteen years of age to cause such children to attend some recognized school. If such parent, guardian or other person in charge of such children fail to do this they neglect to perform a duty imposed upon them by law relating to compulsory education, and consequently violate this section.

COLUMBUS, OHIO, November 9, 1913.

HON. DAVID H. JAMES, *City Solicitor, Martins Ferry, Ohio.*

DEAR SIR:—I have your letter of October 16, 1913, in which you submit the following inquiries:

> "1. May the parent, guardian or other person in charge of a child between fourteen and sixteen years of age, who has passed a satisfactory test in the studies enumerated in section 7762, General Code, be prosecuted for failure to cause such child to attend a public, private or parochial school, if such person is able to do so?
>
> "2. If so, what provision of the statutes provides the penalty for such cases?"

Section 7762, General Code, prescribes the branches which children must be taught.

Section 7763, General Code, provides as follows:

> "Every parent, guardian or other person having charge of any child between the ages of eight and fifteen years of age, if a male, and sixteen years of age, if a female, must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, in city or other districts having such superintendent, or by the clerk of the board of education in village, special

or township districts, not having a superintendent, or by the principal of the private or parochial school, upon satisfactory showing that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent or clerk, as the case may be, to teach the branches named in the next preceding section."

It will be noted that the statute just quoted is an amendment, appearing in 103 Ohio Laws 864; the difference between it and the law which it superseded being the raising of the school age of children, and making a distinction between boys and girls in this regard.

Section 7764, General Code, provides in part that:

"All children between the ages of fifteen and sixteen years, not engaged in regular employment, shall attend school for the full term the schools of the district in which they reside are in session."

Section 7765, General Code, provides for the granting of age and school certificates for boys under sixteen years of age and girls under eighteen years of age; while section 7766 authorizes the granting of such certificates to a boy over fifteen years of age, or a girl over eighteen years of age, when these children have passed a certain graded test in the studies enumerated in section 7762.

While it is not material in answering your question, nevertheless, I wish to call your attention to the fact that the word "eighteen," in reference to girls, has been construed by this department to mean "sixteen."

Section 7768, in part, reads thus:

"Every child between the ages of eight and fifteen years, if a male, or between the ages of eight and sixteen years, if a female, and every male child between the ages of fifteen and sixteen years, not engaged in some regular employment, who is an habitual truant from school, or who absents himself from school * * * shall be deemed a delinquent child, and shall be subject to the provisions of law relating to delinquent children."

The first clause of section 1771 requires the truant officer to institute proceedings against any parent violating the provisions of this chapter; while section 7773 contains a provision that:

"When any child between the ages of eight and fifteen years, or between the ages of fifteen and sixteen years, in violation of the provisions of this chapter is not regularly employed and is not attending school, the truant officer shall notify the parent, guardian or other person in charge of such child, of the fact, and require such parent, guardian or other person in charge, to cause the child to attend some recognized school within two days from the date of the notice; and it shall be the duty of the parent, guardian or other person in charge of the child so to cause its attendance at some recognized school. Upon failure to do so the truant officer shall make complaint against the parent, guardian or other person in charge of the child. * * * "

The foregoing sections make clear the fact that it is the duty of parents, guardians and others having charge of children between the ages of eight and fifteen years of age, if boys, and between the ages of eight and sixteen years of age, if girls, to send such children to school. All such children, not engaged in regular employment are required

to attend school for the full term, when such schools are in session. To this there are certain exceptions, which are set out in section 7763, hereinbefore quoted, and also those appearing in the statutes authorizing employment under an age and schooling certificate. It must be observed, however, that this schooling certificate may only be granted when the boy is over fifteen years of age and the girl is over sixteen years of age. If the children have not reached these prescribed ages there is absolutely no excuse for their non-attendance, excepting in those cases where they are bodily or mentally unfit, or where they are taught at home. It is patent from this that no boy under fifteen and no girl under sixteen can be regularly employed under any circumstances. The whole purpose, aim and scope of the compulsory education and child labor laws indicate this.

The legislature failed, however, to provide any new penalty for violation of these provisions, it, evidently, having been under the impression that the old penal sections, which were not amended, would cover the situation.

Section 12977, General Code, in part, reads thus:

> "Whoever, being the parent or guardian or other person in charge of a minor between eight and fourteen years of age, or a minor between fourteen and sixteen years of age who has not passed a satisfactory fifty grade test in the studies enumerated in section 7762, *or is not regularly employed,* upon notice from a truant officer as provided by law, fails to cause such minor to attend a public, private or parochial school, unless such person proves his inability so to do, shall be fined not less than five dollars nor nore than twenty dollars, or the court may in its discretion require the person so convicted to give bond in the sum of one hundred dollars, with sureties to the approval of the court, conditioned that he or she will cause the child * * * to attend some recognized school within two days thereafter. * * * "

It will be observed, from the italicized language in the foregoing quotation, that the person in charge of the minor may be prosecuted if such minor is not regularly employed, and he does not cause such minor to attend school. As children, under the specified age, cannot be regularly employed, it must follow as a logical sequence that parents violate the statute last cited if, after notice from the truant officer, they fail to require the minor to attend school, the only defense being inability to force the child into school, in which latter event the child may be prosecuted as a delinquent. In those cases in which this section does not cover the situation, section 12983, General Code, would govern. This statute provides that:

> "Whoever violates any provision of law relating to the compulsory education or employment of minors for which a specific penalty is not provided by law, shall be fined not more than fifty dollars."

This would apply to the case of a boy between fifteen and sixteen years of age who did not have an age of schooling certificate, and who was employed in violation of statute, for which no penalty was prescribed. Furthermore, in case the parent, guardian or other person having charge of such boy should allow him to work without a schooling certificate, he could be prosecuted under section 13007-9, which provides graduated penalties for permitting a child to be employed in violation of the provisions of the child labor law.

In case it could be shown that the parent or person in charge of the child caused, encouraged or induced the child to remain away from school, he could be prosecuted for contributing to the delinquency of such minor, under the provisions of section 1654. This must be read in connection with section 7768, hereinbefore quoted.

Section 12981 provides that:

> "Whoever, being an officer or teacher, or other person, neglects to perform a duty imposed upon him by laws relating to compulsory education or employment of minors, for which a specific penalty is not provided by law, shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense."

It would seem that there should be no doubt that section 7773 makes it the absolute duty of the parent, guardian or other person in charge of children, such as those to whom you refer, to cause them to attend some recognized school. If such parents fail to do this they neglect to perform a duty imposed upon them by the laws relating to compulsory education, and, consequently, they violate this section.

In considering the application of the old statutes, remaining unrepealed, to the recent amendments herein discussed, it must be remembered that they are in pari materia, and consequently such amendments are presumed to have been passed in contemplation of the continuance of the sections which were allowed to stand; and, therefore, the latter are broad enough to cover new conditions brought within their terms by said amendments.

Wiler vs. Logan Natural Gas & Fuel Company, 6 C. C. n. s. 206 State vs. Cleveand, 82 O. S. 61.

Trusting that this fully answers your question, I am,

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

618.

WHERE A CHIEF OF POLICE IS SUSPENDED AND HIS PLACE IS TEMPORARILY FILLED, THE PERSON ACTING AS CHIEF OF POLICE MAY RECEIVE THE SALARY OF THE CHIEF OF POLICE—IF THE PERSON ACTING AS CHIEF OF POLICE RECEIVES THE SALARY OF THE CHIEF OF POLICE, THE CITY WILL NOT BE LIABLE TO THE CHIEF OF POLICE FOR HIS SALARY DURING PERIOD OF SUSPENSION AFTER HE IS REINSTATED—WHEN A POLICE OFFICIAL IS GRANTED A LEAVE OF ABSENCE HIS OFFICE MAY BE TEMPORARILY FILLED BY ANOTHER PERSON, AND HIS SALARY PAID TO THE PERSON FILLING THE OFFICE DURING SUCH LEAVE OF ABSENCE.

1. Where a chief of police is suspended by the mayor in a manner provided by law, pending a hearing of the charges before the civil service commission, and the chief of police is suspended by the commission after hearing, the chief of police so suspended may not recover from the city his salary during the period of suspension where this salary was paid to a de facto officer.

2. Where a chief of police is suspended and the de facto officer receives the salary of the chief of police, the city will not be liable to the de jure officer for the salary paid to the de facto officer.

3. Where a lieutenant of police is granted a leave of absence, the mayor may make a temporary appointment during said absence, and the person so appointed may receive the salary of the officer taking the leave of absence.

COLUMBUS, OHIO, November 10, 1913.

HON. JOHN T. BLAKE, *City Solicitor, Canton, Ohio.*

DEAR SIR:—Your favor of May 21, 1913, is received in which you inquire:

> "*First.* A chief of police is suspended by the mayor in the manner provided by law, pending the hearing of the charges before the civil service commission. If the chief is re-instated by the commission after hearing, is the chief so suspended entitled to his salary during the period of suspension?
>
> "*Second.* During the period of suspension of a chief of police, such suspension being duly made, pending the hearing of the charges before the civil service commission, has the mayor authority to appoint a person to act as chief during such period of suspension pending said hearing, and is the person so appointed entitled to the salary of a chief of police?
>
> "*Third.* A lieutenant of police is granted a leave of absence. During said absence has the mayor or other authority power to make a temporary appointment to fill said vacancy to continue during said absence, and is such person, if appointed, entitled to the salary of lieutenant of police?"

Under date of October 22, 1913, you submit a further letter giving dates of suspension and reinstatement of the chief of police. It appears that he was suspended by the mayor on November 23, 1912, and charges filed. On January 17, 1913, supplemental charges were filed making former charges definite and certain. The hearing before the civil service commission began on January 21, 1913, and ended on January 23. On January 29, 1913, the decision of the commission was rendered and the suspended chief re-instated in these words:

"Wherefore, we the members of the civil service commission of Canton, Ohio, find chief H. W. S_____ not guilty of any of the aforesaid specifications, and that said chief H. W. S_____ be reinstated to said office at once."

The order of the commission was that he should be re-instated "at once" and not as of the date of his original suspension.

You also stated that during the suspension a chief of police was appointed by the mayor and acted as such, and that the salary of the office was paid to the acting chief.

Your question asks for a general rule in case of suspension. A general rule cannot be given as each case must depend upon its peculiar circumstances.

The acting chief in your case would be considered as a de facto officer.

At page 1389 of 29th Cyc. a de facto officer is defined:

"One of the rules of the English common law was to the effect that the acts of one who, although not the holder of a legal office, was actually in possession of it under some color of title or under such conditions as indicated the acquiescence of the public in his action, could not be impeached in any suit to which such person was not a party. Such a person was called an officer *de facto*. This principle has been incorporated into the common law of the United States."

On page 1391 it is further said:

"One of the fundamental prerequisites to the existence of a *de facto* officer is the possession of the office and the performance of the duties attached to it."

And on page 1392:

"But the mere fact of the possession of the office is not sufficient to make the incumbent a *de facto* officer. Either he must have color of title or his possession must be acquiesced in by the public. The mere possessor of an office without these other conditions is an intruder whose acts have legally no effect. Color of title to the office may be defined as apparent right to the office. Such apparent right is usually to be found in a certificate of election or a commission of appointment, which certificate or commission is void because some other person is entitled thereto, * * * or because the incumbent has been irregularly appointed, * * *"

The acting chief in this case served under color of appointment by the mayor. The mayor has authority to appoint a chief of police. The appointment was irregular because another was entitled to the office.

The acting chief, therefore, not only had possession of the office and performed the duties thereof, but he had possession under color of title.

The general rule of payment of compensation to a de jure officer where the compensation has been paid to a de facto officer is stated in 29th Cyc. at page 1430:

"The payment of the official salary to a *de facto* officer is, however, a defense to a claim against the public corporation or disbursing officer making such payment in an action brought against it or him by the *de jure* officer. But payment of the salary to a person who is merely an intruder, or to a *de facto* officer who has been judicially determined not to be the *de jure* officer, will not be a defense in an action brought by the *de jure* officer for his salary."

This rule is discussed more fully by Dillon on municipal corporations at section 429, where he says:

> "It is generally but not universally held that the person who is de jure entitled to the office, and not the incumbent de facto who actually renders the service, is entitled in law to the emoluments of the office. * * *
>
> "But for reasons of public policy, and recognizing payment to a de facto officer while he is holding the office and discharging its duties as a defense to an action brought by the de jure officer to recover the same salary, it is held in many jurisdictions, that an officer or employe who has been wrongfully removed, or otherwise wrongfully excluded from office *cannot recover against the city* for salary during the period when his office was filled *and his salary paid to another appointee.*"—(Citing Steubenville vs. Culp, 38 Ohio St. 18).

In Steubenville vs. Culp, 38 Ohio St. 18, it is held:

> "A police officer suspended from office by the mayor of a city, under the authority granted by sections 121 and 211 of the municipal code (66 Ohio L. 170, 184), is not entitled to wages during the period of such suspension, notwithstanding the council afterward declared the cause of suspension insufficient."

The statute under consideration in the above case is different from the present statute. This will be noted in answer to your second question.

In case of State vs. Eshelby, 1 Cir. Dec. 592, it is held:

> "An officer, to be entitled to the salary of an office, must have qualified thereto in the manner provided by law.
>
> "Where a municipal corporation has paid the salary of an office to a *de facto* officer, it will not be required to pay the salary a second time to a *de jure* officer, who has been excluded therefrom, pending litigation as to the title to the office."

This case is directly in point and follows the general rule. In your case I assume the salary was paid to the de facto chief of police before the decision of the civil service commission reinstating the former chief.

It has been contended that the so-called "Carter" case arising in the city of Columbus is decisive of your first question.

There have been two cases in reference to Carter's status. The first case was in reference to his title to the office. The other was in reference to his right to compensation during the period of his suspension. The first case was taken to the supreme court, and the second terminated in the court of common pleas.

The case which determined Carter's right to the office is reported as Karb, Mayor, vs. The State, ex rel. Carter, 87 Ohio St. 197. The right of compensation was not involved in this case.

After this decision was rendered an action was brought in the court of common pleas on behalf of Carter to require the auditor to draw a warrant in favor of Carter for compensation during the period of his suspension. No compensation had been paid to O'Neil, the de facto, or acting chief of police. This distinguishes that case from your case. The case was entitled State ex rel., Carter vs. Cain, Auditor, and is No. 64415 in the court of common pleas of Franklin county, Ohio. The opinion was rendered by Judge Evans on December 21, 1912, and he held that Carter was entitled to the salary during the period of his suspension.

In the Carter case the civil service commission ordered that Carter should be reinstated as of the date of his suspension. This further distinguishes your case from the Carter case.

Judge Evans says in his conclusion:

> "But not having drawn salary, I am of the opinion that inasmuch as there was no vacancy in said office, that the mayor had no authority by law to appoint another to fill a vacancy; that the question of title to the office as between Carter and O'Neil has been finally adjudicated; that O'Neil cannot now draw salary as against Carter, and that Carter is entitled to salary, so far as the pleadings show, from the date of said suspension."

You have been heretofore furnished a copy of Judge Evans' decision in the above case.

Therefore, following the general rule, where a municipality has paid a de facto officer the salary of such office, it is not liable to the de jure officer for such salary and the de jure officer cannot recover the same from the city for the period it was paid to the de facto officer. If such payment is made to the de facto officer after it has been determined in a proper proceeding that the de jure officer is entitled to the office, the municipality would be liable therefor to the de jure officer.

In your case the salary was paid to a de facto officer and the de jure officer cannot recover from the city.

In answer to your second inquiry the opinion of Judge Evans in State ex rel. Carter, vs. Cain, Auditor, supra, is in point and he answers the question as to the right of the mayor to appoint another during the suspension of an officer, pending a hearing before the civil service commission.

He says:

> "The distinction, as claimed by defendants, that the issues upon which the finding was made which held title to said office in Carter and not in O'Neil, was one predicated upon the removal from office of Carter by the mayor, and appointing O'Neil as chief of police, and the suspension of Carter from said office, and appointing O'Neil as acting chief during suspension, would, in my opinion, not avoid, for the reason that the provisions of law heretofore in force, giving the mayor power to appoint another to office for the time covering the period of suspension of an officer, were repealed, and the statutes now make no such provision, except in case of riot or emergency, or to prevent the stoppage of public business, or to meet extraordinary exigencies, as provided in sections 4373 and 4488, Code.
>
> "The act, 66 O. L. 184, expressly provided that the mayor may suspend any policeman for causes there designated, 'until the next regular meeting of council, and to appoint other persons to fill the temporary vacancy caused thereby.' That provision was repealed, and has not been re-enacted.
>
> "The court expressly say in Shotwell vs. Culp, 38 Ohio St., 18, that 'the statute speaks of the suspension creating a *vacancy*, and provides how that vacancy shall be filled. If the office is vacant it becomes, as to the suspended person, for the time being, as though it did not exist, and, as to the public, the person appointed to fill such vacancy is the sole incumbent of the office.'
>
> "It was upon the above provisions of the statute, then in force, that the court held that the suspended officer could not receive salary as pay for the time he was suspended, because the mayor then had authority of law to appoint another person to fill the vacancy, and there being such authority the person so filling the vacancy was for such time lawfully *entitled to the office* and also the salary.

"For some reason, probably arising from the radical changes made by law in providing for civil service in office, and reposing in the civil service board as final arbiters the removal from office of such as were in the civil service class the above provisions of statute giving such powers to the mayor were repealed, and where it is determined that an official was wrongfully suspended or removed by the mayor such official can be re-instated by such board. *The statute does not create a vacancy, as formerly, when an official is suspended, nor can the mayor appoint another to fill such temporary vacancy, because there is no vacancy now recognized by statute.*"

Your question arises under the civil service law as it existed prior to the adoption of 103 Ohio Laws 698, et seq. The former sections will be quoted.

Section 4484, General Code, provides:

"Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

Section 4485, General Code, provides in part:

"No officer or employe within the classified service shall be removed, reduced in rank, or discharged, except for some cause relating to his moral character or his suitableness to perform the duties of his position, though he may be suspended from duty for a period not to exceed thirty days, pending the investigation of charges against him."

It will be observed that by section 4485, General Code, the officer is "suspended from duty."

Section 4488, General Code, provides:

"To prevent the stoppage of public business or to meet extraordinary exigencies, as provided in this title, the mayor may make temporary appointments."

A de facto officer is not entitled to the salary of the office, but if he is paid the salary, the city is not liable to pay the same salary to the de jure officer.

In Ermston vs. Cincinnati, 9 Ohio Dec. 567, it is held:

"A de facto officer (although his acts are valid as to third persons) who has been ousted from office, cannot recover salary for fees for the time he performed the duties of the office."

Your third inquiry involves a different state of facts. An officer is granted leave of absence and I assume without pay. You inquire if the appointing authority can make a temporary appointment, and if such appointee can draw the salary of the position.

In such case there is no contest between a de jure officer and a de facto officer as to the right to the office or to the compensation thereof. There is no question of an illegal, unauthorized or wrongful suspension or removal from office.

Occasions may arise when it is necessary to grant a leave of absence to an officer, and during such absence it may be necessary to have some one to perform the duties of such office.

In such case the mayor would have power under section 4488, General Code, supra., in order to prevent the stoppage of public business to make a temporary ap pointment and the person so appointed would be entitled to the salary of the office. The municipality would not be liable to pay salary to two persons for the same office.

Respectfully,

TIMOTHY S. HOGAN,

Attorney General.

619.

WHERE IN A CITY OF LESS THAN 50,000 POPULATION THREE MEMBERS HAVE BEEN ELECTED ON THE SCHOOL BOARD WHERE ONLY TWO SHOULD HAVE BEEN ELECTED, THE PROPER WAY TO PROCEED IS TO DECLARE THE TWO RECEIVING THE HIGHEST NUMBER OF VOTES ELECTED.

Where in a city of less than 50,000 population three members are elected on the school board when only two should have been elected, the better way to clear up the situation is to declare that the two members receiving the highest number of votes at the November election are elected. If this is not satisfactory to all concerned the dissatisfied party can proceed in court in the proper manner.

COLUMBUS, OHIO, November 10, 1913.

HON. GEO. C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Under date of November 5, 1913, you submit a statement of facts which may be summarized thus:

> "The board of education of the city of Painesville, which contains a population of less than 50,000, reduced its membership from six to five members. At the time of the reduction the terms of three members expire on January 1, 1914, and the terms of the remaining three on January 1, 1916. To effectuate this reduction the board of education, in an effort to comply with the law, certified to the deputy state supervisors of elections three members for election at the November election, 1913. This now creates the unfortunate situation of having six members, which is contrary to law, unless there is some method of obviating this difficulty."

Your query is as follows:

> "How shall one member be eliminated from the three holding over, in order that the number of members of the board may comply with section 4698, and their election from time to time with section 4702?"

The last few words of your query, with reference to compliance with section 4702 in future elections, involves a discussion of several sections of the act relating to boards of education, appearing in 103 Ohio Laws 275.

Section 4698 is clear upon the point that there shall not be more than five members of a board of education in a city of the size of Painesville.

Section 4699 provides for the determination of the number of members by the board of education, by resolution providing for the classification of the terms of

members, so that they will conform to section 4702, "taking into consideration the terms of office of the existing members whose terms do not expire or terminate on the day preceding the first Monday in January, 1914."

Section 4701 governs the situation arising in your case, it providing for the election of additional members when the number fixed by the board of education is more than the number whose terms will not expire on the first Monday in January, 1914.

Your board originally consisted of six members, three of whom now are hold-over members; and when the number was reduced to five, it still left such number greater than the number of members whose terms will not expire on the day preceding the first Monday in January, 1914. The statute expressly states, under these conditions, that:

> "The *additional members* of such board shall be elected at the general school election in the year 1913, for such terms of two or four years as may be necessary to comply with the two provisions of sections 4698 and 4702."

Section 4702 provides for the term of office of members of the board, and unequivocally requires that all members in office at the time the act takes effect *shall serve the unexpired portions of the terms for which they were respectfully elected,* unless their terms shall have been terminated by section 4698 and section 4701. As these terms can only be concluded under the latter section cited, in the event that the total number fixed is less than the number of hold-over members, the provisions of sections 4701 do not, in this respect, govern.

The main difficulty in construing this law arises out of the second paragraph of section 4702, which is to the effect that if the number be even one-half shall be elected in the year preceding, and the remaining half in the year following the calendar year, divisible by four, which is the year 1916; and if the number be odd, one-half of the remainder after diminishing the number by one shall be elected in the year preceding, and the remaining number shall be elected in the year following the calendar year divisible by four.

It is absolutely impossible to reconcile this section with the others referred to when the number of members had been reduced from six to five. This is true because if the additional members are elected for a term of four years, then, the three hold-over members should have their successors elected in 1915, which would not be in compliance with section 4702, because if the number be odd one-half of the remainder after diminishing the number by one should be elected in the year preceding the calendar year divisible by four, which would require the election of two members instead of three in 1915. If on the other hand an attempt is made to work the matter out through consideration of this section together with section 4701, by electing one member for four years and one member for two years in 1913, this would cause the terms of four members to expire the day preceding the first Monday in January 1916. Following this out, if, at the November election, 1915, two members were elected for two years and two for four years, there being one hold-over member, three members could be elected for four years in 1917, and two for four years in 1919, which would then have the number to be elected conform to all of the provisions of the act. In arriving at this result, however, section 4702 would be violated, in that such section only permits elections for terms of four years, excepting at the election held in November, 1913. It would also be violative of section 4702, in providing for the manner in which division of members to be elected should be made, until the year 1917 shall have been reached.

Feeling that it it is not proper to hold the statute void for vagueness and uncertainty, it would seem that either of these two plans might properly be adopted: (a) Elect two members for four years at the November election in 1913, and three members for four years in 1915; or (b) elect one for four years and one for two years at the

November election in 1913, and two for two years and two for four years in 1915 one holding over; and, finally, to elect three for four years in 1917, when the proposition would render the entire act workable.

As your board provided for the election of three members for terms of four years, as stated in your telegram to me under date of November 19, 1913, it would seem that you followed, to a certain extent the first plan suggested here, but disregarded it in other respects, by calling for the election of a greater number of members than proper.

It is my opinion that the theory of electing the additional members, viz.: two for four years, when the situation is that stated in your letter, is the proper one to follow, for the reason that it more nearly expresses the obvious policy and intent of the general assembly as gathered from the whole act, even though it results in disregard of another provision of the law. The fact that three members are to be elected when two should be elected prior to the year divisible by four is not material. What difference does this make, in view of the fact that the number to be elected is biennially divided as nearly equally as possible? There is no public policy or legislative intent that will be subserved by giving great significance to the division of number before a certain year. Two are to be elected at one election and three at another, and it is not important at which date either number is chosen. Much that might here be said is so clearly expressed in State vs. Mulhern, 74 O. S. 364, that I shall conclude this branch of the opinion with reference to that case.

Coming, now, to your chief inquiry, as to the manner of elimination of the surplus member, I am of the opinion that it would not be proper to cause any of the hold-over members to retire. Wherever this phase of the situation is discussed in the statutes it is unequivocally manifest that it was the legislative intention that the hold-over members should remain in office wherever it was possible so to permit. In one section their terms are to be taken into consideration; in another it is only members additional to the hold-over members who shall be elected; and in a third all members are to serve the unexpired portion of the terms for which they were elected. The only exception to this is in a case which arises when the total number of members is less than those who hold over, when lots are to be cast to decide who shall retire. This exception does not here obtain and cannot be read in to the situation you set out.

With these facts in mind we are driven to the position of accepting one of two alternatives:

(1) To declare the action of the board of education, that of the deputy state supervisors of elections, that of the nomination papers, and that of the electors in voting for the three persons absolutely void, and thus permitting all of the old members to hold over until their successors are properly elected and qualified; or

(2) To declare that the two members receiving the highest number of votes at the November election are elected.

It would be a regrettable thing to accept the first alternative, and consequently I am of the opinion that the latter should be taken advantage of. It is fully warranted by section 5121 of the General Code, which, in part, reads as follows:

> "In the canvass of the vote for members of the board of education * * * the person having the highest number of votes shall be declared elected, and the next highest, and so on until the number required to be elected shall have been selected from the number having the highest number of votes."

This section has no reference to what has taken place before the election, and clearly imposes upon the canvassers of elections the duty to declare elected the number required by law to be so elected; and in doing this they must take the highest number of votes. Therefore, it should be clear that the two receiving the highest number of votes should be given the office. If it be objected that the electors voted for three persons, and their tickets should therefore not be counted, my answer is that this can-

not be determined by the canvassers. They are only to count the votes. If there have been errors or irregularities in the conduct of the election that should be determined in a contest proceeding. When certificate of election has been issued to the two persons receiving the highest number of votes, if anybody is not satisfied therewith he can proceed in court in the proper manner.

You do not state whether your city is a registration city. If it is, I desire to call your attention to section 5115, General Code, which provides that the returns of elections of members of the board of education shall be turned over to the deputy state supervisors of elections and canvassed by them and the city auditor. Of course, if it is not a registration city section 5111 obtains and the return should be made to the clerk of the board of education. I make this suggestion in the light of the concluding paragraph of your letter, in which you state that the board of education will meet in a few days to canvass the returns.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

634.

A MEMBER OF THE BOARD OF PUBLIC AFFAIRS OF A MUNICIPALITY SHOULD NOT PERFORM THE DUTIES OF A LINEMAN ON THE ELECTRIC LIGHT AND WATER WORKS PLANT AND RECEIVE COMPENSATION FOR THE SAME.

A person employed as a lineman on the electric light and water works plant, and while holding this position is elected a member of the board of trustees of public affairs, and inasmuch as the board of public affairs employs, fixes the wages of and pays the linemen, the same party should not occupy both positions.

COLUMBUS, OHIO, November 24, 1913.

HON. GEO. W. ROSE, *Solicitor, Glouster, Ohio.*

DEAR SIR:—I have your letter of November 19, in which you inquire:

> "A fellow has been employed as a lineman on the electric light and water works plant, and at the last election was elected as a member of the board of trustees of public affairs.
>
> "The question is, can this fellow serve on the board, and also be employed in the capacity of such lineman, the board of trustees of public affairs having charge of this department, and draw salary from both positions? Or could he serve in both positions and relinquish the salary from one, say the salary as a member of this board?"

While it is true, as you state, that officials may hold many different positions, so long as they do not conflict, yet you state that the board of trustees of public affairs has charge of the department in which the party mentioned is employed as a lineman, and of course it follows from this that inasmuch as the board of public affairs employs, fixes the wages of, and pays the linemen, the same party should not occupy both positions—that of employer and employe, but he should let go of the one or the other and not permit himself to be placed in the position of hiring himself and fixing his own wages.

The statutes being very general as to the duties of trustees of public affairs and silent as to linemen, are not quoted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

639.

THE COUNCIL OF CIRCLEVILLE IS WITHOUT AUTHORITY TO DONATE THE USE OF A COTTAGE TO THE BENEVOLENT SOCIETY OF PICKAWAY COUNTY.

The council of a municipality is without authority to donate the use of a cottage to the benevolent society of Pickaway county, a society formed for and chartered as a free institution for the treatment of tuberculosis and other contagious diseases, also to visit the sick and needy poor.

COLUMBUS, OHIO, December 4, 1913.

HON. C. A. LEIST, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—I have your letter of November 27 as follows:

> "There is an organization here known as the Benevolent Society of Pickaway county. It is formed for and chartered as a free institution for the treatment of tuberculosis and other contagious and infectious diseases, also to visit the sick and needy poor. They employ a district nurse, who gives all her time in visiting the sick and poor and looks after the health and comfort of persons needing care. The city is the owner of a small cottage which it leases and which is used for no other purpose. This society desires the use of this cottage free for headquarters for the society and for the district nurse, and if it can be done council would like to donate the use of the cottage to the society. We have no city infirmary."

Section 6, article 8, of the constitution provides:

> "The general assembly shall never authorize any county, city, town or township, by a vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation or association."

Corporations not for profit were in existence at the time of the adoption of the constitution in 1851, and are included in this section. The constitution makes no distinction between the types of corporations or associations, but provides against the evil of permitting a public corporation such as a county or city from raising money for, or loaning its credit to, or in aid of any corporation or association, and thus devoting public money to enterprises over which the county or city does not exercise management or control.

The supreme court in the case of Walker vs. Cincinnati, 21 O. S., 14, at page 53 said as to such section:

> "Its language is specifically comprehensive to embrace every enterprise involving the expenditure of money, and the creation of pecuniary liabilities."

The court also say on page 45:

> "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state, and individual or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

It was said by the common pleas court in the case of Crossland vs. Zanesville, unreported, affirmed in 56 O. S., 735, that:

> "It is for the public interest that the municipality retains control and management of the sick and disabled poor. One of the chief purposes of the local government is to preserve the health and safety of the inhabitants. If the municipality may escape its obligations and duties to the sick and disabled by farming out the same to the charitable associations or corporations, the public interests may suffer in that respect. 'The statutes will be construed the most beneficial way which their language will permit to oppose all prejudice to public interests.' (Sutherland on Statutory Construction, section 324.)"

Elliott in his work on "Municipal Corporations" in speaking of alms-houses and hospitals, page 61, says:

> "The power of taxation cannot be employed to support such institutions when they are under the control of private persons who are not accountable to the government."

It appears in this matter that aside from the constitutional question involved, for the council to devote the use of a cottage for headquarters for this society would be against public policy inasmuch as it would be a diversion of public money to a private purpose, and however charitable that purpose may be, such action on the part of council would be contrary to the general principles of ou government that the subdivisions of the state should spend directly the public money of each subdivision for the purpose authorized by law.

I am, therefore, of the opinion that the council of your municipality is without authority to donate the use of a cottage to the benevolent society of Pickaway county.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

644.

THE CITY COUNCIL HAS NO RIGHT TO MAKE A REDUCTION IN ASSESSMENTS FOR STREET IMPROVEMENTS ALONG A PART OF A PIECE OF PROPERTY THAT IS NOT IMPROVED.

Where in the improvement of a street a piece of property is worthless, or not improved, and the improvement of the street is made to extend along this property, the city council has no right to make any reduction in the assessment on the part of said street property that is not improved.

COLUMBUS, OHIO, December 3, 1913.

C H. STOLL, *City Solicitor, London, Ohio.*

DEAR SIR:—I have your inquiry of November 25th as to the power of the council to reduce the assessment for improving Main street charged against Gus Paine, who owns a triangular tract fronting 45 feet and 2 inches on Main street, 34 feet and 2 inches of which is covered by a building, and the corner 11 feet on Main street which you state is of no value to him (Paine) as he cannot extend his building much further than it is now.

You state that in your opinion "they (the council) have the right to reduce such assessment when they feel he is paying an exorbitant assessment and part of lot assessed

is of no value to the owner, although the assessment does not exceed one-third of its value."

It must be kept in mind, while not so specifically stated by you, that this improvement has been made on the foot front plan. To do this it was necessary that the council should first pass a resolution of necessity to improve (section 3814, G. C.) The council shall determine the nature of the improvement; the grade of the street; elevation of same and of curbs, and shall approve plans, specifications, estimates and profiles, and the number of assessments to be made (section 3815, G. C.) All assessments shall be limited to special benefits conferred (section 3819.) The municipality shall pay not less than one-fiftieth and all intersections (section 3820.) It may issue bonds to pay its share of the improvement (section 3821) and in anticipation thereof (section 3815).

Assuming, which is only fair, that the municipality has taken the proper steps and in the orderly and proper manner, we must conclude:

1. Two classes of bonds have been issued,
   (a) To pay the share of the village,
   (b) In anticipation of collection of assessments.

As both classes are based on estimates before the council and it must be conceded that this three cornered piece is not an intersection, and that the payment for the improvement in front of it was not considered as a part to be paid by the municipality; then it follows that it was cared for in the bonds issued in anticipation of the collection of assessments, or, was not provided for at all.

However, another view remains, Mr. Paine's property is an entirety, regardless of its shape, and it must in this proceeding be treated as such. He bought it as an entirety; when he had notice of the intention to make this improvement he was so holding it and entered no objection to the manner of making the improvement or the character of the assessment, but remains quiet, permits the improvement to be constructed, not merely in front of that part of his lot covered by his house, the 34 feet 2 inches, but also in front of the addition, now claimed to be worthless, 11 feet.

The actual question propounded in this case, it appears to me is answered by Spear, J., in Schroder vs. Overman, Clerk, etc., et al., 61 O. S., p. 14, wherein he says:

> "Does the record show that the assessment was in excess of twenty-five per cent. of the fair market value of the lands to the depth of 150 feet after the improvement was made? The plaintiff owned a parcel of land fronting over 700 feet on the street. It was in one tract; land in bulk, in other words. A considerable part (some 250 feet of frontage) was below the grade of the street and had a ravine through it and was used for pasturage purposes. If that part should be assessed separately from the remainder of the tract on which the dwelling house is situated, the value would be less than four times the assessment for the improvement. But the value of the whole tract to a depth of 150 feet after the improvement was made, was much more than four times the amount of the assessment.
>
> "The contention is that the council, and upon its neglect to do so, the court, should have divided the parcel thus standing in bulk, and that the court should grant relief by enjoining the assessment as to that portion which is in value less than four times the amount of the assessment. There is plausibility in the claim that the rule adopted reaches an unfair and inequitable result, and perhaps it is sufficiently important to call for legislative action on the subject. But we are of opinion that the authorities giving construction to the statutes are against the claim as a legal proposition. Section 2269, Revised Statutes; Cincinnati vs. Oliver, 31 Ohio St., 371; Griswold vs. Pelton, 34 Ohio St., 482."

To my mind, the principles above stated and the very obvious result of adopting any rule, other than as there pointed out, conclusively determine that the council has no power to grant any relief to Mr. Paine. If Mr. Paine's wish were granted, every man who owned property abutting on an improvement, but a portion of whose lot was not covered by buildings, would be making the claim that the unoccupied portion of his lot was valueless, that he should not be assessed on such frontage, and the collection of assessments would be hindered, delayed, and surrounded with all sorts of questions and unsurmountable difficulties.

Besides, if Mr. Paine is relieved of the assessment against the eleven feet, against whom will it be charged? It was not considered when the amount to be paid by the municipality was fixed, is not an intersection, and as I understand your statement and diagram, is a portion of a general improvement and probably somewhere near the center thereof. Consequently, it is a central portion of a general improvement and cannot be taken out and divided among the other abuttors on the improvement.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

645.

A CORPORATION MAY NOT DETACH ITS PROPERTY FROM A CITY UNDER THE PROVISIONS OF SECTION 4577, G. C., AS THE PROVISIONS OF THIS SECTION APPLY ONLY TO FREEHOLD ELECTORS

The city council of Warren, Ohio, has no right to pass an ordinance permitting a corporation owning a steel mill to detach its territory from the city. A petition for the detachment of property must be filed by a freehold elector under the provisions of section 3577 G. C. There is no power in the city council under this section to allow the property of a corporation to be detached in this manner.

