1820.

APPROVAL, "CORRECTED FINAL RESOLUTION" FOR ROAD IMPROVEMENTS IN SENECA COUNTY, OHIO.

COLUMBUS, OHIO, January 26, 1921.

HON. T. S. BRINDLE, *Acting State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Referring to your letter of January 20, 1921, submitting for my examination "Corrected Final Resolution" covering the improvement of:

Tiffin-Republic road, I. C. H. No. 449, section K, Seneca county.

I returned the document in question to you under date January 21, 1921, for the reason that I had already approved final resolutions on this improvement as per Opinion No. 1707, dated December 13, 1920.

I now find from the letter of Mr. Murray of your department of date January 22, 1921, that there was an error in the original final resolutions approved December 13, 1920, in that the county's share as covered by the auditor's certificate and appropriation by the county commissioners was shown to be $111,500, and further, in that the state's share as shown by the certificate of your department was given as $22,000; whereas, in fact, the county's share should have been shown as $83,368.96 and the state's share as $50,131.04. I further find that correction as to the respective shares of state and county had been made on January 5, 1921, through aditional appropriation to cover the state's share; so that had the "Corrected Final Resolution" been submitted to me on the last-named date in the form now submitted I should have given my approval thereto.

I have examined the "Corrected Final Resolution" and have found it to be in proper form and legal, and I am therefore returning it enclosed with my approval endorsed thereon as of January 5, 1921.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1821.

SOLDIERS' BONUS—SENATE JOINT RESOLUTION NO. 6 PROPOSING AMENDMENT TO OHIO CONSTITUTION—VALID PROVISION.

Senate Joint Resolution No. 6, proposing an amendment to Article VIII of the constitution so as to provide for payment of adjusted compensation to veterans of the World War, would, if submitted to and adopted by the people, be a valid provision.

Certain verbal changes should be made in the language of the proposal dealing with tax levies, and in the ballot form directed by the resolution.

COLUMBUS, OHIO, January 26, 1921.

HON. F. E. WHITTEMORE, *Chairman, Taxation Committee, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of January 21 submitting for the opinion of this department the following question:

"The taxation committee of the senate have under consideration Senate Joint Resolution No. 6 relative to submission of a constitutional amendment providing for the issuing of bonds of the state of Ohio in an amount not to exceed $25,000,000.00, the proceeds of which are to be used for the paying of soldiers' bonus.

Our committee at a meeting to consider this resolution requested the chairman of the committee to request the Attorney-General's department for an opinion as to the legality and constitutionality of the resolution as drawn. I should like your opinion as to these matters and any suggestions which you may have relative to the form of the resolution as drawn.

Permit me to call attention to the fact that by the terms of this resolution and proposed amendment all legislative powers relative to issuing of the bonds, method, manner and time of payment and all other matters have been delegated to the sinking fund commissioners."

Senate Joint Resolution No. 6, referred to in your letter, is entitled "Joint Resolution proposing to amend article VIII of the constitution of the state of Ohio, relative to the creation of debts by the state of Ohio." Specifically, the proposal is to add to Article VIII of the constitution a section to be designated as "section 2a." The section itself is quite long and need not be quoted in full here. It provides that the commissioners of the sinking fund (a board of officers for which the constitution as it now exists provides) shall "under such regulations as they may by order promulgate" issue and sell bonds from time to time, not to exceed the total sum of twenty-five million dollars, the proceeds of which are to be paid into the state treasury to the order of the commissioners, and known as "The World War Compensation Fund." The bonds are to be paid by means of a tax levy not to exceed one-half mill annually, in such amount as the commissioners of the sinking fund shall by certificate filed with the auditor of state require, which levy is to be "in addition to all other taxes now or hereafter provided by law." The proceeds of the tax levy are to be paid into the fund, to be paid out upon the order of the commissioners for the payment of interest and the retirement of the bonds and the expenses of administration.

Out of the fund the commissioners are "under such regulations as they may from time to time promulgate" to pay to persons whose eligibility is marked out by the proposal itself, "adjusted compensation for their full period of active service to the date of separation therefrom, at the rate of ten ($10.00) dollars per month, but not to exceed two hundred fifty ($250.00) dollars." The commissioners are authorized and directed to "make regulations providing for the assignment and payment of the whole or part of any such payment to any organization composed exclusively of veterans of the World War; providing for the assignment and payment of the whole or part of any such payment to a fund to be retained by the said 'the commissioners of the sinking fund' for the purpose of erecting and maintaining, under such laws as shall be enacted for that purpose, hospitals for the relief of veterans of the World War"; and providing for and against various other matters, such as assignments, fees for collection, imposition of penalties for violation of other regulations, imposing limitations on the presentation of claims, etc.