COLUMBUS, OHIO, December 4, 1913.

HON. GEO. BUNTING, *City Solicitor, Warren, Ohio.*

DEAR SIR:—I have your letter of November 29, in which you inquire:

> "The city council of this city have passed an ordinance to its second reading which I feel is not right. A corporation owning a steel mill which is now within the city limits have filed a petition with the county commissioners to detach the territory from the city. The ordinance is to give the authority of the city and their consent.
>
> "I have held that this petition must be filed by a freehold elector and I have contended that a corporation is not within the provision of section No. 3577, G. C."

Section 3577 referred to by you, reads, in so far as applicable:

> "If a petition of a majority of the freehold electors owning lands in any portion of the territory of a municipality, accurately described in such petition with an accurate map or plat thereof, praying to have such portion of territory detached therefrom the commissioners of the county in which such portion of territory is situated, with the assent of the council of the municipality given in an ordinance passed for that purpose, shall detach such portion of the territory therefrom and attach it to any township contiguous

thereto, or, if the petition so requests, they shall erect the territory into a new township, the boundaries of which need not include twenty-two square miles of territory * * *."

Section 3578, G. C., reads:

"The owner or owners of unplatted farm lands annexed to any municipality after the incorporation thereof may file a petition in the court of common pleas of the county in which the lands are situated, in which such owner or owners shall be named as plaintiffs, and the municipality shall be the defendant, setting forth the reasons why the land should be detached, and the relief prayed for. On the petition a summons shall issue as in other actions, and the case proceed as in other causes. Provided, however, that no such action shall be brought, or detachment ordered or decreed within five years from the time that such lands were annexed by any such municipality under the provisions of this or the preceding chapter."

That a corporation does not come within the meaning of "freehold elector," as used in section 3577, requires neither discussion nor citation of authorities, and it is equally clear that the lands mentioned by you do not come within the description of "unplatted farm lands" as used in section 3578.

I am of the opinion that as the proceeding you mention is evidently intended to be covered by section 3577, that there is no power in the council and commissioners to detach the property in the manner attempted.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

647.

WHERE THE ONE PER CENT. LIMITATION OF SECTION 3940 G. C., AND OTHER LIMITATIONS OF BONDED INDEBTEDNESS ARE NOT EXCEEDED, IT IS NOT NECESSARY FOR THE COUNCIL TO PUT THE QUESTION OF A BOND ISSUE FOR STREET IMPROVEMENT UP TO A VOTE OF THE ELECTORS.

Where a village desires to improve two streets and its bonded indebtedness is not up to the limit, it is not necessary to put the question of improvement and the issue of bonds to pay for the improvement of these streets up to a vote of the electors, that is, provided the 1% limitation of section 3940, G. C., and the other limitations upon the bonded indebtedness are not exceeded.

COLUMBUS, OHIO, December 13, 1913.

HON. C. H. STOLL, *City Solicitor, London, Ohio.*

DEAR SIR:—Under date of June 27, 1913, you submitted four inquiries to this department. Recently you withdrew the first, second and fourth inquiries, leaving only your third for answer.

Your third inquiry is as follows:

"We have parts of two streets that are almost impassable in wet weather. If our bonded indebtedness is not up to the limit, is it necessary to put the

improvements and the issue of bonds to pay for the improvements of those streets up to a vote?"

You state that the bonded indebtedness of the village has not reached the limit prescribed by law. This will exclude any consideration of limitations.

Section 3821, General Code, provides:

"A municipality may issue and sell bonds as other bonds are sold to pay the corporation's part of any such improvement, and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon."

This section permits the municipality to "issue and sell bonds as other bonds are sold" to pay the corporation's part of the improvement.

Section 3939, General Code, provides in part:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

"22. For resurfacing, repairing or improving any existing street or streets as well as other public highways. "

This is a general statute covering the issue of bonds by municipal corporations.

Section 3940, General Code, provides:

"Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation."

Section 3914, General Code, provides:

"Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of such bonds."

Section 3949, General Code, provides in part:

"* * * * * In ascertaining the limitations of one per cent., four per cent. and eight per cent. herein prescribed, the following bonds shall not be considered.

"*c.* Bonds issued in anticipation of the collection of special assessments, either in original or refunded form."

By virtue of the foregoing sections council may issue bonds for the improvement of a street without submitting the question of issuing such bonds to a vote of the people, provided the one per cent. limitation of section 3940, General Code, and the other limitations upon the bonded indebtedness are not exceeded.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

666.

PUBLICATION OF ORDINANCES—PRESIDENT OF COUNCIL MAY NOT BE STOCKHOLDER IN NEWSPAPER PUBLISHING ORDINANCES OF SUCH CITY.

Wher a heavy stockholder in a printing company is elected president of the council of the city of Painesville the publication of said ordinanc by such printing company would disqualify the person holding stock in such company from acting as president of the city council.

COLUMBUS, OHIO, December 3, 1913.

HON. GEO. C. VON BESELER, *City Solicitor, Painesville, Ohio.*

DEAR SIR:—Under date of November 18, you write as follows:

"We beg to ask your opinion based upon the following statement of facts:

"Mr. M. L. Harter is a very heavy stockholder in The Educational Supply Company. The Educational Supply Company publishes the 'Lake County Herald.' The 'Lake County Herald' is the only Democratic newspaper of general circulation in the city of Painesville. Mr. Harter has been elected president of the council for the term beginning January 1, 1914."

"Section 3808 of the General Code of Ohio is as follows:

" 'No member of the council, board, officer or commissioner of the corporation, *shall have any interest in* the expenditure of money on the part of the corporation other than his fixed compensation.'

"At first thought one would immediately say that Mr. Harter would be disqualified from holding said office.

"There is this additional view, however. Section 4229, of the General Code, is as follows:

" 'Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein.'

"Section 6251 of the General Code fixes definitely and absolutely the rate for all insertions.

"In view of these regulations, although of course Mr. Harter has an interest in such an expenditure of money, yet he can have no control over what shall be inserted or the rate to be charged therefor.

"*Query*—With the understanding that no printing other than the publication of ordinances required by law and for which the rate is fixed shall be done by The Educational Supply Company, will the publication of ordinances as required by law by the company in which Mr. Harter is a stockholder disqualify him from acting as president of the council?"

You suggest that in view of the fact that the officer in question is empowered to exercise no control whatsoever over the expenditure involved in such publications there might be grounds for modification of the prohibition of section 3808, General Code prohibiting an officer of a corporation from having any interest in the expenditure of money on the part of the corporation, other than his fixed compensation. This statute, however, presents an absolute and unquestionable prohibition against having any interest whatever in the expenditure of such moneys, and I am able to see nothing whatsoever in its terms which would justify the view that the question of control or lack of control over the amount of such expenditure would in any way vary the effect of having an interest in such expenditure.

With regard to your reference to the provisions of section 6251, General Code, which fix definitely and absolutely the rate for all insertions, and your suggestions in this connection that the policy of the statute might possibly not be expected to extend to amounts so fixed and determined, I beg to quote the following from the opinion of Judge Price, in the case of McCormick vs. City, 81 O. S., 253:

"The following is part of section 1536-619 (4229 G. C.) which prescribes the duty: 'All ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be * * *.' It is claimed, therefore, that publication in that manner is mandatory, and for that reason no express contract is necessary. To this claim is added another, that section 4366, revised statutes (6251, G. C.) fixes the rates per square for each publication which left mere clerical duty for the clerk to perform in calculating the cost of publication. But it must be observed that this statute fixes *maximum* rate, and no *minimum* rate. Hence it is practicable to contract for a much lower rate than the *maximum* and thereby make large savings for the city or village."

Following this decision, therefore it is not true that section 6251, General Code, fixes definitely and absolutely the rate for all insertions, but merely prescribes the maximum which may be expended for such purposes. Expenditures for such publications, therefore, are no different than expenditures made upon any other contract in behalf of the municipality.

I am, therefore, of the opinion that publication of ordinances by the company in question would disqualify the official from acting as president of the council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

668.

CITY FIRE DEPARTMENT—CHANGING FROM VOLUNTEER TO PAID FIRE DEPARTMENT—CHIEF OF VOLUNTEER FIRE DEPARTMENT WILL BECOME CHIEF OF THE PAID FIRE DEPARTMENT.

Where a city changes from a volunteer fire department to a paid fire department the chief of the volunteer department will become chief of the new fire department under the provisions of the recent civil service law and he will be protected by the provisions of this law.

COLUMBUS, OHIO, December 23, 1913.

HON. R. E. MYGATT, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—Your favor of November 10, 1913, is received, in which you inquire:—

"The city of Conneaut is about to change from a volunteer fire department to a paid department.

"The volunteer department exists under authority of sections 62 and 63 of the codified ordinances of the city of Conneaut.

"Section 62 provided "the fire department shall consist of one chief, one first assistant chief, and one second assistant chief, one fire warden etc.'

"Section 63 of the codified ordinances provides for four different companies, and specifies the number of members in each company, together with the salary to be paid to the chief, other officers and volunteer members of the fire department.

"The city council has recently passed an ordinance to reorganize the fire department, and change the same from a volunteer to a paid department.

"This ordinance will go into effect soon, and I submit for your opinion the following question:

"Does the chief of the fire department who is now acting as such chief in the volunteer department, continue in office after the organizing of the paid department, or does the mayor have a right to appoint another person chief of the paid department?"

It appears that the volunteer fire department has been organized by ordinance of council. The chief of the volunteer department receives a salary, the amount of which is not given.

The office of chief of the fire department is a regularly created position of the city. The fact that the incumbent may not give all his time to the service of the city is not decisive as to his right of protection under the civil service law.

The first question to be determined is whether the chief of the volunteer fire department, organized by ordinance of council, was protected by the municipal civil service law, recently repealed.

Section 4377, General Code, provides:

"The fire department of each city shall be composed of a chief of the fire department and such marshals, assistant marshals, firemen, telephone and telegraph operators as are provided by resolution or ordinance of council. The director of public safety shall have the exclusive management and control of such other officers, surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council."

This section creates the position of chief of the fire department where such department is maintained by the city. No distinction is made as between a volunteer and a paid fire department.

Section 4484, General Code prior to its repeal in 103 Ohio Laws 713, provided:

> "Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

By virtue of this section the chief of the fire department was protected in his position by the civil service law. No distinction is made as between the chief of a paid department and the chief of a volunteer department. The terms of the statute are broad enough to include both classes of chiefs.

It is my conclusion therefore, that where a volunteer fire department is organized by ordinance or resolution of council, and a salary fixed for the chief of such department that such chief is protected by the civil service law.

The fire department has been changed from a volunteer department to a paid department. The position of chief of the fire department is retained in the new ordinance. In fact the statute prescribes the position of chief.

The duties of the chief under the paid department will no doubt be greater than under the volunteer department. The general character of the duties, however will remain the same.

The reorganization of a department by ordinance of council and the repeal of the former organization ordinance does not deprive the incumbents of their positions, where the same positions are provided for in each ordinance. The instant one ordinance becomes effective the other ceases to be operative. There is no interim.

In the present case there is a chief of the fire department provided for in the old ordinance and also in the new ordinance. This is independent of the statute, which provides for a chief.

The chief of the volunteer department is protected by the civil service law and this protection will follow him into the paid department.

I am of opinion, therefore, that the chief of the volunteer department will become the chief of the new paid department under the provisions of the recent municipal civil service law, and the provisions of the new civil service law protect him in that right.

Section 31 of the state civil service law, 103 Ohio Laws 713, provides in part:

> "All officers and employes in the classified service of the state, the counties, cities and city school districts thereof holding their positions under existing civil service laws, shall when this act takes effect be deemed appointees under the provisions of this act."

The mayor, therefore, has not the right to appoint another person chief of the paid fire department.

Respectfully,
TIMOTHY S. HOGAN
Attorney General.

673.

MUNICIPAL ELECTION—CITY COUNCIL—QUALIFICATIONS OF MEMBERS OF A CITY COUNCIL.

1. Where a person a former resident of a city who has resided out of that city for a period of more than one year, and returns to this city within one year before election and is elected to the city council, such person is not eligible to hold the office of councilman for the reason that the law requires that he be a resident of his city for a period of one year before his election as councilman.

2. Where at the time of his election to the city council a person who is a member of the board of health of his city and did not resign as a member of said board until after his election, the fact of his not resigning his office as member of board of health does not prevent him from being eligible to office of councilman of his city.

COLUMBUS, OHIO, December 27, 1913.

HON. ELMER E. BODEN, *City Solicitor, Barberton, Ohio.*

DEAR SIR:—Under date of December 3 you requested my opinion upon the following propositions:

> "*First:* At the recent municipal election, November 4, Joseph McCarty was elected councilman from the first ward for the city of Barberton. It now appears that, although Mr. McCarty was formerly a resident here and at one time a member of the council, he had been living in Ashtabula county for more than a year prior to about April or May of this year, and that he just returned to Barberton about that time. I am also advised that he voted in Ashtabula county at the election one year ago.
>
> "The question now arises as to whether or not he is eligible to the office of councilman.
>
> "*Second:* At the same election Albert Ling was elected councilman from the third ward for said city. At the time of his election Mr. Ling was a member of the board of health of said city, and did not resign as a member of such board until after the election, namely, on November 12.
>
> "The question also arises as to Mr. Ling's eligibility to the office of councilman."

The qualifications of a city councilman are set forth in section 4207, General Code, as follows:

> "Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards for at least one year next preceding their election. Each member of council shall be an elector of the city, shall not hold any other public office or employment except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

I have had occasion, in several instances, to construe the requirement as to residence of a city councilman as the same is intended by this statute, and have always taken the view that the residence required is *actual* and not constructive or merely legal residence. In other words, it means residence of a different character than that required by the election laws. The purpose of this requirement as to residence is to

secure the election to council of persons who are actual residents of, and familiar with the territory they are elected to represent.

I am, therefore, of the opinion that Mr. McCarty, not having resided in the ward for which he was elected, for a period of one year prior to his election, is not eligible to the office of councilman.

It will be observed, that one of the other qualifications of a councilman is that he "shall not hold any other public office or employment, except that of notary public or member of the state militia."

Most of the reported cases, in which this provision has been construed, involved the validity of the election or appointment to another public office or employment, of a person who was already serving as councilman. The leading reported cases involving the validity of the election to the office of councilman, of a person who, at the time of such election, held one public office, are Commissioners vs. Cambridge, 7 O. C. C., 72, and State ex rel. vs. Gard, 8 O. C. C., N. S., 599. In the former, the court held:

> "A member of a board of work-house directors of a municipal corporation is an officer, and holds an office, within the meaning of the constitution, and is ineligible to the office of councilman in such corporation, under section 1681, revised statutes, while holding such office of work-house director; and his election and induction into the office of councilman while holding the office of, and acting as, such work-house director, is illegal and void."

On page 82 of the opinion, it is said:

> "In State ex rel. vs. Kearns, supra, it was held that the appointment of a member of council to another office, does not work an abandonment of his office as councilman, but that the appointment to such other office is absolutely void; and we think the converse of this is equally correct—that the election to the office as councilman of one who, at the time of his election and induction into such office, holds another office in the corporation, is absolutely void, when there is no abandonment of such other office."

You will observe that the language of the syllabus is qualified by the phrase *"when there is no abandonment of such other office."* The court, in effect, held that where the incumbent of the other office relinquished the same before assuming his duty as a member of the city council, he did not forfeit the latter office.

In the Gard case, the court held:

> "The inhibition against the holding of another public office or employment, found in section 120 of the municipal code (revised statutes, section 1536-613), relating to the qualifications of councilmen, is not limited to other office or employment by the municipality, but extends to all public office or employment."

The following language of the opinion is significant:

> "We are of the opinion that at no time between his election and the hearing of this case did Fred Shearer have the qualifications of a member of council provided and required by section 120 of the municipal code. He held the public office of school examiner and the public employment of superintendent of one of the Hamilton public schools before the election and continuously during the entire time of his pretended incumbency as member of council * * * *."

The facts of these cases were different from the facts presented in your case, in that at the time the councilmen involved in them had entered upon the duties of their office, and when the action that was the principal subject of contention was had, the respective councilmen were holding another office in violation of the prohibition of the statute against the same. They had already forfeited the office of councilman. In your case, the man elected to council has resigned from the board of health, prior to his entering upon the former office.

In neither of these cases did the court hold that if the councilmen in question had ceased to hold the other incompatible offices at the time of their entering upon their duties as councilmen, and when the action complained of was taken, they would forfeit their office as councilmen. Because the facts in your case are different from the facts of the two cases above cited, I do not regard these cases as being in point.

It will be further observed that the prohibition of section 4207, goes to the *holding* by a member of a city council of any other public office or employment. That section does not say that a *candidate* for the office of councilman cannot hold any other public office or employment, nor that the *election* of a person to the office of councilman would be invalidated by reason of his holding another public office or employment at the time of such election.

In the case of School District vs. Dilman, 22 O. S., 194, the court recognized the principle that ineligibility existing at the time of election or appointment to an office, is not a bar to the assumption of the office, providing the ineligibility is removed prior to the taking of the office. That was a case involving the right of a teacher, who had no certificate to teach, as required by the statute then in force, to recover compensation under a contract of employment, the teacher having received such certificate prior to assuming his duties.

The court in the opinion say:

> "The law (S. & S. 707, section 7) forbids the *employment* of a teacher who has not a certificate. The teacher is not 'employed' within the meaning and intent of this provision, until he engages in the discharge of his duties as teacher."

So in this case, a person elected to the office of councilman, cannot be regarded as holding the office until he has qualified and *acts* in that capacity.

The general rule on this subject is laid down in a note to the case of State of Washington ex rel. vs. Howell, 41 L. R. A., N. S., page 1119, as follows:

> "The earlier cases upon this question are collected in a note to Bradfield vs. Avery, 23 L. R. A. (N. S.) 1228.
>
> "As shown by that note, a part of which is quoted in the dissenting opinion in State ex rel. Reynolds vs. Howell, the greater number of cases take the view that eligibility to an office relates to the time of entering upon the office rather than the time of election or appointment.
>
> "The later cases tend to strengthen this view of the question rather than otherwise."

Decisions of courts of numerous states are cited and the great majority of them sustain the principle stated in the note.

See also note to Bradfield vs. Avery, 23 L. R. A. (N. S.) 228.

Inasmuch, therefore, as Mr. Long has resigned from the board of health, I am of the opinion that he is legally eligible to the office of councilman to the city of Barberton.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

(Village Solicitors.)

9.

MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS TO LAY ADDITIONAL WATER MAIN FOR USE WHEN OLD MAIN IS OUT OF COMMISSION, AS A PROTECTION AGAINST FIRE.

Under the power granted by section 3619 to extend and enlarge the waterworks of a village, a village which receives its water from another village may issue bonds to lay an additional main to be used when the old main happens to be out of commission, as a means of fire protection, and providing such action is done within the tax limit and in compliance with the provision of law in relation to the issuing of bonds.

COLUMBUS, OHIO, December 19, 1912.

HON. GORDON C. KINDER, *Village Solicitor, Bridgeport, Ohio.*

DEAR SIR:—Your letter of November 25 in which you state:

> "Bridgeport owns a line of water mains but does not own a pumping station, and the reservoir that it has has never been used by it. It gets its water supply from the city of Martins Ferry, which adjoins it, the inhabitants of Bridgeport that take water paying the same rate that the Martins Ferry citizens pay to the city of Martins Ferry, under a twenty year contract between the municipalities, executed in 1901. When the village of Bridgeport laid its water mains it issued bonds called 'Water Works Bonds.'
>
> "My understanding of the definition of 'water works' is that water works is a system for the collection, preservation and distribution of water, and if this is a correct definition, has the village the power, under the statutes, to bond itself to put down an additional main, to be used when the old main happens to be out of commission and as a means of fire protection?"

Section 3619, General Code, reads:

> "To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs and water works, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor.

Under this section the village has power to provide a supply of water by any of the means mentioned, and as your inquiry really ends with the query as to whether the council may make provision for a water supply, in advance of a failure of present means, I am constrained to the opinion that it has such power, either as an original proposition, as when it made the contract mentioned, or as a precautionary and protective measure, for use as a means of fire protection, and as an enlargement or extension of its present works.

Of course it has to be done within the tax limit of the village and in compliance with the provisions of law in relation to the issuance of bonds.

I can see, therefore, no reason why bonds may not be issued and the additional main put down, but would suggest that it be done for the purpose of "enlarging and extending the water-works of the village."

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

17.

INITIATIVE AND REFERENDUM—BOND ORDINANCE INVOLVES EXPENDITURE OF MONEY AND IS SUSPENDED.

Inasmuch as the ordinance providing for the issuing of bonds in the sum of $100,000.00 for cemetery improvements, specifies a liability ultimately to be paid by the tax payer, such ordinance involves the expenditure of money within the meaning of the initiative and referendum and under section 4227-3 may not be declared an emergency measure, but must remain suspended for sixty days.

COLUMBUS, OHIO, January 2, 1913.

HON. E. P. WILMOT, *Solicitor, Chagrin Falls, Ohio.*

DEAR SIR:—Under date of December 4th you advised me as follows:

> "On November 7, 1912, the council of Chagrin Falls village passed an ordinance declaring it to be necessary to purchase and provide land to enlarge and improve the cemetery, and levied a tax in the sum of $10,000 on all the property in the village for that purpose, and in the ordinance declared it to be an emergency measure."

You then submit for my opinion the question whether the ordinance in question is subject to a referendum vote of the electors upon a proper petition filed by the electors with the clerk of the village as provided by section 4227-2 and 4227-3 General Code.

In an opinion heretofore rendered to the Hon. Don J. Young, Prosecuting Attorney, Norwalk, Ohio, under date of September 16, 1911, wherein the question was asked as to whether an ordinance providing for an issuance of bonds in the sum of $10,000.00 for the purchase of a fire engine, which ordinance authorized the expenditure of the money for that purpose, was within the Initiative and Referendum Act, I gave it as my opinion that the same was within such act for the reason that it involved the expenditure of money. In your case, however, it appears that the ordinance in question simply declares it necessary to purchase and provide land to enlarge and improve the cemetery, and to levy a tax on the property within the village for that purpose, and further provides for bonds in anticipation of receipts of such tax levy, nevertheless, it has been held by various common pleas courts throughout the state that a bond ordinance was an ordinance involving the expenditure of money, and consequently, was such an ordinance under the Initiative and Referendum Act as would not become effective in less than sixty days. While it is true that the ordinance in question itself does not expend the money, yet it seems to be the policy of the legislature that the electors shall be permitted to decide for themselves if they so desire what expenditures shall be made in a municipality and since the ordinance in question would create by the issuance of bonds for the purpose specified a liability ultimately to be paid by the tax payers of the municipality since the fund raised by such bond ordinance can be used for no other purpose than the purpose specified by the ordinance, I am of the opinion that the same would be considered as an ordinance involving the expenditure of money, consequently, since section 4227-3 specifically declares that such an ordinance cannot be declared an emergency measure, I am of the opinion that the ordinance in question is subject to a referendum vote of the electors on a proper petition filed with the clerk of the village.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

37.

TAXES AND TAXATION—BONDS SOLD TO SINKING FUND TRUSTEES PRIOR TO JANUARY 1, 1913, ARE EXEMPT FROM TAXATION AS PER CONSTITUTIONAL AMENDMENT.

Section 3913, General Code, speaks of the sale of bonds other than to the trustees of the sinking fund, and thereby discloses that the issuing of bonds to the sinking fund trustees, under section 3932, General Code, constitutes a sale thereof.

Therefore, when such bonds are issued to the sinking fund trustees prior to January 1st, 1913, they must be considered "at present outstanding," within the meaning of proposal 32 of the constitutional amendment, providing that bonds at present outstanding of the city, village, etc., shall be exempt from taxation.

COLUMBUS, OHIO, December 13, 1912.

HON. JAMES I. BOULGER, *Solicitor, Village of Frankfort, Chillicothe, Ohio.*

DEAR SIR:—I have your letter of October 4, 1912, in which you inquire:

> "What will be the status of bonds as to taxation if they are sold to the sinking fund trustees prior to January 1, 1913? If the municipality sells them, they will have to be advertised for thirty days, which will not be the case if the sinking fund trustees would sell them, but whether or not that rule obtains, the important matter to be decided is whether bonds taken over by the sinking fund trustees before the first of the year are 'issued' so as to prevent the constitutional amendment applying to them, or does issuance mean the delivery of the bonds to those members of the general public who desire to purchase them? In other words, are the bonds issued before the village officials, viz., the sinking fund trustees dispose of them?"

Proposal 41, submitted and adopted at the election held September 3, 1912, reads:

> "The several amendments passed and submitted by this convention when adopted shall take effect on the first day of January, 1913, except as otherwise specially provided by the schedule attached to any of said amendments."

Proposal 32 provides for taxing all property,

> "excepting all bonds at present outstanding of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools of Ohio and the means of instruction connected therewith, which bonds so at present outstanding shall be exempt from taxation."

In as much as the proposition takes effect upon January 1, 1913, the words "at present outstanding," as twice used must be held to mean January 1, 1913, and therefore bonds sold prior to that date come within the exception and exemption.

Section 3922 General Code provides as follows:

> "When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official

capacity, or in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity."

It will be seen that the bonds must first be offered to the sinking fund trustees at par and accrued interest, and as provided in section 3923 it is only after failure of the persons named in section 3922 to take the bonds that they may be publicly offered for sale.

In answer to your query as to whether the bonds are issued before the sinking fund trustees dispose of them, I would call attention to section 3924, General Code, where it reads "*sales of bonds other* than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized by any municipal corporation, shall be to the highest and best bidder, etc."

Inasmuch as this section treats the taking of the bonds by the sinking fund trustees as a sale, I hold the bonds are issued when taken by and delivered to the trustees of the sinking fund, and therefore, if taken by the sinking fund trustees prior to January 1, 1913, are exempt from taxation.

In a recent opinion it was held by this department that when bonds are offered to and taken up by the sinking fund trustees, the trustees may not hold the proceeds to be paid out by them as needed by the city, but must pay the purchase price of the same to the treasurer on delivery of the bonds.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

46.

VILLAGES—POWER TO FUND INDEBTEDNESS—NECESSITY FOR CERTIFICATION OF CLERK THAT FUNDS ARE IN TREASURY AND NOT APPROPRIATED TO OTHER PURPOSES—POWER OF VILLAGE TO ISSUE NOTES.

Under Sections 3916 and 3917, General Code, municipal corporations are authorized to fund or refund existing valid and binding obligations. This power cannot extend to notes issued under sections 3913 and 3915, General Code, for the reason that such notes must be paid in accordance with these sections, out of the general revenue fund of any fiscal year and out of special assessments respectively; notes issued, however, for valid and existing indebtedness may be refunded by issuing bonds therefor under sections 3916-17, General Code.

By virtue of section 3806, General Code, a village clerk may not lawfully certify that money to meet a given expenditure is in the treasury, not appropriated for any other purpose, when council has not specified a fund by appropriation for the purposes contemplated. If council has failed to appropriate for salaries or fixed charges, but has appropriated for general expenses, the clerk may certify for the purpose of paying salaries that the funds in his possession are not appropriated to any other purpose, unless it is clear that it is the intention of council that salaries are not to be paid from such funds.

When council has failed to make an appropriation for salaries they may be compelled to do so by mandamus.

COLUMBUS, OHIO, November 21, 1912.

HON. O. H. STEWART, *Solicitor, Village of Middleport, Ohio, Pomeroy, Ohio.*

DEAR SIR—I beg to acknowledge receipt of your letter of November 7th, requesting my opinion upon the following questions:

"1. May a village council issue "deficiency" bonds for the purpose of taking up notes issued by the village?

"2. May the village clerk lawfully certify that the money to meet a given expenditure is in the treasury, not appropriated for any other purpose, when the fixed salaries are sufficient to exhaust the appropriation and the fund as well?"

Answering your first question I beg to state that the only "deficiency" bonds which may be issued by council are those which are issued under section 3931, General Code, subject to a vote of the people. I take it that you do not have such bonds in mind, but that you refer to the funding or re-funding bonds issued under section 3916 General Code, which provides as follows:

"For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interests of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually."

Section 3917 of the General Code is to be read in connection with the foregoing section, which provides in part as follows:

"No indebtedness of such municipal corporation shall be funded, refunded, or extended, *unless it shall first be determined to be an existing valid and binding obligation of the corporation* by a formal resolution of the council thereof. * * "

Your letter does not clearly describe the nature of the notes which are outstanding in the case you submit. I have no hesitancy in advising, however, on the authority of Newton vs. Toledo, 18 Circuit Court 756, which you cite, and upon the plain language of section 3917, that bonds may not be issued under section 3916 for the purpose of taking up notes that were themselves not issued under specific authority of law. This is because if the notes themselves were not so issued they do not constitute a "valid and binding obligation of the corporation." The only authority of municipalities to issue notes is found in sections 3913 and 3915, General Code. The first section authorizes notes to be issued in anticipation of the general revenue fund in any fiscal year. Such notes should have been discharged as therein provided out of money received from taxes at the next succeeding settlement. Similar authority is given to issue notes under section 3915 in anticipation of the collection of special assessments. The assessments themselves should be sufficient to discharge such notes. I think it is obvious that neither one of these sections authorize the issuance of notes which can be refunded under section 3916.

Section 3916 itself, however, does authorize the issuance of notes in that it provides that council may "issue bonds * * * or borrow money." Once notes are issued under this section they may be refunded under the same section. However, the notes issued under section 3916 must themselves represent a valid and existing indebtedness of the municipality. No such indebtedness can be created without observing the requirements of section 3806, General Code, which provides in effect that no obligation shall be incurred unless the clerk shall certify that the money required therefore is in the treasury, and not appropriated for any other purpose, etc. Although you do not so state, I assume that the notes of which you speak were issued for current expenses in violation of section 3806. If that is the case bonds cannot be issued to take them up.

Answering your second question, I beg to state that the same involves a consideration of section 3806 which has just been cited. That section provides as follows:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

This section should be read in conjunction with sections 3797 et seq., which provide for semi-annual appropriations for each of the several objects for which the municipality must provide and in connection with section 5649-3d enacted in 1911 as a part of the Smith one per cent. law, so-called, which has supplanted certain provisions of these sections in part. In the same connection section 4285, General Code, which specifies the duties of the village clerk must be read. This section provides as follows:

"The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

From all these sections the following appears to be the duty of the village clerk: He may not pay out any money *whatever* unless an appropriation has been made. If appropriations have been made to cover the fixed charges, which should have been done, I cannot understand how any question of the sort which you submit could possibly arise. If council has not been in the habit of making appropriations at the beginning of each half yearly period it has violated its duty and the auditor has violated his duty in paying out any money to any person whether for fixed charges or not. In other words, if proper appropriations have been made to cover salaries and other fixed charges then, of course, the money so appropriated cannot be considered "not appropriated" within the meaning of section 3806, *supra*. If, on the other hand, council has made no such appropriation for any purpose then the clerk is not authorized to make any certificate whatever or to pay any money to any person, but must hold the funds in his possession intact until council has made an appropriation.

If, again, council has failed to appropriate for salaries and other fixed charges, but has appropriated for general expenses, then the clerk is not bound to take cognizance of the amount of such fixed charges, but so long as the duty of council in the premises has not been discharged he may certify that the funds in his possession, though insufficient to meet such charges, are not appropriated for any other purpose. Unless it is clear that it is the intention of council that salaries are to be paid from such an appropriation for general expenses, it would be the duty of the clerk not to pay any salary vouchers. In the meantime, however, council might be compelled by mandamus to make some appropriation for salaries.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

121.

FRANCHISE—CONTRACT BY MUNICIPAL CORPORATION WITH PUBLIC UTILITIES FOR FIRE HYDRANTS, INVALID, IN ABSENCE OF AUTHORIZATION OF ELECTORS IN ACCORDANCE WITH STATUTES.

On June 19, 1902, section 2434, Revised Statutes, required that a contract by a municipal corporation for water for fire purposes should be authorized by the electors. A contract entered into, therefore, on that date, without such authorization, is illegal and void, and in accordance with the authorities in Ohio, the court will leave the parties as it finds them.

COLUMBUS, OHIO, February 6, 1913.

HON. O. H. STEWART, *Solicitor of Village of Middleport, Pomeroy, Ohio.*

DEAR SIR:—Your letter of December 30, 1912, recites: That on May 16, 1899, the village of Middleport granted a franchise for twenty years, to The P. and M. Water Company, to establish and maintain a waterworks system in said village; that no contract was entered into at the time for service to the city or private consumers; that no prices have been fixed by ordinance or contract, up to this date, for service to private consumers—the company charging therefor at pleasure; that at the date of said franchise, said village was not financially able to contract for fire hydrant service, but said company, in section 8 of the aforesaid franchise, had agreed to contract at any time, within the limit thereof, to furnish the same at $40.00 each, per year.

This was the situation up to June 19, 1902, when the village, by ordinance contracted with the water company to take sixteen fire hydrants at $40.00 each, per year, during the life of the franchise—about seventeen years. This contracting ordinance was never submitted to, or ratified by, a vote of the electors of the village; but the municipality has been paying for said hydrants until within a few months past.

Your letter then concludes as follows: "The one question upon which I would ask an opinion is this: Is the contract (ordinance), passed June 19, 1902, valid or not?"

On June 19, 1902, when your village entered into this contract with the water works company, the law on the subject was as follows: "Any municipal corporation, except cities of the first grade of the first class, shall have power to contract with any individual or individuals, or any other incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporation limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon, *provided, that no such contract shall be executed or binding upon any such municipal corporation until the same shall have been ratified by a vote of the electors thereof, at a special or general election*, etc." (Section 2434 Revised Statutes.)

The above section was carried into the General Code, and is now section 3981 thereof, and is still in force.

From the reading of this statute, it is apparent that the attempt of the village of Middleport to contract with the water works company, *without submitting the same to the electors for ratification, is without authority of law and void.*

No contract has ever been made that can be enforced. It was void from the beginning; and at any time the village could have refused to pay for the hydrants. The mere fact that the village has paid for service up to this time, does not compel it to do so any longer. If the contract was never valid, it was never binding on either party; and the courts will leave the parties thereto in the situation in which they have placed themselves, by granting relief to neither.

The manner of contracting for water supplies for a village is regulated and controlled by statute, and nothing is left to inference.

This whole question is fully covered in the 60 O. S. page 406. There the county commissioners entered into a contract with a bridge company to construct a bridge. The bridge was constructed and used by the public; *but the contract therefore was not entered into according to the terms of the statute.* The supreme court refused to grant any relief and the bridge company lost all its time, labor and money expended in the constructing of the bridge.

In the 65 O. S. 220, in the syllabus, the supreme court says: "Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation, or appropriation have been complied with." The supreme court in this case also decided that since April 8, 1876, there is no implied municipal liability *ex con tractu* in this state; and that no contracts can be entered into by municipalities otherwise than as provided by statute.

The doctrine of strict compliance with the statute, before a municipal corporation can be bound by a contract, is further enunciated in the 58 O. S. 558, and 61 O. S. 288. Without further discussion, I am of opinion that the contract of Middleport with the water works company for hydrants, not having been ratified by a vote of the electors of said village, is void, and cannot be enforced.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

131.

COUNCIL—POWER TO RESUBMIT AT SPECIAL ELECTION QUESTION OF ISSUING BONDS IS DISCRETIONARY.

The power of council to submit to the electors the question of issuing bonds, under sections 3942 and 3943, General Code, is a discretionary one, and whether or not such question may be immediately resubmitted, when the bond issue has been defeated, rests with the discretion of council and may not be interfered with in the absence of fraud, corrupt motive or flagrant abuse of discretion.

COLUMBUS, OHIO, March 13, 1913.

HON. E. R. YOUNG, *Legal Counsel, Ripley, Ohio.*

DEAR SIR:—Under date of February 25th, you request my opinion upon the following question:

> "The council of a village, under sections 3942 and 3943, G. C., having submitted the question of issuing bonds at a special election for the purchase of gas and electric works, and same having failed to carry, can the council proceed at once by resolution and notice and again submit the proposition to the voters?"

Section 3942, General Code, is as follows:

> "In addition to the authority granted in section one (1) (G. C. section 3939) of this act and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent. annum, as it may determine upon for any of the purposes set forth in said section one (G. C. section 3939), upon obtaining

the approval of the electors of the corporation at a general or special election in the following manner."

The only direction contained in the statutes as to the time at which action may be taken upon the issuing of such bonds, and the holding of a special election therefor, is contained within the words "whenever it (council) deems it necessary." These words make the duty entirely a discretionary one with the council.