Upon the retirement of all the bonds and payment of all claims presented within the limitations of time as prescribed by the commissioners, they are to "render a final report to the legislature of the state of Ohio" and "any balance remaining in such fund shall be disposed of as shall be provided by law."

The proposal contains the following declaration of intent:

"The people of the state of Ohio hereby declare that they have enacted this special amendment to meet the specific emergency covered thereby and they declare it to be their intention to in no manner affect or change any of the existing provisions of this constitution except as herein set forth. The provisions of this section shall be self-executing."

The committee's letter does not submit specific questions, but intimates doubt arising from the delegation of legislative powers to the sinking fund commissioners. This question will be discussed first and will be followed by a discussion of such other points as have occurred to me in connection with the committee's general query and as have been verbally suggested to me.

It is true that there is a distinct delegation of legislative power to the sinking fund commissioners. This fact makes the proposed section 2a inconsistent with Article II, section 1 of the constitution, which provides that:

"The legislative power of the state shall be vested in a general assembly * * *."

Indeed, this is not the only provision of the state constitution as it now stands with which the proposal conflicts. Without discussing each one of them, or even deciding that there is a square conflict in each case, the following quotations of possibly inconsistent provisions of the present constitution may be made:

Article VIII:

"Section 1. The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; * * *."

"Section 2. In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; * *."

"Section 3. Except the debts above specified in section one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state."

Article XII:

"Section 4. The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay the interest on the state debt."

"Section 5. No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only it shall be applied."

"Section 6. Except as otherwise provided in this constitution the state shall never contract any debt for purposes of internal improvement."

"Section 11. 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 real or imaginary conflict between the proposed Article VIII, section 2a and all or any of the provisions of the state constitution which have been quoted cannot affect the validity of the former. In the first place, a constitutional amendment, such as the new section purports to be, must necessarily conflict with some-

thing in the former constitution. If there were no such conflict no amendment would be necessary. To the extent that the new provision conflicts with the old, just to that extent there has been an "amendment" of the constitution.

Navigation Co. vs. Madere, 124 La. 635;
Edwards vs. Lesueur, 132 Mo. 410;
State vs. Fulton, 299 O. S. 168;
Prohibition Cases, 253 U. S. 350.
(Official advance sheets, Aug. 5, 1920).

It may not be inappropriate to deal specifically with the delegation of legislative power, as that is referred to in the committee's letter. It must be remembered that the whole doctrine of the separation of powers results from the framework of the constitution itself. If a state constitution should declare that all legislative power shall be exercised by the general assembly excepting some particular legislative power which should be exercised by some other authority, this would raise no question under that constitution. In fact, we have exactly that situation in Ohio under the initiative and referendum provisions of our constitution, whereby the general assembly's legislative power is qualified by the reserved power of the people to have a referendum on laws passed by the general assembly and to propose laws by initiative petition. Such a deviation from the usual practice of reposing all legislative power in an independent body does not raise a justiceable question under the federal constitution, which directs that the United States shall guarantee to the several states a republican form of government.

Telephone and Telegraph Co. vs. Oregon, 223 U. S. 118.

Nor is it material from either a federal or state constitutional point of view that some legislative power is vested in a tribunal in which, by the constitution itself, are also vested executive, administrative or judicial powers. Thus, an amendment to the constitution of Virginia created a state corporation commission and reposed in it powers that were concededly legislative, administrative and judicial. This delegation of powers was sustained upon principles herein laid down.

Railroad Co. vs. Commonwealth, 103 Va. 289, 294;
Railway Co. vs. Commonwealth, 106 Va. 264, 267;
Prentiss vs. Atlantic Coast Line Co., 211 U. S. 210.

See also: Dreger vs. Illinois, 187 U. S. 71.