The rule as to the exercising of discretionary duties by public officials is stated in section 849, Throop on Public Offices, as follows:

> "Doctrine as to enjoining discretionary power. The rule, with respect to granting an injunction, where the matter complained of is left by the law to the discretion or judgment of the officer, against whom it is asked, is the same, as where any of the other remedies, treated in this chapter, is asked in a similar case; namely, that the court will not interfere to review, control, or restrain the exercise of the powers by the officer or officers, in whom the law has vested the discretion or judgment to exercise the same. But in this respect, the power of a court of equity to interfere by injunction exceeds that of a court of law; for equity will review the exercise of discretionary power, which is tainted with fraud, or where it is necessary so to do, in order to prevent abuse, injustice, or violation of a trust."

and also in section 242, Dillon on municipal corporations, in the following terms:

> "Discretionary powers not subject to judicial control. Power to do an act is often conferred upon municipal corporations, in general terms, without being accompanied by any *prescribed mode* of exercising it. In such cases the common council, or governing body, necessarily have, to a greater or less extent, a *discretion as to the manner* in which the power shall be used. This discretion, where it is conferred or exists, cannot be judicially interfered with or questioned except where the power is exceeded or fraud is imputed and shown, or there is a manifest invasion of private rights. Thus, where the law or charter confers upon the *city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government,* their judgment upon matters thus committed to them; while acting within the scope of their authority, cannot be controlled by the courts. In such case the decision of the proper corporate body is, in the absence of fraud, final and conclusive, unless they transcend their powers."

By the same authority, section 242, it is said that "discretionary powers are not, unless in extraordinary and exceptional instances of gross abuse, subject to judicial control."

Whether or not, therefore, council may proceed at once by resolution and notice to again submit a proposition to the voters in the present case, depends upon whether or not such action would be a reasonable and judicious exercise of the discretion vested in council, and whether or not such is the case depends upon the particular facts of the case. It is to be presumed that council does not act arbitrarily and bases its action upon some substantial reason, and its decision may not be considered invalid in the absence of evidence of fraud, corrupt motives or flagrant abuse of its discretion.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

134.

OFFICES INCOMPATIBLE—MAYOR OF VILLAGE AND MEMBER OF BOARD OF TOWNSHIP TRUSTEES.

Inasmuch as, under section 7177, General Code, providing for the joint action of township trustees and a municipal corporation in the erection of a boundary line road, and under section 3402, providing for such joint action in the erection of a public building, a mayor and a member of a board of township trustees are obliged to represent conflicting interests, such office may not be held at one and the same time by a single individual.

The acceptance by an officer of an office incompatible with the one occupied by him, operates to vacate the office held.

COLUMBUS, OHIO, March 12, 1913.

HON. CLIFFORD L. BELT, *Village Solicitor, Bellaire, Ohio.*

DEAR SIR:—Under date of March 8th, you request my opinion as follows:

> "May the office of a member of a board of township trustees, and the office of the mayor of a village situated in the same township, be held by one and the same person? If not, if the person was a member of the board of township trustees when elected and qualified as mayor of the municipality in the same township, does the person have the right to elect which office he shall hold, or is he ineligible to qualify as mayor?"

The rule as to incompatibility of public offices is stated in Throop on Public Offices, section 33, page 34:

> " 'Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, *or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be* executed with impartiality and honesty.' And in Dillon on Municipal Corporations (section 166, note), it is said, that *'incompatibility in offices exists, where the nature and duty of the two offices are such as to render it improper, from considerations of public policy,* for one incumbent to retain both.' "

and in State vs. Gebhart, 12 Ohio Circuit Court, N. S., page 275, the court says.

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."

Section 7177, General Code, is as follows:

> "If a road is established as a part of the line or boundary of a township or municipal corporation, the trustees of such adjoining townships and council of such corporation, shall meet at a convenient place as soon after the first Monday of March as convenient, and apportion such road between the townships, or township and corporation, as justice and equity requires. *The trustees of the respective townships, and council of the corporation,* shall cause the road to be opened and improved accordingly, and shall thereafter cause their respective portion to be worked and kept in proper repair."

Section 3402, General Code, providing for the erection of a public building, by the

joint operation of the township and the municipal corporation, after an election by the people of each subdivision, authorizing the same, provides as follows:

> "If at such election two-thirds of the electors of the township and of the village voting, vote in favor of such improvement, *the trustees of such township,* and the *council of the village* shall jointly take such action as is necessary to carry out such improvement."

Under section 4255, General Code, the mayor of a village is required to act as president of the council and must preside at all regular and special meetings thereof, being permitted a vote in all instances of a tie.

The above quoted statutes, providing for the joint action of the trustees of a township and the council of a corporation, in the instances respectively, for the improvement of a boundary line road and the construction of a public building, contemplate representation on behalf of both the township and the village. In each case the duty is of an important nature, which clearly would not justify a refusal to act on the part of an official, acting either in the capacity of township trustee or of mayor of the village. Unless a person endeavoring to act in both capacities should refrain from taking part in these proceedings, he would be placed in a position requiring him to act in behalf of separate and distinct interests, which the statutes clearly contemplate should be represented by separate individuals.

Whilst recognizing the right of a mayor to withdraw and allow the president protem to act in his place, I am of the opinion that even though the mayor were not to be considered a member of the council, the interest and duty devolving upon him, as official head of the corporation, is sufficient in itself to justify the conclusion that as representative of the village in these proceedings, he should not, on grounds of public policy, be influenced by the practically contrary duties which would be incumbent upon him as township trustee. The statutes require consultation and agreement in both cases, and one individual could not act in a capacity which would be akin to consulting and agreeing with himself.

In the investigation which I have made, I have found no other provisions in the statutes which point to incompatibility in the duties of these offices, but I am of the opinion that the duties imposed by the statutes above quoted, are such as to make it impracticable, from considerations of public policy, to permit one individual to represent each subdivision in the negotiations therein provided for.

You furthermore inquire whether a person elected to both positions, has the right to elect which office he shall hold. In this connection, permit me to cite State ex rel. vs. McMillan, 15 Ohio Circuit Court, page 165, to the effect that under the common law the acceptance of an office, by an officer, incompatible with the first, ipso facto, vacates the first. Under this authority a person elected to both the positions mentioned, may qualify for either and if he qualifies for one and later qualifies for the second, the first office would be vacated by his acceptance of the second.

In conclusion, therefore, I am of the opinion that one individual cannot hold contemporaneously both the office of the townshp trustee and mayor of a village; and if he is elected to both he may elect which of the two offices he shall qualify for and hold.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

142.

VILLAGE COUNCIL MAY ISSUE BONDS ONLY TO EXTENT OF ONE PER CENT. OF TOTAL TAX DUPLICATE WITHOUT AUTHORITY OF ELECTORS.

COLUMBUS, OHIO, March 7, 1913.

HON. A. J. WORKMAN, *Solicitor for the Village of Danville, Danville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of January 21st, and to express my regret at being unable to comply with your request for an earlier answer. The legislative session has resulted in an unusual pressure of business in this office and I have fallen considerably behind in my correspondence.

If I understand your letter correctly the following hypothetical statement of facts is sufficient for the purpose of showing the question upon which you request my opinion:

> "A village has a tax duplicate of three hundred thousand dollars. May the council of such a village, without a vote of the electors, incur a bonded indebtedness in the amount of fifteen thousand dollars, payable wholly from the proceeds of taxation, there being no outstanding indebtedness of the village?"

The answer to this question must be in the negative. The borrowing power of municipal corporations is defined and limited by section 3939 et seq., General Code. Section 3940 expressly limits the power of a council to incur indebtedness without a vote of the electors to an amount equal to one per cent. of the total tax duplicate in any one year. In the case of the village of Danville this amount would be three thousand dollars.

If it is of interest to you I might point out that under the joint operation of sections 3942, 3948 and 3952, General Code, the council could, by vote of the electors, issue exactly fifteen thousand dollars worth of bonds, to be paid out of general tax levies (assuming the duplicate to be three hundred thousand dollars), and no more.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

149.

COUNCILMAN WHO MOVES FROM VILLAGE DISQUALIFIED.

Inasmuch as a councilman, who moves his family from a village and resides with such family the greater part of the time outside of the village, ceases to be an elector, he becomes disqualified to hold his seat as councilman, by virtue of section 4218, General Code.

COLUMBUS, OHIO, April 1, 1913.

HON. ROBERT C. MYERS, *Solicitor for the Village of New Boston, Portsmouth, Ohio.*

DEAR SIR:—Under date of December 16th you inquire of me as follows:

> "At the last municipal election one, Mr. E., was elected member of the village council of New Boston, who was then residing in said village, living in his own property with his family, and has been and is now serving as coun-

cilman, but within the past 60 days he has moved his family into Porter Township, Scioto County, Ohio, and is now assisting in operating a saloon in said village, and stays a portion of his time in Porter Township, Scioto County, Ohio, and the balance of the time at his place of business in same village, and as I have been informed sleeps about half of the time in the village of New Boston, and the remainder of the time with his family in Porter Township. Personally he claims he is a resident of New Boston. The question has been raised whether or not he is a legal member of the village council."

The qualifications of a village councilman are prescribed by section 4218, General Code, as follows:

"Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

Upon the facts before me, I am of the opinion that Mr. E. has ceased to be a resident of the village of New Boston, as required by section 4218, and he has therefore forfeited his office as councilman of said village.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

188.

BOARD OF TRUSTEES OF PUBLIC AFFAIRS—POWERS SIMILAR TO THOSE OF DIRECTOR OF PUBLIC SERVICE CONSIDERED—AUTHORIZATION OF COUNCIL FOR CONTRACT TO PROVIDE POWER FOR RUNNING WATERWORKS PLANT.

Under section 3619, General Code, council has authority to apply moneys received as charges for water, to the maintenance of the waterworks and this power includes the right to provide for power to run such plant.

Under section 4362, General Code, a village council may levy a tax for such purpose where the receipts are insufficient.

The powers of the board of trustees of public affairs are those formerly resting upon trustees of waterworks, but now transferred to the director of public service in cities.

Under the decision of Hutchins vs. City of Cleveland, the words "director of public service," and "board of trustees of public affairs" may be deemed interchangeable, and the provisions relating to the director of public service in cities must be held applicable to the board of trustees in villages.

If a contract, therefore, for the purpose of supplying power for the operation of a village water plant exceeds $500 such contract must first be authorized by the village council, after which the board of trustees may advertise and enter into the contract and pay the expenses for the same out of funds appropriated by council for the purpose, by order upon the village treasury.

COLUMBUS, OHIO, April 19, 1913.

HON. WALTER S. STEVENSON, *Village Solicitor, Leipsic, Ohio.*

DEAR SIR:—I am replying to your favor of June 18, 1912, in which you say the contract between the board of trustees of public affairs and one Cottingham, for fur-

nishing electric power to run the water works will expire during the present term of said board and the council. You ask the following questions, and the proper mode of procedure:

"1. Who has authority to renew this contract, or in other words, whose duty is it to provide power for running the water works plant?

"2. Can the council, under section 3619 of the General Code, enter into a contract for the purchase of electric power to run said plant?

"3. Can the board of trustees of public affairs, under sections 4361 and 3961, or any other section of the General Code, enter into a contract for the purchase of power to run said plant?

"4. Should this contract be entered into under the provisions of section 4328 of the General Code?"

By virtue of section 3619 G. C., the council has authority "to apply moneys received as charges for water to the *maintenance* etc., of the works." Electric power to run the works falls within the scope of *"maintenance"* and, hence, council has the right to apply moneys so received for said purpose.

Section 4362 G. C., provides that where water works are owned and operated by a village, which receives its fire protection therefrom, and the proceeds from the operation thereof are insufficient to pay the operating expenses, council may levy a tax to pay the running expenses of the said plant.

Section 3960 G. C., provides that money collected for water works purposes shall be deposited weekly with the treasurer of the corporation; and that money so deposited shall be kept as a separate and distinct fund. It is further provided that *"when appropriated by council"* it shall be subject to the order of the director of public service, who shall sign all orders drawn on the corporation treasurer against such fund.

I cite the last three sections to show the origin of water works funds, their separate preservation, and that such funds are not under the control of the waterworks department of cities or villages until council has *appropriated* the same for that purpose, by dinance or resolution.

It follows, then, that the board of trustees of public affairs in villages does not have custody of water works funds, having no treasurer of its own, and only issues orders on the corporation treasurer for such bills and accounts as it approves.

Without a careful examination, comparison and knowledge of the history and judicial interpretation of the various statutes of Ohio on the subject of municipal water works, some doubts may arise as to the duties, powers and jurisdiction of the various statutory officers and boards in the maintenance and control thereof.

Chapter 1, Title XII, Division IV, and sections 4357 to 4362, inclusive, of the General Code, contain the present law on the subject as to both cities and villages. These statutes embrace the old laws revised in different language, and constitute part of the Municipal Code. Section 4357 G. C., under the title "Boards of Trustees of Public Affairs" provides that in villages having water works, the council shall establish the above named board of three members.

Section 4361, G. C., says:

"The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of water works, *and such other duties as may be provided by law or ordinance not inconsistent herewith.*"

In Ellis' Municipal Code, 5th Edition, Note 1, under the above section, page 598, the author, under the title "provisions referred to" clears up the situation as follows:

"There are no provisions in Title XII relating to the powers and duties of trustees of water works. The general provisions governing the management of water works are found in Chapter 1, Division 4, sections 3955 to 3981, inclusive. They provide the powers and duties of the director of public service in cities in the management of such works. These sections, however, are a revision of various sections of the Revised Statutes (2407 R. S., and others), which relate to the powers and duties of trustees of water works; and the reference is probably to these sections.

"Section 205 of the Municipal Code of 1902, of which sections 4357, supra et seq., are a revision, provides that the trustees of public affairs in villages should have all the powers and perform all the duties provided for the trustees of water works in sections 2407, 2409 and others of the Revised Statutes.

"These sections of the Revised Statutes provide for the trustees to manage water works, etc. In the revision of the statutes in the General Code, the substance of these provisions is carried in Chapter I, of Division IV, but *'director of public service'* is substituted for *'trustees of water works'* wherever those words occur, and thus no provisions are left relating to trustees of water works."

The same doctrine is laid down in Note 1, section 3955, G. C., page 388, by the same author.

In the case of Hutchins vs. The City of Cleveland, et al., decided February 11, 1907, 9 Circuit Court Reports, N. S., page 226, the Cuyahoga Circuit Court, in its first syllabus, says:

"In sections 2410 and 2411, Revised Statutes of Ohio (sections 1536-521 and 522 Bates' Annotated Statutes) the words 'trustees' and 'trustees or board' include the directors of public service in cities, as well as boards of trustees of public affairs in villages."

This was affirmed by the supreme court, 79 O. S. 478.

It follows, then, that the words "Director of Public Service" and "Board of Trustees of Public Affairs" are interchangeable, where the sense requires it, and hence the sections and chapter of the General Code heretofore cited and referred to must be construed together, and applied in a practical manner to the questions submitted in your letter.

The council has certain duties to perform in the construction, maintenance, etc., of water works, and when these duties are exhausted it devolves upon the director of public service, or board of trustees of public affairs, as the case may be, to supplement the council's action by managing, controlling and carrying into effect all necessary measures pertaining to a complete system of such municipal plant.

There can be no conflict between council and these directors and boards, provided each keeps within its own jurisdictional domain.

Let us see what the statutory powers and duties of council, directors of public service and boards of trustees of public affairs are, relative to such contracts as you mention.

Section 4328 G. C., gives the right to the board of trustees of public affairs (by the construction heretofore given, although the statute says director of public service), to make any contract relative to any matters under the supervision of that department, not involving more than $500. When the expenditure (exclusive of employes) exceeds $500, it shall be first *authorized and directed by ordinance of council.* When so authorized and directed, the board must advertise not less than two weeks in a news-

paper of general circulation in the city, and award the contract to the lowest and best bidder.

You say in your letter that the use of electricity for motive power is to supplant the old boiler and engine system. This being a new feature, and the cost per annum probably exceeding $500, the manner of procedure should be as follows: Council should by ordinance outline and adopt this system, describing it sufficiently therein, and then authorize and direct the board of trustees of public affairs to advertise for bids thereon, and to enter into a contract with the lowest and best bidder thereon. Council should also appropriate sufficient funds to meet the annual expenses under this contract.

The powers of council are ended when they appropriate the money and authorize the board to advertise—after that the whole matter is jurisdictional with the board. Council should exercise care in the appropriation of this fund and in passing the ordinance, keeping within the safeguards of the general laws governing such matters.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

192.

LONGWORTH ACT—LIMITATIONS ON OUTSTANDING INDEBTEDNESS OF A VILLAGE DOES NOT INCLUDE BONDS WHOSE PAYMENT IS COVERED BY FUND IN POSSESSION OF SINKING FUND TRUSTEES, NOR CERTIFICATES OF INDEBTEDNESS.

Under sections 3939, 3940, 3941 and 3952, General Code, the total outstanding bonded indebtedness of a village may not exceed, without vote of electors, two and one-half per cent. of the revenues from all property listed and assessed for taxation therein. These limitations do not include bonds whose payment is provided for by moneys in the possession of the sinking fund trustees, nor certificates of indebtedness.

COLUMBUS, OHIO, April 16, 1913.

HON. J. W. WATTS, *Village Solicitor, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 9th requesting my opinion upon the following facts:

> "The tax duplicate of the village of Hillsboro is $3,972,075.00. The outstanding bonded indebtedness amounts to $80,000.00, there being $15,000 in the sinking fund for the retirement of one of the issues included within this aggregate. The village is also indebted on certificates of indebtedness in the amount of $3,000.
>
> "Can the council of the village by an affirmative vote of two-thirds of its members, by ordinance, issue and sell bonds for the purpose of resurfacing, repairing and improving its streets in the amount of $5,000 without submitting the question to the approval of the electors?"

The general power to borrow money for the purpose of resurfacing, repairing and improving streets is found in paragraph 22 of section 3939, General Code, which I need not quote. Nor is it to be doubted that a municipal corporation may make such repairs and improvements by general taxation without assessing any part thereof upon the abutting property, if this is the purpose.

Section 3939 requires an affirmative vote of not less than two-thirds of the members elected or appointed to council, and that the action of council be by resolution or

ordinance in order that the power of borrowing money thereunder may be properly exercised.

Section 3940, General Code, imposes a limitation upon the exercise of the power vested in council by section 3939 in the following words:

> "The total indebtedness created in any one fiscal year by council * * under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation."

One per cent. of the total value of all the property in Hillsboro would, under the facts submitted by you, amount to $39,720.75. It follows that so far as this limitation is concerned the council is not restrained by it from exercising the borrowing power in the manner referred to by you.

Another limitation upon the exercise of this power is found in section 3941 and 3952, General Code, which must be read together for this purpose. They provide in part as follows:

> "Section 3941. The net indebtedness created or incurred by the council under the authority granted it in section one (1) of this act (section 3939 G. C.) and in an act passed April 29, 1902 (the so-called Longworth act which was the predecessor of present section 3939, etc., and was of similar import) * * shall never exceed four (4) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation."
>
> "Section 3952. * * * On and after the first day of October, 1911, the said four per cent. limitation shall be reduced to two and one-half per cent. * * * and such reduced limitations shall be applied to and based upon the value of all the property listed and assessed for taxation in such municipal corporation as determined by the duplicate then or thereafter in force."

Two and one-half per cent. of the duplicate of the village of Hillsboro, as stated by you, would amount to $99,300, approximately. This exceeds the entire out-standing indebtedness of the village, as represented by you, but not all of the out-standing indebtedness of the village is to be counted in ascertaining this limitation as is apparent from the provisions of section 3949, General Code, which is in part as follows:

> "The 'net indebtedness' prescribed in sections three and ten * * * of this act shall be the difference between the par value of the outstanding and unpaid bonds and the amount held in the sinking fund for their redemption."

Therefore, the sum of $15,000 being the amount held in the sinking fund for the retirement of the water works bonds, referred to by you, must be deducted from the total of $83,000, leaving the sum of $68,000 as representing the outstanding indebtedness of the village, within the meaning of the statutes under consideration. From this total of $68,000 a still further reduction must be made because the certificates of indebtedness of which you speak are not to be counted in ascertaining any of the limitations of the law. The limitations of the Longworth act and its successor, the present group of statutes now under consideration, are appliable only to bonded indebtedness. This is apparent on the face of the statutes. Therefore, the sum of $65,000 is the sum total of the present outstanding indebtedness of the village of Hillsboro for the purposes of the limitations of the so-called Longworth act in its present form.

Although section 3948, for reasons which will become obvious, has nothing what-

ever to do with your question, yet I deem it proper to call your attention to its provisions in connection with section 3952. The joint effect of these sections is to impose an absolute limitation of five per cent. upon the amount of bonds which may at any time, either with or without the approval of the electors, be out-standing under the Longworth act. In ascertaining this limitation, however, the rule of section 3949, already referred to, must be applied.

I am of the opinion, therefore, that not only may the council of the village of Hillsboro by a two-thirds vote of the members elected thereto, and by ordinance or resolution, at the present time issue bonds in the amount of $5,000 for the purpose of resurfacing, repairing and improving its streets, but also that the total amount of bonded indebtedness which may be incurred under authority of the Longworth act, so-called, by the council of a village at the present time, without a vote of the people, is about $34,000.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

202.

INITIATIVE AND REFERENDUM—ORDINANCE PROVIDING FOR RE-DATING OF BONDS FORMERLY AUTHORIZED BUT NOW SOLD MUST LAY OVER.

When by ordinance of council, an issue of bonds is authorized to bear the date of September 1, 1912, which bonds council failed to sell, a new ordinance amending the former ordinance so as to change the date of said bonds to April 1, 1913, involves the expenditure of money and would come within the initiative and referendum act and be required to lay over sixty days before going into effect.

COLUMBUS, OHIO, April 5, 1913.

HON. C. M. BABST, *Solicitor, Crestline, Ohio.*

DEAR SIR:—Under date of January 10, 1913, you state:

> "Last fall the council of the village of Crestline passed an ordinance for the issue of bonds, in which it was recited that said bonds were to bear date of September 1, 1912. Owing to the lateness of the season the bonds were not sold.
>
> "We now desire to amend said ordinance so as to date the bonds at some future time, say April 1, 1913.
>
> "The question that arises is whether or not sixty days must elapse before the amendment to the original ordinance would become effective under section 4227-2, General Code.
>
> "The sixty days have elapsed from the passage of the original ordinance."

An ordinance seeking to amend an ordinance theretofore passed would, as I view it, be in effect an original ordinance, and while it appears that the only purpose of the amendment is to cause the bonds referred to to bear date at a later time than that fixed by the original ordinance, yet it would seem to me that such new ordinance amending the old ordinance would be in effect the same as if nothing had been done under the old ordinance and since an ordinance providing for an issue of bonds would be an ordinance involving the expenditure of money for which the bonds were issued, assuming that the bonds provided for are sought to be issued under section 3939, General

Code, the new ordinance amending the former ordinance would in my opinion be required to go through the same formalities as the former ordinance, and would, therefore, have to lie sixty days before going into effect.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

241.

REFERENDUM PETITIONS IN MUNICIPALITY—RIGHT OF PETITIONERS TO WITHDRAW NAMES PRIOR TO CERTIFICATION TO BOARD OF ELECTIONS BY CLERK.

It is well settled that names may be withdrawn from a petition at any time before jurisdiction is acquired thereover by the board or officer entitled to exercise the same.

When a petition for the referendum on a municipal ordinance, therefore, has been filed with the clerk of the village, the names may be withdrawn therefrom at any time prior to the certification of such petition to the board of elections by said clerk.

COLUMBUS, OHIO, April 19, 1913.

HON. WILLIAM A. HUNT, *Solicitor, Salineville, Ohio.*

DEAR SIR:—Under date of February 1, you inquire as follows:

> "Information in regard to the municipal initiative and referendum section 4227-1, 2, 3, 4 and 5, Laws of Ohio, 1911, pages 521-3.
>
> "Briefly the facts are these: Two ordinances were passed by our village council within the last sixty days, one a resolution to pave a certain street. Referendum petitions were filed January 28 and 29 with the city clerk by a committee; this committee now wishes to withdraw the petitions. Can this be done? Or would a withdrawal petition, signed by those who had signed the referendum petition, and asking that their names be withdrawn from the referendum petition be of any effect?
>
> "Of course it is granted that the ordinances are such as the referendum will apply to."

There is no provision in the municipal initiative and referendum law providing for the withdrawal of names signed to a referendum petition. The only provisions of such law relative to the filing of petition is found in section 4227-2, General Code, the first paragraph of which provides that if within thirty days after the passage or adoption of any ordinance, resolution or measure by council there shall be filed with the clerk of a municipal corporation a petition filed by fifteen per cent. of the qualified electors ordering the submission of such ordinance, resolution or measure to a vote of the electors within ten days after the filing thereof the clerk shall certify the same to the board of elections, and in the second paragraph of said section it is provided in reference to certain ordinances that upon the filing of a petition signed by fifteen per cent. of the qualified electors the clerk shall certify the fact of the filing of such petition to the board of elections.

The right of a petitioner to withdraw his name after signing it to a referendum petition has so far as I am aware not been passed upon by the courts of Ohio. Such courts have, however, passed upon the withdrawal of names signed to a petition in other matters.

In the case of Hays et al. vs. Jones et al., 27 O. S. 218, the first three paragraphs of the syllabus read as follows:

> "1. The board of county commissioners, under the act passed March 29, 1867, (64, O. L. 80) as amended March 31, 1868, (S. & S. 673) and again amended May 9, 1869, (S. & S. 675-6) to 'authorize county commissioners to construct roads on the petition of a majority of the resident land owners along and adjacent to the line of said roads,' are not authorized to grant a final order for making such road improvement, except upon the petition of 'a majority of the resident land holders whose lands are reported benefited' by, 'and ought to be assessed' for the costs of the improvement.
>
> "2. The jurisdiction of the board of county commissioners to make the final order for the improvement, under these statutes, is special, and conditioned upon the consent, at the time the final order is to be made, of a majority of the resident land holders, who are to be charged with the costs of the improvement.
>
> "3. Resident land holders, who have subscribed a petition praying for such road improvement, may, at any time before such improvement is finally ordered to be made by the board of commissioners, withdraw their assent by remonstrance, or having their names stricken from the petition, and after withdrawal of consent, such persons can no longer be counted as petitioning for the improvement."

This case holds that names may be withdrawn from such a petition as was involved in that case at any time before the improvement is finally ordered to be made by the board of county commissioners on the ground that the jurisdictional majority must be found in the attitude of asking for the improvement at the time the proposed final order is to be made, and that one who has subscribed to the petition may at any time before the board makes the final order by remonstrance or other unmistakable sign signify his change of purpose, and that his assent is within his own control up to the time the commissioners make the final order.

In the case of Grinnell vs. Adams 34 O. S. 44, the syllabus is as follows:

> "After the jurisdiction of county commissioners, in the matter of laying out or altering a county road, has attached by the filing of a proper petition, etc., such jurisdiction cannot be defeated by any number of the petitioners afterward becoming remonstrants against the granting of the prayer of the petition."

It would appear from a reading of such case, however, that not only had the petition been filed but that notice had been given and a certain bond had been executed to pay the expenses in case the application failed, which was held to confer upon the county commissioners power to act in the premises. In other words, that the county commissioners had jurisdiction in the matter. It is distinctly stated in this case that they do not undertake to overrule the case of Hays vs. Jones, 27 O. S. 218.

In the case of Dutten vs. Village of Hanover, 42 O. S. 215, which was a case in mandamus to compel council of an incorporated village to order an election on the question of the surrender of its corporate power upon petition filed by council for that purpose the third paragraph of the syllabus is as follows:

> "While such petition is under consideration and before action thereon by the council, signers thereof may withdraw their names from such petition, and if thereby the number of names is reduced below the requisite number, it is the duty of the council to refuse to order such election."

Johnson, C. J., rendering the opinion of the court, on page 217, says:

> "Did the district court err in holding that persons who signed the petition, could withdraw their names therefrom before action had thereon? We think not. When the petition was presented it was the duty of the council to take proper steps to ascertain if the signatures were *bona fide*, and if it contained the requisite number who were electors. For that purpose the same might be referred to a committee and postpone action until time for such examination. Between the time the petition was presented and the next regular meeting, at which action was had thereon, several signers withdrew their names. This they had the right to do, the council not having acted thereon. Hayes vs. Jones, 27 O. S. 218.
>
> "If the council had ordered the election, it may be that petitioners could not thereafter defeat an election, nor authorize the council to rescind its order, by withdrawal of their names. It was held, they could not do this in a road case, after the petition for a road had been acted on, and a report of the viewers made. Grinnell vs. Adams, 34 O. S. 44."

In reference to a petition filed under the Brannock Law for a special election the court of common pleas of Lucas county in the case of In re petition for special election in Toledo, 2 N. P. n. s. 469, held:

> "Names may be withdrawn from the petition or added to it by the filing of a duplicate petition at any time before the order thereon is made."

In the above case the case of Grinnell vs. Adams, 34 O. S. 44, was distinguished. (See page 473.)

In the case of Cole vs. City of Columbus, 2 N. P. n. s. 563, Black, J., it was held:

> "It is quite true that persons, before the mayor or judge have acted, may add their names to or withdraw their names from the petition. (42 O. S. 215.)"

In the case of Haynes et al. vs. Hillsboro, 3 N. P. n. s. 17, the syllabus is as follows:

> "It is the privilege of electors signing a petition for a Beal Law election to withdraw their names from the petition, either with or without the consent of council, at any time before the election is ordered; and where such withdrawals reduce the number of signatures remaining on the petition to less than the requisite forty per cent. of the qualified voters, jurisdiction of council to order an election is lost."

On page 27 of said opinion the court states:

> "In 34 O. S. case, jurisdiction had been assumed and action taken, and practically only confirmation needed, while in 27 O. S. 218, no action had at all been taken and jurisdiction not assumed. Even if we were to give the contestees the benefit of all they claim on account of 34 O. S. the 42 O. S. 215, passes over it and cites 27 O. S. 218; and 42 O. S. case is so clear and clean cut in its terms that no room for doubt as to the rule established can be entertained."

In the case of Norwood vs. Board of Elections, 13 C. C. n. s. 465, the court on page 466 states as follows:

"But aside from this we are of opinion that each council not only had the right to determine, but it was its duty to determine whether the petition presented to it was signed by twenty-five per cent. of the resident electors of the territory to be annexed, and that its finding upon this question must stand and is final until set aside by some competent tribunal. And we are further of the opinion, following the case of Dutten vs. Village of Hanover, 42 O. S. 215, that up to the time that council took action on the petition, any signer had the right to withdraw his name from the petition, and if after such withdrawal there was not twenty-five per cent. remaining on the petition, it was the duty of council to reject the same and take no further action."

It would seem from the list of authorities which I have foregoing cited that the question is as to jurisdiction.

Section 4227-2 General Code provides a certain duty upon the clerk should a petition signed by fifteen per cent. of the qualified electors be filed with him. It would seem to me, therefore, that before the clerk would be authorized to either certify the ordinance or the fact of the filing of petition with the board of elections he must determine that there are sufficient names signed to such petition to constitute a valid petition, and that only after such ascertainment would he be authorized to certify. If the clerk has not certified the ordinance or the fact of the filing of the petition to the board of elections, I am of the opinion that the names signed to such petition may be withdrawn, but that after he has certified the names cannot be withdrawn.

There is no provision in the Initiative and Referendum Act for a withdrawal petition, and consequently, I do not believe that it would have any force or effect. The only power vested in those who have signed a referendum petition to withdraw their names is exhausted after the clerk has certified to the board of elections. Up until that time names may be withdrawn from such a petition.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

242.

INITIATIVE AND REFERENDUM—ORDINANCE EMPLOYING A VILLAGE SOLICITOR, WITHIN.

An ordinance of council employing a village solicitor contemplates a contract involving the expenditure of money, and the same is subject to the municipal initiative and referendum law.

Since the duty of such position depends upon contract, the holder thereof may not be considered a public officer, and therefore, does not come within the provisions of article 16, section 4, of the constitution, requiring all persons elected or appointed to any office in this state to possess the qualifications of an elector.

COLUMBUS, OHIO, April 19, 1913.

HON. W. A. HUNT, *Legal Counsel, Salineville, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 11th wherein you submit for our opinion two questions as follows:

"1. Can section 4227-2, General Code, apply to an ordinance employing a village solicitor, and

"2. Does Article XV, section 4 of the constitution of Ohio apply to the employment or appointment of a village solicitor."

You refer in your letter to a village solicitor. As far as I am able to ascertain there is no legal authority recognizing a village solicitor.

Section 4220, General Code, reads as follows:

> "When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

It would therefore, appear that the position of legal counsel of the village was one that was contractual in its nature.

Section 4227-2 of the General Code provides that no ordinance, involving the expenditure of money shall become effective in less than sixty days and it shall be subject to referendum. A contract between the village council and an attorney at law employing him to look after the legal affairs of the village or any department thereof and fixing the compensation to be paid therefor would, as I take it, be an ordinance involving the expenditure of money in that the contract undoubtedly calls for the payment to such legal counsel for the services to be performed by him. Such being the case, I am of the opinion that such an ordinance would come within the provisions of section 4227-2 General Code and would be subject to referendum.

Second: Your inquiry involves a construction of article XV, section 4 of the constitution of Ohio. Such section reads as follows:

> "No person shall be elected or appointed to any office in this state, unless he possess the qualifications of an elector."

Since the relation which exists between the legal counsel of a village and the village itself is contractual in its nature it cannot be considered as an office, and, therefore, would not fall within the provisions of such section and article.

Yours truly,
TIMOTHY S. HOGAN,
Attorney General.

256.

ELECTRIC LIGHT PLANT—COUNCIL HAS NO POWER TO APPOINT A COMMITTEE TO INVESTIGATE—DUTY OF BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES.

Inasmuch as there is no statutory provision with reference to electric light plants similar to section 3962, General Code, empowering the council of a municipality to appoint a committee to investigate water works, such power cannot be exercised by council. Examiners of the department of the bureau of inspection and supervision of public offices, however, may make such investigation.

COLUMBUS, OHIO, April 22, 1913.

HON. W. E. COOPER, *Legal Counsel, McComb, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 19th wherein you desire my opinion as to whether council of a village (having no waterworks but only an electric light plant) can appoint a committee for the investigation of books and papers in matters pertaining to the management of the electric light works, by reason of certain

neglect of duty or malfeasance on the part of any officer as provided by section 3962 General Code taken in connection with section 4361 General Code.

Section 4361 General Code provides:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

Since the duties of the trustees of the waterworks in cities have been transferred to the director of public service, and the office of trustees of waterworks has been abolished this department has held that in section 4361 the words "trustees of waterworks" should now be read "director of public service."

Section 3962, General Code, provides as follows:

> "The council of a municipality in which waterworks are situated or in progress of construction may appoint a committee for the investigation of all books and papers and all matters pertaining to the management of the waterworks, at least once a year, and oftener, if necessary by reason of neglect of duty or malfeasance on the part of any officer of the works. Any such officer found by such committee so offending shall be liable to removal from office by the council."

Since your inquiry is solely in reference to section 3962, General Code, I have not undertaken to examine further to see whether or not there are any other statutes which would pertain to the subject. Section 3962, General Code, however, limits the right of council thereunder to "appoint a committee for the investigation of all books and papers, and all matters pertaining to the management of *waterworks*." I am unable to see how said section can be extended so as to include an electric light plant.

If there is any reason that you feel that an investigation of the management and affairs of the electric light plant should be made I would suggest that you take the matter up with the Bureau of Inspection and Supervision of Public Offices, which Bureau, I do not doubt, upon proper showing made, would be very glad to send one of the state examiners there for a special investigation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

258.

VILLAGES—POWER OF COUNCIL TO DETERMINE METHOD OF LIGHTING STREETS—POWER OF BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

The board of trustees of public affairs, section 4361, General Code, conferring when the powers of boards of trustees of water works, intends to grant to such board the powers resting upon the directors of public service. Such board also has such powers as may be conferred upon it by ordinance of council.

Under section 3990, General Code, and relative sections, council has authority to determine whether streets are to be lighted by gas or by electricity and may confer upon the board of trustees of public affairs, by ordinance, powers exercisible by that board with reference to a municipal lighting plant.

COLUMBUS, OHIO, April 24, 1913.

MESSRS. E. H. & R. A. KERR, *Solicitors for the village of Tippecanoe, Tippecanoe City, Ohio.*

GENTLEMEN:—I am in receipt of your letter of February 22nd, in which you request my opinion as follows:

> "As solicitors of the village of Tippecanoe we write to inquire relative to the rights and powers of the council and the board of public affairs relative to the changing of the system of lighting in the village.
>
> "Prior to the first of the year the streets were lighted by what is known as the arc light system; since said date the board of public affairs has changed the system in such a manner that the streets are now lighted by incandescent lights. The village council differs from the board of public affairs relative to the comparative lighting powers of the two systems, and thus raises the question as to which body is entitled to determine the manner in which the streets shall be lighted. We have advised the village officers in accordance with the law as we construe it, but for the satisfaction of both the council and the board of public affairs we write to ask your opinion as to which body has the right to determine the method by which the streets shall be lighted."

Section 4357 of the General Code provides as follows:

> "In each village in which waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or which council orders waterworks, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be elected for a term of two years."

Section 4361, General Code, provides as follows:

> "The board of trustees of public affairs shall have all the powers and perform all the duties provided in this title to be exercised and performed by the trustees of waterworks, and such other duties as may be prescribed by law or ordinances not inconsistent herewith."

There is a manifest defect in section 4361, in that it confers on the board of trustees of public affairs of villages all the *powers of water works trustees*, whereas there are no such officers as waterworks trustees mentioned in the code. In my opinion addressed to Hon. Allen C. Aigler, village solicitor of Bellevue, I held that the powers of the trustees of water works are the same powers now vested in the director of public service of cities by sections 3956 to 3981, General Code; and that these powers are the statutory powers of the board of trustees of public affairs of villages. I also held in that opinion that the board of trustees of public affairs has such powers as may be conferred upon it by ordinance of council.

Referring to sections 3956 to 3981, General Code, I find there is no statutory power given to the board of trustees of public affairs in reference to electric light plants; and there are no other duties prescribed by law for the board of trustees of public affairs in reference to a municipal lighting plant; but the village council may, by ordinance, prescribe their powers and duties in reference thereto.

Under section 3990 of the General Code and other sections relating to the powers of municipal corporations as to electric light plants council have certain duties to perform in the construction and maintenance thereof. Council has the authority to determine whether the streets are to be lighted, whether by gas or electricity, and the method by which this should be done. The board of trustees of public affairs is an administrative board, subject to the control and direction of the council; they have only such powers and duties as the council prescribes, in reference to a municipal light plant. All contracts made for the purchase of arc lights or incandescent lights, and all material for the electric light system should be made by council; though it may authorize the board of trustees of public affairs to make the purchases for them.

I am therefore of the opinion that the council has the right to determine the method by which the streets of your village shall be lighted

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

271.

COUNCIL MAY NOT PAY SECRET SERVICE MEN EMPLOYED BY INDIVIDUAL WITHOUT ITS KNOWLEDGE OR CONSENT.

There can be no implied contract against a municipal corporation, and when an individual hires detectives for the purpose of apprehending parties guilty of the illegal sale of intoxicating liquors, without knowledge or consent of council, such person and the parties hired by him, so far as the city is concerned, will be deemed mere voluntary inter-meddlers and will not be entitled to reimbursement from the city.

COLUMBUS, OHIO, May 19, 1913.

HON. W. W. SCOTT, *Village Solicitor, Loudonville, Ohio.*

DEAR SIR:—Your letter of May 10, 1913, is received wherein you ask an opinion upon the following state of facts:

> "Mr. ——— of this place presented a bill amounting to $281.55 to the council of this village, and asked the council to reimburse him for that amount, claiming that he had expended said amount in March, 1913, in employing secret service men relative to the illegal sale of intoxicating liquor in Loudonville. Mr. ——— bases his claim under section 6139, General Code. The money was expended by Mr. ——— without the knowledge or consent of the

council. Fines have been collected in the sum of $150.00 during the month of April, 1913, on account of the illegal sale of intoxicating liquors within said village.

"I would appreciate an opinion from you as to whether or not the council can legally reimburse Mr. ——— wholly or in part."

Section 6139, General Code, provides:

"The council of a city or village, by ordinance, may provide for the destruction of intoxicating liquor found to have been kept for illegal sale or distribution, or implements or vessels used for such illegal sale or distribution. Such council may use any part of the fines, collected for the violation of the local option law, for hiring detectives or secret service officers to secure the enforcement of such law, and may appropriate not more than one hundred dollars annually from the general revenue fund for enforcing the local option law when there are no funds available from such fines so collected."

As said by Goldsberry, J., in Powell vs. Ashville, 11 Nisi Prius (N. S.) 369, this section plainly confers upon *municipal corporations* authority to hire detectives to enforce the local option law.

It is to be observed that council may use the fines, or any part thereof, collected for the violation of the local option law for hiring detectives or secret service officers, and further that when there are no funds available from such fines that an amount not exceeding one hundred dollars per annum may be appropriated from the general revenue fund for such purpose. So that if your village council had passed ordinances providing for the hiring of detectives or secret service officers to secure the enforcement of local option laws, and had contracted with such officers, complying with all the requirements of law pertaining to such contracts, such detectives or secret service officers might be paid in an amount not exceeding the fines collected, if any there had been, or to the amount appropriated under section 6139 General Code, from the general fund. But as I understand your inquiry council had neither passed any ordinance providing for the hiring or contracting with any detectives nor did council or any officer of your village even attempt to make any contract with these detectives. In fact you state that Mr. ——— on his own motion, and without the knowledge and consent of council, hired and paid the detectives, and while the result of the activities of the detectives enriched the village treasury in the sum of one hundred and fifty dollars during the month of April, 1913, this fact attached no liability to the village.

Even if the detectives performed services for the village without any legal contract therefor, or at the instance of any of the village officers, but without complying with all the necessary requirements of the statute to make a valid contract, they would have no legal claim against the municipality, for it is well settled in Ohio that there could be no *implied* contract. (City of Wellston vs. Morgan, 65 O. S. 219.)

But in the case under discussion there was no contract of any kind with the municipality. The contract of the detectives was with Mr. ——— and they were paid by him under their contract and assert no claim against the village. Even if the detectives had a valid claim against the village and Mr.—— on his own volition, and without the knowledge and consent of the municipality, paid the amount agreed to be paid for their services, he would not have any claim against the village for the amount so voluntarily paid. He would be a volunteer. There was no obligation for him to make payment for the village nor did he have any interest which he was obliged to protect.

In the case of Wormer vs. Waterloo Ag. Works, 67 Iowa, 699 the court said:

"Where a person is in no manner bound, and on his own motion in the absence of a contract or expectation that he will be substituted in the place

of a creditor, pays the debt of another he will be regarded as an inter-meddler and not entitled to subrogation."

In Aetna Life Ins. Co. vs. Middleport, 124 U. S. 534, speaking of the right of subrogation the court said:

"The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another."

So it is readily seen that if Mr. ——— could not be subrogated even in a case where the municipality actually owed the debt to the detectives, there can be no possible ground on which he would be entitled to reimbursement either in whole or in part for moneys paid out by him to detectives who had no claim whatever of any kind against the municipality. It would be a mis-application of funds to make such payment, and any officer doing so would be liable for the amount paid out the same as on any other illegal payment.

I am, therefore, of the opinion that your council is entirely without authority to legally reimburse Mr. ——— in whole or in part for the amount of money he claims under his bill of $281.55.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

273.

COUNCILMAN APPOINTED BY MAYOR WITHIN THIRTY DAYS AFTER OCCURRENCE VACANCY SERVES AS DE FACTO MEMBER.—VOTE OF MAYOR IN ACCORDANCE WITH FRAUDULENT PRE-ELECTION PROMISE, VOID.

When a mayor in contravention of the terms of section 4226, General Code, appoints a member of council within thirty days after the occurrence of a vacancy therein, such appointee serves as a de facto member of council merely. All acts performed by him in such capacity are valid.

If a mayor, when casting the deciding vote upon a resolution to dismiss court proceedings in which the village is interested, acts solely in response to fraudulent pre-election promises without any regard to village rights, such vote is void.

COLUMBUS, OHIO, May 21, 1913.

HON. W. O. WALLACE, *Legal Counsel, Columbiana, Ohio.*

DEAR SIR:—Your favor of March 12, 1913, received. You state in your letter that on a regular meeting night of the village council, February 14, 1913, D. W. B. tendered his resignation as councilman, which resignation was accepted. The mayor, having been informed of Mr. B's intention to resign, had present at the meeting Mr. R. H. V., and, informing the members of the council that it was his duty to appoint a man to fill the vacancy, appointed R. H. V. and instructed council that they had authority to confirm the appointment, which council immediately did. You desire to know whether R. H. V. is a legal member of your village council.

Section 4236 of the General Code provides as follows:

"When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

Under said section 3246, General Code, it became the duty of council to fill the vacancy and the mayor had no authority to make the appointment at that time; his act in appointing R. H. V. to fill the vacancy was void, and council could have disregarded the appointment and filled the vacancy as provided by section 4236. However, R. H. V. was appointed by the mayor, and council by appropriate action confirmed the appointment and permitted him to act as a member of their body. It appears from your letter that shortly after February 4th the council, with R. H. V. sitting as a member and participating in the proceedings, passed a resolution to construct a general sewer system for your village, all members of the council being present and voting in favor of the resolution. You also state that subsequently thereto other proceedings were had by council; that the said R. H. V. was present and took part in those proceedings, without protest from other members of council.

Since R. H. V. actually performed the duties of the office of councilman, with an apparent right under claim of color of appointment or election, he was a *de facto* member of council and all his acts were valid; and the proceedings of council, had while he was acting as a *de facto* member, are legal and binding on the corporation, if otherwise in compliance with law. Ex Parte Strang, 21, O. S., 617; Ermston vs. Cincinnati, 9 Ohio Decisions, 657.

Having decided that R. H. V. was a *de facto* member of council, and that his acts were legal, it becomes unnecessary to answer your remaining questions, except as to the right of council to dismiss the case referred to in your inquiry.

You state that some time in 1893 council duly passed an ordinance requiring sidewalks to be constructed of sawed stone and of a width of eight feet on North Main street; that in 1908 certain residents on North Main street laid a seven foot walk and secured an injunction restraining the village from tearing up said walk and making the same to conform to the ordinance and other sidewalks on said street, which case is now pending in the circuit court. You further state that the present council decided it was necessary to employ special counsel to try this case in the circuit court, and Mr. E. H. Moore and yourself were employed; but that on March 4 one of the members of council made a motion to dismiss this action, and council voted—three members for the dismissal and three members against it, counting Mr. V. as a member; that the mayor cast the deciding vote in favor of dismissing the action, and instructed the solicitor to have the same dismissed before the circuit court, and that the village pay the costs.

You also state in your letter that, prior to the election of village officers in 1911, you were informed that the mayor was soliciting the support of parties, and received the assurance of the support of such parties on the promise that if he were elected he would guarantee to have the suit dismissed.

If the council and the mayor acted in good faith, believing it was to the best interests of the village that litigation between the village and the citizens who brought the action should cease, their action was legal and proper. On the other hand, if the mayor, in casting the deciding vote, acted fraudulently, or cast it in order to carry out a pre-election promise, without any regard to the village rights, or those of the citizens, then, his vote in deciding this question would be void. However, that would be a hard matter to establish. I would advise, if you think, the interest of the city demands that this case be prosecuted, that you report these matters to the court, who will no doubt take proper action thereon.

Very truly yours,
TIMOTHY S. HOTAN,
Attorney General.

286.

CEMETERY—BOARD OF TRUSTEES HAS NO POWER TO IMPROVE STREET FRONTING UPON PROPERTY.

Inasmuch as the statutes do not confer such power, the board of trustees of a cemetery in a village may not improve a street fronting on its property.

COLUMBUS, OHIO, April 29, 1913.

HON. N. H. MCCLURE, *Village Solicitor, Medina, Ohio.*

DEAR SIR:—In your letter of March 6, 1913, you say:

"The cemetery grounds in the village of Medina are under the control of a board of trustees consisting of three members appointed by the mayor.

"The west side of the grounds front upon Spring Grove street and occupy the entire frontage upon the east side of said street between E. Liberty and E. Washington street.

"The cemetery board desire to have Spring Grove street improved by grading, paving, curbing, etc., but the village council, owing to restrictions in the matter of raising taxes do not feel justified in proceeding with the improvement.

"More than twenty-one years ago the cemetery board desiring to make a better approach to the cemetery moved back their fence a distance of some thirty feet along the entire frontage, making the street about sixty feet wide, and the public have entered upon and used the same as a street ever since, but without any formal dedication or acceptance of the land for street purposes by the village.

"The improvement which it is desired to make, with the exception of about six feet in width, will fall wholly within the boundary of the lands formerly owned by the cemetery board.

"The board has on hand a large fund which has been derived from the sale of lots and they propose to use a portion of this fund in paying the entire cost and expense of the improvement of said street from this source. No taxes are levied upon the property of the village for the maintenance of said cemetery."

You then ask whether under the above conditions the cemetery board has any authority to employ its funds arising from the sale of lots in making said proposed street improvements.

The duties and powers of cemetery trustees are statutory; and they can do nothing by way of expenditure of money which is not expressly covered by the law.

Section 4178, General Code, gives the cemetery trustees the same power and imposes the same duties as the director of public service in cities.

Section 4162, General Code, says the said director shall direct all *improvements and embellishments of the grounds and lots, protect and preserve them, etc.*

Section 4165, General Code, gives the director authority to determine the price and sell lots, and give receipts for the money.

Section 4166, General Code, says he shall not charge more for the sale of lots *"than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the grounds."*

The power to improve streets in municipal corporations is conferred on the municipality by section 3629 of the General Code.

Section 3714 gives the council care, supervision and control of public streets in the municipality.

The municipal code provides that improvements of streets shall be made under the supervision of council; and the assessments for so much thereof as is just, shall be made upon the adjoining property. There is nothing in the statutes authorizing cemetery trustees to improve streets which belong to the municipality; and they can not do so without a statute to that effect. No money can be expended by them except as expressly provided for. The money raised from sale of lots must be used only for the purposes enumerated in the statutes heretofore quoted; and street improvements do not fall within the term "embellishment of the grounds." Any such use of the money is a diversion of such funds from the lawful purpose for which the same was raised and is not permissible.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

307.

BONDS ISSUED UNDER THE BENSE ACT FOR INSTALLATION OF SEWER WORKS AND WATER WORKS UPON ORDER OF THE STATE BOARD OF HEALTH, NOT EXEMPTED FROM FIFTEEN MILL LIMIT OF SMITH ONE PER CENT. LAW.

Inasmuch as bonds issued under the Bense act, sections 1249 and 1261, General Code, providing for the installation of sewer works upon the order of the state board of health, are not expressly exempted from the fifteen mill limit of the Smith One Per cent. law, such limitations may not be exceeded in making levies for the purpose of paying the interest or principal of such bonds.

COLUMBUS, OHIO, May 23, 1913.

HON. HARRY A. SMITH, *Counsel for the village of Caldwell, Caldwell, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 18, requesting my opinion upon the following question:

> "Under the Bense act, sections 1249-1261, General Code of Ohio, can bonds be issued by a village, making the tax rate exceed the 15 mill limit?"

The sections referred to by you, and known popularly by the name which you give to them, were passed in 1908, 99 O. L., 74. They provide in effect that under certain circumstances the state board of health may order a municipal corporation to install works for disposing of sewage or acquiring a purer water supply. Section 1259, General Code, is the only section in the act relating to the financing of such a project. It provides as follows:

> "Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes. When so secured, or the bonds thereof have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for such purpose shall not exceed five per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote."

It is to be observed that this section exempts the bonded indebtedness incurred under its favor from the limitations of the law, but is silent respecting the levy, and dispenses with the necessity of a vote on the bonds. There was, therefore, no purpose at the time this act was passed to create special levying power.

The Smith One Per Cent. Law, so called, being sections 5649-2 to 5649-5b, inclusive, General Code, was passed in 1911, and in comprehensive language, which I need not quote here, imposes limitations upon all levies made by a municipal corporation, with certain exceptions; among which, levies for the purposes of the so-called Bense act are not included. It is true that some of these exceptions are of levies made for purposes such as to replace destroyed county infirmaries or children's homes, etc. But the fact that these levies are of a nature similar to that of levies for the purposes specified in the Bense act merely strengthens the inference that the legislature, in enacting the Smith law, did not intend to exclude levies for the purposes mentioned in the Bense act from the limitations therein provided for. Having mentioned a number of similar things, and having failed to mention the levies in question, it necessarily follows, on familiar principles of statutory construction, that the levy in question cannot be regarded as exempted from the limitations in question.

In short, I know of no reason, save only the fact that proceedings under the Bense act are more or less compulsory, upon which it could be claimed that levies for its purposes are exempt from the limitations of the Smith One Per Cent Law, or from any of them, including even the five mill limit and the ten mill limit thereof, as well as the fifteen mill limit, to which you refer in your question. The suggested reason bears on the policy of the legislation, however, and not upon its interpretation. It affords, perhaps, grounds for a contention that the levies in question *ought to be* exempted from the Smith law limitations; but it does not afford sufficient ground for holding that they are exempt from such limitations in the face of plain statutory provisions to the contrary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

352.

ORIGINAL MAP EMPLOYED IN INCORPORATION PROCEEDINGS OF A VILLAGE MUST BE DEPOSITED WITH AND RETAINED BY COUNTY RECORDER.

Under both sections 3524 and 3530, General Code, which specifically provide for the filing with and retention by the county recorder of all papers employedin the proceedings for the incorporation of a village, the original map must be left in the county recorder's office.

COLUMBUS, OHIO, June 19, 1913.

HON. A. M. BROWN, *Solicitor, St. Clairsville, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of the date of June 6, 1913, wherein you inquire as follows:

> "As legal counsel for the village of Holloway, Ohio, tl ere has been submitted to me for my opinion the following proposition.
>
> "When the village was incorporated a map was made and with the petition for incorporation, filed with the county commissioners; and later was filed with the recorder for record. Query: Should the original map, after record, be delivered to the agent of the petitioners of the village, or retained and filed by the recorder in the recorder's office?"

In reply thereto I desire to say that section 3517, of Tit. XII, Div. 1, Ch. 2, of the General Code, provides that villages may be created and incorporated in the manner provided in this title. Section 3517 of the General Code provides in substance, that the inhabitants of any territory laid off into village lots, a plat of which territory has been acknowledged and recorded as is provided with respect to deeds, or the inhabitants of any territory which has been laid off into such lots and surveyed and platted by an engineer or surveyor, who certified thereon under oath to its correctness, and which is recorded as is provided with respect to deeds, etc., may obtain the organization of a village in the manner provided in this title.

Section 3518 of the General Code provides how the application for such incorporation shall be made and that the same shall be made by petition to the county commissioners as follows:

> "Application for such purpose shall be made by petition, which, except as provided in the last preceding section, shall be signed by not less than thirty electors, residing within the proposed corporate limits, and addressed to the county commissioners, accompanied by an accurate map of the territory."

Sections 3519, 3520 and 3521 of the General Code, respectively, provide what such petitions shall contain; the time and place and the hearing of such petition and the giving of notice of the time and place of such hearing; and how such hearing shall be conducted and provides the manner whereby those opposed to incorporation may contest the granting of the prayer of such petition.

Section 3522 of the General Code provides that if such petition is granted by the commissioners, then the commissioners shall cause an order to be entered on their journal to the effect that the corporation may be organized.

Section 3523 of the General Code provides that the county commissioners shall deliver a certified transcript of their proceedings, together with all of the papers, *including the map,* to the county recorder, as follows:

> "The commissioners shall cause to be entered on their journal all their orders and proceedings in relation to such corporation, and they shall cause a certified transcript thereof, signed by a majority of them, to be delivered, together with the petition, map and all other papers on file relating to the matter, to the recorder of the county, at the earliest time practicable."

Section 3524 of the General Code prescribes the duty of the county recorder in relation to such papers, as follows:

> "The recorder shall file the transcript and other papers in his office, and at the expiration of sixty days thereafter, unless enjoined as hereinafter provided, he shall make a record of the petition, transcript, and map in the proper book of records and preserve in his office the orginal papers delivered to him by the commissioners, certifying thereon that the transcript, petition, and map are properly recorded."

In this connection it is to be noted that said section 3524 requires that the county recorder shall preserve in his office the original papers which are delivered to him by the commissioners, in accordance with said section 3523, supra, certifying on the same that they are properly recorded. Another method for the incorporation of villages is also provided by section 3526 of the General Code, which provides in substance that a petition for the incorporation of a village may be submitted to the trustees of the township, or, if the territory to be incorporated is located in more than one town-

ship, then such petition may be filed with the trustees of that township in which a majority of the inhabitants reside.

Sections 3527 and 3528 of the General Code provide for the holding of an election and the procedure to be followed in holding such election, for the purpose of determining whether or not a majority of the electors residing in such territory are favorable to such incorporation.

Section 3530 of the General Code provides that the trustees shall make a certified transcript of their proceedings and deliver the same to the county recorder, together with the petition and plat or map, and that said recorder shall make a record of such transcript, plat or map in the public book of records, and preserve the same in his office, as follows:

> "The trustees shall make a certified transcript of the journal entries of all their proceedings and a majority of them having signed it, with the original petition and plat they shall deliver it to the county recorder, who shall forthwith make a record of the petition, transcript and plat or map, in the public book of records, and preserve in his office the original papers delivered to him by the trustees, and certify thereon that the transcribed petition and map are properly recorded. When the recorder has so made such record, he shall certify and forward to the secretary of state a transcript thereof."

Said sections 3524 and 3530 of the General Code, Supra, are identically alike in their provisions in that all the papers *including the map* shall be recorded with and preserved in the office of the county recorder, whether incorporation is accomplished through the county commissioners under sections 3517 to 3525 inclusive, of the General Code, or through the township trustees under sections 3526 to 3531 inclusive, of the General Code.

For the reasons that both of said sections, to wit, 3524 and 3530 of the General Code, supra, specifically provide that the county recorder shall preserve in his office all papers delivered to him, either by the county commissioners or the township trustees, as the case may be, and inasmuch as the map is specifically included in the list of all the papers to be so delivered by the county commissioners or the township trustees to the county recorder—it is the opinion of this department, in direct answer to your question, that the original map, after being recorded in the county recorder's office, should be retained by the county recorder and preserved in the office of the county recorder.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

357.

TAXES AND TAXATION—INTEREST IN SINKING FUND LEVIES—AUTHORITY OF COUNCIL FOR BORROWING MONEY—NOTES OF A MUNICIPAL CORPORATION.

1. As between the 1910 tax limitation and the one per cent. limitation, the distinction which has been universally adopted is that the lesser in amount must apply. If the levy subject to the 1910 limitation exhausts the limitation before the one per cent. limitationis reached, then the one per cent. limitation in a sense does not apply. If the levies subject to the one per cent. limitation exhausts that limitation, then the 1910 limitation does not apply.

2. Interest and sinking fund levies, to provide for the retirement of bonded indebtedness created prior to June 1, 1911, or thereafter, by vote of the people, are not subject to the one per cent. limitation, but are subject to the 1910 limitation.

3. The sole authority of council for borrowing money is found in section 3913, General Code. Under the provisions of this section notes may be issued in any fiscal year in anticipation of revenue funds, but these notes must not run for a longer period than six months.

COLUMBUS, OHIO, June 26, 1913.

MR. E. E. JACKSON, *Solicitor for the Village of Rockford, Rockford, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 9th, requesting my opinion on the following questions:

"1. Under section 5649-3, General Code, may there be levied and collected in a taxing district an amount in excess of that produced by a rate of ten mills, if such excessive amount is within the limitation measured by the taxes levied in the year 1910 therein?

"2. May a council of a village borrow money on certificate of indebtedness running beyond the succeeding tax distribution period for the purpose of purchasing machinery for the water works; or must the borrowing power for such purpose be asserted by the issuance of bonds?"

Sections 5649-2 and 5649-3, General Code, are both involved in answering your first question. I quote the material portions of them:

"Except as otherwise provided in section 5649-4 and 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, for the year 1911 and any year thereafter, including taxes levied under authority of section 5649-1 of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910, provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.

Section 5649-3. * * * If in any year the taxing authorities of any taxing district shall desire to raise a less amount of taxes for a particular purpose than was levied for such purpose in the year 1910, the amount of taxes that may be levied for another or other purposes may be correspondingly increased; the intent and purpose of this act being to provide the total amount of taxes which may be levied in the year 1911 or in any year thereafter, for all purposes, shall not exceed in the aggregate, the total amount of taxes levied in the year 1910, plus six per cent. thereof for the year 1912, nine per cent. for the year 1913, and twelve per cent. thereof for any years thereafter, or, *such less amount* as may be produced by the levy of a maximum rate of ten mills on each dollar of the tax valuation of the taxable property therein, of any county, township, city, village, school district or taxing district, for that year, whether such taxes be levied for the same or other purposes, except to the amount of such levies as may be made for interest and sinking fund purposes as provided in section 5649-2 of the General Code as herein enacted, for emergencies as provided in section 5649-4 of the General Code and such additional levies as may be authorized by a vote of the people as provided in section 5649-5 of the General Code as herein enacted."

Whether or not the 1910 limitation imposed by these original sections is now in force, and whether or not an act passed by the last session of the general assembly, amending these sections so as to eliminate therefrom the 1910 tax limitation, has come into effect, are questions involved in a case now pending in the supreme court. Because of the view which I take of the case, however, it is perhaps not necessary to await the supreme court's decision, which, indeed, may be given publicity before this opinion reaches you.

The construction of these sections which has been universally adopted is that whichever of the two limitations, as between the 1910 tax limitation and the one per cent. limitation, is the lesser in amount must apply. That is to say, if the levies subject to the 1910 limitation exhaust that limitation before the one per cent. limitation is reached, then, the one per cent. limitation, in a sense, does not apply at all; conversely, if the levies subject to the one per cent. limitation exhaust that limitation then, despite the fact that the 1910 tax limitation may be larger in amount, there is no authority to violate the former because of this fact, and the latter has no such application.

I beg leave to point out, however, that interest and sinking fund levies, to provide for the retirement of bonded indebtedness created prior to June 1, 1911, or thereafter by vote of the people, are not subject to the one per cent. limitation but are subject to the 1910 tax limitation; so that the two limitations are not upon precisely the same thing. It may be that the village, of which you are the solicitor, is required to make levies of this sort. If that is the case such levies are not within the one per cent. limit at all. The exact application of the proper construction of the above quoted sections to your village cannot be stated without full knowledge of the facts.

Answering your second question, I beg to state that the sole authority of council to borrow money otherwise than in anticipation for special assessments is that found in section 3913, General Code. Under this provision the issuance of notes in anticipation of the general revenue fund in any fiscal year is authorized; but it is expressly required that the certificates shall not run for a longer period than six months. There being no other provision authorizing the borrowing of money on notes, I am constrained to advise that while council can, for the purpose you mention, borrow money on notes to run for a period of six months, in supposed anticipation of the general revenue fund, money cannot be borrowed on notes to run for a period longer than six months, or otherwise than in anticipation of such general revenue fund.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

361.

COUNTY DITCHES—PROPERTY OWNERS IN A VILLAGE MAY NOT START DITCH PROCEDURE—JOINT DITCH PROCEEDINGS.

1. When the boundaries of a municipal corporation become identical with those of a township, by strict compliance with the statutes, the municipality may take advantage of county ditch proceedings for the purpose of constructing and widening a ditch within the municipality.

2. Property owners in a village have no right to start ditch proceedings, under county ditch provisions, as there is no provision therefor, and they are not permitted to start ditch proceedings under municipal law.

3. Property owners in an adjoining township have no right to compel a village council to join with them in a joint ditch proceeding. Under section 6496, General Code, when a proposed improvement, which passes through or into a municipality, has been petitioned for by the residents outside corporation, the mayor upon being served with a copy of the petition and notice of its pendency is obliged to notify the council therefor; whereupon the council may confer with the commissioners with regard to such improvement.

COLUMBUS, OHIO, July 11, 1913.

HON. WILLIAM MATHEWS, *Solicitor, Village of Bay, Cleveland, Ohio.*

DEAR SIR:—Under favor of December 16, 1912, you requested my opinion as follows:

> "In order that we may conform to the practice of other villages, it would be a great help if we had your advice on the following:
> "The statutes of Ohio provide minute proceedings for establishing and cleaning and widening ditches in townships. This village ceased to have a township government when it became a municipal corporation and also became a township with boundaries the same as a village. I have examined the statutes, but I can find no provision for the above ditch proceedings, which apply to villages. The officials of townships are allowed extra fees for these proceedings, but I cannot find that officials of villages have any right to accept such fees."

You then append the following questions:

1. "In the matter of ditches, is not our village limited to the general powers given them in which they have general right to establish proper drainage
2. "Have the property owners in a village any right to start ditch proceedings within the village?"
3. "Have the property owners in an adjoining township any right to compel the village council to join with them in joint ditch proceedings to establish or clean or widen a joint ditch?"

Answering question No. 1, section 3512 of the General Code provides as follows:

> "When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other

officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township, may be enforced by or against the corporation."

By this statute, when the limits of a municipal corporation become identical with those of a township, all township offices are abolished, but the *duties thereof are transferred to the corresponding officers* of the municipality, with the exception of the justices of peace and constables.

I have been able to find but two decisions which made comment upon this provision, in any way material to your inquiry. In the case of McGill vs. The State, 34 O. S., on page 251, in construing these acts as they existed prior to the enactment of the municipal code, the court said:

"The act of May 7, 1872, (69 Ohio L. 23) preserves the corporate existence of such township for the sole purpose of electing justices of the peace and constables, evidently to meet the constitutional requirement that justices of the peace shall be elected by townships. But for all other purposes the township organization in this class of cities and villages is abolished."

In the case of Curtiss v. McDougal, 26 O. S. 66, it was held that when the corporate limits of a city or village are identical with those of a township and by statute the office of township clerk was thereby abolished, under statutes which provided for depositing chattel mortgages with the township clerk, such mortgages should be deposited with the clerk of such city of village, if the mortgagor lived therein.

The legislature has conferred ample authority upon municipal corporations to establish the necessary drainage within the corporate limits. The mode of government described for a municipality, wherein the legislative powers are vested in a council consisting of representatives of the various portions of the municipality, are so entirely different from, and inconsistent with the authority conferred for the control of townships wherein the authorities conferred are vested in three trustees chosen at random, that it would seem highly improbable when the township lines have become identical with those of a municipal corporation and a municipal form of government given full sway within a territory, that the accumulative powers applicable to a township could also be intended to be exercised within the corporation. I am of the opinion that had such been the intent of the statute, the legislature would have made expression of the same in clear, direct and definite terms. The provision in the statute, therefore, transferring duties to corresponding officers must be construed to apply to only such duties as are necessary and applicable to a change of governmental system. An example of such duties is offered by the case of Curtis vs. McDougal in reference to the filing of chattel mortgages, which duty was in no wise provided for under a municipal form of government. This provision was to transfer duties; may also be held to be applicable to the obligations incumbent upon the municipal officers in reference to pending rights, claims and interests against the township. I therefore conclude that when the corporate limits become identical with those of a township, the corporation is confined to its municipal powers in ditch procedure and that individuals residing therein have no powers under the statute providing for prodecure in townships.

Also as regards your first question, reference should be made to section 6196 and section 6496 of the General Code. They are as follows:

Section 6494. "The council of a municipal corporation, by resolution, may authorize the mayor to present a petition, signed by him officially, and a bond to the county commissioners, to locate and construct a ditch described

in the resolution, or authorize the mayor to sign officially a petition and bond for a ditch to be presented by parties interested whose lands are without the limits of the corporation, whenever the improvement will be conducive to the public health, convenience, or welfare of the whole or any portion of the inhabitants of the corporation. In such case the commissioners shall count the municipal corporation as an individual petitioner, and may direct the surveyor or engineer to locate the improvement in accordance with the petition, whether wholly within or wholly without, or partly within and partly without, the limits of the corporation. The surveyor or engineer, in making his schedule of lots and lands, benefited, may enumerate such lots and lands within or without the corporate limits, which will receive benefits to the health and welfare of their inhabitants."

Section 6492. "If the municipal improvement passes through or into a municipal corporation, the mayor of which has not signed the petition therefor, as provided in the next preceding section, he shall be notified of the pendency of the petition by being served with a copy thereof by the county auditor at the same time that the county commissioners are required by law to be notified. The mayor shall notify the council of the pendency of the petition, at its next regular meeting, or, if necessary, call a special meeting of the council therefor; and thereupon the council shall appoint a committee of its members, or the engineer of the corporation, or both, to meet the commissioners, at the time and place of their meeting and view, and confer with them in regard to such improvement."

Under these statutes, as construed by the court in the case of Village vs. Commissioners, 71 O. S., page 133, individual petitioners, living within the limits of a municipality, are excluded from the right of presenting a petition permitted to other residents of the county, under section 6446, General Code.

In the view of the court, under 6494 of the General Code, the only method by which a county ditch proceeding could be instigated from within a municipal corporation, would be by a petition signed by the mayor and authorized by the council, and when county ditch proceedings are instituted by property holders living without the municipality for the improvement of such a ditch, which is to pass through or into the municipality, the mayor of which municipality has not signed the petition, as provided by section 6494 of the General Code, that official is to be notified as therein provided, and council given an opportunity to confer with the commissioners with respect to the improvement.

The language of the court in this connection appears at pages 138 and 139 as follows:

"By section 2303, revised statutes, power and authority is vested in the council of any city or village to provide for the construction of ditches for necessary drainage within the corporation. And by section 1692, power is *expressly* conferred upon cities and villages within this state, 'to open, construct, and keep in repair sewers, drains and ditches' within the municipality; and section 2232, revised statutes, authorizes them, for such purposes, 'to appropriate, enter upon, and take, private property outside of the corporate limits.' From a consideration and comparison of these several statutory provisions, giving to each full force and effect, we are led to conclude that the manner in which drainage shall be accomplished within the municipal corporation is a matter primarily, and peculiarly, within the discretion and control of the municipality itself, by and through its legally constituted authorities. Dayton vs. Taylor's Admr., 62 O. S., 11, and we do not believe that it was the purpose or policy of the legislature to confer upon boards of county commis-

sioner's jurisdiction and authority to locate and construct a ditch or drain within a municipal corporation, except where such municipality shall petition for the same, as provided in section 4483, or when the ditch or improvement being constructed by the commissioners, necessarily passes into or through the municipality as provided in section 4485."

I am of the opinion, therefore, that such a municipality may take advantage of the county ditch procedure by strict compliance with these two statutes.

Answering question 2, in view of the answer to question 1, I am of the opinion that in the village referred to by you, property owners have no right to start ditch proceedings, either under the township or county ditch laws and as there is no provision therefor, they are permitted no right to start ditch proceedings under municipal law.

Answering question 3, I find no statutory provision by which property owners in an adjoining township are given any right to compel a village council to join with them in joint ditch proceedings to establish or clean or widen a joint ditch. Under section 6496, General Code, above quoted, however, when a proposed improvement, which passes into or through a municipal corporation, has been petitioned for by residents outside of the corporation, the mayor upon being served with a copy of the petition and notice of its pendency, is obliged to notify the council thereof, whereupon the council may confer with the commissioners with regard to such improvement.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

364.

BOND ISSUE—ASSESSMENT—INTEREST ON BOND ISSUE—COMPUTING INTEREST ON BOND ISSUE—SINKING FUND.

When bonds are issued in anticipation of the collection of an assessment in an amount considerably greater than the amount of the assessment as it subsequently develops and the proceedings have been had in good faith, the interest on the entire issue of bonds is properly chargeable against the property owners as a part of the assessment. In computing interest so charged, there may be taken into consideration the anticipated earnings of the excessive amount paid into the sinking fund in the manner provided by section 3804, General Code, and invested in the manner provided by law.

COLUMBUS, OHIO, July 9, 1913.

HON. CILTON H. STOLL, *Village Solicitor, London, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of June 29th in which you submit for my opinion the following question:

"The village of London has issued in anticipation of the collection of special assessments to pay the property owner's portion of paving a certain street, bonds in the amount of $16,000. Subsequent to the issue of these bonds it has been discovered that the actual assessable cost of the improvement, exclusive of the interest on the bond indebtedness aforesaid will amount to only about $12,000. In determining the total cost of the improvement upon the basis of which assessments are to be made, should interest on the entire $16,000 of the bonds issued in anticipation of assessments be included therein;

or must the interest to be included in the portion of the costs to be assessed against the property owners be limited to that upon the sum of $12,000?"

I have stated the question as I understand it to have arisen in your mind. That is, I understand that the whole $16,000 of bonds has been issued in anticipation of the collection of the special assessments alone, and that the money borrowed to meet the village's one-fiftieth of the entire cost and cost of intersections and paving in front of public places, etc., is separately provided for by a different bond issue. My opinion will be written upon this understanding.

Section 3896 General Code, which you cite, seems to me clearly to furnish on its face an answer to your question. It provides in part as follows:

"The cost of any improvement contemplated in this chapter (i. e. the cost assessable against property owners) shall include * * * interest on bonds, when bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

In connection with which section must be read certain other sections. For example section 3932 provides:

"Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others."

Section 3817 of the General Code provides:

"When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

Section 3804 General Code provides:

"When an unexpected balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

In my opinion interest on the entire amount of bonds issued in anticipation of the collection of assessments is properly chargeable against the property owners as a part of the cost of the improvement for which assessment may be made.

Section 3817 General Code read in connection with section 3896 explicitly so provides. No statute requires that the amount of bonds shall correspond exactly with the total cost, exclusive of interest, for which it may be subsequently ascertained the improvement may be constructed. It is the evident intention of the statutes that the council shall not be required to wait until the actual cost of the improvement is

ascertained before issuing the bonds of the municipality; but that an estimate of the total cost and the portion thereof to be assessed against abutting property be first made as a basis of the issuance of bonds. The statutes which I have quoted contemplate the possibility of an estimate too liberal for the actual needs of an improvement and provide explicitly what shall be done with the unexpended proceeds of bonds issued under such a liberal estimate and with premiums and accrued interest thereof.

It is clear therefore, that in the absence of fraud, at least, there is nothing illegal in the issuance of bonds in anticipation of the collection of special assessments in an amount which may subsequently develop to be considerably in excess of the principal sum of the assessable costs. When bonds are so issued the municipality becomes bound for their payment when due and for the payment of the interest thereon. Its obligation to the holders of its bonds is not directly bound up with the obligation of the assessable property owners to it. Thus it was held prior to the enactment of section 3817, supra, that the interest upon the deferred installments of the assessments need not correspond with the interest which the municipality is required to pay to the bond-holders; so that if the municipal corporation succeeds in refunding its bonds at a lower rate of interest than that for which it was originally bound, the property owners are not entitled to participate directly in the benefits of such lower rate of interest. Borger vs. Columbus, 3 N. P. n. s. 261.

It is my opinion, therefore, that when bonds are issued in anticipation of the collection of an assessment in an amount considerably greater than the amount of the assessment as it subsequently develops, and the proceedings have been had in good faith and without fraud, the interest on the entire issue of bonds is properly chargeable against the property owners as a part of the assessment. I should add, however, that in computing the interest so chargeable there may, in equity, be taken into account the anticipated earnings of the excessive amount when paid into the sinking fund in the manner provided by section 3804 and invested in the manner provided by law. If it should happen that these anticipated earnings should equal the interest payable to the bondholders on account of the excessive amount (which is improbable) the property owners would, of course, by this method of figuring be relieved from the payment of the additional interest.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

417.

VILLAGE ORDINANCE VALID WITHOUT MAYOR'S SIGNATURE—MAYOR OF A VILLAGE HAS NO AUTHORITY TO CHANGE THE WORDING OF AN ORDINANCE.

The signature of the mayor of a village is not necessary to the validity of an ordinance. His duty to sign an ordinance is ministerial. The ordinance will go into effect without his signature.

As a monthly payroll is similar to any other ordinance passed by council, the mayor has no authority to alter it in any way. It will go into effect without his signature should he refuse to sign it.

COLUMBUS, OHIO, July 17, 1913.

HON. CHARLES J. FORD, *Legal Counsel, Geneva, Ohio.*

DEAR SIR:—Under date of July 12th you submitted the following inquiries:

"*First.* Whether the signature of the mayor of a village is necessary to the validity of an ordinance."

"*Second.* Whether there is anything about a monthly pay ordinance requiring the mayor's signature to make it valid, it being nothing more than an ordinance and being passed by unanimous vote of council and certified to by the clerk and whether the mayor has a right to alter the ordinances by drawing his pencil through certain items to which he objects."

The provision in section 4211, General Code, providing that the power of council shall be legislative only and that it shall perform no administrative duties whatever applies only to cities and does not in any way apply to villages. Consequently, villages have not only legislative but administrative powers as well.

Section 4224, General Code, which applies equally to cities and villages provides in part as follows:

"The action of council shall be by ordinance or resolutions, and on the passage of each ordinance or resolution the vote shall be taken by 'yeas' and 'nays' and entered upon the journal. * * * *"

Section 4227, General Code, which applies equally to cities and villages provides in part as follows:

"Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. * * * As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

Section 4255, General Code, which applies solely to villages, provides that the mayor of a village shall be the president of council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.

Section 4234, General Code, which provides that every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval, is limited in its provisions to cities only. Consequently the mayor of a village has no veto power over ordinances and resolutions passed by a village council.

It is to be seen, therefore, from the above quoted sections that the mayor of a village is the presiding officer of council and that it is his duty together with the clerk of council to authenticate the ordinances, resolutions and by-laws passed by council but that as mayor of a village he has no vote power whatsoever. As it is stated in section 4227, General Code, that ordinances, resolutions and by-laws *shall* be authenticated by the signature of the mayor as presiding officer of council the question arises as to whether or not the signature of such mayor is necessary to the validity of the ordinance. If such signature is necessary to the validity of the ordinance the effect would be that the power of a mayor of a village over the ordinances of a village would be greater than the powers of a mayor of a city over the ordinances of a city for the reason that under section 4234, General Code, on the failure of the mayor of a city to approve an ordinance within ten days or return it to council with his objections stated such ordinance takes effect in the same manner as if the mayor had signed it. It can hardly be doubted that the provisions of section 4227, General Code, requiring the signature of the mayor to ordinances, resolutions and by-laws is directory merely and not mandatory.

In the case of Blanchard et al. vs. Bissell 11 O. S. 96, decided at the December term 1860, the sixth paragraph of the syllabus reads as follows:

"An assessment of taxes made pursuant to an ordinance passed by a city council, is not rendered invalid by the omission of the presiding officer of the council to sign the ordinance."

Scott, J., rendering the unanimous opinion of the court on page 101 states as follows:

> "It was further objected, by the same party, that the ordinance which was passed by the city council in February, 1853, submitting the question of annexation to the vote of the electors of the city of Toledo, was never signed by the presiding officer of the council. But if, as the plaintiff below avers in his petition, this ordinance was, in fact, regularly passed by the council and recorded among their proceedings by the proper officer, we would be unwilling to hold that the omission of the presiding officer to attach to it his signature, would render the election held pursuant to its provisions wholly void. Its validity depends, as we think, upon the fact that it was regularly passed by the council, and this fact may be shown by the records."

and further in said opinion on page 102-3 says:

> "But it is further objected by the petition of the plaintiff below, that the ordinance of the city council for the levying of the taxes sought to be enjoined was not signed by the presiding officer of the council. We are strongly inclined to think that the signature of the presiding officer was not essential to the validity of an ordinance of this kind. It is admitted to have been regularly passed, by the proper body, and to have been duly recorded by the proper officer. And though it be true, that the statute directs him to authenticate all ordinances by his signature, it does not follow that his signature is essential to their validity."

This opinion was rendered after the rule of court adopted in 1898 to the effect that the syllabus of opinions should be prepared by the judge rendering the opinion. This case has been cited with approval in the case of Fisher vs. Graham, I Cincinnati Superior Court Report 113 by Taft, J., on page 115 wherein he states as follows:

> "An ordinance was not void because it was not signed by the president of the council, if it were actually passed and recorded. (11 Ohio St. 101). That was an ordinance for annexation, which was not signed by the president of the council. 'Though it be true that the statute directs him to authenticate all ordinances by his signature, it does not follow that his signature is essential to its validity.' "

and again in the case of Street Railway Company vs. Street Railway Company 3 Ohio Circuit Decisions 504-5 therein the court says:

> "It appeared upon the hearing that the ordinance of March 27, 1889, and that of July 28, 1890, copies of which are attached to the petition, were never, in fact, signed by the presiding officers of the two branches of the council. The names of these officers were signed thereto before publication by the city clerk, in conformity with a custom and practice of long standing. It was objected that as reason of this omission, and for many other causes suggested upon the hearing, the ordinances were invalid; that the clerk had no authority to record them, and that the record book in which they had been recorded was not, as to these ordinances, competent evidence. The journals of both branches of the council, showing the due passage of the two ordinances, were offered and received in evidence. The court overruled the objections of counsel for plaintiff in error, and permitted the record of the ordinances to be given in evidence. It is now insisted that in this particular

the court erred. We think that the court committed no error in receiving this evidence. Revised Statutes, sections 1693, 1699; Blanchard vs. Bissell 11 O. S. 96, 102-3; Chase vs. Hunter decided at the present term of this court."

The entire question has been summed up in the 21st American and English Encyclopedia of Law, Second Edition, 965 as follows:

"The true rule undoubtedly is that where the mayor or presiding officer of the city council is required simply to sign ordinances, and it is apparent that his act is ministerial in its nature and required merely to furnish evidence of the authenticity of the enactment, and the idea of approval is not involved, the requirement is directory only, and an omission to comply therewith will not render the ordinance invalid. But where a requirement that the mayor shall sign ordinances is couched in such language or appears in such a connection as to make it apparent that such signature is required as evidence of his approval, the requirement is mandatory."

See Dillon on Municipal Corporations 607; McQuillan on Municipal Ordinances 149

It has also been summed up in 25 Cyc 357 wherein it is said:

"Laws and charters providing that the mayor shall sign ordinances and resolutions are of such variant tenor or have received such different construction that they can scarcely be reconciled or harmonized. In some cases where signing seems to be treated as the equivalent of approval, the rules stated in the preceding section are followed. In others where the signing seems to be for the purpose of certification rather than approval, the provisions are held to be directory rather than mandatory, and lack of signature does not vitiate the measure, although in some jurisdictions lack of signature invalidates a by-law.

There can be no doubt that under the statutes of Ohio the provision that the ordinances and resolutions and by-laws passed by council shall be authenticated by the presiding officer and the clerk in so far as such provision relates to ordinances, resolutions and by-laws passed by a village council is not in order to give the mayor any right of approval or disapproval of such ordinances. This is clearly shown from the fact that the provision that every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval under section 4224 General Code, is by the provision of such section itself applicable only in cities. Consequently the signing of village ordinances by the mayor thereof is solely for the purpose of verification and not for approval.

A case exactly similar to the question submitted by you is found in Commonwealth vs. Williams, 120 Ky. 314, the first paragraph of the syllabus of which is as follows:

1. "Ordinances, Validity, Adoption, Publication. Approval by mayor. Under Kentucky statutes, section 3638 part of charter of cities of the fourth class, which provides that 'an ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper in said city * * * and shall be in force from and after the publication thereof.' It appearing that the mayor of cities of the fourth class has no veto power, the council is the legislative body of the city, and an ordinance of such city is valid when passed by a vote of at least three members of the council and published, although it may not have been signed or approved by the mayor."

The evidence showed in that case that the mayor of the city in question had not signed the ordinance at the time that the offense charged in that case was committed, and, therefore, that the ordinance was not then in force. It further appears that the veto power had not been conferred upon the mayor and the court on page 319 after stating the rule set forth in 21 American and English Encyclopedia of Law, supra, says:

> "It will be observed, from the provisions of the statute above quoted, that the veto power is not conferred upon the mayor. His only power is to preside at the meetings of the council and to vote in case of a tie. The council is the legislative body of the city. Ordinances have validity or effect when passed by the vote of at least three members of the council and published. To hold that the failure of the mayor to sign an ordinance destroys its validity would be in effect to confer on him the veto power, withheld from him by the statutes; for he could in any case, by withholding his signature, accomplish the same result as by a veto of the ordinance. This is not the meaning or purpose of the statute. Its purpose is simply to provide an evidence of the authenticity of the ordinance by the signature of the mayor, and is as to this directory only."

From all of the foregoing I am of the opinion that the signature of the mayor of a village is not necessary to the validity of an ordinance. His duty to sign an ordinance being ministerial only he can of course be mandamused so to do, but the ordinance would go into effect without his signature.

Answering your second inquiry I can see no distinction between what you term a monthly pay ordinance, and any other ordinance that is passed by a village council. There is no distinction made in the statutes, nor should there be. It is simply an ordinance of council of no greater magnitude than any other ordinance of council. Since the ordinance would go into effect without the signature of the mayor, and since the approval of the mayor is not neccessary or required in any way for village ordinances he is without authority to alter in any way an ordinance passed by council. Should he attempt so to do before attaching his signature as required by section 4227 General Code his act is a nullity and the ordinance is the same after such attempt to strike out as before. It is only the mayor of a city by virtue of section 4324 General Code who is permitted to approve or disapprove the whole or any item of an ordinance appropriating money, and not the mayor of a village. He is powerless to either approve or disapprove any ordinance, resolution or by-law of a village council.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

436.

ORDINANCE LEVYING SPECIAL ASSESSMENTS ON LOTS BOUNDING AND ABUTTING ON AN IMPROVEMENT OF A STREET BY PAVING NEED NOT BE PUBLISHED.

It is not necessary to publish an ordinance levying special assessments on lots bounding and abutting on an improvement of a street by paving, the fact being they are special ordinances and not general, and are in reality ordinances adopting an assessment previously made, notice of which has been given under section 3895, General Code.

COLUMBUS, OHIO, August 8, 1913.

HON. CLINTON H. STOLL, *Village Solicitor, London, Ohio.*

DEAR SIR:—I have your inquiry of August 2, 1913, in which you ask:

> "Is it necessary to publish an ordinance levying a special assessment on lots bounding and abutting on an improvement of a street by paving, etc?"

Assessments by municipalities are controlled by Chapter 5 Division III, Title XII of the General Code, and you will find that notice of passage of the resolution to improve shall be served by the clerk of the council upon the owner of each piece of property to be assessed, if residents of the county or if not, or owners cannot be found, publication must be made; see section 3818, General Code.

This does not answer your question, as I understand you refer to an ordinance levying the assessments.

Section 3895, General Code, reads as follows:

> "Before adopting an assessment made as provided in this chapter, the council shall publish notice for three weeks consecutively, in a newspaper of general circulation in the corporation, that such assessment has been made, and that it is on file in the office of the clerk for the inspection and examination of persons interested therein."

Section 4227 reads:

> "Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. *Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation.* No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

This question was before the circuit court of Lucas county in the case of Brick Co. vs. Toledo, 10 C.C. (N.S.) 137 and it was held there that:

> "It is urged that thereby the report was made a part of the ordinance and should have been published with it. It appears that that was not done. But we are of the opinion that it was not necessary to publish this ordinance at all; so that we need not pass upon the question whether the schedule was made a part of the ordinance so that in case the publication of any part of it was required, the schedule should be published with it.

"Revised statute 1695 requires that:

"Ordinances of a general nature or providing for improvements shall be published in some newspaper of general circulation in the corporation.'

"This ordinance was not an ordinance providing for an improvement; the improvement had been provided for; and it was not an ordinance of a general nature, but was of a special nature."

To my mind this decision is decisive of the question submitted, is correct, and should be followed.

The answer to your question is: Publication of the so-called assessment ordinances is not necessary, the fact being they are special and not general, and are in reality ordinances adopting an assessment previously made, of which notice has been given under section 3895, G. C.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

468.

THE LAW WHICH PROVIDES THAT WOMEN SHALL NOT WORK MORE THAN FIFTY-FOUR HOURS PER WEEK, APPLIES TO VILLAGES AND CITIES, EXCEPT MERCANTILE ESTABLISHMENTS, AND AS TO THESE IT APPLIES ONLY IN CITIES.

Amended section 1008, General Code, which provides that females shall not work at certain kinds of employment more than fifty-four hours per week, applies generally to villages and cities as to all establishments except mercantile establishments, and as to these latter it applies only in cities.

COLUMBUS, OHIO, September 10, 1913.

HON. GEORGE W. ROSE, *Village Solicitor, Glouster, Ohio.*

DEAR SIR:—In your letter of August 6th you state:

"O. L. 103, page 555 and 556 read as follows in part:

"Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dressmaking establishment, restaurant or in the distributing or transmission of messages or in any mercantile establishment located in any city, more than ten hours in any one day, or more than fifty-four hours in any one week, etc.'

"I take it that it means just what it says, and that the above law will not apply to a village. Am I correct?"

The part section you quote is amended section 1008 of the General Code. This section was amended by inserting the following words:

"or in any mercantile establishment located in any city."

This was the sole amendment and the intention of the legislature was to make the so-called fifty-four hour law applicable to mercantile establishments in cities. There was no intention, nor do I think the language used justifies the interpretation that the entire law should only be applicable to establishments in cities. It applies generally

to villages and cities as to all other establishments except mercantile establishments, and as to these latter it only applies to such establishments in cities.

In making this ruling I am construing the amended law as it no r stands, assuming its constitutionality, which I do not pass upon.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

480.

VILLAGE MAY ISSUE BONDS FOR THE PURPOSE OF SECURING FUNDS FOR THE IMPROVEMENT OF ITS WATERWORKS SYSTEM.

A village may issue bonds, under the Longworth Act, to meet the expenses of drilling wells for the purpose of extending, enlarging, improving and securing a more complete waterworks system.

COLUMBUS, OHIO, August 14, 1913.

HON. J. C. MARTIN, *Village Solicitor New Vienna, Wilmington, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 26, in which you request my opinion on the following question:

> "May a village issue bonds under the Longworth act for the purpose of securing new wells for waterworks purposes, and producing an additional water supply?"

Section 3939, General Code, provides that bonds may be issued under the limitations of the succeeding sections for the following specific purposes, among others:

> "11. For erecting or purchasing waterworks and supplying water to the corporation and to the inhabitants thereof."
> "2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section * * *."

It seems reasonably clear to me that if the municipality were originally embarking upon the enterprise of securing a water supply it would find authority to borrow money for that purpose under paragraph 11, above quoted. In the procuring of a water supply it would be empowered, of course, to use such means as might, under the geological conditions in which it might find itself, seem most desirable, whether by the construction of a reservoir, the drilling of wells or otherwise.

Therefore, it would follow, I think, that the municipality might lawfully borrow money under the sub-section above referred to for the purpose of drilling wells for a new waterworks, in connection with the other works necessary to complete the entire equipment of the plant.

That being the case, then, I am of the opinion that paragraph 2 of section 3939, above quoted, affords sufficient authority for borrowing money for the purpose of drilling wells with a view to extending, enlarging, improving and securing a more complete enjoyment of the original improvement.

I am, therefore, of the opinion that a village may borrow money under the Longworth act for the purpose above referred to.

Yours very truly,
TIMOTHY S. HOGAN.
Attorney General.

484.

VILLAGE COUNCIL MAY TAKE CENSUS IN ORDER TO DETERMINE NUMBER OF SALOONS THAT MAY BE PERMITTED UNDER THE LAW.

The council of a village has authority to take a census in order to determine the number of saloons that may be permitted, under the law, and may pay for taking such census out of any funds of the treasury not appropriated for any other purpose.

COLUMBUS, OHIO, August 29, 1913.

HON. C. B. MCCLINTOCK, *Solicitor for Village of Brewster, Canton, Ohio.*

DEAR SIR:—Under date of August 25th, 1913, you advise us that the village of Brewster now has a population of approximately six hundred, and that in order to determine the number of saloons permissible under the new liquor license law some of the members of council insist upon the village appropriating money so as to take the census, and you request our opinion as to whether the number of licenses permitted under the new liquor license law is to be determined by the population of the last census or the population at the time the license is allowed; also whether or not there is anything in the statutes which allow the village to appropriate money to take the census at this time.

Among the municipal powers granted are, section 3625, General Code, to take and authenticate a census of the municipality.

Section 24 of the license act provides:

> "Not more than one saloon shall be licensed in any township or municipality of less than five hundred population, nor more than one saloon for each five hundred population in other townships and municipalities."

The first paragraph of section 44 of the license act reads:

> "In determining the maximum number of licenses which shall be granted in any municipal corporation or township of the state, the license commissioners shall be governed in determining the population of said political subdivision by any official census which shall have been taken therein within the year next preceding that for which licenses shall be granted. If no such official census of the population has been taken, the board shall be governed by the latest estimates of the United States census bureau."

These sections make the matter clear and the council has the right to take and authenticate a census and the license commissioners are controlled by "any official census which shall have been taken therein within the year next preceding that for which licenses shall be granted and when no such census has been taken, the license commissioners are controlled by the latest estimates of the United States census bureau."

I am of the opinion that council has power to take a census of the village and to pay for the same out of any funds in the treasury not appropriated for some other purpose. Of course, if desired, the council or license commissioners can procure the latest estimates of the United States census bureau and act upon it.

Yours very truly,

TIMOTHY S. HOGAN,

Attorney General.

487.

AT THE PRESENT TIME IT IS NOT NECESSARY TO OFFER MUNICIPAL BONDS TO THE STATE LIABILITY BOARD OF AWARDS FOR PURCHASE.

The act found in 103 Ohio Laws, 76, has not yet gone into effect, consequently, at the present time municipal bonds are not required to be offered for purchase to the State Liability Board of Awards.

COLUMBUS, OHIO, September 15, 1913.

HON. JOHN L. CANNON, *Solicitor for the Village of Cleveland Heights, Marshall Building, Cleveland, Ohio.*

DEAR SIR:—Acknowledging receipt of your letter of August 26, and noting your request therein for an early consideration of the question you present, which is as to whether or not municipal bonds, after having been offered to the sinking fund trustees of a municipality, and having been refused by them, must be offered for purchase to the state liability board of awards (or its successor, the industrial commission) as indicated by section 11 of the act found in 103 O. L. 76, therein designated as section 1465-58, General Code, I beg to advise as follows:

It is true that the act which you cite specifically requires bonds which have been refused by a municipal board of trustees of the sinking fund to be offered for purchase to the state liability board of awards.

Section 11 of the act provides inter alia:

> "And it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, prior to advertising the same for sale, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds; and said board shall within ten days after the receipt of such written offer either accept the same * * * or any portion thereof at par and accrued interest, or reject such offer in writing; and all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state * * * and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same, when so collected into the state insurance fund. The treasurer of state shall honor and pay all vouchers drawn on the state insurance fund for the payment of such bonds when signed by any two members of the board, upon delivery of said bonds to him when there is attached to such voucher a certified copy of such resolution of the board authorizing the purchase of such bonds. * * *"

I assume that you are familiar with the fact that by the act found in 103 Ohio Laws, page 95, and in particular by section 12 thereof, (103 O. L. 97), the newly created industrial commission succeeds to the powers and duties of the state liability board of awards.

Whenever the act found in 103 O. L. 76, was intended by the general assembly to become effective, I am of the opinion that it is not yet even the law in a complete sense. You are doubtless aware that within the ninety days prescribed by Article II, section 1 of the constitution, as amended, after the date when this act was filed by the governor in the office of the secretary of state, to wit, March 17, 1913, petitions

were filed in the office of the secretary of state for the purpose of ordering a referendum thereon. Questions have been raised as to the sufficiency of these petitions, an as you are doubtless also aware the secretary of state is at present conducting a hearing into charges which have been made respecting the petitions. If a referendum election is held upon the petitions which have been presented it will be at the regular election in November of this year. (Article II, section 1c.)

If upon the hearing now in progress the secretary of state decides that the petitions are not sufficient, and if his decision be regarded as final, then "in such event ten additional days shall be allowed for the filing of additional signatures to such petition." (Article II, section 1g.)

The initiative and referendum provisions of the constitution while exceedingly detailed, do not prescribe two things which are of importance in this connection, viz.: The date from which the "ten additional days" shall run, and the date when, and as of which a law, against which a petition has been filed, shall go into effect, if the petition be held insufficient. In fact it is not specifically provided by section 1c or any other section in the new constitution as to when a law which has been referred to the people and has been approved by them shall go into effect. Presumably, however, the law becomes effective as of the date of its approval by the electors. It is seen, therefore, that the act which you cite, and the situation respecting it, at the present time, raise a number of very interesting questions which may occasion judicial interpretation of the constitution. In any view of the case, however, the act in question is not now in effect, even as a law. The petition challenged is under favor of section 1g of Article II," "presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved." The effect of filing a sufficient petition is defined in section 1c of Article II as follows:

> "When a petition * * * shall have been filed with the secretary of state * * * ordering that such law * * * be submitted to the electors of the state * * * no such law shall go into effect until and unless approved by a majority of those voting upon the same."

Even if be assumed that the petition filed is insufficient, so long as it has not been officially determined to be so, the legislative act is not complete, and the act of the legislature is not in the full sense "law." Even after the official determination of insufficiency, should occur, the effectiveness of the law is apparently postponed until "ten additional days." Whether or not in that event further hearings might be had as to the sufficiency of the "additional signatures" is still another question.

At all events, however, the law in question is not yet in effect. Accordingly, I am of the opinion that at the present time municipal bonds are not required to be offered for purchase to the state liability board of awards, or rather, to the industrial commission.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

489.

A PERSON MAY NOT AT THE SAME TIME BE A MEMBER OF COUNCIL AND HOLD ANY OTHER PUBLIC EMPLOYMENT.

Under the provisions of section 4218, General Code, a person may not remain a member of council and at the same time hold any other public employment.

Where a member of council is holding another public office, he is a de facto officer and all measures passed by his vote would be legal, but he may be ousted from his office at any time.

COLUMBUS, OHIO, September 16, 1913.

MR. T. B. MATEER, *Legal Counsel, Mt. Gilead, Ohio.*

DEAR SIR:—Under favor of September 8th you state:

> "In our village council we have one member who was elected two years ago and qualified, and on last January he was appointed and qualified as deputy sheriff of Morrow county, Ohio.
>
> "We also had a vacancy caused by the resignation of one of the members of the council and one J. D. Fate was appointed to fill the vacancy, he at that time being the treasurer of the county and now is acting as the deputy treasurer. The question has arisen—are either one of the above acting councilmen legally qualified to fill such position while holding the other public positions?
>
> "I, as city solicitor, held that they were not qualified as councilmen, and some other attorneys here have held that the deputy sheriff was qualified, and for that reason the mayor of the village has requested me to request the opinion of the attorney general.
>
> "I base my holding on section 4218, General Code, which provides that 'no member of the council shall hold any other public office or employment except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office.'
>
> "Also the holdings under State ex rel. vs. Gaid, 8 C. C. N. S. 599.
>
> "The village will appreciate the opinion from your office."

It has been universally ruled by this department that the section quoted by you prohibits a person holding any other public office or employment and at the same time remaining a member of council. This prohibition undoubtedly extends to the offices held by the individuals in each case presented by you. These members, while occupying the position of councilmen, would, of course, be *de facto* officers, and all measures passed by their vote would be legal. The council, itself, however, may at any time declare their offices vacant, whilst they attempt to exercise the duties of both offices; or proceedings may be instituted in court to oust them.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

497.

VILLAGE OWNING AND OPERATING MUNICIPAL LIGHT AND POWER PLANT MAY MAKE MINIMUM CHARGE OF FIFTY CENTS PER MONTH AND MAY OWN METERS AND RENT THE SAME.

Where a village owns and operates a municipal light and power plant, it may make a minimum charge of fifty cents per month per user. The village through its board of trustees of public affairs may retain the ownership of the meters and charge a reasonable rental of the same.

COLUMBUS, OHIO, September 16, 1913.

HON. BEN. H. DEWEY, *Village Solicitor, Clyde, Ohio.*

DEAR SIR:—In your letter of August 6, 1913, you say:

> "The village of Clyde, Ohio, owns and operates a municipal electric lighting and power plant and is about to put into effect a new schedule of rates. Will you kindly inform me whether or not there is any law which will prohibit the establishment of a minimum charge of $0.50 per user, and also as to whether or not the board of trustees of public affairs can require the payment of meter rent?"

I do not find much difficulty in answering your question.

Section 3618, General Code, gives municipal corporations the right to establish maintain and operate municipal lighting plants and to furnish the municipality and the inhabitants thereof with light. The same authority is more explicitly and extensively granted by section 3990, et seq, General Code.

Section 4357, General Code, provides for the establishment of a board of trustees of public affairs to have supervision of electric light plants and other public utilities. It only remains to ascertain what the duties and powers of this board are, in relation to the municipal electric light plant in your village.

Section 4361, General Code, as amended in 103 Ohio Laws, page 561, provides that said board shall manage, conduct and control electric light plants and other public utilities. Said board may also make such by-laws and regulations as it may deem necessary for the management of said public utilities, which shall have the validity of ordinances, unless repugnant to the constitution, state laws or other ordinances. In order to pay expenses, this statute further says that said trustees may assess a light, power or other utility rent, of sufficient amount, in such manner as they may deem most equitable, upon all tenements and premises supplied with light, water, etc., and if not paid may certify the same for collection as other taxes. In this section all the powers of director of public safety of cities are conferred on these village trustees of public affairs; and all powers and duties by statutes relating to waterworks are extended to electric light plants.

The supreme court of Ohio, 82 O. S., page 216, fully sustains the doctrine of the right of municipal corporations to enact and enforce such regulations as the above.

The powers of the board of trustees of public affairs, under the statute, are very extensive; and so long as their rules and regulations are reasonable, they can be enforced. The plant and all the necessary appliances, being the property of the village, it can make any reasonable rule of service of electricity to the inhabitants thereof, through its trustees aforesaid.

A minimum fee of $0.50 per user seems to me to be reasonable, as the current must be brought to the door of the consumer ready for use, and so maintained there in readiness for him, whether he uses it or not.

In my opinion, the right of the board to retain the ownership of the meters and charge a reasonable rental for their use, is a reasonable exercise of the authority vested in the said board by the statute.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

500.

WORKMEN EMPLOYED BY MUNICIPAL CORPORATION ON PUBLIC WORKS SHALL NOT WORK MORE THAN EIGHT HOURS PER DAY OR FORTY-EIGHT HOURS PER WEEK.

Municipal corporations are subject to the provisions of section 37, article 2, of the constitution and of the act in 103 Ohio Laws, 854, which provides that workmen engaged on public works shall not work more than eight hours per day or forty-eight hours per week. This applies to municipal corporations employing workmen on streets and highways.

COLUMBUS, OHIO, September 19, 1913.

HON. PIERCE D. METZGER, *Solicitor of South Newburg, Cleveland, Ohio.*

DEAR SIR:—Under date of May 14 1913, you make inquiry as follows:

> "The council of the village of South Newburg request your opinion as to whether or not the village is required to observe what is known as the eight hour law with respect to employes of the village working upon streets and highways."

Section 37 of article 2 of the constitution of Ohio, as recently amended, provides:

> "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise."

The recent legislature passed an act to enforce this provision of the constitution. Section 1 of act of 103 Ohio 854, to be known as section 17-1, General Code, provides:

> "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen.

The above constitutional provision and the act above quoted apply to any public work carried on "by the state, or any political subdivision thereof."

The question arises, is a municipal corporation a "political subdivision" of the state?

In Payne vs. Treadwell, 16 Cal. 220, part of a syllabus reads:

> "A municipal corporation is a public institution created for public purposes. The municipality is a political subdivision or department of the state, governed, regulated and constituted by public law."

The above is quoted in volume 5, of Words and Phrases, at page 4620.

At page 907 of volume 31 of Cyc. it is said:

> "Political Division of the State. A division formed for the more effectual or convenient exercise of political power within the political localities."

The phrase "political subdivision" as used in the above constitutional provision is synonomous with the phrase "political division."

A municipal corporation is a political division formed to exercise functions of government. It is a political division subordinate to the state, and as such is a "political subdivision" of the state.

I am, therefore, of the opinion that a municipal corporation is subject to the provisions of section 37, article 2, of the constitution and of the act of 103 Ohio Laws 854, as to the number of hours which shall constitute a days work, or what is known as the eight hour law. This conclusion is borne out by the provision of the above act which exempts policemen and firemen from its operation.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

513.

MUNICIPALITY ENTITLED TO DAMAGES FROM A RAILROAD COMPANY WHERE THE RAILROAD COMPANY CONSTRUCTS A SIDE TRACK OVER A SEWER AND DAMAGES SEWER.

Where a railroad company permits a municipality to construct a sewer on its right of way and the railroad company afterwards constructs a side track over this sewer, and because of the heavy traffic on the side track the sewer pipe is broken and destroyed, the village, has a valid claim for damages against the railroad company for the breaking of the sewer. The amount of damages should be the cost of replacing that part of the sewer so destroyed.

COLUMBUS, OHIO, September 24, 1913.

HON. O. A. BALYEAT, *Solicitor of Ohio City, Van Wert, Ohio.*

DEAR SIR:—Under date of March 18, 1913, you submit for the consideration of this department, the following:

> "The facts in the case are as follows: Directly east of the village of Ohio City and perhaps some portion of it is within the boundaries of the village, there is an open county ditch into which numerous branches run. The village of Ohio City, some ten or twelve years ago, erected a sewer or drain which is used both as a sanitary sewer and for drainage, beginning in the western

portion of the village and extending eastwardly and across the Toledo, St. Louis and Western Railway and emptying into the county ditch. The railroad not desiring to have the sewer across their right of way, by an arrangement with the village authorities, when the drain reached the northern boundary of its railroad, extended the drain or sewer on the railroad right of way along the north side of the track until it intersected the county ditch. Subsequent to that time, the railroad company desiring to facilitate its business within the village, built a side track over and along this sewer and running its heavy trains thereon has broken down the sewer in several places, which practically makes the sewer worthless. It will be remembered that this sewer is not an actual water course and had not been established long enough to become a water course at the time the damage occurred."

You enclose a letter of the president of council of the village, Dr. C. A. Musgrove. The facts are states in this letter as follows:

"About twenty-eight years ago the Toledo, St. Louis and Western Railway was built. In building the railroad, the road bed was so built that it cut off (damned up or destroyed) the natural water course of the land in which our town was built. After destroying this natural water course the railroad dug an open ditch along the north side of the railroad bed. The open ditch took the place of the natural water way that was destroyed in building the railroad. This was sufficient for some years and was used in carrying water from off the village land.

"During the year 1900 the village of Ohio City commenced to build its main sewer. It was completed the following year, 1901. The east end, eighty rods (eighteen inch sewer pipe) of this sewer was placed in this open ditch on the north side of the Toledo, St. Louis and Western Railroad. This is on the railroad right of way. At the time of locating and building this sewer there was no objection raised by the railroad company to building the sewer on the north side of the railroad on their ground.

"About five years after the building of the sewer the railroad company placed a passing track (side track) for nearly sixty rods over the sewer. All was well for some time and then the sewer began to break down, owing to the railroad being directly over it. (The sewer has not broken down any other place in its whole length.) This has been repaired at the expense of the corporation from time to time, until now it is past repair. Should the corporation have done this repairing at its own expense?

"All of that part of sewer under the railroad track must be replaced with a new sewer according to the advice of an engineer. The railroad company has been notified at different times, but have always ignored the notice.

"In addition to question asked above we want to know who will have to rebuild the destroyed sewer, the corporation, or the railroad company?

"Can we make them rebuild the sewer that they have destroyed?"

You call attention to several sections of the General Code which apply to nuisances and their abatement. The facts submitted do not make your situation a nuisance, although it may develop into a nuisance if the sewer becomes useless. It will not be necessary to consider that phase of the question at the present time.

It appears that the railroad company obstructed the natural drainage of this land, but that it constructed a ditch along its right of way to carry the surface water away in another direction. The railroad in effect changed the natural course of the water, to the extent of the drain along its right of way.

The principles of law governing the right of a railroad to divert the natural flow of water are stated in the following citations:

At page 1620 of Farnham on Waters and Waters Rights it is said:

> "So, it is the duty of a railroad company which by the construction of its roadbed across a natural watershed so as to constitute a dam, permits the accumulation of surface water, either to confine it there, or transmit it to adjacent lands in such a manner as to cause no material injury to such lands, and it is liable, if through its negligence, it escapes and injures lower lands."

Also on page 1677, Farnham further says:

> "So, persons engaged in making improvements which are intended to be for the benefit of the public have no right to interfere with the course of streams to the injury of riparian owners. A railroad company is liable for diverting the water from a stream for its own convenience in constructing its roadbed, to the lower proprietor who is thereby deprived of the use of the water; and, in case it attempts to change the channel of the stream, it will be liable for injuries caused by casting the water on to the lower proprietor in an unusual manner to its injury. So the company has no right to construct embankments which will deflect the flow of the water to the injury of an adjoining land owner."

The rule is stated in 33 Cyc. at page 326:

> "In crossing streams and water courses the railroad company must construct its road so as not to obstruct the flow of water, and must construct its bridges and culverts with sufficient openings and in such manner as properly to permit the passage of the water and prevent injury to riparian owners, taking into consideration the nature of the country, and making provision for the amount of water at all seasons, and under conditions of storm and flood which are likely to occur, and for the passage of floating ice which may be expected, and must subsequently maintain the same in proper condition and repair."

A railroad company in damming up a stream or changing a water course must take into consideration the rights of the adjoining landowners. The owner of the uplands has the right to have his lands drained of the surface water. The owner of the lowlands has the right to the use of the water of the stream. They also have other rights.

In the present case the railroad company obstructed the natural flow of the surface water by its embankment. In order to take care of the water it constructed a ditch along its right of way. In doing this it was doing only what was required of it. It was obliged to take care of the surface water which was obstructed in its flow by the embankment. This duty only applied to the surface water. It did not apply to the sewage of the community.

It appears that the ditch along the right of way was an open ditch, as constructed by the railroad. The village thereafter decided to construct a sewer which was used for both surface and sanitary drainage. A part of this sewer was constructed on the right of way of the railroad and in or under the open ditch. There appears to have been no written agreement between the railroad company and the village for the use of the right of way for this sewer. The agreement, if any, was verbal. Its terms are

not given and probably are unknown. For the purposes of this opinion it will be assumed that there was no agreement.

It appears that the railroad company made no objection to the construction of the sewer on its right of way. It permitted the village to make improvements of some considerable cost upon its right of way and interposed no objection.

If the railroad company through its agents had knowledge of such construction and stood by and made no objection thereto, the doctrine of estoppel would apply.

At page 681 of Volume 16 of Cyc., it is said:

> " 'Estopped by silence' arises where a person who by force of circumstances is under a duty to another to speak refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice."

Also at page 765 it is said:

> "One who with knowledge of the facts and without objection suffers another to make improvements or expenditures on or in connection with his property, or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that other who has acted in reliance on and been misled by his conduct.

It is further said on page 768 of Volume 16 of Cyc.:

> "Where an owner permits the construction of a railroad on his land, he cannot after the road is completed and large sums of money are expended on the faith of his apparent acquiescence, deny to the railroad company the right to use the property."

It is the duty of an owner of land, when he sees improvements made upon his land, to object and protest. If he stands by and permits another to make improvements upon his land under a claim of right, he is estopped from asserting his complete title to the land to the prejudice of such other.

This principle is applied in favor of a railroad company when it constructs its railroad over the lands of another without protest. It will also be applied as against a railroad company when it stands by and without objection permits the construction of a sewer upon its right of way.

If the railroad company made no objection to the construction of the sewer in question at the time it was constructed, or as soon as it had knowledge thereof, it would be estopped to deny the right of the village to use its right of way for said sewer.

As the railroad company is estopped to deny the right of the village to use said right of way for the sewer, it could not so use its right of way as to damage said sewer, or to interfere with the right of the village therein. By reason of its silence when it should have objected, the railroad company cannot interfere with the rights of the village so acquired.

The railroad company constructed a switch or side track over the sewer and by reason thereof damaged the sewer and thereby interfered with the rights of the village to the use of the sewer.

The railroad company had a right to use its right of way for additional tracks, but in using the part of its right of way in which the sewer was located it was obliged to so construct its tracks as not to damage the sewer. In other words it must protect the sewer from damage by it.

In this connection it must be borne in mind that the railroad company is under

obligation to take care of the surface water which was diverted by the construction of its embankment. Since the construction of the sewer the village has in effect relieved the railroad of this duty. If it was not for the sewer the railroad company would have to maintain a ditch of some kind to take care of this surface water.

The facts plainly show that the side track, and the use thereof by the railroad company, caused the damage to the sewer, as in other parts, the sewer is in good condition.

The village has a valid claim for damages against the railroad company for the breaking of the sewer. The amount of the damage to be recovered should be sufficient to compensate the village for placing the part of the sewer under the switch in the same condition as the other part of the sewer.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

556.

A VILLAGE COUNCIL MAY PASS AN ORDINANCE AND ENTER INTO A CONTRACT WITH THE WATER WORKS COMPANY FOR FURNISHING WATER FOR THE USE OF THE VILLAGE WITHOUT SUBMITTING THE QUESTION TO A VOTE OF THE PEOPLE.

Where a village council passes an ordinance and enters into a contract with the water works company and the contract is accepted by the water works company, the ordinance is valid without submitting it to a vote of the electors of the village, and the village authorities are authorized to pay the water works company at rates fixed in the ordinance for water furnished by it to the village for fire protection and other municipal purposes.

COLUMBUS, OHIO, October 14, 1913.

HON. CILTON H. STOLL, *Village Solicitor, London, Ohio.*

DEAR SIR:—I have your communication of October 8, 1913, asking opinion of me, in which you advise that in the year 1889 the village of London, Ohio, pursuant to the provisions of section 2434 Revised Statutes (now section 3981 G. C.), by ordinance, on submission of the same to the qualified electors of the village, entered into a contract with one Martin and his assigns, whereby he and his assigns agreed to construct and maintain a system of water works in or near said village, and for a period of twenty years to furnish a supply of water to the village for fire protection and other municipal purposes, and to the citizens thereof for private purposes, at certain rates fixed in the ordinance; that pursuant to said contract The London Water Works Company, on assignment of said contract to wit, by said Martin, constructed the contemplated water works system, maintained the same and furnished water to the village and its citizens until the expiration of the contract, after which time, following negotiations with reference to an extension of the contract over a considerable period of time, the village council on February 7, 1913, passed an ordinance fixing the rates at which The London Water Works Company was to furnish water to the village for fire protection and other municipal purposes and to the citizens of the village for private purposes for a period of seven and one half years, and that the terms of the ordinance were accepted by the water works company on April 12, 1913, and a schedule of the rates so accepted were filed by it with the public utilities commission.

The question submitted for opinion is, whether the ordinance and the contract embodied and made by its acceptance by the water works company are valid, and whether the village authorities are authorized to pay the water works company at

rates fixed in ordinance for water furnished to the village for fire protection and other municipal purposes, it appearing that the ordinance was not submitted to a vote of the electors of the village.

In the consideration of this question I note that Section 3809 General Code, in terms authorizes a village council to enter into a contract with an individual or corporation for furnishing water to such municipality. This statute was enacted originally as a proviso, and primarily for the purpose of removing the contracts therein mentioned from the application and operation of the Burns law, and not primarily as an independent grant of power to municipalities with reference to such contracts. As indicated (96 O. L. 37, section 45), this statute provided that the contracts therein mentioned should be subject to the provisions of sections 2491 and 3551 Revised Statutes (sections 3994 and 9324 G. C.), and such undoubtedly is the proper construction of this enactment as carried into the General Code by revision.

State ex rel. vs. Commissioners, 36 O. S. 326, 330.

Section 9324 General Code (section 3551 R. S.) provides as follows:

> "The municipal authority of any city or village or the trustees of any township, in which a gas or water company is organized, may contract with such company for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village or township."

Undoubtedly this statute stands as full authority to a municipality to enter into a contract with a water works company organized therein for supplying water for the purposes therein mentioned, without submitting such contract to a vote of the electors of said municipality. Inasmuch, however, as the ordinance in question, as an entirety, is distinctly broader and more extensive in purpose than the contract authorized by this section, the application of this section to the ordinance at hand may be questioned, and in the view I take of the question submitted to me, the provisions of section 9324 are not of vital importance in the solution of the question.

Sections 3981 and 3982 General Code, provide as follows:

> Section 3981 (2434 R. S.) "A municipal corporation may contract with any individual or individuals or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the water works were owned by such municipal corporation."
>
> "Section 3982 (section 2478 R. S.) The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies or companies for supplying water for public or private consumption, are established or into which their wires, mains or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves and landing places, or for fire protection. Such companies shall in no event

charge more for electric light, natural or artificial gas, or water furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by the companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made either directly or indirectly for the use or repair of them."

The powers granted by these respective sections are widely different in object and nature.

The power granted by section 3981 is to the municipality, and is wholly contractual; that granted by section 3982 is to council, and is legislative in character. At the time of the passage of the original ordinance, embodying therein a contract between the village of London, Ohio, and Martin and his assigns, section 3981 G. C., then section 2434 R. S., was the sole sufficient authority for the contract then entered into, and such contract was governed by its provisions. As soon, however, as The London Water Works Company, as the assignee of this contract from Martin, established its water works system and entered on the performance of the contract in furnishing water to the village and its citizens, it became a public utility, subject, within constitutional limitations, to the police power of the state as to regulation of rates which it might charge for water furnished by it to consumers, such power being exercisable directly by the legislative power of the state, or by the municipality on delegation of such power to it by the legislature.

State ex rel. vs. Cincinnati Gas Light Co. 18 O. S. 262.
Spring Valley Water Works vs. Schottler, 110 U. S. 347.

The character of a water works company furnishing water to consumers as a public utility, is declared by statute (Section 614-2a G. C.). However, the statute in this respect is but declaratory of the unwritten law.

As to companies for supplying water for public or private consumption, the power of the state to regulate rates has been delegated to municipalities by the provisions of section 3982 G. C. The ordinance in question fixes the rates to be charged by the water works company for water furnished for both public and private consumption,which the statute itself makes the maximum price which may be charged for the particular service on which the rate is made. The rates for the particular services in furnishing water for municipal and private consumption named in the ordinance have been accepted by the water works company and it does not appear that any complaint on behalf of the electors of the municipality has been filed with the public utilities commission, as provided for in section 614-44 G. C., and by force of the provisions of this section the rates so fixed are operative.

I note that the ordinance in question is drafted in the form of a contract between the village and The London Water Works Company. In the view I take of the nature of the power granted by the provisions of section 3982, this form of the ordinance was unnecessary. However, as the ordinance is effective to fix the rates that may be charged by the water works company for water furnished to the municipality and its citizens, and such rates have been accepted by the water works company, the form of the ordinance in other particulars is unimportant, as by force of statute, the rates therein fixed are now in operation and effective, whether the acceptance of such rates by the water works company was effective to make a contract between it and the village or not. That such is the effect of such acceptance, is held in the opinion of the court n the case of State ex rel. vs. Cincinnati Gas Light Company, 18 O. S. at pages 299,300.

On the considerations above noted, I am of the opinion that the ordinance in question was valid without the submission of the same to the electors of the village, and that the village authorities are authorized to pay the water works company, at rates fixed in the ordinance, for water furnished by it to the village for fire protection and other municipal purposes.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

592.

A VILLAGE CLERK MAY NOT RECEIVE ADDITIONAL COMPENSATION FOR PREPARING, AT COUNCIL'S REQUEST, THE ANNUAL BUDGET REQUIRED TO BE SUBMITTED BY COUNCIL TO THE COUNTY AUDITOR.

Work performed by the village clerk for council outside of his statutory duties is presumed to be gratuitously performed, consequently, the clerk may not receive additional compensation for preparing the annual budget required to be submitted by council to the county auditor.

COLUMBUS, OHIO, November 3, 1913.

HON. CHARLES W. KARR, *Solicitor for the Village of North Bend, Cincinnati, Ohio.*

DEAR SIR—In your letter of October 18th, receipt whereof is acknowledged, you request my opinion on the following question:

> "May a village clerk receive from the village treasury additional compensation voted to him by council for preparing, at council's request and under an agreement as to such compensation, the annual budget required to be submitted by council to the county auditor?"

The annual budget required to be submitted by council to the county auditor is set forth in section 5649-3a General Code and is required to contain the following items:

> "(1) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.
>
> "(2) The balance standing to the credit or debit of the several funds at the end of the last fiscal year."
>
> "(3) The monthly expenditures from each fund in the twelve months and the monthly expenditures from all funds in the twelve months of the last fiscal year."
>
> "(4) The annual expenditures from each fund for each year of the last five fiscal years.
>
> "(5) The monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years.
>
> "(6) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received during the incoming year, from such source or sources."
>
> "(7) The amount of the bonded indebtedness setting out each issue and the purpose for which issued, the date of issue and the date of maturity, the

original amount issued and the amount outstanding, the rate of interest, the um necessary for interest and sinking fund purposes, and the amount required for all interest and sinking fund purposes for the incoming year.

"(8) The amount of all indebtedness incurred under authority of section 5649-4 and the amount of such additional taxes as may have been authorized as provided in section 5649-5 of the General Code, setting out each issue in detail as provided in the next preceding paragraph.

"(9) Such other facts and information as the tax commission of Ohio or the budget commissioners may require."

By the provisions of section 3788 General Code the village clerk is required to furnish to the mayor and council and to each member thereof the following statements:

"1. A statement showing the balance standing to the credit or debit of the several funds on the balance sheet of the corporation, at the end of the last fiscal year.

"2. A statement showing the monthly expenditures from each fund in the twelve months, and the monthly expenditures from all the funds in the twelve months of the last fiscal year.

"3. A statement showing the annual expenditures from each fund for each year of the last five fiscal years.

"4. A statement showing the monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average from all of them for the last five fiscal years."

By section 3789 General Code the clerk is "an officer provided for in this chapter" must, as a part of his official duties furnish, upon request, "to the mayor or council any information desired in relation to the affairs of their respective offices."

By force of the two sections last above cited, the village clerk might be required, as a part of his official duties, to furnish some of the information required to be set forth in council's annual budget. No statute, however, would require him to furnish information respecting bonded indebtedness in detailed form, as required by item 7 of section 5649-3a or to estimate the probable income of the corporation from sources of revenue other than taxation as required by item 6 thereof, nor, in short any of the information required to be set forth in the annual budget except that under items 2 to 5 inclusive.

Again, no statute requires the village clerk, or permits council to require him, to do the actual work of preparing the budget or any other measure coming before council.

Section 4280 General Code requires the clerk to keep a record of all proceedings, by-laws, resolutions and ordinances, but this is quite a different thing from preparing the measures upon which council acts, for its own action.

I, therefore, reach the conclusion that the services which the village clerk, in the case stated by you, has performed for council, are not within the purview of his official duties.

The next question which I encounter is, as to whether or not the services are such as council may contract for the performance of.

This question is not free from doubt as council has authority to provide legal counsel for itself (section 4220 G. C.), and to "provide such employes for the village as they may determine." (Section 4216 G. C.)

However, I am of the opinion that in procuring the services of the clerk in this particular, council was not exercising the authority to appoint employes for the village, because the duty to prepare the budget is cast upon the council itself.

On the whole, I am of the opinion that no express power exists in council to make any such employment.

Looking at the question from another angle of view, it appears that the village clerk, as an officer of the village, is precluded from sustaining any contractual relation to the village as such, resulting in receipt by him of money from the treasury aside from his official compensation. Section 3808 of the General Code provides that:

> "No * * * officer * * * of the corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation."

This section would seem to preclude the making of such a contract with the village clerk, even if council had authority to enter into it. The strict law of the case then, is this: The clerk cannot be required by council to perform the services in question as a part of his official duties, which are defined by law. The council lacks power to contract with any person for the doing of this work unless the same be considered legal work to be done by the legal counsel appointed under the section cited; the clerk being an officer of the corporation in prohibited by a quasi penal statute from receiving compensation in excess of his official salary.

As a matter of fact, of course, village councils rely on their clerks for the performance of many services not exacted of such officers by the statutes themselves. Undoubtedly the performance of such services was contemplated by the framers of the municipal code. However, it was correctly assumed that such matters would be taken into consideration in fixing the salary of the clerk. In other words, it is proper and lawful for council to call upon the clerk who is, in one view of the case one of its officers, for the performance of any service which is of assistance to it, although if the clerk desires to be technical he may lawfully refuse to perform any service that is not required of him by statute. On the other hand, council is presumed to take into consideration the miscellaneous services that it may see fit to require of the clerk when it fixes his regular official compensation. As a result of these principles, work performed by the clerk for council outside of the pale of his statutory duties is presumed to be gratuitously performed.

The foregoing principles are sustained in the case of Jones vs. Commissioners, 57 O. S. 189, which presents a state of facts strikingly similar to that submitted by you.

I am, therefore, of the opinion that the clerk may not receive additional compensation for performing the services in question.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

607.

WHERE A PETITION HAS BEEN FILED ASKING FOR THE IMPROVEMENT OF A STREET, AND THIS PETITION HAS BEEN ACTED UPON BY COUNCIL, THE PETITIONERS MAY NOT THEN WITHDRAW THEIR NAMES FROM THE PETITION.

1. A petition under section 3753, General Code, was signed and filed with the village clerk and was taken up at a regular meeting of council, and a resolution passed granting the prayer of the petition. After this action has been taken by council the signers of said petition cannot withdraw their names.

2. It is not necessary that all the requisites spoken of in section 3753, General Code, be embodied in the petition. The fact that the number of square yards are not shown or the manner of the assessment and the period of time petitioners desire that the street be treated with oil were not contained in the petition would not prevent council from proceeding with the improvement.

COLUMBUS, OHIO, October 31, 1913.

HON. J. GUY O'DONNELL, *Solicitor for the Village of Covington, Troy, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of June 26, wherein you state:

> "As the solicitor of the village of Covington, Ohio, I desire to submit to you two propositions in relation to the oiling of streets of a village and would like your opinion. I have rendered an opinion upon these matters to the village council and enclose you a copy of the same.
>
> "First proposition.—A petition, under section 3753 of the General Code of Ohio, was signed and filed with the village clerk, was taken up at a regular meeting of council and a resolution passed granting the prayer of the petition. After this action was taken by council, a petition by some of the parties who had signed, or were alleged to have signed the original petition, was presented to council asking to withdraw from the original petition. Question: Can the parties withdraw from the petition after it has been filed and acted upon as above stated?
>
> "Second proposition.—In section 3753 there are a number of requisites to be embodied in the petition among which are the description of the roadway area, the amount of square yards showing it to be more than five thousand, the manner of assessment and the period of time that the petitioners desire the street treated with oil. All of these requisites to the petition were not contained in the above petition, one especially, that of the period named for which they desire the street treated with oil. Question: In order to make the petition valid and to give the council jurisdiction to proceed under the petition and to so treat the district with oil, is it not necessary that all of these requisites to contained in the petition and thereby express the desire of the petitioners?

Sections 3753 to 3761, inclusive, of the General Code of Ohio, confer authority upon municipal corporations to treat the streets therein with oil and outline a method of procedure for the accomplishment of that purpose. Section 3753 provides:

> "When a written petition signed by the owners of the majority of the abutting feet of property on a street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, having a roadway area of not less than five thousand square yards, is presented to the director of public

service in a city, or to the council in a village, praying that the roadways within the territory described be treated with oil, and for the assessment of the whole cost thereof on the property abutting such streets or alleys, the director or council shall forthwith declare, by resolution, such territory to be, and thereupon it shall be, a district within which the roadways will be treated with oil, for a period named in the petition, not to exceed the life of the contract, and the cost thereof assessed upon the property abutting the streets or alleys therein, by the abutting foot."

Section 3754 provides for the treatment of such streets with oil upon the initiative of the director of public service in cities and of the council in villages, without the filing of a petition by abutting property owners. Your inquiry does not involve a construction of that section, hence it need not be considered.

The general rule of law is that when a statute authorizes the presentation of a petition to a public officer or body clothed with the power to grant the prayer thereof, signers of such petition may withdraw their names at any time before action is taken thereon, but not after.

In the case of Hays et al, vs. Jones et al, 27 C. S. 218, the court held:

"The board of county commissioners, under the act passed March 29, 1867, (64 O. L. 80) as amended March 31, 1868, (S. & S. 673), and again amended May 9, 1869 (S. & S. 675-6) to 'authorize county commissioners to construct roads on the petition of a majority of the resident land owners along and adjacent to the line of said roads,' are not authorized to grant a final order for making such road improvement, except upon the petition of a 'majority of the resident land holders whose lands are reported benefited' by, 'and ought to be assessed' for the costs of the improvement. (1st Syllabus).

"The jurisdiction of the board of county commissioners to make the final order for the improvement, under these statutes, is special, and conditioned upon the consent, at the time the final order is to be made, of a majority of the resident land holders, who are to be charged with the costs of the improvement. (2nd Syllabus).

"Resident land holders, who have subscribed a petition praying for such road improvement, may, at any time before such improvement is finally ordered to be made by the board of county commissioners, withdraw their assent by remonstrance, or having their names stricken from the petition, and after withdrawal of consent, such persons can no longer be counted as petitioning for the improvement." (3rd Syllabus).

In Dutton vs. Village of Hanover, 42 O. S. 215, the court held:

"Upon the presentation of a petition to the council for such an election, it is the duty of the council, before taking action thereon, to satisfy itself that it contains the requisite number of qualified petitioners, and for that purpose may refer the same to a committee to make the necessary examination. (2nd Syllabus).

"While such petition is under consideration and before action thereon by the council, signers thereof may withdraw their names from such petition, and if thereby the number of names is reduced below the requisite number, it is the duty of the council to refuse to order such election." (3rd Syllabus).

In Grinnell et al. vs. Adams et al. 34 C. S. 44, it was held:

"After the jurisdiction of county commissioners, in the matter of laying out or altering a county road, has attached by the filing of a proper petition, etc., such jurisdiction can not be defeated by any number of the petitioners afterward becoming remonstrants against the granting of the prayer of the petition." (Syllabus).

Consideration of the facts upon which the decisions in these cases were based, discloses that in the first and second cases, the withdrawal of names from the original petitions was upheld by the court only because the county commissioners and municipal council, respectively, had not taken action. In the third case cited, the commissioners had ordered the improvement before the signers of the petition attempted to withdraw their names.

In view of these expressions of the supreme court, I am constrained to hold that after the village council had adopted the resolution granting the prayer of the petition to oil the streets, the signers of said petition cannot withdraw their names.

It will be noted that section 3751 limits the period for which the director of public service in cities and the council in villages may contract for the oiling of streets, to five years. This is a general limitation upon the power of these authorities to contract whether the streets are to be oiled upon petition of abutting property owners or upon the initiative of the proper municipal officers.

From a consideration of sections 3753 and 3754, it will be observed that when an improvement is to be made upon the petition of abutting property owners, the whole cost is to be so assessed against such owners and when the improvement is made on the initiative of the municipal officers, not to exceed 50% of the whole cost can be assessed. In a case where the property owners petition, inasmuch as they are required to pay the whole cost of the improvement, they have the right under section 3753 to name the period of time during which they desire the treatment with oil to continue. This right, however, is one which may be waived by the petitioners, either expressly or by their failure to mention it in the petition, and in either event the council in villages has the power to determine the length of time such oiling is to continue, not to exceed the period named in the statute, to wit, five years. The failure of the petition to show affirmatively that the area of the road way sought to be oiled is not less than 5,000 square yards, is not of itself sufficient to invalidate the petition or to prevent council from taking action thereunder, because that fact can and should be determined by the municipal authorities themselves. If the petition did contain such a statement, it would not be conclusive upon the municipal officers and they would have a right and it would be their duty, to satisfy themselves of its correctness before proceeding with the improvement.

The method of making assessments to pay the cost of such improvement is provided by the statute and the omission of any mention of that subject in the petition is not material.

I am of the opinion, therefore, that council may legally proceed with said improvement, notwithstanding the petition is deficient in the above mentioned respects.

Yours very truly,

TIMOTHY S. HOHAN,

Attorney General.

(Miscellaneous.)

1.

SHERIFF AND DEPUTIES—COMPENSATION—SALARY—ANNUAL SALARY OF SHERIFF BASED ON OFFICIAL, NOT CALENDAR YEAR—PAYMENT OF DEPUTY ACCORDING TO TIME EMPLOYED—AGGREGATE FIXED BY COUNTY COMMISSIONERS FOR DEPUTY MAY NOT BE EXCEEDED.

The law providing for the annual salary to the sheriff contemplates that such annual salary shall be paid for the official and not for the calendar year. When the sheriff takes office, therefore, on the first Monday of January, and the term of the predecessor ends on such date, the sheriff is not entitled to extra compensation for time spent in office intervening the end of the calendar year and the first Monday of January, since the annual salary provided for contemplates all services performed by him during his official term.

Deputies and clerks, however, hold subject to the will of the head of the office and are entitled to receive pay for the actual calendar time employed. The payment of such deputies and clerks, however, should be governed by the limitations of sections 2980 and 2980-1, General Code, providing that the commissioners shall fix an aggregate sum which the head of the office shall expend for deputy and clerk hire during the year. In fixing the amount, therefore, to be so expended during the calendar year, the commissioners must proportion the amount to be expended by a sheriff for the interval between the expiration of the calendar year and the first Monday of January, when he leaves office.

COLUMBUS, OHIO, January 2, 1913.

MR. FRED M. SAYRE, *Auditor of Franklin County, Ohio.*

DEAR SIR:—In answer to your request for opinion under date of December 23, in re fees and salaries; salary of sheriff and deputies between December 31, 1912, and January 6, 1913.

Section 2823 provides:

> "There shall be elected biennially in each county a sheriff and coroner each of whom shall hold his office for a term of two years beginning on the first Monday of January next after his election."

The language of this statute fixes a statutory rather than a calendar year, that is the two years term is from the first Monday in January next after his election until the first Monday in January third after his election.

The law provides for the payment only of annual salaries and the year necessarily is the year referred to by the statute creating the office, that is from the first Monday of one January until the first Monday of the next January.

Section 2989 which provides that each county officer shall receive out of the general county fund the annual salary provided by that chapter payable in monthly installments does not in any wise modify this.

In arriving at whether or not there is anything due the sheriff you should compute the entire amount of salary drawn by him during the present term, and deduct that from the total of the annual salary provided by the statute for two years. In other words, the sheriff is not entitled to draw any compensation for services between the thirty-first day of December, 1912, and the 6th day of January, 1913, in addition to his annual salary. This same reasoning will apply to all other county officers who draw annual salaries.

As to the deputies the situation is somewhat different. Deputies and clerks hold subject to the will of the head of the office and are entitled to receive pay for the actual calendar time employed. The only thing to be watched in this matter is section 2980 and 2980-1.

Section 2980 provides that the commissioners shall fix an aggregate sum to be expended for the compensation of deputy assistants, etc.

Section 2980-1 provides that that aggregate sum shall not be exceeded and also contains the following provision:

> "When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed the county commissioners at the time of fixing the same shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

As the commissioners fix the amount under section 2980 to be expended for the calendar year beginning January 1st, next thereafter they should have apportioned the amount of money to be expended by the present sheriff for the interim between December 31, and January 6 from the total amount of money allowed for that office for the calendar year 1913. The fact that the commissioners did not act as required by statute does not in my opinion prevent them from still making this apportionment which should be done at once.

Respectfully,
EDWARD C. TURNER,
Prosecuting Attorney.

APPROVED:
Columbus, Ohio, January 2, 1913.
TIMOTHY S. HOGAN,
Attorney General of Ohio.

2.

INTOXICATING LIQUORS—CONSTITUTIONAL AMENDMENT—LICENSE —DOW-AIKEN TAX STILL TO BE PAID UNTIL GENERAL ASSEMBLY PASSES LICENSE LAWS.

Inasmuch as the constitutional amendment providing for licenses for traffic in intoxicating liquors is not self-executing, and expressly provides that it shall not be construed so as to modify, repeal or suspend regulatory laws, and as furthermore the supreme court has decided that the tax upon traffic in intoxicating liquors is but a means of providing against the evils of such traffic, it follows that the regulatory law providing for the tax is still in force and county auditors shall still continue to assess the Dow-Aiken tax and receive the same until such time as the legislature may act upon the subject of licensing the sale of intoxicating liquors.

COLUMBUS, OHIO, January 2, 1913.

HON. ROBERT E. EDMONSON, *County Auditor, Court House, City.*

DEAR SIR:—You requested my opinion on the question whether the recent amendment to the constitution repealing section 18 of the schedule to the constitution of 1851, and permitting the license of traffic in intoxicating liquors, prohibits the renewal

of payments of the Dow-Aiken tax or prevents persons desiring to commence business, before action by the legislature, from paying such tax and operating saloons.

Article 15, section 9, of the constitution of Ohio, adopted by vote of the electors on September 3, 1912, went into effect on January 1, 1913, and repealed article 15, section 9, of the constitution of 1851, known as section 18 of the schedule to the constitution. The amendment adopted September 3, 1912, provides:

> "License to traffic in intoxicating liquors shall be granted in this state and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law. * * * *"

This amendment in its terms is not self operative but will require legislation on the subject by the general assembly before its provisions shall be effective.

The said article 15, section 9, of the constitution as adopted September 3, 1912, specifically provides that nothing therein contained shall be so construed as to modify, repeal or suspend any prohibitory or regulatory laws now in force.

In the case of Anderson vs. Brewster, 44 Ohio State, 576, at page 583, the supreme court of Ohio say:

> "But the general assembly under section 18 of the schedule to the constitution, *as one of the means of providing against the evils resulting from the traffic in intoxicating liquors*, has deemed it proper to assess the business of those engaged in such traffic, and to provide that the assessment shall operate as a lien upon the real property on and in which such business is conducted."

And at page 586:

> "But not only has the general assembly authority to make this assessment upon the liquor traffic, as being invested with all the legislative powers of the state, but by the schedule to the constitution it is permitted and in duty bound, we think, to use any or all of these powers, not expressly or by necessary implication prohibited, in providing against the evils resulting from such traffic. And, if, in the exercise of its judgment and discretion, the legislature sees fit to impose a burden on the traffic in the shape of a tax, for the purpose of diminishing those evils, it does not come within the province of this court to renew its action in selecting such means."

The said amendment to the constitution providing for the granting of license to traffic in intoxicating liquors not being self-executing, but requiring legislative action before licenses shall be granted, and the said section specifically providing that it shall not be construed so as to modify, repeal or suspend "regulatory laws," and the supreme court having decided that the tax upon traffic in intoxicating liquors is but a means of providing against the evils of such traffic, it follows that in the absence of legislative action the regulatory law providing for the tax is still in force, and you are authorized to continue the assessment of the tax, and to receive the same until such time as the legislature may act upon the subject of the license.

Respectfully submitted,
CHAS. A. GROOM,
Ass't Prosecuting Attorney.

APPROVED:
Cincinnati, O., Jan. 2, 1913,
TIMOTHY S. HOGAN,
Attorney General.

40.

MEMBER OF BOARD OF COMMISSIONERS FOR ERECTION OF STATE HOSPITAL MAY RESIGN AND BE APPOINTED TO SUPERINTEND WORK OF CONSTRUCTION.

Inasmuch as section 1843, General Code, which provided that no commissioner of a benevolent institution of the state or of a county could be eligible to the office of superintendent within one year after his term as member of such board expires, has been repealed, and as there are no other statutes prohibiting the same, a member of such board of commissioners may now resign and may be appointed superintendent of a state hospital.

COLUMBUS, OHIO, January 24, 1913.

HON. J. H. SECREST, *Clerk of the board of commissioners for the erection of the Lima State Hospital, Lima, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 22, 1913, in which you request my opinion as follows:

> "The board of commissioners for the erection of the Lima state hospital requests your opinion in writing, as to the legality of the election of one of its members to the position of superintendent of the Lima state hospital; provided, of course, such member first resign as member of the board of commissioners for the erection of the Lima state hospital."

Section 1989 provides for the appointment of a superintendent by the board of commissioners for the erection of the Lima state hospital. This section is as follows:

> "The commission may appoint a superintendent, who has had at least three years' experience in the care and treatment of insane, to superintend the work of construction and open such buildings as are ready for occupancy during the progress of the work. He also shall have charge of the buildings when occupied and all patients kept therein, and, under the direction of the commissioners, may employ necessary officers and employes."

Section 1843 as it formerly stood provides as follows:

> "No trustee, commissioner, manager or director of a benevolent, correctional or penal institution of the state or of a county shall be eligible to the office of superintendent or steward, as an employe of such institution during the term for which he was appointed, nor within one year after his term expires, nor shall any officer or employe of such institution be related by blood or marriage to him."

This section was expressly repealed by the act passed May 11, 1911, 102 O. L. 211, which is the act creating the board of administration. The section was probably repealed for the reason that under the board of administration act, the powers formerly lodged in the trustees of the different benevolent institutions were vested in the board of administration.

This act creating the board of administration does not apply to the board of commissioners for the erection of the Lima state hospital, (see section 40 of the act) until such time as the Lima state hospital is ready to be operated and to receive inmates as provided by law, and until such time, old section 1843 having been expressly repealed and not re-enacted, section 1989, above quoted is the only section of the code

that now applies, and there would be no inhibition upon the commissioners electing a person as superintendent who had been one of the members of said board but who had resigned from the board prior to his election as superintendent.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

66.

HOME RULE DOES NOT DEPRIVE STATE OF POLICE POWERS WITHIN MUNICIPALITIES—BUILDING CODE EFFECTIVE THEREIN—RECOMMENDATIONS OF BILL PROVIDING FOR CONSTITUTION OF BUILDING CODE COMMISSION AND FOR AMENDMENT OF BUILDING CODE.

Section 3 of the home rule amendment to the constitution reserves to the state its police powers over municipal affairs, by providing that municipalities shall have authority to exercise any powers of local self government except such as are not in conflict with general laws. Recommendations made for an act providing for continuance of building code commission and for amendment of building code.

COLUMBUS, OHIO, February 8, 1913.

HON. THOMAS P. KEARNS, *Chairman, State Building Code Commission, Columbus, Ohio.*

DEAR SIR:—Your letter of October 25th is at hand in which you inquire:

> "Will the adoption of the Home Rule Amendment to the Constitution in cities where this plan of government is established effect in any way the jurisdiction of the state in matters relating to the enforcement of the state laws in these cities such as the State Building Code."

The answer to this is: No. that it certainly was not intended by said Constitutional Amendment to deprive the state of power to make all necessary police regulation in cities which may avail themselves of the provisions of this amendment. This I think is made clear by section 3 of the Amendment which reads as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

As to your inquiry in regard to the proper title to the head of your department, I would prefer Head, or Chief of the Department of Workshops and Public Buildings as being most comprehensive and less liable to give rise to misunderstandings, and misconceptions of the law, although when the title to the act and the act itself is considered, the matter of name may not be important.

You also state:

> "I am also submitting herewith a copy of a resolution prepared by the commission to be presented at the next session of the general assembly, which has for its purpose continuing this commission, fixing the salary of some of the appointees of that body, as well as appropriations for the expense of the

commission in conducting the work, together with a copy of the administrative section of the code which has been revised by us, both of which we would be pleased to have you examine carefully and advise us whether or not they are in proper and legal form."

The paper enclosed is an act rather than a resolution, and is in proper and legal form, but I would call attention to the following facts:

1. Section 3 provides the commission shall maintain a suitable office in the City of Columbus, Ohio, shall appoint a consulting architect, stenographer and other assistants and limits "The total cost of maintaining such State Building Code Commission" to $6,000.00 per year.

Section 6 fixes the salary of the architect at $2,500.00 and the stenographer at $720.00; other salaries to be fixed by the commission and the clerk's bond to be considered as part of expenses.

2. I find no provision as to where this office shall be maintained other than in Columbus, Ohio, nor for rent of same, and it occurs to me that it might be better to so reframe the act as to take care of these matters and make it easy for the commission to keep within the prescribed limit.

I would also suggest that section 2 of the act be made a little more specific and that it be made to read:

"Shall upon request make examination and tests and decide when a fixture, device or construction at variance with what is prescribed in the State Building Code is or is not a substantial compliance therewith; to hear applicants who have been refused permits and holders of permits that have been revoked and determine whether such refused permit should have been granted, or such revocation should be set aside; to hear and determine questions in dispute relative to the application, interpretation and enforcement of the state building code, to investigate, etc."

I would suggest this additional section:

"Section —. All orders, rulings, holdings, determinations and findings of the commission shall be final unless within sixty (60) days after making the same party aggrieved shall file a petition in the Court of Common Pleas of Franklin County, Ohio, asking that the same be set aside on account of its being unreasonable, or contrary to law in which event the enforcement of such order or ruling shall be suspended until the final determination thereof by said Court."

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

88.

REFORMATORY—JUDGE OF JUVENILE COURT MAY TRANSFER INMATES OF BOYS' HOME—REFORMATORY NOT A PRISON.

The United States District Court in the case of in re Frank Januszewski, has decided that the Ohio juvenile court act does not contravene any constitutional guarantee of the federal government.

The reformatory at Mansfield is not intended for the purpose of punishment for crime, but rather to place prisoners under suitable guardianship for proper care and discipline, until reformed or until arriving at the age of majority. The further fact that the legislature, in section 2139, General Code, authorizes the transfer to such institution from the Boys' Industrial School, of inmates of the latter place, is declarative of the fact that the State Reformatory is not to be regarded as a prison.

The fact that a person convicted of a felony may be sentenced to the reformatory does not contravene the idea that a reformatory is not a prison.

The judge of a juvenile court, therefore, does not exceed his jurisdiction in transferring a boy whom he has committed to the Boys' Industrial Home, from that institution to the State Reformatory, since the boy has not been sentenced for a crime for which imprisonment in a prison has been constituted a penalty.

COLUMBUS, OHIO, February 11, 1913.

HON. GEORGE S. ADDAMS, *Judge of the Juvenile Court of Cuyahoga County, Cleveland, O.*

DEAR SIR:—In your letter of January 25, 1913, you ask my opinion as to the legality of the commitment by you to the Ohio State Reformatory, at Mansfield, of one Sam Licker. Accompanying your letter is a communication from Mr. Ezra S. Brudno, attorney for said Sam Licker, who joins in your request. There is no disagreement between you and Mr. Brudno as to the facts in the case which have resulted in the commitment of said Licker to said reformatory. Habeas corpus is about to be instituted for his release.

The facts are substantially as follows:

> "Sam Licker, between sixteen and seventeen years old, was brought into said juvenile court as a delinquent, charged with grand larceny. On his plea of not guilty a hearing was had and the court committed him to the Hudson City farm. After serving there about six weeks the said juvenile judge, learning that the boy was afflicted with a bad disease, sentenced him to the Mansfield Reformatory without any new trial, hearing or proceeding. There was never any indictment against the boy."

You ask the following questions:

> "1. Did the court have the right, after committing the boy to the City Farm school, to change the commitment to the reformatory or any other institution?
>
> "2. Has the juvenile court a right to commit to the reformatory?
>
> "3. If the commitment is illegal should the boy be returned to the juvenile court for discipline and protection?

The question you present is one not free from difficulties:

> "1. That great care should be used before infringing upon the constitutional right of any citizen, young or old, is elementary;

"2. That at first blush many statutes may appear to be unconstitutional which, in fact, are not;

"3. Every reasonable intendment exists in favor of the constitutionality of a statute."

This proposition, as you are well aware, has been declared over and over; and notwithstanding its reiteration in about every decision ever handed down by a superior court involving constitutional questions, nevertheless the people of the state have felt that the intendments of the courts in that direction were not strong enough, and the policy of the state against holding statutes and enactments of the legislature unconstitutional was emphasized at the election held on September 3, 1912, at which time the people approved an amendment whereby all of the judges of the supreme court, save one, must concur before a statute is to be held unconstitutional. The particular effect of this is, that there should be little room for dispute about the unconstitutionality of an act before the court passing upon the question directly will hold such statute unconstitutional.

If there is any doubt whatever as to the validity of an act of the general assembly it becomes the duty of this department to hold in favor of such validity, even though if we were a court we might have concluded that the statute was not valid. I apprehend that the same rule applies to yourself when sitting as a court and not authorized to pass directly upon the constitutionality of an act; in other words, when the hearing before you does not directly raise the question of the constitutionality of the act.

The Ohio juvenile act does not contravene any constitutional guarantees of the federal government. Such was the holding of United States district court for the southern district of Ohio In Re Frank Januszewski in a decision by Hon. John A. Sater, judge of the United States court. This case is a lucid one and very valuable as an aid in the present question. The case is to be found in the Ohio Law Reporter of June 24, 1912, at page 151. The syllabus is as follows:

"Repugnancy of a state statute to the constitution of the state does not afford ground for the granting of a writ of habeas corpus by a federal court upon application of one convicted thereunder, unless the petitioner is in custody by virtue of such statute and the statute is in conflict with the Constitution of the United States.

"Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal or penal in its nature, but is an administrative police regulation of a corrective nature; and while, as in the case at bar, the commission of a crime may set the machinery of the juvenile court in action, the accused was not tried in that court for his crime, but for incorrigibility.

"Inasmuch as the privileges and immunities of a citizen of the United States do not include the right to trial by jury in a state court even for a state offense or the right to be exempt from trial for an infamous crime except upon presentment by a grand jury, it follows that jury trial is not essential in all cases to due process of law; and the commitment of the petitioner in the present case to the Boys' Industrial School for incorrigibility by the juvenile court of Cuyahoga county was not rendered invalid by reason of the fact that it was without the intervention of a jury, notwithstanding the charge in the affidavit upon which he was arrested was that he was a delinquent in that he maliciously and purposely shot M. with intent to kill.

"Nor is there merit in the contention that the petitioner was denied his rights by reason of the fact that the juvenile act does not afford opportunity for appeal or prosecution of error, inasmuch as it is the settled rule in Ohio that there can be no appeal or proceedings in error from one judicial tribunal to another unless the right thereto is given by statute."

Judge Sater in that opinion inter alia says:

> "The evidence offered in the juvenile court must have shown that he shot as charged in the affidavit, but as he was charged with and tried for a species of delinquency only, such evidence could not, by any known rule, be used in such hearing to convict him of the crime of shooting with intent to kill. The only office which it could perform was to establish the particular kind of delinquency alleged. His commitment was not designed as and is not a punishment for crime, but to place him under suitable guardianship for proper care and discipline until he is reformed, or arrives at the age of majority. Nor is the industrial school a prison.
>
> "Citing Prescott vs. State, 19 O. S., 184, and other authorities."

The last sentence quoted from Judge Sater's opinion, to wit: "Nor is the industrial school a prison," might lead one hastily reading it to the conclusion that the juvenile court could not commit a delinquent to the Ohio State reformatory, because in one sense it might be said to be a prison. Let us see what the facts are in that behalf.

The act creating the Mansfield institution is to be found in Laws of Ohio, Vol. 81, page 206, and is entitled, "An act to establish an intermediate penitentiary, and to provide for the appointment of a board of managers to locate, construct and manage the same."

Section 1 whereof is as follows:

> "Be it enacted by the general assembly of the state of Ohio, That there be established an intermediate penitentiary, for the incarceration of such persons convicted and sentenced under the laws of Ohio as have not previously been sentenced to a state penitentiary in this or any other state or country."

It is apparent that when this act was passed it was the conviction of the legislature that a certain class of convicted persons should not be sent to the penitentiary at Columbus.

Section 8 of the act discloses this:

> "The discipline to be observed in said penitentiary shall be reformatory, and the managers and warden shall have power to use such means of reformation consistent with the improvement of the inmates as they deem expedient. Agricultural labor or mechanical industry may be resorted to by said managers and warden as an instrument of reformation. The contract system of employing convicts shall not exist in any form in said penitentiary, but the prisoners shall be employed by the state, and in such way as to in the least possible manner interfere with or affect free labor."

Had the Ohio legislature stopped with this the institution at Mansfield might well be designated a prison rather than a reformatory, although the discipline of such prison was reformatory in character. The idea of imprionment predominated. The legislature acted again as found in Laws of Ohio, Vol. 88, page 418. The title of the last mentioned act is as follows: "Anact to amend an act to establish an intermediate penitentiary, and to provide for the appointment of a board of managers to locate, construct and manage the same, passed April 14, 1884, and the act amendatory thereto passed April 18, 1890, and to change the name of said institution to the Ohio state reformatory."

Section 1 whereof is as follows:

"Be it enacted by the general assembly of the state of Ohio, That there be established an Ohio state reformatory, for the incarceration of such persons convicted and sentenced under the laws of Ohio, as have not previously been sentenced to a state penitentiary in this or any other state or country."

By the last mentioned act military training is added to the other branches of instruction. The Manfiseld institution is now known as the "Ohio State Reformatory." (See division No. 4 under the head of penal institutions.)

Section 2131 provides who may be sentenced to the reformatory. It is as follows:

"The board of managers shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory if they are not known to have been previoulsy sentenced to a state prison. Male persons between the ages of sixteen and twenty-one years convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degrees shall be sentenced or transferred to the reformatory."

Section 2136 provides for the discipline and labor of persons, as follows:

"The discipline to be observed in the institution shall be reformatory and the board of managers shall employ such means for reformation or improvement as may be expedient. The labor imposed upon the inmates or industrial pursuits prescribed for them shall be such as the board directs, but the contract system of prison labor shall not be employed."

Section 2139, among other things, provides:

"The board, upon the order of the governor, shall receive from the boys industrial school such of its inmates as the governor deems advisable to transfer to the reformatory."

This last section is a strong legislative declaration in favor of the proposition that the Mansfield institution is a reformatory rather than a prison; otherwise, the governor would not have the right to cause to be transferred one from Lancaster who had not been convicted of crime to Mansfield. The fact that a court sentences to Mansfield persons who have been regularly indicted and convicted is, in my mind of no moment. The relieving of prisoners from what would otherwise be the full consequences of their violations of the law is merely the humanity of the law. It will always be kept in mind that the commitment as stated by Judge Sater, is not designed and is not a punishment for crime but to place prisoners under suitable guardianship for proper care and discipline until they are reformed or arrive at the age of majority. So long as the institution at Mansfield is a place where the inmates receive proper care, training, discipline and education, certainly no objections can be made to it as a proper place for the detention of delinquents.

It is not necessary here to go into the statutes or the decisions to disclose that the common pleas court has the right to sentence to the industrial school at Lancaster boys between certain ages who have been convicted of crime. In the eye of the law such boys are felons just as well as those who have been sentenced to the penitentiary

for burglary. Nevertheless, the boys industrial school, while in one sense a prison, is not a prison in the sense in which the people of this state, or for that matter the people of the different states of the country, understood a prison or a penitentiary to be when the various constitutions were adopted. That the legislature authorized delinquents sent to Mansfield is a legislative declaration, and delinquents are committed there not for the purpose of imprisonment but for the purpose of guardianship, and all that guardianship implies.

Section 2148-1, under the head of Ohio reformatory for women, provides:

> "The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency as hereinafter provided, and for the detention of such female prisoners as shall be transferred thereto from the Ohio penitentiary and the girls' industrial home as hereinafter provided."

This is indicative. If the contention of Mr. Brudno be correct hopeless confusion will result with reference to the Ohio reformatory for women. The Ohio state reformatory at Mansfield, the industrial school at Lancaster, and may be other similar institutions.

Now, coming to the question of fact, I should pause long before recommending that you should recede from your position in sending the delinquent to Mansfield. The Ohio state reformatory under the management of Dr. Leonard has a reputation, which from personal observation I believe is deserved, of being one of the very best managed institutions for the guardianship of the youth to be found anywhere in the world. It has received the most favorable commendation from statesmen, courts, magazine writers, newspapers and everybody who ever visited it that I have talked to. It is, to my mind, just the place for delinquent boys, whether they have been tried before a jury for crime and convicted or tried by a court as delinquents.

Your committing the boy to the state farm school was not an act functus officio. The guardianship is a running one. The court had the guardianship, standing parens patriae, and in my judgment you had a perfect right to commit the delinquent to the reformatory at Mansfield. Of course, while at the reformatory such youth is subject to all of the rules of that institution.

I would advise you to adhere to your position until the court in the habeas corpus proceedings holds to the contrary.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

155.

TAXES AND TAXATION—LEGISLATION UNNECESSARY FOR TAXATION OF MUNICIPAL BONDS UNDER CONSTITUTIONAL AMENDMENT.

Under the language of the constitutional amendment which removes the former constitutional exemption of municipal bonds, legislative enactment is unnecessary to bring about the exemption of such bonds, in view of the existing statutes providing for the taxation of bonds in general.

COLUMBUS, OHIO, April 1, 1913.

HON. S. GALE LOWRIE, *Director, Legislative Reference Bureau, Columbus, Ohio.*

DEAR SIR:—I hasten, at my earliest convenience, to acknowledge and reply to your letter of March 21, in which you request my opinion as to the necessity of legislation in order to provide for the taxation of municipal bonds, issued since Jan. 1, 1913.

In my opinion such legislation is not necessary, and such bonds are now taxable without further act of the general assembly. The constitution, article XII, section 1, originally contained no reference whatever to bonds of municipal corporations of this state. In the year 1905 the following was incorporated into this section:

> "Excepting bonds of the state of Ohio, bonds of any city, village, hamlet, county, or township in this state, and bonds issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, *which bonds shall be exempt from taxation.*

No legislation was ever had under this amendment, for the reason that it was palpably self-executing.

In 1913 this section of the constitution was again amended, so that this portion thereof now reads as follows:

> "excepting *all bonds at present outstanding* of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds *so at present outstanding* shall be exempt from taxation."

This provision simply withdraws from bonds issued after the date when it took effect, namely, January 1, 1913, the protection of the self-executing exemption adopted in 1905. Now the first sentence in the section I have referred to requires that all investments in bonds be taxed by a uniform rule at their true value in money. This provision is, of course, not self-executing. In pursuance thereof, however, numerous statutes have been passed asserting the intention of the legislature respecting the taxation of property (section 5328), and requiring the listing of specific items thereof, including investments in bonds (section 5376). It follows, I think, that these statutes automatically require the listing and taxation of all investments in bonds subject to the taxing power of the state not exempted from taxation.

I know of no principle of statutory construction which would require the legislature, for example, in doing away with an exemption which is purely statutory, to do otherwise than to repeal the exemption statute. The same principle, in my judgment, applies to the case of an amendment of a self-executing constitutional provision.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

177.

JOINT RESOLUTION MAY NOT HAVE EFFECT OF LAW—MAY NOT PROVIDE FOR PRINTING OF LAW LIBRARY CATALOGUE EVERY FIVE YEARS BY JOINT RESOLUTION.

Since a joint resolution of the general assembly may not have the binding effect of law, the general assembly may not by such method, provide for the printing of a state law library catalogue every five years.

COLUMBUS, OHIO, March 31, 1913.

HON. E. HOWARD GILKEY, *State Law Librarian, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 28th in which you request my opinion upon the following:

> "Will you please advise this office in writing, if, under S. J. R. No. 30 (98 O. L. 421) we can proceed to get out another edition of the catalogue of the supreme court law library, over five years having elapsed since the edition of 1907, and constant demands being made upon us for a later guide to the volumes now in our library."

Senate Joint Resolution No. 30 was passed April 2, 1906, and provided as follows:

> "Be it resolved by the general assembly of the state of Ohio: That the supervisor of public printing is hereby authorized and directed to have printed and bound two thousand copies of the catalogue of the law library of the supreme court of Ohio, for general distribution among the judges, members of the bar, citizens and law libraries of the state, and to pay for the same out of the appropriations for state printing and binding. The commissioners of printing shall let the contract for the printing of the catalogue, by competitive bidding among bidders who are prepared to do catalogue work, and the quality of presswork and typesetting shall be considered in awarding the contract. The books shall be bound at the state bindery in a good quality of law buckram and shall be distributed by the law librarian under the supervision of the supreme court, the expense of such distribution to be paid from the contingent expense fund of the supreme court and law library.
>
> "Resolved, further, That the law librarian shall furnish copy for subsequent editions of the said catalogue, once in every five years hereafter, which editions shall be printed, bound and distributed hereafter, in the same manner as is above specified."

Printing for the state is governed by the provisions of sections 745 to 787 inclusive of the General Code. Section 754 divides such printing into seven classes and provides for the letting of contracts therefor as follows:

> "Section 754. The printing for the state shall be divided into seven classes and shall be let in separate contracts as follows
>
> "*First Class*:—Bills for the two houses of the general assembly, resolutions and other matters ordered by such houses or either of them to be printed in bill form.
>
> "*Second Class:*—The journals of the senate and house of representatives, and reports, communications and other documents which form a part of the journals.

"*Third Class:*—Reports, communications and other documents ordered by the general assembly or either house thereof, or by the executive departments, to be printed in pamphlet form, not including the bulletins of the agricultural experiment station.

"*Fourth Class:*—General and local laws and joint resolutions.

"*Fifth Class:*—Blanks, circulars and other work for the use of the executive departments, not including those to be printed in pamphlet form.

"*Sixth Class:*—The bulletins of the agricultural experiment station.

"*Seventh Class:*—The report of the secretary of state, auditor of state, commissioner of common schools, superintendent of insurance, rail oad commission, commissioner of labor statistics, state board of agriculture, and other reports of executive officers required by law to be bound in either cloth or half law binding, not including the laws, joint resolutions and journals of the house and senate.

"The printing for each of the classes except the seventh class shall be let in one contract; the printing for the seventh class may be let in one or more contracts as the commissioners of public printing in their discretion may require."

Section 786 General Code provides for printing for the state not included in the classification made by section 754 as follows:

"Section 786. All printing and binding for the state not authorized by the provisions of this chapter shall be subject to the provisions thereof so far as practicable, and, whether provided for by law or resolution, the commissioners of public printing may advertise for proposals and let contracts therefor as herein provided."

It will be observed that section 754 does not specifically include the catalogue of the books in the supreme court law library among the documents which may be printed at the state's expense. The same may be so printed, however, in pursuance of a resolution of the general assembly by virtue of the authority found in section, 786, but it remains to be determined whether the joint resolution adopted in 1906, which directs the law librarian to furnish copy for subsequent editions of said catalogue once in five years is sufficient to authorize the printing and distribution of another edition thereof at this time, more than five years having elapsed since the printing of the last edition.

In Blanchard vs. Bissell, 11 O. S. 103, Judge Scott in speaking of a resolution said, "It is of a temporary character and prescribes no permanent rule of government."

In the case of Mullen vs. State, 114 Cal. 578, it was held: "A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law and bind others than the members of the houses adopting it."

The joint resolution adopted in 1906, in so far as it provides for the printing of said catalogue at intervals of five years has not in my judgment, the force and effect of law. The legislature is without power to pass laws by joint resolution. Provision for the periodical printing of said catalogue can be made only by statute.

I am of the opinion that you may not, upon the authority of said joint resolution, proceed to issue another edition of said catalogue. I would suggest that a new resolution be adopted at this session of the general assembly, or that a general statute be enacted providing for the printing and distribution of said catalogue at certain stated periods.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

186.

STATE GEOLOGIST MAY NOT BE ALLOWED EXPENSES AND FEES FOR ATTENDANCE AT CONFERENCES OUTSIDE OF STATE.

Inasmuch as the statutes do not impose the duty nor do they authorize the expenses incurred by a state geologist in attending conferences outside of the state, that official may not be reimbursed for the same out of public funds.

COLUMBUS, OHIO, February 14, 1913.

HON. J. A. BOWNOCKER, *State Geologist, Columbus, Ohio.*

DEAR SIR:—In your letter of February 3, 1913, you say that as state geologist you have calls to attend two types of meetings: (1). Conferences with federa, bureaus, such as the U. S. Geological Survey and the U. S. Bureau of mines; (2)l For the purpose of presenting and discussing various papers of a geological nature. which may or may not relate to the geology of Ohio.

Under these two heads, you set forth, in detail, the general object of such meetings, and the advantages which will enure to your department and the state, by these conferences, comparisons, data obtained and money saved.

You then ask: "To what extent can I draw on the appropriations for the geological survey of Ohio to meet the expense of such trips?"

Your department and office are creatures of statute law; and all matters pertaining thereto are covered in sections 799 to 810, inclusive, of the General Code.

The legislature is presumed to have fully covered all duties, powers and emoluments, which it intended should apply to this particular state department, by the above sections.

There can be no implied authority on your part, to expend money along lines not authorized in express terms of the law, and not covered by legislation appropriations.

The simple test is: Does the law provide for such expenses as you enumerate? Let us see what provisions are made for your duties, salary and expenses.

Section 802 says:

> "The state geologist shall investigate the geological structure and resources of the state. He shall determine as nearly as possible the number and extent of geological formations, and from time to time represent them upon maps and diagrams. He shall study the occurrence and distribution of useful minerals and products of such formations, determine their chemical composition and structure, investigate the soils and water supply of the state, and give attention to the discoveries of coal, building stone, natural cement, petroleum, gas and other natural substance of use and value. He may also collect and describe the fossils of geological formations of the state, but no expenditure shall be incurred therein unless authorized by the general assembly."

These are the only duties assigned to you, except such as relate to maps and reports.

Section 801 says:

> "The state geologist shall receive for his services two hundred dollars for each month for the time employed in the discharge of his official duties. Each assistant shall receive such compensation as the state geologist may allow.

The necessary traveling and incidental expenses of the geologist and assistants shall be paid each month from the state treasury on presentation of an itemized voucher approved by the governor. The compensation of the state geologist and assistants and the traveling and incidental expenses of the department shall not exceed in any year the amount appropriated by the general assembly for such purposes."

The duties of your office, as you can see from the law, are all confined within the bounds of the state; and no provision is made for attending conventions or meetings. Only *"necessary traveling expenses"* are provided for you; and these expenses, until further enlarged by statute, must be strictly confined to the duties performed by you, as enumerated in section 802. Moreover the appropriations by the legislature for your department in Vol. 102 O. L. do not specify any such items as you refer to. However beneficial such trips might be to the geological department of Ohio, there is no authority of law for incurring the expense thereof to be paid by the state. It will require legislative action to extend the law so as to include such items as valid expenses, payable by the state.

Yours very respectfully,
TIMOTHY S. HOGAN,
Attorney General.

329.

INTEREST OF STATE IN ITS CANALS—PENNSYLVANIA AND OHIO CANAL —TITLE OF STATE TO LANDS UPON ABANDONMENT—INTEREST OF UNITED STATES GOVERNMENT IN MIAMI AND ERIE CANAL.

1. In the act incorporating the Pennsylvania and Ohio Canal Company, that company was given the fee simple or whatever other title it acquired by purchases, and upon dissolution of the company, the state and other stockholders shared equally in the distribution of such possession. By the same act, lands acquired by appropriation reverted to the original owners upon the dissolution of the company.

2. For the canals acquired by the state itself, its right of way is obtained:

(a) By purchasing rights and property of a private canal company, in which case upon abandonment of the canal, the state retains only such right and title to lands as were received by the company for which the purchase was made.

(b) By securing a right of way by taking the property owned by private persons, under the act of 1825, in which case the state acquired an absolute fee simple which remained in the state upon the abandonment of the canal.

(c) As regards the Miami and Erie canal, by securing its right of way directly from the United States, in which case the acts of congress granting such right of way, granted an absolute fee simple title to the state of Ohio subject to the condition that while such canals were operated they should be public highways for the use of the government of the United States, free from any toll or charge whatever for any property of the United States or persons in their service passing along the same, provided that the canal was completed wi hin the time prescribed in this act, which proviso was accomplished.

The state, therefore, upon abandonment of canals received in this manner, retains absolute fee simple title.

COLUMBUS, OHIO, June 14, 1913.

HON. W. A. WEYGANDT, *Chairman of Canal Investigation Committee, Columbus, Ohio.*

DEAR SIR:—Your committee has submitted the following questions to this department for opinion.

"*First:*—What interest, if any, has Ohio in the old Pennsylvania and Ohio canal?

"*Second:*—In case the state abandons the canals does the land revert to the abutting property owner?

"*Third:*—What interest, if any, has the United States government in the Miami and Erie canal?"

FIRST

The Pennsylvania and Ohio Canal Company was a private corporation organized by special acts of the legislatures of Ohio and of Pennsylvania.

Its organization and dissolution is referred to in case of McCombs vs. Stewart, 40 Ohio St., 646, by Justice Dickman, on page 661, where he says:

> "The Pennsylvania and Ohio Canal Company was incorporated in the year 1827, by a special act of the general assembly of the state of Ohio, and by a special act of the general assembly of Pennsylvania, for the purpose of constructing and maintaining a navigable canal from a point on the Ohio canal, at Akron, Ohio, to the waters of the Mahoning River, and thence to meet or intersect the Pennsylvania, or Chesapeake & Ohio canal at or near Pittsburgh, Pennsylvania, etc. On account of the company's neglect to keep its canal in repair, it was, in 1872, by proceedings in the nature of quo warranto, ousted from its corporate franchises received from the state of Ohio, and dissolved, and a trustee was thereupon appointed as required by statute."

On page 663, Dickman J. further says:

> "It is obvious from the language and provisions of the act, that the legislature intended to authorize the company to acquire by donation or purchase an absolute estate in fee in lands, in aid of the objects of the corporation. Upon a dissolution of the corporation, the lands so held in fee simple would not revert to the original owners, but would remain to be disposed of for the benefit of the creditors and stockholders of the company."

On page 664, he further says:

> "But a different rule prevails where lands and easements are acquired by appropriation or proceedings in invitum. The Pennsylvania and Ohio Canal Company had the undoubted right to take and hold lands in fee, but such taking was to be by gift or purchase, and not by right of eminent domain. The right derived under section 3 'to enter upon, take possession of, and use' lands, real estate, and streams, cannot be enlarged by implication into an estate beyond the corporate existence of the company. The property being taken for public use, when that use ceases, it must revert to the owner of the soil from whom it was taken, relieved of the burden or easement which the sovereign power has imposed."

Therefore all land secured by appropriation for a right of way for the canal of The Pennsylvania and Ohio Canal Company would revert to the abutting property owners when the property was no longer used for such public purpose. Where property was secured by purchase or gift a fee could have been secured. In order to determine the title secured an examination would have to be made of the records of each county through which the canal passed.

The case dissolving this company is reported in 23 O. S. State 121. The proceedings for ouster were commenced in 1869, judgment for ouster entered and trustees appointed in 1873.

Minute Book No. 2, page 43, of the supreme court, where the case is docketed shows the appointment of the trustees but does not show that they, at any time, made a report. The original papers were also examined and no report of the trustees was found.

The legislature of Ohio at various times has passed acts in reference to this company. In 64 Ohio Laws 285 an act is set forth authorizing the company to sell or lease part or all of its right of way. The act of incorporation provided that any state could subscribe for stock in the company. It appears that the state of Ohio did hold such stock.

In the history of the canals published by the Ohio State Archaeological and Historical Society, on page 44, it is said:

> "Gov. Medill in his message of Jan. 7, 1856, pointed out that there were 2,600 miles of railroad completed in Ohio and more than that many projected and in the course of construction. He said Ohio owned stock in the Cincinnati and Whitewater Canals, $150,000; Pennsylvania and Ohio and other canals, $420,000."

The state as a stockholder would have no more right in the right of way than any other stockholder would have.

The dissolution of the company terminated its rights to conduct a canal. The state, therefore, has no right of any kind in the Pennsylvania and Ohio canal which was operated by this company.

SECOND.

It appears from the decisions that the state of Ohio acquired the right of way for its canals in three ways:

(*a*) By purchasing the rights and property of a private canal company.

(*b*) It secured a right of way by taking the property owned by private persons under the act of 1825.

(*c*) On part of the Miami and Erie Canal, its right of way was secured directly from the United States.

a

When the state secured a right of way from a canal company it took only the right which the canal company had in the land.

This is determined in case of Vought v. Railroad Co., 58 Ohio St. 123, where it is held:—

> "Lands acquired for its use by a canal company, a private corporation, organized under the act of the general assembly before the adoption of the present constitution, as the Lancaster Lateral Canal Company, 24 Laws., 71, authorizing it to acquire lands for its use by donation, grant or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired, on the abandonment of the canal, or his successor in title. The general rule being, that where lands are acquired for a public use, an easement only is taken therein, unless the taking of a greater estate, as a fee simple, is expressly authorized by law. And the rule is the same where it afterwards disposes of its canals to the state, which, under the act of 1825, takes a fee simple in lands condemned by it to the uses of its canal system."

It will be necessary therefore, in such case, to ascertain what interest the private canal company took in the land in order to determine the right of the state therein.

If the private company had only an easement, the state has only an easement and upon abandoment the land would revert to the abutting property owner. If the private company held a fee, the state also secured a fee, and in such case the land would not revert to the abutting property owner.

b.

The title acquired by the state under the act of 1825, has been often determined by the supreme court of Ohio.

In State of Ohio vs. Griftner, 61 O. S., 201, it is held:—

> "The title acquired by the state to lands which it appropriated and used in the construction and operation of canals under the act of February 4, 1825, 23 O. L., 50, is a fee simple, and the former owners of such lands, by reason of such appropriation, parted with all their title and interest in such lands.
>
> "The fee simple title to such lands remains in the state after it ceases to use such lands for canal purposes, and the statute of limitations does not run against the state as to such lands.

It is well established that the title of the state to all land appropriated or taken for the use of the canals under the act of 1825, was an absolute fee simple. The abutting property owner has no right or interest in such land. Their entire title was divested when the state took the land.

Upon the abandonment of the canal the lands secured under the act of 1825 will not revert to the abutting property owners. And the state has an absolute right to sell, lease or otherwise dispose of this land. The state can grant an absolute fee simple title thereto.

THIRD.

(c) The third branch of the second question involves also the right of the United States in the Miami and Erie canal, and the two will be considered together.

The right of way of the Miami and Erie canal from Dayton north to Toledo and of the Wabash extension, with but few exceptions, was secured direct from the United States government by virtue of two acts which will be given in full. The land or part of the right of way which did not come under these acts was located through land which had been patented by the United States prior to the grants to the state.

The act of congress of May 24, 1828, is found in Volume 8, Laws of United States, pages 118, et seq. and provided:

> "Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, that there be, and is hereby granted to the state of Ohio, for the purpose of aiding said state in extending the Miami canal from Dayton to Lake Erie, by the Maumee route, a quantity of land, equal to one half of five sections in width on each side of said canal, between Dayton and the Maumee river, at the mouth of the Auglaize, so far as the same shall be located through the public land, and reserving each alternate section of the land unsold to the United States, to be selected by the commissioner of the general land office, under the direction of the president of the United States; and which land, so reserved to the United States, shall not be sold for less than two dollars and fifty cents per

acre. *The said land hereby granted to the state of Ohio, to be subject to the disposal of the legislature of said state, for the purpose aforesaid and no other: Provided, That said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll or other charge, whatever, for any property of the United States, or persons, in their service, passing through the same; And, Provided, also, That the extension of the said Miami canal shall be commenced within five years, and completed within twenty years, or the state shall be bound to pay to the United States the amount of any lands previously sold; and that the title to purchasers under the state shall be valid.*

"Section 2. And be it further resolved, that so soon as the route of said canal shall be located, and agreed on by the state, it shall be the duty of the governor thereof, or such other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular lands to which the said state will be entitled under the provisions of this act, and report the same to the secretary of the treasury of the United States.

"Section 3. And be it further enacted, That the state of Ohio, under the authority of the legislature thereof, after the selection shall have been so made, as aforesaid, shall have power to sell, and convey the whole, or any part of said land, and to give a title, in fee simple, therefor, to the purchaser thereof.

"Section 4. And be it further enacted, That the state of Indiana be, and hereby is, authorized to convey and relinquish to the state of Ohio, upon such terms as may be agreed upon by said states, all the right and interest granted to the state of Indiana, to any lands within the limits of the state of Ohio, by an act, entitled 'An act to grant a certain quantity of land to the state of Indiana, for the purpose of aiding said state in opening a canal to connect the waters of Wabash river with those of Lake Erie,' approved on the second of March, 1827, *the state of Ohio to hold said land on the same conditions upon which it was granted to the state of Indiana, by the act aforesaid.*

"Section 5. And be it further enacted, That there be, and hereby is, granted to the state of Ohio 500,000 acres of the lands owned by the United States within the said state to be selected as hereinafter directed for the purpose of aiding the state of Ohio in the payment of the debt or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said state, in the construction of the canals within the same, undertaken under the authority of the laws of said state, now in force, or that may hereafter be enacted, for the extension of canals now making; which land, when selected, shall be disposed of by the legislature of Ohio, for that purpose, and no other; *Provided, The said canals, when completed or used, shall be, and forever remain, public highways, for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same;* And, provided further, That the said canal, already commenced, shall be completed in seven years from the approval of this act; otherwise the state of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her within that time, may have brought; but the validity of the titles derived from the state by such sales, shall not be effected by that failure.

"Section 6. And be it further enacted, That the selection of the land granted by the fifth section of this act may be made under the authority, and by the direction of the governor of the state of Ohio, of any lands belonging to the United States within said state, which may at the time of selection be subject to entry at private sale, and within two years from approval of this

act; Provided, That, in the selection of the lands hereby granted, no lands shall be comprehended which have been reserved for the use of the United States as alternate sections in the grants hitherto made, or which may be made during the present session of congress of lands within the said state, for roads and canals; And provided, That all lands so selected shall, by the governor of said state, be reported to the office of the register of the district in which the land lies, and no land shall be deemed to be so selected, 'till such report be made, and the lands so selected shall be granted by the United States to the state of Ohio.

"Section 7. And be it further enacted, That this act shall take effect, provided the legislature of Ohio, at the first session thereof, hereafter to commence, shall express the assent of the state to the several provisions and conditions hereof; and unless such expression of assent be made, this act shall be wholly inoperative, except so far as to authorize the governor of Ohio to proceed in causing selection of said land to be made previous to the said next session of the legislature.

Act of Congress, Vol. 8, Laws of United States,
pages 118 et seq.
Approved May 24, 1828.

The act granting land to Indiana and which was afterwards transferred to Ohio is found in volume 7, Laws of United States, pages 585, et seq., and provided:

"Section 1. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That there be, and hereby is, granted to the state of Indiana, for the purpose of aiding the said state in opening a canal to unite at navigable points the waters of the Wabash river, with those of Lake Erie, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States to be selected by the commissioner of the land office, under the direction of the president of the United States, from one end thereof to the other; and the said lands shall be subject to the disposal of the legislature of said state, for the purpose aforesaid, and no other; *Provided, That, the said canal, when completed, shall be, and forever remain, a public highway for the use of the government of the United States, free from any toll, or other charge, whatever, for any property of the United States, or persons in their service, passing through the same;* Provided, That said canal shall be commenced within five years and completed in twenty years, or the state shall be bound to pay to the United States the amount of any lands previously sold, and that the title to purchasers under the state shall be valid.

"Section 2. And be it further enacted, That so soon as the route of the said canal shall be located and agreed on by the said state, it shall be the duty of the governor thereof, or such other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular lands to which the said state will be entitled under the provisions of this act, and report the same to the secretary of the treasury of the United States.

"Section 3. And be it further enacted, That the said state, under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole, or any part of the said land and to give a title, in fee simple, therefor, to whomsoever shall purchase the whole or any part thereof."

Act of congress, approved March 2, 1827; 7 Laws of United States, page 585.

The assent of the state of Ohio to the foregoing grants was given at the next general assembly as shown in 27 Ohio laws, page 16, passed December 22, 1828. Said act provided:

> "Be it enacted by the general assembly of the state of Ohio, That the assent of the state of Ohio, be, and the same is hereby expressed, and declared to be given, to the several provisions and conditions of an act of the congress of the United States, approved 24th May, 1828, and entitled 'an act to aid the state of Ohio in extending the Miami Canal from Dayton to Lake Erie, and to grant a quantity of land to the said state, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas territory.' "

It will be noted that the acts of congress do not say anything about a right of way for the canal. It will be noted also, that only alternate sections are given along the line of the canal. Therefore, the right of way must necessarily pass through land given to Ohio, subject to sale by it, and also through land which was reserved by the United States.

The supreme court of the United States, in construing a similar grant to the state of Illinois, has held that the right of way was granted by implication in the reserved sections.

In Werling vs. Ingersoll, 181 U. S., 131, it is held:

> "When congress, under the act of March 2, 1827, granted to the state of Illinois alternate sections of land throughout the whole length of the public domain, in aid of the construction of a canal to connect the waters of the Illinois river with those of Lake Michigan, it also granted by implication the right of way through reserved sections, but this implication would not extend to ninety feet on each side."

The act under consideration in the above cited case is found in volume 7, Laws of United States, page 582. This act also contained a clause that the canal when completed should remain a public highway free of toll to the United States. The proviso contained in said act was as follows:

> "Provided, That the said canal, when completed, shall be, and forever remain, a public highway for the use of the government of the United States, free from any toll, or other charge, whatever, for any property of the United States, or persons in their service, passing through the same."

This provision is the same as that contained in the above quoted acts granting land to the states of Ohio and Indiana.

The proviso in the grant to Ohio will be here repeated for convenience. Said proviso is as follows:

> "Provided, That said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll or other charge, whatever, for any property of the United States, or persons in their service, passing through the same; And, Provided, also, That the extension of the said Miami canal shall be commenced within five years, and completed within twenty years, or the state shall be bound to pay to the United States the amount of any lands previously sold; and that the title to purchasers, under the state shall be valid."

This proviso is taken from section 1 of said act. A similar proviso is found in section 5 of said act, and also in section 1 of the act granting the land to the state of Indiana. The provisos are similar and are inserted for the same purpose.

It will be observed that there are two provisos, in said provision. The first one has reference to the canal being a public highway to be used free of charge by the United States, and the second is a limitation upon the time in which the canal must be started and completed.

The right, if any, of the United States in the land over which the canal is constructed must come by virtue of the first proviso. The act does not specifically provide for a forfeiture of the land if the state fails to maintain the canal as a public highway. There is a conditional clause to the second proviso and that is that the state shall be bound to pay for the land sold if the canal shall not be completed within the time specified. This provision limits the second proviso only, and does not limit the first. The canal has been completed and the state has complied with the second proviso.

In People ex rel. vs. The Lake Superior Ship Canal, 32 Mich. 233, it is held:

> "The right of the respondent company, under the legislation of congress and the state legislature in that regard, to the possession of the Portage ship canal, and to collect the tolls, is considered and sustained, as against the claim of the state as trustee of the United States.
>
> "The provision of the act of congress requiring the canal to be a public highway free of toll for United States vessels is held not to evince a purpose to create by the act a trust in the possession of the state for the United States. Similar provisions for free right of passage in United States land grants for railroads have never been construed as making the roads government roads."

The act of congress under consideration in the above cited case, contained this provision as shown on page 236 of the report:

> "And the said canal shall be and remain a public highway for the use of the government of the United States free from toll or charge upon the vessels of said government or upon vessels employed by said government in the transportation of any property or troops of the United States."

It will be observed that the court holds in the above case that the state does not hold the canal in trust for the United States. But the court does not touch upon the rights of the United States if the canal should be abandoned.

The rule of construction of grants of this nature is stated in Leavenworth L. & G. Railroad Co. vs. United States, 92 U. S. 733, as follows:

> "The rule announced in the former decisions of this court, that a grant by the United States is strictly construed against the grantee, applies as well to grants to a state to aid in building railroads as to one granting special privileges to a private corporation."

Rules of construction apply only where there is doubt as to the meaning of the grant or to the extent thereof.

The grant under the act of congress now under consideration is not doubtful. The doubt, if any, arises in the proviso.

A proviso is usually a limitation upon a grant or general provision of a statute The proviso will not be extended beyond its plain terms.

An example of a proviso by the federal government which amounts to a right of forfeiture is found in a grant to Illinois by act of March 30, 1822, as set forth in 181 U. S. 131, supra. at page 132. Said provision reads:

"Section 1. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That the state of Illinois be, and is hereby authorized to survey and mark through the public lands of the United States the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; and ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for, and the use thereof forever shall be, and the same is hereby vested in the said state for a canal, and for no other purpose whatever, on condition, however, that if the said state does not survey and direct by law said canal to be opened, and return a complete map thereof to the treasury department within three years from and after the passing of this act, or if the said canal be not completed, suitable for navigation, within two years thereafter; *or if said ground shall ever cease to be occupied by, and used for, a canal, suitable for navigation, the reservation and grant hereby made shall be void and of none effect.*"

Illinois did not act under this grant and afterwards congress made another grant, which contained a proviso similar to the one contained in the Ohio grant. This is the act which is quoted from and is construed in the case of Werling vs. Ingersoll, 181 U. S. 131, supra.

If the United States had desired to retain a right of forfeiture it would have so stated in plain and explicit terms. The right secured to the United States by the first proviso is a right to free tolls. It is not a condition that the state shall so maintain the canals forever as a public highway.

Forfeitures are not favored in law. Although grants from the government are construed in favor of the government, at this late date the courts would not favor a right of forfeiture under the doubtful terms of the proviso now under consideration, and which contains no specific right of forfeiture.

The difference in the terms of the two grants to Illinois shows a change of purpose in the federal government and a more liberal policy toward the states in aiding them in the construction of canals.

It is my opinion that the United States government has a right to free tolls on the canals so long as they are maintained as public highways; that it has parted with all its right or interest in the land used for the canal; and that the state has an absolute title in fee to the right of way of the Miami and Erie canal secured from the United States government.

The state of Ohio has the same right to dispose of this part of the canal system as it has to dispose of the part secured under the act of 1825.

Reference has been made to the Cleveland Terminal decision. This case is found in 85 Ohio St. 251, and is entitled, The Cleveland Terminal & Valley Railroad Co. vs. The State.

The syllabi of this case read:

"In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.

"When land is granted to a city upon a valuable consideration to be used for streets and other purposes, the title will not, in the absence of an express stipulation to that end, revest in the grantor because the land is subsequently used for street and railroad purposes.

"When the governor, in the exercise of authority expressly conferred upon him by statute, grants to a municipality "all the interest of the state" in lands which it owns in fee to be used for streets and other purposes, the municipality, reserving the right to use the same for street purposes without compensation, may execute a valid lease of such lands to a railroad company for its general purposes."

The land in controversy in the foregoing case was not a part of the Miami and Erie canal, and it is no aid in determining the right of the United States in the Miami and Erie canal.

Respectfully,
TIMOTHY S. HOGAN,
Attorney General.

523.

REVALUATION OF PROPERTY DESTROYED BY FIRE SHOULD BE MADE BY COUNTY AUDITOR.

When buildings are destroyed by fire, the board of review has no authority to make deduction on the tax duplicate unless acting in an appellate capacity from the decision of the county auditor. The application for relief should be made to the county auditor, who should act on the advice of the prosecuting attorney.

The county auditor should not take account of insurance money in making revaluation.

COLUMBUS, OHIO, September 10, 1913.

HON. ALBERT J. DWYER, *Special Counsel, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 4, requesting, on behalf of the board of review for the city of Dayton, my opinion as to the following question:

"When a building is destroyed or injured by fire may the board of review, in making deductions on the duplicate, set off against such deductions the amount of insurance money received by the owner on account of his loss? The particular destruction took place during the March, 1913, flood."

The board of review, let me say, in the first instance, has, by virtue of section 5578, General Code, authority to act in case of destruction of buildings by fire only in the event that the assessor of personal property fails at the time of taking the lists to return the proper reduction. As the section cited stood as originally codified, indeed, there was no recourse whatever, inasmuch as section 5593, General Code, applies only to personal property, and section 5583, General Code, is not exactly a grant of authority; and inasmuch also as section 5578, by undoubted inadvertence, referred only to the destruction of "new structures." This section still remains unamended. It originally afforded the only means of taking from the duplicate property destroyed or injured between the first day of October in one year and the second Monday in April in the succeeding year, which, unfortunately, includes the period during which the Dayton flood occurred.

Section 2591, General Code, originally provided a distinct method (with which, however, the board of review has nothing whatever to do) of taking from the duplicate for a current year property destroyed after the second Monday in April and before the first day of October. This statute was first enacted for the purpose of making

deductions upon a duplicate the lien of which has already attached. In order that the county auditor might have authority to act under it, however, the destruction must have occurred between the times specified, and this fact was jurisdictional. This section wa amended, 103 Ohio Laws, 562, and at present reads as follows:

> "When after the second Monday in April and before the first day of October in any year it is made to appear by the oath of the owner or one of the owners of a building or structure and by the affidavit of two disinterested persons, resident of the city, village or township in which the building or structure is or was situated, that such building or structure has been injured or destroyed by fire, flood, tornado or otherwise, since the second Monday in April of the current year, the county auditor shall deduct from the tax list and duplicate the value of such building or structure or such part of the value thereof as shall correspond to the extent of the injury; *and when it is made to appear in the manner herein provided that said building or structure has been so injured or destroyed since the first day of October of any year and prior to the first day of April of the succeeding year, the following deductions shall be made upon the taxes due in the following June, being the second one-half of the taxes for the current year, to wit:* When such injury or destruction occurs during the month of October of any year, the second one-half of the taxes on the amount deducted for such injury for the current year shall be entirely remitted; if in the month of November of any year, five-sixths of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted; if in the month of December of any year, four-sixths of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted; if in the month of January, three-sixths of the second one-half of the taxes for the current tax year shall be remitted; if in the month of February, two-sixths of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted; if in the month of March, one-sixth of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted."

By reason of this amendment the relief which was necessary to meet the situation presented by the floods and the attendant fires was extended, for under the statutes as they formerly existed if a building was destroyed between the first of October and the following April, unless it were a "new structure," no alteration in the tax duplicate could lawfully be made on that account.

It being true that section 2591 provides the only method for relief, the provisions of the other sections referred to may be ignored.

Upon consideration of this section it appears, as already observed in connection with the section in its original form, that the board of review has no authority in the premises unless, possibly, when acting in an appellate capacity from a decision of the county auditor. The application for relief should be made to the county auditor, and he should act, of course, under the advice primarily of the prosecuting attorney.

Being cognizant, however, of the customs of city boards of review and the manner in which they work in co-operation with their respective county auditors I have no hesitancy in stating my view as to the question involved. In my opinion the phrase "the extent of the injury" as used in the section means substantially the same thing as the phrase found in section 5578, for example, which is as follows: "How much less valuable such tract or lot is in consequence of such destruction." That is to say, I do not believe that it is competent for the county auditor to take cognizance of the payment of insurance money in revaluing the real estate and making the necessary deductions. The insurance money, when paid, becomes the "personal property" of

the owner, with which he is at liberty to do anything he pleases. He may erect another building in place of the one which has been destroyed, or he may decide to sell the land on which the building was located, in the condition in which it was found after the destruction. In either event he is possessed of the insurance money in some form or another not necessarily related to the real estate as such; that is, he may have it in the form of money in bank, in which event he would have to return it under the caption of "moneys" in listing his personal property; he may have invested the proceeds in non-taxable bonds, in which event the bonds themselves could not be taxed, and he would only be required to list the time during the year in which he had the fund in taxable form.

The thing listed on the duplicate as "real estate," under the section of the General Code pertaining to such listing, which I need not quote here, is the property itself as it lies or stands before the eye of the assessing officer. No deductions from the value of such property are allowable under our laws for liens thereon, such as mortgages and the like; conversely, no additions to the value of such property are permissible on account of the fact that the owner thereof may have received money as indemnity for the destruction of what was formerly a part thereof.

In short, the phrase "extent of the injury," as used in the statute, means in my opinion the injury to the real estate itself and not the injury to the owner.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

548.

THE PROSECUTING ATTORNEY IS NOT PERMITTED TO RECEIVE SALARY FOR COLLECTING THE DOW-AIKEN TAX, AS THIS IS A PART OF HIS OFFICIAL DUTY.

Where the county commissioners of Licking county on December 7, 1909, adopted a resolution employing the prosecuting attorney as counsel in suits arising out of the collection of the Dow-Aiken tax at a salary of $15.00 per suit, the prosecuting attorney so acting is not entitled to receive this compensation as this is already his official duty to act as attorney for the county in these suits.

COLUMBUS, OHIO, October 9, 1913.

HON. J. HOWARD JONES, *Newark, Ohio.*

DEAR SIR:—I have your letter of August 6, 1913, in which you inquire:

> "Enclosed please find copy of resolution by the county commissioners of this county, by virtue of which Mr. P. B. Smythe, former prosecuting attorney, claims certain attorney fees. Attached you will also find citations referred to me by Mr. Smythe. Will you kindly advise me if these fees can be legally paid Mr. Smythe?"

The resolution to which you refer reads:

RESOLUTION.

> "Whereas, C. L. V. Holtz, treasurer of Licking county, Ohio, and C. L. Riley, as auditor of Licking county, Ohio, have been made defendants in various suits now pending in the Common Pleas court of said county, wherein

it is sought to enjoin said officials from collecting the Aiken liquor tax from the plaintiff in said actions, and whereas, said officials have requested this board to be permitted to employ counsel therein, and that said counsel fees be fixed.

"It is therefore resolved that said treasurer and said auditor be authorized and directed to employ Phil B. Smythe, prosecuting attorney for said county, to defend them in each of said suits, and that said Smythe be allowed and paid a fee of $15.00 in each case.

"Provided, however, that if it shall hereafter be determined that it is the duty of said Smythe to render said services as such prosecuting attorney, without extra compensation, then said sums or sum shall not be payable by reason thereof."

The references and citations referred to are section 1274, R. S., 5700 G. C. and State vs. Stafford, 11 O. D. 720.

The answer to your question depends upon a consideration of the above numbered sections. Section 845, R. S., and the determination as to whether it was a part of the duty of Mr. Smythe, as prosecuting attorney, to defend the suits in question.

The proviso found at the close of the resolution, as above copied, suggests the idea that there was at the date of its passage, some doubt in the minds of the commissioners whether it was not the duty of the prosecutor to defend said suits.

Section 5700, G. C., reads:

"When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the public revenue, such treasurer, auditor or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts and organizations entitled thereto."

This section was formerly section 2862, R. S., which was the same in so far as the matter under consideration is concerned, as section 5700.

It will be observed that this is a re-imbursement statute, and does not authorize the commissioners to employ counsel, nor require their approval of an employment made by a treasurer or auditor.

Section 1274, R. S., as amended March 31, 1906, and found in 98 O. L. 160, reads in part:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and any and all of them may require of him written opinions or instructions in any matters connected with their official duties; *he shall also perform all duties and services as are required to be performed by legal counsel under section 845* and he shall further be the legal adviser for all township officers, and no county or township officer shall have authority to employ any other counsel or attorney at law."

The language—"he shall also perform all the duties required to be performed by legal counsel under section 845" calls for inspection of said section as in force at that time. It reads in part:

> "Whenever the board of county commissioners of any county deems it advisable, it may employ legal counsel and the necessary assistants upon such terms as it may deem for the best interests of the county, for the performance of the duties herein enumerated. Such counsel shall be the legal adviser of the board of county commissioners and the board of control, where there is such board, and all of other county officers, of the annual county board of equalization, the decennial county board of equalization, the decennial county board of revision, and the board of review; and any of said boards and officers may require of him written opinions or instructions in any matters connected with their official duties. He shall prosecute and defend all suits and actions, which any of the boards above named may direct, or, to which it or any of said officers may be a party, and shall also perform such duties and services as are now required to be performed by prosecuting attorneys under sections 799, 1277, 1278a and 3977 of the revised statutes, and as may at any time be required by said board of county commissioners."

Section 845 finds its way into the revision as sections 2409, 2412, General Code, in all of which reference to section 845 is omitted for the very obvious reason that the duties of counsel employed under section 845, and referred to in the amended section 1274, is carried into sections 2917 and 2918 of the General Code, which fact is of no influence in solving the question presented, further than as showing that the duties of prosecuting attorneys, as fixed by the act of March 31, 1906, have been carried into the General Code.

I think it perfectly clear from an inspection of sections 845 and 1274, of the revised statutes, in force when this resolution was passed, and as above set forth, that it was the duty of the prosecuting attorney as such, to defend the suits in question; that they are covered by the proviso attached to said resolution and that Mr. Smythe is not entitled to receive the $15.00 per suit mentioned in said resolution, his contract having been entered into December 7, 1909.

Of course, quite an argument might be made as to the effect of section 2862 R. S., now 5700, being in force during all of said time, and whether it was or was not repealed by implication to a very large extent, at least by the amendment of section 1274, supra, but it is not thought to be necesssry, as the provisions of that amendment and the intention of the legislature in making them are believed to be too plain to call for explanation.

Yours very truly,
TIMOTHY S. HOGAN,
Attorney General.

563.

THE LANGUAGE OF THE STATUTE SHOULD BE FOLLOWED IN PUBLISHING THE CITATIONS FOR NON-RESIDENT PARENTS THAT COME INTO JUVENILE COURT.

In publishing citations for non-resident parents that come into juvenile court as provided in section 1648, General Code, the language of the statute should be followed and the citation rather than an abstract of its contents, and the time and place of the hearing should be published.

COLUMBUS, OHIO, October 8, 1913.

HON. GEORGE S. ADDAMS, *Judge of Juvenile Court, Cleveland, Ohio.*

DEAR SIR:—I have the letter from your deputy in which it is asked:

> "Will you kindly render us an opinion on section 1648, page 870, 103rd Ohio Laws, as regards publication of citation for non-resident parent of children that come into juvenile court. We have prepared a notice which seems to cover all requirements and upon which the newspapers have given us a flat rate of one dollar ($1.00) for publishing. Section 1648 says: 'The clerk shall cause such citation to be published once in a newspaper of general circulation.' Now, if we cause a copy of the citation to be published the newspapers want $2.00 and more for publishing same. Will you kindly let us know whether we are required to publish the citation in full or will the short form do?
>
> "As to payment for said publication, will we be required to use a voucher for payment or can we use a voucher in the form of subpoena vouchers which carry a stub giving title and numbe of case and which would be more convenient and would also give a check on all publications made an l paid for?"

Section 1648, General Code, as found on page 870 of 103 Ohio Laws, in so far as your query is concerned, reads:

> "Whenever it shall appear from affidavit that a parent or guardian or other person having the custody of such child resides or has gone out of the state or that his or her place of residence is unknown so that such citation cannot be served on him or her, the clerk shall cause such citation to be published once in a newspaper of general circulation throughout the county, and published in the county, if there be one so published. The citation shall state the nature of the complaint, and the time and place of the hearing, which shall be held at least two weeks later than the date of the publication; and a copy of such citation shall be sent by mail to the last known address of such parent, guardian or other person having custody of such child, unless said affidavit shows that a reasonable effort has been made without success to ascertain such address."

From this it is quite apparent that the legislature intended to give the parent, guardian or other person having custody of the child in question very full information as to the time and place of the hearing and nature of the charge.

Inasmuch as the only question made goes to the cost of publication, only amounts to one dollar in each case, and in the language of the statute, "the clerk shall cause such citation to be published, etc.," is plain and unequivocal, I advise you that it is best and safest to follow the language of the act, and publish the citation rather than an abstract of its contents showing the nature of the charge and the time and place of hearing.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

589.

THE ONLY BORROWING POWER WHICH MAY BE LAWFULLY EXERTED TO MEET DEFICIENCIES IN THE REVENUES OF A MUNICIPALITY IS THAT POWER PROVIDED FOR IN SECTION 3931, GENERAL CODE.

Where the village of Ft. Recovery, Ohio, is indebted to the board of public affairs in the sum of $2500.00 for water and power furnished for said village, this indebtedness is simply a deficiency in the revenues of the municipality which should be met through the exercise of its taxing powers. The only borrowing power which may be lawfully exerted in the premises is that provided in section 3931, General Code.

COLUMBUS, OHIO, October 10, 1913.

HON. B. A. MYERS, *Legal Counsel for the village of Ft. Recovery, Celina, Ohio.*

DEAR SIR:—In your letter of October 6, receipt whereof is acknowledged, you submit for my opinion the following question:

> "The village of Ft. Recovery, Ohio, is indebted to the board of public affairs of the village of Ft. Recovery, Ohio, in the sum of about $2,500, which debt is due to a shortage of funds under the tax limitation law. The village will be compelled to provide funds in some way to pay their board of public affairs for its light and water services, and to maintain their electric light and water plant, or otherwise it will be compelled to close down their plant which would cause a great amount of trouble with reference to insurance policies and otherwise.
>
> "Can the village council, under section 4506 of the General Code of Ohio, or under sections 3912 et seq., issue bonds or borrow money for the payment of this debt?"

I assume that what you term the "indebtedness" of the village to its board of trustees of public affairs consists of charges made by the board against the village for water furnished to the public places, and for lighting the streets, alleys and public places of the municipality. This is the only charge which the trustees would have authority to make against the village. That is to say, there is at least a serious question as to whether or not the trustees may operate the plant as a whole at a loss, and thus charge the general taxpayers for the electric current and water furnished to private consumers.

Assuming, then, that the deficiency exists by reason of the inability of the village within its tax limits, to pay the sums lawfully charged against it for the service furnished to the village as such, I am of the opinion that neither of the sections to which you refer authorizes the borrowing of money for the purpose of supplying this deficiency.

Section 4506, General Code, which I need not quote, authorizes the levy of taxes for sinking fund purposes. Section 3912, General Code, creates a general power to borrow money but is in itself in the absence of supplementary authority in the same chapter, not sufficient to invest a municipality with power to borrow money for a designated purpose.

The so-called obligation of the village is, at the most, not a funded one, to be met directly through the medium of the sinking fund levies. In point of fact it does not amount to a technical indebtedness at all. It is simply a deficiency in the revenues of the municipality, which should be raised through the exercise of its taxing power to meet a specific municipal purpose. Such being the case, the only borrowing power which may lawfully be exerted in the premises, in my opinion, is that provided for by section 3931, General Code, which is as follows:

"Council may issue deficiency bonds in such amount and denominations, for such periods of time, not to exceed fifty years and at such rate of interest not to exceed six per cent. as it deems best when in the opinion of council it is necessary to supply a deficiency in the revenues of the corporation. The total amount of deficiency bonds issued by a corporation, outstanding at any time, shall not exceed one per cent. of the total value of all property in the corporation as listed and assessed for taxation. The issuance of such bonds shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation voting upon such question at a regular or special election to be provided for by council."

The conditions and limitations upon the exercise of the power in question are explicitly stated in the section quoted.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

597.

A COUNCIL OF A MUNICIPALITY IN THE STATE OF OHIO HAS NO AUTHORITY TO CONTRACT WITH THE COUNCIL OF ANOTHER MUNICIPALITY TO FURNISH CURRENT FOR THE STREETS OR FOR THE CITIZENS OF THE SECOND MUNICIPALITY.

Where the village of Plymouth, Ohio, has installed an electric lighting system and is desirous of furnishing current to the village of Shiloh, the village of Plymouth is without authority to do this, as section 3618, General Code, applies only to the establishment, maintenance and operation of the municipal lighting, power and heating plants, and furnishing such power, light or heat by the municipality to the citizens thereof and does not apply to furnishing it to another village.

COLUMBUS, OHIO, October 28, 1913.

HON. B. F. LONG, *Legal Counsel, Shilo, Shelby, Ohio.*

DEAR SIR:—We are in receipt of your letter of April 24, 1913, submitting for my opinion the following questions:

"Shilo is a village situated four miles from Plymouth, another village in Ohio. Plymouth is installing an electric light plant, and is desirous to furnish current to Shiloh for her streets, and also for her citizens, and is desirous to enter into a contract with Shiloh by which Shiloh is to erect poles and string wires throughout the corporate limits of Shiloh, and then extend the light line, erect poles, etc., from Shiloh to the corporate line of Plymouth.

(1) "Can Shiloh and Plymouth enter into such a contract and legally incur the indebtedness necessary therefor?

(2) "If Shiloh can enter into this contract with Plymouth, could the necessity of electric lights be declared an 'emergency measure' and not be within the meaning of the Crosser Act?"

In answer to your first question I beg to state that it has been held repeatedly by the supreme court of this state that a municipal corporation has only those powers

which are expressly granted to it and such others as are necessary to carry out the the powers expressly granted. In support of this statement I cite the following cases:

Collins vs. Hatch, 18 Ohio, 523.

Revenna vs. Penn Co., 45 O. S., 118.

Gas and Water Co., vs. Elyria 57 O. S.. 374.

Unless there can be found in the statute specific authority for Plymouth and Shiloh to enter into the contract as stated by you, the councils of the respective municipalities would have no authority to make it.

Section 3618, General Code, to which you refer, and by the terms of which you suggest that such a contract may be authorized by implication, is as follows:

> "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

This section authorizes the establishment, maintenance and operation of the municipal lighting, power and heating plants; and before its amendment, 99 vol. Ohio Laws, 34, it was held by our courts that it contained no authority for the furnishing of electricity to citizens by a municipal corporation. I am, therefore, of the opinion that section 3618 applies only to the establishment, maintenance and operation of the municipal lighting, power and heating plants and the furnishing of light, heat and power by such municipality to the citizens thereof, and does not authorize the council of a municipality to contract with another municipality, either to purchase from or to furnish to such other municipality light, heat or power.

Sections 3982 and 3984, General Code, to which you refer in your letter, provide substantially that a municipal corporation may contract with a company for electric lights and give such municipality the power to establish by ordinance, the price at which such light shall be furnished to the inhabitants of the municipality; and section 3994 authorizes a municipal corporation to contract with any company for electric lights, natural and artificial gas, for the purpose of lighting or heating the streets, squares and other public places and buildings in the incorporated limits. The companies referred to in these sections could not, by the most liberal interpretations of the statutes, be construed to mean municipal corporations, and I am, therefore, of the opinion that there is nothing in these sections that would authorize a contract such as contemplated by the villages of Shiloh and Plymouth.

Section 3973, General Code, to which you refer, applies only to municipal waterworks and can not include, by implication, contracts between municipalities for light.

In the case of *Wright vs. The village of Kennedy Heights, 25 C. C. Rep. 409*, it is held by the court that contracts to be authorized by this section must be strictly within the terms thereof. Therefore, I will hold that the villages of Shiloh and Plymouth have no authority to enter into this proposed contract.

Since your first question has been answered in the negative, the question as to whether or not the necessity of electric lights, under the proposed contract, could be declared an emergency measure and not be within the meaning of the Crosser Act, does not require answer, as the request for an opinion thereon is made conditional upon an affirmative answer of the first question.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.

602.

WHERE THE INDUSTRIAL COMMISSION AND ITS DEPUTY IN CHARGE OF THE DEPARTMENT OF WORKSHOPS, FACTORIES AND PUBLIC BUILDINGS CONDEMN THE USE OF A PUBLIC SCHOOL BUILDING FOR SCHOOL PURPOSES, THE ORDER MUST BE COMPLIED WITH, AND AN EMERGENCY IS CREATED.

Where the industrial commission and its deputy in charge of the department of workshops, factories and public buildings condemn the use of a public school building for school purposes, the order must be complied with, and an emergency is created.

If bonds are issued by the board of education, with the approval of a majority of the electors, at a special election, the tax levies necessary to carry these bonds may be made outside of the limitations of the Smith One Per Cent. Law. Such is the effect of the amendment to section 5649-4, General Code.

COLUMBUS, OHIO, November 7, 1913.

HON. W. V. ANDERSON. *Legal Counsel for the village of Bridgeport, Bridgeport, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 14, embodying a copy of an order addressed to the board of education of the Bridgeport school district by the industrial commission of Ohio and its deputy in charge of the department of workshops, factories and public buildings, relative to a certain school building in the Bridgeport school district, the essential portion of which is as follows:

> "Do not use this building for school purposes on account of the bad sanitary conditions of same; to be complied with at the close of the present term of school."

You ask whether the issuance of this order would entitle the board of education of the Bridgeport school district to take action under section 7630-1, General Code and otherwise under the act passed April 8, 1913, 103 Ohio Laws, 547. You also ask whether or not, in the event that a favorable vote of the electors of the school district might be obtained by the board of education, under favor of the section just cited, a levy in excess of fifteen mills of the tax valuation of the school district might lawfully be made to retire bonds which would, in that event, be issued.

Your question invites consideration of the act above cited, which provides in part as follows:

> "Section 7630-1. * * * if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds * * * and to provide a sinking fund * * * such board of education shall annually levy a tax as provided by law.

"Section 5649-4. For the emergencies mentioned in sections * * * 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

It appears on the fact of Section 7630-1 that in order to entitle a board of education to proceed thereunder, and to exercise the power thereby conferred, the following conditions must exist:

1. The use of the school house for its intended purpose must be prohibited by an order of the chief inspector of workshops and factories (now the industrial commission, which has succeeded to the powers and duties of that officer).

2. The board of education must be without sufficient funds to put the building in proper shape or to construct a new one.

3. The board must be satisfied that it is not practicable to secure the necessary funds because of the limits of taxation. This condition would exist whenever the tax limits were in dange of being exceeded by levies at the maximum rate or amount necessary for the current needs o the schools, and the discharge of funded obligations already incurred, so that it would be difficult, if not impossible, to float the necessary bonds by proceeding under section 7625, et seq., General Code.

I take it that your question assumes the existence of the above mentioned conditions, and raises the point only as to whether or not the order copied in your letter is a fulfillment of the first condition.

In my opinion it is: The prohibition contained in the order, as quoted, is a positive one, qualified only by the statement that it is not to be operative until the end of the present school term. An "emergency" is none the less created by this order because in order to have the building repaired or a new one erected in time for the succeeding term of school it would be necessary to commence proceedings to secure the necessary funds within a very short time.

As already pointed out the industrial commission now has succeeded to all the powers and duties of the chief inspector of workshops and factories so that the order is in compliance with the statute in this particular.

You also ask as to whether or not if bonds are issued by the board of education with the approval of a majority of the electors at a special election the tax levies necessary to retire these bonds may be made outside of the limitations of the Smith one per cent. law.

In my opinion the answer to this question is in the affirmative. Such is the effect of the amendment to section 5649-4. All that is mentioned in that section is outside of the fifteen mill limitation as well as all other limitations of the act as will more fully appear from the provision of section 5649-5b which as amended 103 Ohio Laws 57 provides for the fifteen mill limitation as follows:

"* * * in no case shall the combined maximum rate for all taxes levied in any year in any county city, village, school district, or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

The omission of section 5649-4 from the catalogue of sections mentioned in section 5649-5b cannot be ascribed to any intention other than to exclude the emergency levies provided for by the last named section from the operation of the fifteen mill limitation.

Very truly yours,
TIMOTHY S. HOGAN,
Attorney General.

603.

THE ASSISTANT LIBRARIAN, DOCUMENT CLERK, LIBRARY ASSISTANT, SUPERINTENDENT OF TRAVELING DEPARTMENT, AND THE ASSISTANT IN THE TRAVELING DEPARTMENT ARE REQUIRED TO GIVE BOND IN THE SUM OF $1,000.00.

Under the provisions of section 794, General Code, the state librarian shall give bond in the sum of $10,000.00 to the state, the assistant librarian, document clerk, library assistant superintendent of the traveling department, and assistant in traveling department shall give bond in the sum of $1,000.00. The library organizer and assistant, by reason of section 794, General Code, and the stenographer, messenger and janitor, are not required to give bond.

COLUMBUS, OHIO, October 23, 1913.

HON. J. H. NEWMAN, *State Librarian, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 20th wherein you submit the following for my opinion:

> "Would you kindly advise us as to the application of section 790 to the employees of the Ohio State Library? The section referred to reads as follows:
>
> "Section 790 (Bond of librarian and assistants.) Before entering upon the discharge of the duties of his office, the librarian and each assistant shall give a bond to the state, the former in the sum of ten thousand dollars and the latter in the sum of one thousand dollars, with two or more sureties approved by the board of library commissioners, conditioned for the faithful discharge of the duties of his office. Such bond, with the approval of the board and the oath of office indorsed thereon, shall be deposited with the treasurer of state and kept in his office.
>
> "Heretofore, it appears, no one was required to give bond but the librarian and his first assistant. The pay-roll hereto attached will give you an idea of the positions held by the various employees. By consulting it, perhaps, you will be the better enabled to give an opinion. You will notice that some are recorded as clerks, others as stenographers, janitors and messengers."

Attached to your inquiry you give the positions that are held by the various people in your department as follows: Librarian, one assistant librarian, one document clerk, nine library assistants, one superintendent traveling department, five assistants traveling department, one janitor traveling department, one library organizer, one assistant library organizer, one stenographer, one messenger and janitor and one janitor.

The sections to which I would call your attention in this opinion are as follows: Sections 789, 790 and 798-2 General Code.

Section 789 General Code provides that the state board of library commissioners shall have the management of the state library and further that it shall appoint and remove the librarian with the consent of the Governor, and with the consent of the librarian shall appoint the assistants who shall serve during the pleasure of the board.

Section 790 General Code provides that the librarian and each assistant shall give a bond for the faithful discharge of his duties.

Section 792 General Code provides that the librarian shall have charge of the library and give personal attendance therein and attention thereto.

Section 794 General Code provides that the library commissioners may appoint a library organizer.

Section 798-2 General Code provides that the library commissioners shall appoint an assistant who shall be known as the legislative reference librarian, and is authorized to appoint such other assistants as the work of that department may require.

These are the only sections that deal with the question of library assistants. It is to be noted, however, that the statutes refer to assistants to the librarian and not to assistant librarians. That is to say, any position that could be considered as an assistant in the library would be within the purview of section 790 General Code and is not necessarily confined to what might be officially termed "assistant librarian." In fact there is no statutory position as "assistant librarian."

From an interview had with you in reference to this matter I am informed that the person designated "document clerk" in your department is in fact a library assistant in charge of the document room, and consequently I am of the opinion that such clerk would be considered as a library assistant. The same is true as to the superintendent of the traveling department and the assistants in such department for the reason that they handle the books that are sent out to the various libraries. The library organizer is specifically designated in section 794 General Code, but in such statute is not stated to be a library assistant, but is designated simply as library organizer. Consequently, I do not believe that such library organizer nor assistant library organizer are within the purview of section 790 General Code, nor would the stenographer, messenger or janitors be so considered.

Since section 790 General Code requires each assistant to give a bond in the sum of one thousand dollars to the state of Ohio, I am of the opinion that bond should be given in such sum by the assistant librarian, document clerk, library assistants, superintendent of traveling department and assistant in traveling department. And I am of the opinion that the library organizer and assistant by reason of section 794 General Code, and the stenographer, messenger and janitors are not required to give bond.

Yours truly,

TIMOTHY S. HOGAN,

Attorney General.

641.

A VILLAGE COUNCIL IS NOT AUTHORIZED TO ISSUE BONDS IN MAKING TAX LEVIES FOR THE PURPOSE OF CREATING A SINKING FUND FOR THE RETIREMENT OF CERTAIN BONDS.

Where a village passes two ordinances providing for the making of tax levies, annually, for a period of a number of years in the future, for th purpose of creating a sinking fund for the retirement of certain bonds, the council acted illegally and the election is void. The bonds which are not yet delivered, and upon which bids have never been received, should not be delivered, but where the bonds have been issued and the money expended, the village should do its best under the Smith One Per Cent. Law to provide for their retirement.

COLUMBUS, OHIO, November 13, 1913.

HON. ANDREW S. MITCHELL, *Legal Counsel for the village of Granville, Newark, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 11, enclosing copies of two ordinances passed by the council of the village of Granville, an election notice given by the mayor of the village, and a sample ballot prepared for and used by the electors of the village at the recent election.

The two ordinances provide in substance for the making of tax levies, annually, for a period of a number of years (in one case twenty, in the other fifteen), in the future, for the purpose of creating a sinking fund for the retirement of certain bonds.

The ordinances also provide for the submission of the proposition of making the levy to the electors of the village. The election notice incorporates the substance of the two ordinances. The sample ballot is as follows:

GRANVILLE VILLAGE SPECIAL BOND ELECTION	
	For the issue of bonds
	Against the issue of bonds

You inform me that one issue of bonds has actually been sold and delivered, while the other has been offered for sale and bids have been received therefor.

You also inform me that the mayor's notice was not published in a weekly newspaper which is printed in the village, but was posted in two conspicuous places.

You request my opinion as to whether or not the village "will be justified" in delivering the undelivered bonds, and in making the additional levy to take care of both such bonds, in view of the foregoing facts, and in view also of the fact that the levy for the coming year, as fixed by the budget commission, is insufficient to provide a necessary sinking fund.

I know of no statutory authority for the submission to the electors of any such proposition as that embodied in either of these ordinances. In levying taxes council must act annually and through the submission of its budget to the county auditor as provided in section 5649-3a et seq., General Code. No vote of the people is required or authorized, and each year's levy must be separately made. Furthermore, the levy for sinking fund purposes must be made through the agency of the sinking fund trustees, as provided by sections 4506 et seq., General Code, and not by a vote of the people.

The only section of the General Code authorizing or requiring the submission of any question, as to the levy of taxes for sinking fund purposes, to a vote of the people is section 5649-5, General Code, which with its two succeeding sections authorizes, in effect, the submission to the electors of a taxing district of a proposition to increase the tax levy beyond certain limitations of the Smith law, but within the fifteen mill limitation thereof. Such an increase is only effective for five years, and the question voted on is the increase and not the special levy. The effect of such a vote is to *authorize* the limitations of the act to be exceeded, and not to make the levy itself.

It occurs to me that the supposition of those who have managed this municipal undertaking has been based upon the provisions of section 2 of article 12 of the constitution as recently amended, which is as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The intention, evidently, has been to comply with the spirit of this section, by providing a continuous co-incidental sinking fund levy for each particular issue of

bonds. The very facts of this case, as submitted by you, however, show very clearly that the constitutional section is not self-executing so far as the machinery necessary to enable its mandate to be carried into effect is concerned. The section may be and doubtless is self-executing with respect to the prohibition that no bonds shall be issued except under the circumstances therein referred to; but the section itself does no provide any machinery for the making of a co-incidental and special sinking fund levy required thereby.

I understand that in the case of Linke vs. Karb, mayor of Columbus, it has been held by the common pleas court and the court of appeals of Franklin county that the municipal sinking fund statutes sufficiently comply with this new section of the constitution. This decision, assuming its correctness, merely serves to emphasize the conclusion that the constitution does not contemplate a levying of the tax in the manner in which it is attempted to be levied by the action of the council of the village of Granville.

For the above stated reasons I am of the opinion that the election is void for lack of authority from the council of the village to submit any such proposition thereat

This conclusion makes it unnecessary for me to consider your question as to who should publish the notice of election and as to how it should be published. It also obviates the necessity of considering the effect of the use by the board of deputy state supervisors of elections of the above described form of ballot.

I advise you, therefore, that the bonds which are not yet delivered, and upon which bids have never been received, should not be delivered, and that the village take such steps as may be in its power to cancel the other bonds of which you speak; using for that purpose, of course, the moneys derived from their sale. Obviously, however if these moneys have been expended, and the bonds have passed into the hands of innocent purchasers, the village will have to do its best under the Smith law to provide for their retirement, as it cannot escape the obligation of repaying them.

Very truly yours,

TIMOTHY S. HOGAN,

Attorney General.