Some doubt has been intimated as to the effect of the sentence "the provisions of this section shall be self-executing." In so far as this provision is to be taken as declaring that no action by the general assembly, other than that expressly provided for therein, shall be necessary to make effective law of the proposal, in the event of its adoption, what has already been said will partly dispose of any question that might arise here. It is true that when our first state constitutions were adopted they partook generally of the characteristics of a mere framework of government, the distribution of powers among the created governmental agencies, and limitations upon the exercise of those powers. Yet even a simple constitution of this kind would have to be self-executing in large part. For example, the creation of the general assembly by the constitution could only be through a self-executing provision. Of late the tendency, particularly in some of the western states, has been to incorporate in the constitution provisions that have been called "legislative"

merely for the purpose of distinguishing their characteristics from those of the typical provisions of the earlier constitutions. They deal with matters of detail rather than in broad outline. Frequently they partake of the character of police regulations, as in the case of prohibition amendments, and the like. There is no ground, however, for challenging the validity of such provisions.

The sentence last referred to may have another significance. It may declare what is apparent from the remainder of the proposal, that the section shall be capable of execution in the sense that when the things commanded and authorized to be done under it are once completely done, the whole office and function of the section will be discharged and it will be executed law, furnishing no warrant for the doing of any other and further acts.

That this is the general character of the proposed section sufficiently appears from all of its provisions which have been abstracted, and particularly from the sentence which immediately precedes the one last commented upon, wherein the people declare that the proposed section shall "in no manner affect or change any of the existing provisions of this constitution except as herein set forth." That is to say, it is fairly apparent from this language and from what precedes and follows it that once these bonds for which it provides are retired and their proceeds are applied in the manner for which it provides, the section itself will no longer be a part of the living constitution of this state, and the old limitations with which it conflicts will continue to prevent the repetition of such an enterprise through merely legislative action. This characteristic of the proposal raises a question which has been very carefully considered. It is well settled that when the houses of the assembly are acting under Article XVI, section 1 of the constitution by way of "proposing amendments to this constitution" they are not acting in a legislative capacity, but are exercising a delegated and special power or function; so that the general rule applicable to all such powers applies and forbids and makes void all substantial deviations from the prescribed course.

Ellingham vs. Dye, 178 Ind. 336;
Bennett vs. Jackson, 198 Ind. 533;
Livermore vs. Waite, 102 Cal. 113.

This being true, it follows that the only kind of a proposal which the houses of the general assembly are authorized to submit to the people as affecting their constitution is a proposal to amend it. Therefore, we must test the proposal now under consideration by raising the question as to whether or not it is, or would be, an amendment of the constitution.

In this connection it has already been stated that in one sense at least the proposal is clearly an amendment, inasmuch as its provisions are inharmonious with those of the existing constitution. But the doubt, if any, which is now engendered arises from the fact that no *permanent* change in the constitution is to be effected through the adoption of the proposal. Instead of changing the constitution as it stands, the people by the adoption of this proposal would express a desire to create a temporary exception to the constitution for a particular purpose, and when that purpose has been achieved—and indeed during the time necessary for its achievement—the rest of the constitution is to continue to be as to all other purposes the law of the state.

No authority directly in point has been found upon this question. Temporary suspensions of constitutional provisions for particular purposes are by no means unusual, but ordinarily, if not exclusively, such temporary provisions are found as schedules or ordinances appended to provisions making permanent changes for the purpose of allowing an adjustment. For example, in Ohio we have the instance of

Article XVII, which provided for the separation of state and county elections from other local elections. In order to effect the purpose of this amendment, it was necessary to alter the terms of office of certain positions, to authorize the extension of existing terms, and to extend the tenure of officers in office.

Again, when Article IV of the constitution was amended so as to abolish judicial districts and provide for one common pleas judge in each county of the state, it was felt necessary to provide that the judges in office should continue therein until their successors were elected and qualified under the new constitution, in order to avoid complications that would otherwise have arisen. In the one case, however, the temporary provision was in form made a part of the permanent constitution as section 3 of Article XVII, though at the present time the section is perfectly executed and has no force and effect whatever; whereas in the other case, more appropriately perhaps, the temporary provision was designated as a "schedule" to the amendment. The substance of the two provisions is exactly the same, but one appears as a part of the amendment and the other as a schedule to the amendment. See in this connection: *State* vs. *Harris,* 77 O. S. 481, and *State ex rel.* vs. *Creamer,* 83 O. S. 412, both holding to the effect that the adoption of the seventeenth article of the Ohio constitution worked merely a temporary suspension of certain other provisions of the constitution while it was going into effect.

Without submitting an elaborate argument on the question, it has seemed to this department that the power to propose amendments includes with it, as a lesser power as well as an incidental one, the power to submit a proposal under the form of an amendment which has the effect of making a temporary exception to the permanent provisions of the constitution, or of declaring that for one particular purpose, to be pursued once and for all, the remaining provisions of the constitution shall not apply.

What we are now considering would be in effect the same thing if the present proposal were shortly phrased something as follows:

> "Sec. 2a. None of the provisions of this article or of any other part of this constitution shall prevent the issuance of twenty-five million dollars in bonds by the state, for the purpose of paying adjusted compensation to veterans of the world war, and their retirement as follows: etc."

The only difference between such a provision and one which would be indubitably an amendment from any point of view would lie in its temporary character; so that if instead of naming the World War of 1917 the language had been general and had referred to possible future wars, and instead of referring to particular bonds the proposal had referred to the issuance of bonds generally, limiting only the amount that might be outstanding at a particular time, all would agree that the proposal would be an amendment of the constitution. The only difference between the present proposal and other temporary constitutional provisions sanctioned by usage and acquiesence, such as those to which reference has been made, lies in the fact that the latter were incidental, whereas power to propose the former is asserted as an independent substantive power. These differences do not seem to this department to place the proposed action beyond the pale of the authority of the houses of the general assembly.

The committee also requests any suggestions that this department may have relative to the form of the resolution as drawn. It is deemed inappropriate to make any suggestions looking to substantive changes. During the brief time which has been given to the consideration of this matter but one point has occurred to this department as worthy of notice along this line. The proposal provides that the commissioners of the sinking fund, for the purpose of retiring the bonds, shall "add

to the state levy for taxation, in addition to all other taxes now or hereafter provided by law," certain tax levies. This language engenders a question as to whether the levies would be subject to limitations on aggregate tax levies now provided by statute. On the one hand, it might be argued that the language "in addition to all other taxes now or hereafter provided by law" is sufficient to exempt the proposed levy from such limitations. On the same side it might be asserted that the mere fact that the levy is directed expressly by the constitution itself would take it out of the operation of such limitations.

But there is much to be said on the other side. The limitations imposed by sections 5649-1 to 5649-5b of the General Code do not relate to particular levies as such, but to the aggregate of all levies which may be made in a taxing district. The mere fact that a certain levy is mandatory does not impliedly exempt it from these limitations; that fact merely operates to reduce the amount of the levies which are not mandatory and which are subject to those limitations. The mere language "in addition to all other taxes now or hereafter provided by law," if found in a statute, would not be enough to remove the proposed levy from consideration in applying the statutory tax limitations; such language is found in many statutes providing for tax levies, which contemporaneous and long continued executive action, sanctioned in many instances by court decision, has treated as subject to the limitations. To remove all doubt respecting the application of statutory tax limitations, it is suggested that language be incorporated in the appropriate place in the proposal specifically dealing with this point. For example, if it is desired that this levy shall be outside of all limitations, the way to make that certain is to write into line 25 of the joint resolution, after the word "bonds," provision to the general effect that "such levy shall not be considered in applying any limitation on aggregate tax rates now or hereafter provided by law."

I may add that the form of the ballot designation would seem to be inadequate and to raise serious question as to whether it would comply with the constitution, inasmuch as it does not expressly inform the elector that a constitutional amendment is being voted upon at all. Some other form of words would seem to be preferable here.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1822.

FISH AND GAME ACT—JUSTICE OF PEACE WITHOUT AUTHORITY TO SUSPEND SENTENCE IN SAID CASES, EXCEPT AS PROVIDED BY LAW AND ONLY BEFORE EXECUTION OF SENTENCE BEGINS—DISCHARGE, PAROLE OR RELEASE THEREAFTER UPON ORDER OF SECRETARY OF AGRICULTURE.

A justice of the peace is without authority to suspend sentence imposed for violation of the fish and game act, except as provided by law, and only before execution of sentence begins. Discharge, parole or release thereafter is upon the order of the secretary of agriculture.

COLUMBUS, OHIO, January 27, 1921.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Receipt of the request of your predecessor, Hon. Victor L. Mansfield, which follows, is acknowledged: