IV.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1909, TO JANUARY 1, 1910.

(To the Governor)

COLLINWOOD SCHOOL MEMORIAL—APPOINTMENT OF MEMBER OF GENERAL ASSEMBLY AS TRUSTEE—WHAT IS AN OFFICE.

Duties of trustees of Collinwood school memorial do not come within scope of service barred by Constitution of Ohio and section 18-1 *R. S., to members of general assembly.*

March 19th, 1909.

HON. JUDSON HARMON, *Governor of Ohio.*

DEAR SIR:—In response to your inquiry as to whether William C. Schaefer is eligible to the appointment of trustee under an act by the 78th general assembly of Ohio "To provide for the purchase of a certain school site in the village of Collinwood, Cuyahoga county, Ohio, for the purpose of establishing and maintaining thereon a memorial building and park." Mr. Schaefer being a member of the legislature enacting said law, I beg to say that section 19 of article II of the Ohio constitution provides:

> "No senator or represenative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected.",

What constitutes an office has been the subject of frequent consideration by the courts of this state. In *State v. Halliday* (61 O. S. 171), the court says:

> "The distinguishing characteristic 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. The office must be of a continuous character as opposed to a temporary employment, though the time be divided into terms to be filled by election or appointment in accordance with the genius of our system of government; and a bond and an oath of office are generally, though not always, required for the faithful performance of the duties of the incumbent; and compensation is made either by salary or fees, or both."

And in *Barker v. State* (69 O. S. 68, 72), the court says that the two most essential characteristics of a public office are, first, the fact that the incumbent is clothed with some part of the sovereignty of the state, etc., and second, that the duties are of a continuous character as opposed to a temporary employment. Emolument is not a necessary incident of a public office. *State v. Grennan* (49 O. S. 38).

In the case of *Commissioners v. Pargillis* (10 C. C. 376), affirmed by the supreme court (53 O. S. 680) it is held that a building committee appointed by the circuit court to act with the county commissioners in making and approving plans and awarding contracts for a county court house, were not county officers within the meaning of section 1 of article X of the constitution.

The case of *Slatmyer v. Springborn* (1 N. P. N. S. 157) is to the same effect.

The cases seem to be uniform in holding that persons appointed to perform some specific duty, and not for any definite term, and whose rights and duties terminate when the specific duty for which they were appointed is performed, are not public officers within the meaning of the constitution.

Section 18-1 R. S. provides that no member of the general assembly shall be appointed

> "trustee of any benevolent, educational, penal or reformatory institution of the state supported in whole or in part by funds drawn from the state treasury."

In my opinion the duties of a trustee appointed under favor of section 3 of this act do not come within the scope of service barred by said section 18-1 R. S. to members of the general assembly. The trustee appointed under this act is not authorized to receive compensation for services rendered, nor is he required to take and subscribe to an oath or affirmation before some competent authority, faithfully to discharge all duties required of him by this act.

I am, therefore, of the opinion that no constitutional or statutory provision renders Mr. Schaefer ineligible to appointment as such trustee.

Very truly yours,

U. G. DENMAN,
Attorney General.

HISTORY OF LEASE GRANTED BY BOARD OF PUBLIC WORKS TO THOS. N. FORDYCE—CONSTRUCTION AND EFFECT OF SAME.

March 15, 1909.

HON. JUDSON HARMON, *Governor of Ohio.*

DEAR SIR:—I have your letter of March 2nd, in which inquiry is made as to whether the lease as heretofore made to Thomas N. Fordyce, of that portion of the Miami and Erie canal north of Dayton, and afterwards by him transferred to William H. Lamprecht, is still in force. Not being personally familiar with the facts in the case, I have been somewhat delayed in answering your letter until I could make some investigation as to what has been done between the state and Mr. Fordyce and his assigns, with reference to this matter.

I find that on April 25, 1898 (93 O. L. 379), the general assembly of Ohio passed an act authorizing the board of public works to grant, by lease or permit to any party or parties, the right to make any experiment with electricity as a motive power for the propulsion of boats or other craft on the Miami and Erie canal, and to propel boats or other craft, if the experiment should prove successful; and prescribing certain terms and conditions which should be embodied in any grant or lease which might be given by the board for these purposes.

On March 28, 1900, the board of public works entered into a preliminary contract and agreement for lease with Thomas N. Fordyce, giving the latter the

right to make certain experiments and prescribing the terms and conditions under which such experiments should be conducted for the operation of boats by electricity on the canals, and providing that if the experiments should prove successful, in the judgment of the board, that a lease should then be given to Fordyce to install his plant along the entire length of the Miami and Erie canal.

It was further provided that the lease should contain a stipulation that the plant should be completed, between Cincinnati and Dayton, within two and a half years, and should Fordyce or his assigns fail for such period to construct said plant, between the cities designated, then the contract should be absolutely null and void; but if Fordyce, or his assigns, should be prevented from complying with the contract by any legal proceedings, instituted in good faith, he should not be charged with negligence or failure to comply therewith. The grantees were further granted the period of four years in which to complete said plant or plants along the entire length of the Miami and Erie canal

> "and upon failure to comply therewith this contract shall be forfeited."

Certain other terms and conditions were stipulated not important to be noticed here, and certain experiments were thereafter, and pursuant thereto, carried on. On March 26, 1901, the board of public works entered into a contract and lease with Fordyce in which are recited all of the preliminary steps which had been taken up to that time, and in this lease Fordyce and his assigns were granted the right to construct, maintain and operate along the Miami and Erie canal in the state of Ohio, and upon the land adjacent thereto, all the necessary facilities for operating and propelling boats or other crafts, etc. The lease is drawn in detail as to terms and conditions of operation and maintenance and runs for a period of thirty years after the first operation of boats shall have been begun on the canal.

This lease contains all the stipulations prescribed by the preliminary contract, and among these is that Fordyce and his assigns is granted the period of two and a half years in which to construct the plant from Cincinnati to Dayton, including the portions of said canal in said cities. And it is provided that if Fordyce and his assigns shall fail, for such period, to construct said plant between said cities

> "then this contract to be absolutely null and void. Provided, however, that if one said Thomas N. Fordyce and his assigns shall be prevented from complying with this contract by any legal proceedings entered into in good faith, he shall not be charged with negligence or failure to comply herewith. The said board of public works further grants to said Thomas N. Fordyce, and his assigns, the period of four years from date hereof in which to complete said plant or plants, along the entire length of said Miami and Erie canal and upon failure to comply therewith this contract shall be forfeited."

I find that on April 10, 1901, Fordyce sold and assigned all his rights in said lease and in all the powers, privileges and benefits granted thereby, to William H. Lamprecht; and that thereafter, on May 3, 1901, Lamprecht sold and transferred to the Miami and Erie Canal Transportation Company, its successors and assigns, all his rights, thus acquired, in that portion of the canal between Dayton and Cincinnati. This left Lamprecht, on May 3, 1901, owning

the rights granted by the original lease over that part of the canal north of the city of Dayton. Certain construction work was done on that part of the canal between Cincinnati and Dayton, and this work was done by Lamprecht's assignee, the Miami and Erie Canal Transportation Company, but the plant not being completed within two and a half years stipulated, this department, on October 10, 1905, began a suit in *quo warranto* in the circuit court of Franklin county to oust this company from the canal property.

Thereupon the Cincinnati Trust Company, trustee for the bondholders under the mortgage which had been executed covering the property between these two cities, filed its answer in the cause, setting up certain litigations which had prevented, and were then preventing, the transportation company from building the plants within the time limited. Demurrer to the answer was interposed by the state, and afterwards an amended answer was filed, and certain other demurrers and amendments to the answer have been filed from time to time until the issues were finally made up.

In the meantime the transportation company went into the hands of a receiver in the case of Cincinnati Trust Co. v. The Miami and Erie Canal Transportation Company, in the common pleas court of Hamilton county, and the receivers are now in charge of the property under that proceeding.

In deciding some of the preliminary demurrers or motions, however, in the suit by the state in *quo warranto*, as spoken of, the court held that the transportation company was entitled to certain extensions of time within which to complete the work.

This matter of history, just set out, is simply given for your information rather than for the purpose of answering the question submitted, because I feel that it really has no effect upon that question.

The question as to whether the lease affecting that part of the canal north of Dayton is still in force rests upon the following facts: The original lease, covering the entire length of the canal, was to Fordyce, and was made in March, 1901. Fordyce assigned all his interests in the lease to Lamprecht on April 10, 1901, and Lamprecht, on May 3, 1901, assigned the lease to the Miami and Erie Canal Transportation Company as to the rights covering that part of the canal between Cincinnati and Dayton. No part of the plant has been constructed north of Dayton, and Lamprecht, having parted with all interest in the lease affecting that part of the canal south of Dayton he is in no wise interested in the litigation which has been proceeding, affecting that territory, and, it seems to me, waived any right to claim the benefit of any extension of time to continue the work in the territory north of Dayton.

I am of opinion, therefore, that this lease, so far as it affects the Miami and Erie canal property north of Dayton, has been forfeited, and is no longer of any force or effect. No attempt has been or is being made, so far as I can learn, by Mr. Lamprecht, to exercise any control over any part of the property in question; nor is he, so far as I can learn, making any claims concerning the same under the lease or otherwise.

The chief engineer of the board of public works informs me that no money has been spent by the state on this property north of Dayton other than such as would have been necessary to spend, independent of the existence or nonexistence of the electric transportation plant.

Under the terms of the lease, as I construe it, this proposed transportation plant was to be only one of the uses to be made of the canal, and this is evidenced by the following clause appearing in the lease:

> "*Fifth.* The said Thomas N. Fordyce and his assigns hereby covenants and agrees with the said board of public works of the state of

Ohio that the construction, maintenance and operation of the plant herein contemplated shall in no wise interfere with the ordinary use, control and management of said Miami and Erie canal, and shall in no wise be so considered as to limit the powers of the board of public works as fixed by law."

It seems to have been the understanding on the part of the state, and I am inclined to the same opinion, that this lease, so far as that part of the canal north of Dayton is concerned, did, under the circumstances of the different assignments, lapse and become null and void at the end of the four years stipulated in the lease; and that this forfeiture was effected simply by the lapse of that time, no steps whatever having been taken by Lamprecht to comply with the lease. However, in order that there may be no question about the matter I feel that it would be best for the board of public works, at its meeting on Tuesday, to adopt a proper resolution declaring the lease forfeited and notifying Mr. Lamprecht to that effect.

I have requested the board of public works to instruct their respective superintendents, lock-tenders and other employes, along the line of the Miami and Erie canal north of Dayton, to notify this department and the board immediately if, at any time, Mr. Lamprecht or any person representing him in any way, attempts to do anything on the canal under this lease or otherwise, so that this department may at once take the proper legal proceedings to prevent any such action. The board agrees that this should be done and I have taken the necessary steps to see that no advantage is gained by the owners of this lease along the canal, and to prevent such owners or their assigns from exercising any rights thereunder with respect to this property north of the city of Dayton.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS—MANNER OF FILING BOND OF MEMBER.

September 23, 1909.

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

DEAR GOVERNOR:—Pursuant to our conversation this morning, I have looked into the question as to whether or not the official bond given by Mr. Watkins as member of the board of public works upon his assumption of the duties thereof now requires your official approval.

The bond was given on the 6th day of February, 1907, was approved by Andrew L. Harris, Governor, and filed in the office of the secretary of state on February 12, 1907.

The statute provides that the bond of a member of the board of public works shall be filed with the treasurer of state. This provision, however, is directory and in no wise affects the liability of the sureties on the bond. The fact that this bond has been in the custody of the secretary of state instead of the treasurer of state is not available as a defense against its validity. Inasmuch as the bond bears the approval of Governor Harris, its approval by you is unnecessary and the treasurer of state may properly file the same in his office.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Secretary of State)

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Accounting company may not be authorized to conduct collecting agency.
Public accountant is not a profession.
Articles of incorporation of the Columbus Audit Company disapproved.

January 14th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication enclosing article of incorporation of the Columbus Audit Company is received. You request an opinion as to the legality of the purpose clause contained therein and also as to whether the business of auditing accounts was made a profession by act of the last general assembly creating the Bureau of Accountancy.

In reply thereto I beg to say that the purpose clause as set out in said articles of incorporation is not in conformity to law for the reason that it seeks to incorporate for more than one purpose, viz: to audit accounts, establish a collecting agency and to do a mercantile agency business, none of which are, in my judgment, related. I therefore return the articles to you with the suggestion that they be not accepted until the purpose clause is amended so as to conform to law.

The act passed by the last general assembly creating the Bureau of Accountancy does not require an accountant to be certified in order to engage in the business of public accounting. It only authorizes the bureau to grant certificates to those accountants who comply with its provisions. In other words, it is a sort of an honorary certificate and not essential to the business of a public accountant.

I am, therefore, of the opinion that the act does not bring the business of public accounting within the exception as provided in section 3235 R. S.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

WILLIS LAW—FOREIGN CORPORATION—EFFECT OF ERRONEOUS COMPLIANCE WITH SECTION 148c R. S.

Foreign corporation neither owning nor using property in state, but which nevertheless complies with section 148c R. S., reporting its entire authorized capital stock as being employed in the state is liable for minimum annual fees under the Willis law; secretary of state in exercise of power to fix amount of property employed in state may release such corporation from liability for additional fees.

Reduction of capital stock of foreign corporation dates from corporate act and not from date of filing certificate thereof for purpose of Willis law.

January 28th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 27th, in which you submit facts and ask my opinion thereon as follows:

"The American Agency Company was incorporated under the laws of the state of Arizona in the year 1906, with an authorized capital stock of $2,000;000. During the years 1906 and 1907 they issued no capital stock, and did no business, and owned no property in the state of Ohio. During the year 1908 said company issued $39,000 of its capital stock, but still owns no property in the state of Ohio nor any place else, but are doing business under their charter in the state of Ohio and nowhere else. In December, 1907, the capital stock was reduced to $200,000, but the certificate of said reduction has not yet been filed in my department. By a mistake, as claimed by the company, and as is apparent upon the face of the papers filed in my office, said company complied with sections 148*c* and 148*d*, which make them liable for a report under the foreign corporation tax laws."

Your questions are,

"Has the secretary of state, upon a proper investigation, the authority to permit this company by filing a corrected report or withdrawing its application under section 148*c*, or in other manner to correct its errors so as to make its reports from the beinning to comply with the facts as they really existed from the beginning, and accept thereon the taxes under the statute as they would have been paid had all papers been filed correctly in the beginning?"

"I desire to make this further inquiry: If the procedure suggested by the foregoing is improper, has the secretary of state authority to act under that provision of the statute which empowers him to fix the amount of property owned and used in the state of Ohio, by availing himself of any information other than that set forth in the certificate of compliance and the annual reports of such corporation; and if this procedure is applicable to the case above cited what should be the rule for fixing the proportion of the property used in the state of Ohio when the corporation neither owns nor uses any property in the state of Ohio or anywhere else?"

This corporation is subject to the act of the general assembly passed April 11, 1902, and amended April 25, 1904, and commonly known as the "Willis Law." Section 2 of that act is as follows:

"Every foreign corporation for profit, now or hereafter 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 the provisions of section 148*c* of the Revised Statutes of Ohio, shall, in addition to the statements required by sections 148*c* and 148*d*, Revised Statutes of Ohio, make a report in writing, to the secretary of state, annually, during the month of September, in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation and under the laws of what state or county organized.
2. The location of its principal office.
3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.
4. The date of the annual election of officers.
5. The amount of authorized capital stock and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state of Ohio.

8. The name and location of its office or offices in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio.

9. The value of the property owned and used by the company in Ohio, where situated, and the value of the property owned and used outside of Ohio and where situated.

10. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice-president, secretary, superintendent or managing agent in this state, and forwarded to the secretary of state.

Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and shall charge and collect from such company, in addition to the initial fees provided for in sections 148*c* and 148*d* of the Revised Statutes of Ohio, for the privilege of exercising its franchise in Ohio, annually, one-tenth 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 Ohio, and to be not less than ten dollars in any case."

Special attention is called to the last paragraph of this section wherein the secretary of state is required, from the acts reported by the company, and from any other facts coming to his knowledge bearing upon the question, to determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and to charge and collect from such company, in addition to the initial fees provided for in sections 148*c* and 148*d* of the Revised Statutes for the privilege of exercising its franchises in Ohio, annually, one-tenth 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 Ohio, to be not less than ten dollars in any case.

In my opinion, under this section, you are authorized to permit this company to file a corrected report so as to make the same comply with the facts from the beginning, and to accept thereon the taxes under the statute as they would have been paid had the papers been filed correctly in the beginning.

The statute provides that you shall determine the proportion of the authorized capital stock of the company represented by its property and business in Ohio, and you are to do this from the report of the company filed with you, and any other facts coming to your knowledge bearing upon the question, and if you have come to the conclusion that the facts are as submitted in your letter, and quoted above herein, then, in my opinion, you must accept the taxes under those facts and in accordance therewith. My opinion is that we cannot recover more than that in court. The wording of the statute makes it your duty to consider any and all facts coming to your knowledge bearing upon the question as to what capital stock is authorized and what proportion of it is represented by property and business in the state of Ohio, and this would, of course,

include information other than that set forth in the certificate of compliance and the annual reports of such corporation. If the company should not state the truth in such certificate and annual reports, and such misstatements should be against the interests of the state, and if you should be convinced from "other facts coming to" your knowledge that such certificate and reports were untrue, you should increase the amount upon which the company should be taxed; and it seems perfectly clear to me that if the company, in filing its certificate and making its annual report, does actually make a mistake against itself and in favor of the state, you are required, under the statute, upon request from the company, to allow it to correct such mistake and pay its taxes accordingly.

No papers should be allowed to be withdrawn from the files of your office, but any affidavits or other written evidences of the actual facts may be received and used by you in connection with other information which you may get in determining the actual facts in the case.

The Willis law, under the last paragraph as quoted above, provides that the minimum fee, under that law, shall not be less than $10 in any case, and I am of the opinion, therefore that the Agency Company is indebted to the state for at least $10 per year from the time it filed its application for admission to do business in Ohio, but that it would not be liable for any more than that during any year in which it had no property or business in Ohio, but it is not necessary that the company shall both own property and do business in the state in order that it be required to pay this tax. It is sufficient if it does own property located in the state or does business alone in the state. Under the facts, therefore, as stated by you, the company cannot be taxed more than $10 per year for the years 1906 and 1907, because it had neither property nor business in the state of Ohio. During the year 1908 the company did do business in the state of Ohio and did all of its business in this state. If its authorized capital stock during the year 1908 was $2,000,000, then, since it did all of its business in the state of Ohio, it should pay the Willis tax on that basis. If in December, 1907, it reduced its capital stock, and you are convinced of that fact, and that only by mistake it failed to certify the same to your department, then in my opinion it should pay the tax for the year 1908 on the reduced amount after filing the proper certificate with you of the reduction.

Yours very truly,

U. G. DENMAN,
Attorney General.

"FREE BANK" MAY INCREASE CAPITAL STOCK UNDER PROVISIONS OF ACT UNDER WHICH IT WAS INCORPORATED.

February 1st, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the certificate of increase of capital stock of the North Side Bank of Cincinnati. Said certificate is authorized under the provisions of the Free Banking act of 1851. You inquire whether or not the filing of the same in any way conflicts with the law enacted by the last legislature providing for the organization of banks and the inspection thereof.

In reply I beg to say section 35 of the act relating to the organization of banks and the inspection thereof passed by the last general assembly is as follows:

"All banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies and combinations of any two or more of such corporations, heretofore incorporated under any law of this state, may continue their business and the exercise of the powers they now have without prejudice to any rights acquired under the acts under which they were incorporated; *and there shall be saved to all such associations and corporations all the rights, privileges and powers heretofore conferred upon them.*"

It will be observed that this section reserves the right to banks incorporated under the Free Banking act to exercise all rights, privileges and powers conferred upon them by said act.

Section 3 of the Free Banking act (section 3821-66 of the Revised Statutes) provides that the capital stock of any company authorized under the provisions of the act "may from time to time increase its capital stock to any amount not exceeding $500,000.

I am, therefore, of the opinion that the certificate for the increase of the capital stock of the North Side Bank of Cincinnati, Ohio, does not in any wise conflict with the act relating to the organization of banks and the inspection thereof as passed by the last legislature and the same may be filed.

Yours very truly,

U. G. DENMAN,
Attorney General.

VITAL STATISTICS—DEATH CERTIFICATE—SOLDIERS' CLAIMS—ORDINANCE.

Local registrar of vital statistics may not exempt pension claimants, etc., from payment of fee required by 99 *O. L.* 296, *though municipal ordinances exempts such claimants.*

February 9th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you enclose the inquiry of F. L. Watkins, state registrar of vital statistics, as follows:

"Will you please advise me whether I must charge *all* persons 50 cents for issuing a certified copy of death? Under a city ordinance passed by the city council several years ago, certified copies of death issued to pensioners, or for pension claims, were to be issued by the clerk of the board of health free.

"Under the new law, and the city ordinance, what position must I take in regard to charging a fee for those issued for pension purposes?"

Replying thereto I beg to say that section 1 of the act of May 5th, 1908, providing for the establishment of a bureau of vital statistics, etc., provides that:

"It shall be the duty of the secretary of state to have charge of the state system of registration of births and deaths as hereinbefore provided; * * * and no system for the registration of births and deaths shall be continued or maintained *in any of the several municipalities of this state in conflict with any of the provisions of this act.*"

Section 4 of said act provides, in part:

"Any local or sub-registrar who fails or neglects to efficiently discharge the duties of his office *as laid down in this act* shall be forthwith removed from office by the secretary of state."

Section 20 of said act provides:

"The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this act, for making a certification *of which he shall be entitled to a fee of fifty cents to be paid by the applicant.* * * * And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the state treasurer on or before the fifteenth day of each month, and he shall give a bond satisfactory to the secretary of state in the sum of ten thousand dollars; provided, that in cities certified copies of any birth or death may be furnished by the local health authorities. The fee for such copy or search of record to be the same as herein provided, *and all such fees shall be paid into the treasury of said cities for the use of the board of health.*"

Section 22 of said act provides in part, that:

"The state registrar under the direction of the secretary of state is hereby charged with the thorough and efficient execution of the provisions of this act in every part of the state, and with supervisory power over local registrars, *to the end that all of the requirements shall be uniformly complied with.*"

The ordinance passed by the city council to which you refer can in no wise affect the validity of this act. All the powers of the corporation are derived from the law and its charter; therefore no ordinance or by-law of a corporation can enlarge, diminish or vary legislative enactments.

I am therefore of the opinion that, any municipal ordinance to the contrary notwithstanding, you should charge all persons fifty cents for issuing a certified copy of death, or for such certificates as are authorized and provided for by said act.

Very truly yours,

U. G. DENMAN,
Attorney General.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF OHIO.

99 O. L. 39, section 6, empowers Y. M. C. A. of Ohio to make certain regulations binding upon local associations which belong to state association.

Section 1 of said act gives state association discretion when application has been made by local association for membership to receive or reject such association. R. S. 3794 applies to Y. M. C. A.'s incorporated under above law and they may not incumber real or personal property without permission of common pleas court.

Character of proceeding for correction of corporation misusing its charter is determined by nature of offense. It may be dissolved by order of court as result of quo warranto.

Y. M. C. A.'s conducting savings bank department for benefit of members or others is not authorized by law under which said association is incorporated, so to do.

February 16th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you enclose for opinion inquiries of Robert E. Lewis, state secretary, Ohio Young Men's Christian Associations, as follows:

> 1. Would section 6 of the act of May 9th, 1908, to define charter, organize, regulate and empower Young Men's Christian Associations of Ohio, mean that the regulations of the state association, duly and properly made, shall be binding upon the local associations which belong to the state association, and could such regulations be enforced against local associations?
>
> 2. Has the state association power to refuse the application of a society which complies with all the provisions of this act and applies to the state association for a "certificate of approval," as provided in section 1?
>
> 3. Does section 5 or any other section of the act make it possible for a Young Men's Christian Association incorporated under this law to mortgage its property without permission of the court?
>
> 4. What would be the process of law, if any, for compelling a Young Men's Christian Association to dissolve or to be ousted of its incorporation under this law?
>
> 5. Does section 4 of the law permit Young Men's Christian Associations to conduct savings bank departments of its work for the benefit of its members or others, and if so, what law would apply to the same?

1. Replying thereto in seriatim, I beg to say that section 6 of said act provides in part that

> "the associations affiliated with the state association, through their representatives, *may make such regulations as they may deem necessary;* may choose such officers as they may determine upon *and may delegate such duties as they desire* for the conduct of the work in the state to a state committee to be chosen as the state association may decide."

It seems clear from this provision that the state association has the power to choose such officers as they may determine upon, and to prescribe their duties, and to make rules and regulations for the conduct of the work in the state. To the state committee, selected under authority of this section, is delegated the authority to carry out the regulations and orders of the state association. To interpret this section otherwise would be to hold that a local association would become affiliated with, and a part of, the state association; participate in its meetings; assist in making its regulations to be of general application in this state, and then refuse to comply with the same. To be allowed to do this would render this section of the act impotent, and the making of such rules and regulations as the state association may, in its judgment, provide and the delegating such powers as they desire to a state committee, a vain thing and without force and effect. I am therefore of the opinion that the regulations of the state association, duly and properly made, would be binding upon local associations which belong to the state association; and that such regulations would be enforcible as against local associations.

2. Section 1 of said act provides in part that when a local society

"*shall have received the approval of the state association* and shall file such application and *certificate of approval* with the secretary of state, and pay a fee of ten dollars, he shall cause to be issued to it these articles of incorporation."

Section 6 of said act in part provides that

"the state association may incorporate and exercise the provisions of this act, and when so incorporated and organized *may receive Young Men's Christian Associations into affiliation*, and it shall have the power to pass upon all applications for the incorporation of said associations under this act, causing to be affixed thereto, *a certificate of its approval.*"

These sections clearly give to the state association the discretionary right to receive or reject Young Men's Christian Associations into affiliation, when such application is made therefor, and the issuing to such applicant of articles of incorporation is dependent upon the filing with the secretary of state a certificate of approval from the state association.

Section 5 authorizes the association to encumber by a mortgage its real estate, or personal property, that may be necessary or convenient to enable the association to carry out its aims and objects.

Section 3794 R. S. provides the manner in which *charitable or religious* societies may encumber their real or personal property by mortgage or otherwise, which encumberances can be placed upon said property only after petition is filed in the court of common pleas and upon hearing the court approves of the application and authorizes said encumberance. This section 3794 not being repealed or modified in this respect by the act of May 9th, 1908, leaves it in full force and effect, and I am therefore of the opinion that its provisions must be complied with by the Young Men's Christian Association, in order to legally mortgage its property.

4. The character of proceeding to be invoked for the correction of a corporation misusing its charter rights is to be determined upon by the nature of the offense. A corporation misusing its franchise rights, and perverting the same, may be corrected or dissolved by order of court, as the result of *quo warranto* proceeding.

5. I call your attention to section 2758 R. S., which defines banking, as follows.

"Every company, association or person *not incorporated under any law of this state or the United States for banking purposes*, shall keep an office or other place of business, and engage in the business of lending money, *receiving money on deposit*, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidences of indebtedness with a view to profit shall be deemed a bank, banker or bankers within the meaning of this chapter."

The power to receive deposits is one of the chief functions of banking as is evidenced by the special statutory authorization contained in sections 3799, 3804 and other related sections of the Revised Statutes.

I am of the opinion that for a Young Men's Christian Asscciation *to conduct a savings bank department for the benefit of its members or others* would be a perversion of its objects and not authorized by law under which said association is incorporated.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE MUST BE NOMINATED BY TOWNSHIP PRIMARY.

February 25th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication has been received with which you submit, for an opinion of this office, the inquiry of Mr. L. M. Phillips, as follows:

> Does the act "to regulate the conduct of primary elections passed April 28th, 1908," provide for the nomination by primaries of justices of the peace in this state; and, if so, whether said nominations shall be made by township or county primary?

Replying thereto, I beg to say that the office of justice of the peace has been difficult to accurately define. It has been held by the supreme court of this state not to be a distinct township office, as such; neither is it a distinct county office, as such. This being so, and inasmuch as the act herein referred to does not specifically provide for the nomination by primaries of justices of the peace, the question remains whether section 11 of said act provides for such nomination.

> Section 11. " * * and primaries held to nominate candidates for township * * offices * * shall be held in each county at the usual polling places on the first Tuesday after the first Monday in September of odd numbered years."

The office of justice of the peace is constitutional. Article 4, section 9, of the Ohio constitution provides that

> "a competent number of justices of the peace shall be elected, *by the electors, in each township* in the several counties * * *."

It is true that justices of the peace have and exercise a jurisdiction co-extensive with their county, but the exercise of this jurisdiction has not been held to disqualify the electors of the several townships within counties to elect justices of the peace therein. This being true, the section of the constitution above referred to would seem sufficient authority for the nomination of justices of the peace in various townships by township primaries in the manner provided in the Bronson act, for the nomination by primaries of township officers.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Corporation may be formed for a purpose, not purposes, unless specially authorized by statute.

March 10th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith the articles of incorporation of The Steiner Coal Company, submitted to this department for an opinion thereon of the purpose clause, which is as follows:

"Resolved, That the articles of incorporation of The Steiner Coal Co. be, and the same are hereby amended, so as to change and enlarge the objects and purposes for which The Steiner Coal Co. was formed, as follows, to-wit: For the purpose of mining, manufacturing, quarrying, purchasing, selling, handling and producing coal, clay, stone and all kinds of minerals; and also to import, export, buy, sell, manufacture, trade and deal in marble, granite, terra cotta, lime, stone, clay, cement, asbestos, brick, tile, pottery, earthenware, china, sand, gravel, plaster, ceramic products of all kinds, timber, lumber and products of iron, steel, and other metals; and to acquire, buy, build, construct, erect, sell, lease, mortgage, own, use, maintain or operate any land, real estate, or interest in real estate, quarries, buildings, factories, plants, machinery and any other implements, works or appliances which may become directly or indirectly necessary or advantageous in carrying out the purposes herein set forth; also to construct such railroad or railroads with necessary track or tracks and side tracks, turn-outs; and all proper equipment which the directors of the corporation shall deem necessary to more effectively carry out the objects herein set forth; also to purchase or otherwise acquire and hold shares in stock, in other kindred but not competing corporation, whether domestic or foreign; also to manufacture, buy, sell, trade and barter in natural or artificial ice and to own all necessary equipment and to do all things necessary for the proper prosecution and conducting of said business; and also to buy, sell, deal and trade in hay, grain, flour, oats and all kinds of feed; and to carry on generally the business of manufacturing, buying, selling and dealing in all lines of builders' and contractors' supplies necessary in the erecting of business blocks, manufactories, dwellings and structures of every kind whatsoever, and to carry on generally and to do all things necessary, and to own all proper equipment for the carrying on of all the aforenamed objects, and from time to time to buy and sell all the necessary equipment and supplies which in the judgment of the board of directors is necessary and is for the benefit of said business."

Section 3235 of the Revised Statutes, in placing a limitation upon the business for which a corporation may be formed, used the word "purpose" instead of "purposes" and limits corporations to a single purpose, unless specially authorized by some other statute.

Section 3236 R. S. provides that the articles of incorporation shall contain "the *purpose* for which it is formed."

These sections of the Revised Statutes, as construed by the supreme court in the case of the *State ex rel v. Taylor* (55 O. S. 67), make it clear that a corporation shall be formed for a main *purpose* with such rights and privileges as are incidental to the main purpose for which the corporation was formed.

The numerous purposes stated in the purpose clause of this corporation do not, in my judgment, conform to the law of the state relating thereto. For this reason I return the articles of incorporation to you, advising you not to file or record the same.

Very truly yours,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

March 15th, 1909

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you submit, for an opinion of this office, the proposed amendment to the articles of incorporation of the Beachland Improvement Company, as follows:

> Said corporation is formed for the purpose of making improvements in certain allotments known as Beachland Allotment Nos. 1 and 2 and that part of The Realty Trust Company's Lake Breeze Allotment which abuts on Gardner Road, said allotments being in the villages of Euclid and Nottingham, Ohio; of improving, maintaining and protecting the beach on Lake Erie and the parks and streets of said allotments; of erecting and maintaining pavilions, club-houses, boat and bath-houses on said beach and in said parks; of leasing, purchasing or otherwise acquiring, erecting, improving and maintaining pumping-stations, standpipes, water and sewer mains and pipes and sewer beds and lighting equipment in said allotments; of supplying water to the owners or occupants of said buildings; of purchasing, leasing, or otherwise acquiring, holding and disposing of real estate for all of the aforesaid purposes; of levying and collecting assessments for the carrying out of said purposes; of charging persons for the use of said pavilions, club-houses, boat and bath-houses, and for services rendered in supplying water, light and sewer service to the buildings on said allotments; and of doing such other things as may be properly incident to all aforesaid purposes."

Replying thereto, I beg to say that section 3235 R. S. has placed a limitation upon a business for which a corporation may be formed in using the word "purpose" instead of "purposes," and limits corporations to a single "purpose" unless specially authorized by some other statute. *State ex rel v. Taylor* (55 O. S. 67).

This purpose clause does not recite a main purpose for which the corporation is to be formed, with such incidental and convenient rights as may be necessary to carry out the purpose of the corporation. Instead, it recites a multiplicity of purposes, which is a violation of said section 3235 R. S., as construed by our supreme court in the above mentioned case. See also Marshall on "Corporations," sections 57 and 58. For this reason I am returning the proposed articles of this incorporation with the recommendation that they be not filed by you.

Very truly yours,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—MARPAU OIL AND GAS COMPANY—DISAPPROVED.

March 23rd, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department the proposed articles of incorporation of the Marpau Oil and Gas

Company, for an opinion thereon as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of acquiring, owning, leasing and occupying lands, tenements and hereditaments in the state of Ohio and elsewhere for the purpose of developing the same by mining, drilling, boring or otherwise extracting or removing coal, oil, gas, stone and other precious minerals and timber therefrom."

From the language contained in this purpose clause it is impossible to ascertain the "purpose" for which this corporation is being formed. It might be a coal company, an oil and gas company or a stone company, etc. The name of the corporation is the only express indication of the corporate intent. If this corporation is being formed for the purpose of leasing, buying and owning land, purchasing machinery for the purpose of prospecting and drilling for and producing, handling and marketing oil and gas, the purpose clause of the corporation should so state. It is a general and well-settled rule of law in this state that corporations, in addition to the powers expressly granted, have, by necessary implication, the power to do whatever is needed to carry into effect those granted and to accomplish the *purpose* of its creation unless the particular act is forbidden by law or charter.

Sections 3235 and 3239 Revised Statutes.
Bank v. Flower Co., 41 O. S. 552, 558.
State ex rel v. Taylor, 55 O. S. 61.

Section 3236 Revised Statutes provides that the form of the articles of incorporation which shall be prescribed by the secretary of state must contain the *purpose* for which it was formed. The granting of the right to exercise this main purpose carries with it such incidental and convenient rights as are necessary to the accomplishment of the purpose for which the corporation is formed, and they need not be enumerated in such purpose clause.

It may be noted that these articles do not expressly state that all, or a majority of the incorporators are citizens of the state of Ohio.

For the foregoing reasons I return the articles of incorporation to you, advising you not to file or record the same.

Very truly yours,

U. G. DENMAN,
Attorney General.

SOCIALISTIC PARTY—NOMINATION OF CANDIDATES BY CONVENTION—PRIMARY LAW—MINORITY PARTY.

The Socialistic party does not come under the provision of act in 99 Ohio Law 214, except in such political units wherein it casts at least ten per centum of total vote cast therein at the next preceding general election, and the provisions of section 2966-18 R. S. are still available to it, unless the above percentage of votes are cast by said party.

March 24th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you enclose for the opinion of this department thereon, inquiries of John C. Willert, state secretary of the Socialistic party of Ohio, as follows:

1. Is the Socialistic party still an official party?
2. Does it come under the new primary law?
3. To get on the ballot must they circulate petitions?
4. Can they nominate by convention as before?

The answer to these inquiries are dependent primarily upon the construction to be given section 2 of "An act to regulate the conduct of primary elections" (99 O. L. 214), which section is as follows:

> "Candidates for members of congress, and all public elective offices, delegates provided for herein, and members of the controlling committees of all voluntary political parties or associations, which at the next preceding general election polled in the state or any district, county or sub-division thereof, or municipality at least *ten per centum* of the entire vote cast therein shall be nominated or selected in such state, district, sub-division or municipality, in accordance with the provisions of this act, and persons not so nominated shall not be considered candidates and their names shall not be printed on the official ballots. Delegates and party controlling committees whose members have not been so selected, shall not be recognized by any board or officer. But nothing in this act shall be construed to repeal the provisions of any act relating to the nomination of candidates for office by nomination papers, and no elector shall be disqualified from signing a petition for such nomination of candidates for office by nomination papers, because such elector voted at a primary provided for therein to nominate candidates to be voted for at the same election or because such elector signed nomination papers for such primary."

If the provision of this section, to-wit: "and persons not so nominated shall not be considered candidates and their names shall not be printed on the official ballots," does not annul or control the preceding provision in said section, which clearly refers only to voluntary political parties or associations which at the next preceding general election polled in such political units as are therein designated, at least *ten per centum* of the total vote cast therein, then this section does not deprive such minority parties from making nominations under favor of section 2966-18 R. S.

The rule of construction to be applied, in arriving at the intention of the general assembly in enacting any law, depends largely upon the purposes and objects sought to be accomplished through that law, and in ascertaining the legislative intent in the enactment of this statute under consideration we must keep in mind the principle just stated.

The purpose of this law, regulating the conduct of primary elections, seems clearly to be that an orderly and honest expression of the voters be secured in the selection of candidates of the various political parties, and to throw certain safe-guards around the manner of selection of such candidates when the membership of such parties respectively is of some considerable numbers. And the limitation expressed in the act as to numbers is

> "all voluntary political parties or associations which at the next preceding general election polled in the state or any district, county, or sub-division thereof, or municipality, at least *ten per centum* of the entire vote cast therein," etc.

The general rule is that election laws are to be so construed as to give all persons who comply with the qualifications prescribed for electors, the opportunity to vote for any person who may be qualified to fill the office sought to be filled by election. It is not believed that the general assembly meant, in enacting this statute, that before any person shall be a candidate at any election, and receive the votes of all or a part of the people, that he (the candidate) must have belonged to some political party which, at the last general election, cast at least ten per centum of the entire vote of the political subdivision. This becomes, it seems to me, quite apparent when we consider that section 2966-18 R. S. is not expressly repealed by the Bronson primary law.

Section 2966-18 R. S. is not wholly inconsistent with the Bronson law. Under that section (2966-18 R. S.) political parties or associations which, at the last general election, cast at least one per cent. of the total vote may make nominations by conventions or any one of the other methods named in that section. By the Bronson act, however, if the political party or association cast ten per centum or more of the total vote in any political division, at the last general election, then that political party or association must make its nominations under and according to the Bronson act. Then, too, this statute is not penal in its character, and for this, another reason, the rule of strict construction should not be applied. It must be construed as a whole and in connection with other existing statutes, similar in character, and in such a way as to most reasonably accomplish the legislative purpose.

The legislative purpose and intent in this act seems to be a provision for nominations for public elective offices, by primaries, in the political units such as are designated in section 2 above quoted, by such political parties or associations as polled *at the next preceding general election at least ten per centum of the entire vote cast therein.*

Applying then the rules above discussed for statutory construction, and keeping in mind that a construction holding that the Bronson act furnishes the only means for making nominations would prohibit many persons from becoming candidates who might so do under a construction retaining section 2966-18 R. S. in force, along with the Bronson act, I am clearly of the opinion that it was not the intention of the general assembly to, and that the Bronson act does not, repeal section 2966-18 of the Revised Statutes; and I am therefore of the opinion that the proper construction of the Bronson act, section 2 thereof as above quoted, is that any and all persons who seek nominations in any political party or association, in any political division named in said section 2, which, at the last preceding general election, cast ten per centum or more of the entire vote cast in such political division must get those nominations under the terms of the Bronson act. But if a nomination is sought in a political party which, at the last general election, cast less than ten per centum of the vote, then that nomination may be gotten under the terms of section 2966-18 R. S.

In other words, all political parties in any political division named in said section 2, and which, at the last general election, cast ten per centum or more of the entire vote in that political division, must make their nominations according to this primary election law known as the Bronson act (99 O. L. 214); but political parties which, at the last general election, cast less than ten per centum of the vote in any political division may make their nominations under section 2966-18 of the Revised Statutes.

It therefore follows that the Socialistic party is still an official party, and that it does not come under the provisions of this act except in such political units wherein it casts at least ten per centum of the total vote cast therein

at the next preceding general election, and that the provisions of said section 2966-18 R. S. are still available to it unless coming within the provisions of this act as herein interpreted.

Very truly yours,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—THE GREATER CLEVELAND COMPANY.

March 25th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you enclose articles of incorporation of "The Greater Cleveland Company," requesting an opinion of this department as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of buying, selling, exchanging, dealing and operating in real estate, mortgages, bonds, loans, insurance and general investments, acting as trustee or investing funds for individuals, firms or corporations. Under the provisions of section 3235 this charter shall expire by limitation in twenty-five years from the date of being issued by the secretary of state."

Replying thereto, I beg to say that the multiplicity of purposes set forth in this purpose clause make it such as is forbidden by sections 3235, 3236 and 3239 of the Revised Statutes and as construed by the supreme court of this state in the case of the State ex rel. v. Taylor, 56 O. S. 61. Neither from the name of this proposed corporation, nor from said purpose clause, may it be definitely determined whether its main purpose shall be a real estate company, an insurance company, or a trust company.

Section 3235 R. S. says that a corporation shall be formed for a "purpose," not purposes. For these reasons I return herewith said articles of incorporation, advising you not to file the same.

Yours very truly,

U. G. DENMAN,

Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—THE PYRO CLAY PRODUCTS CO.—DISAPPROVED WITHOUT COMMENT.

April 6th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I herewith return to you the articles of incorporation of The Pyro Clay Products Company which you transmitted to me with a request for an opinion as to the legality of the purpose clause therein.

I have examined the articles with reference to the question presented and

am of the opinion that the purpose clause recites such a multiplicity of powers as may not be lawfully granted to a manufacturing corporation in this state. Section 3235 R. S., in placing a limitation upon a business for which a corporation may be formed, used the word "purpose" instead of "purposes" and limits corporations to a single purpose unless specially authorized by some other statute. The grant of the right to incorporate a corporation for a single purpose carries with it all such relative and incidental rights as may be convenient and necessary to carry out such main object or purpose. This rule is established by the supreme court in the case of State ex rel v. Taylor, 55 O. S. 61, which opinion has since been followed.

If this proposed company is to manufacture clay products the purpose clause should so state, and in my opinion it is not the better plan to enumerate in the purpose clause the incidental rights that the corporation may conveniently exercise in the prosecution of its business. Furthermore, one of the purposes set out in the articles of this corporation is to build, maintain and operate a railroad. The laying and using of a railroad switch or such track as may be necessary and convenient to afford transportation to market of the products manufactured would be a convenient and necessary incident, and therefore a right of the company to construct such switch or railroad for the purpose as expressed in section 3866 R. S. If the main purpose of this company is to build and equip a railroad the purpose clause is faulty because of the provision of section 3237 R. S. I fail to see how "agriculture," as provided for in these articles of incorporation, is a necessary or convenient incident to a clay product company, which I presume is the main purpose of the corporation because of its name.

I return herewith the articles of incorporation, advising you not to record the same, and with the suggestion that the purpose clause be re-drafted in accordance with the provisions of the above section of the Revised Statutes and case cited interpreting the same, and with other suggestions herein contained.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—THE DEFIANCE, NAPOLEON & WAUSEON RY.—APPROVED WITH COMMENT.

April 19th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of the 16th inst., enclosing articles of incorporation of The Defiance, Napoleon & Wauseon Railway Company. You ask for an opinion as to the legality of the purpose clause thereof, which is as follows:

> "Said corporation is formed for the purpose of constructing and operating a line of railroad between Wauseon, Fulton county, Ohio, and Defiance, Defiance county, Ohio. The same to be operated by steam, electricity or other motive power."

The only questionable feature of this purpose clause is whether it is in compliance with section 3443-8 Revised Statutes. This section provides that:

> "Companies incorporated under section 3236 of the Revised Statutes of Ohio for such purposes may construct, maintain and operate electric

street railroads or street railroads using other than animal power as a motive power for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon the highways in the state outside of municipalities or upon private rights of way."

It will be noted that the section gives certain powers to street railroads outside of municipalities "*using other than animal power as a motive power.*" This exception is not set out in this purpose clause. Is it a proper construction of the purpose clause to say that its language, "the same to be operated by steam, electricity or other motive power," means other artificial or mechanical motive power such as would be authorized by law?

I think such a construction may be given, and while this purpose clause would have been much clearer if there were incorporated into it the exception as to animal power as provided in said section 3443-8 R. S., I believe the same is substantially a compliance with the laws of the state relating to corporations for profit. I therefore return the same to you, advising that you make record thereof. I also enclose check for $10.00.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—SCHANTZ ELECTRIC, ICE & WATER CO.—DISAPPROVED WITHOUT COMMENT.

April 13th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you submit the articles of incorporation of the Schantz Electric, Ice & Water Company for an opinion as to the legality of the purpose clause thereof.

The purpose clause is as follows:

"Said corporation is formed for the purpose of manufacturing, producing, furnishing and selling electricity for light, heat, power and other purposes, the purification of water, the manufacture of ice and sale thereof; the acquiring by deed, lease or other legal transfer to it of real and personal property, either in the state of Ohio or elsewhere, necessary for its business purposes, with the power of encumbering or mortgaging the same in a legal manner from time to time as its business needs may require, and for doing all things incidental for said purpose."

In my opinion the above clause contains two purposes, that of manufacturing and selling electricity and that of purifying water and manufacturing ice. The one is not necessarily incidental to the other. Corporations may be formed in the manner provided in Title 2, Chapter 1 of the Revised Statutes, "for any *purpose* for which individuals may lawfully associate themselves, etc."

The purposes expressed in these articles are different and unrelated. Neither is a necessary incident to the other, and are therefore forbidden by section 3235 Revised Statutes (State ex rel v. Taylor, 55 O. S. 67). I therefore return the same to you with the suggestion that the articles be not filed or recorded by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—INCREASE OF CAPITAL STOCK—MOHICAN OIL & GAS CO.

Increased proportion of capital stock of foreign corporations must be filed with secretary of state.

April 22d, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter with which you enclose copy of articles of incorporation of the Mohican Oil and Gas Company and certificate of increase of capital stock thereof.

You state that this company qualified to do business in this state as a foreign corporation with a capital stock of $250,000, since which time it has increased its capital stock to $1,000,000. You ask for the opinion of this department as to whether this company should file an increased proportion of its capital stock with the secretary of state of the state of Ohio under section 148c Revised Statutes.

This company incorporated under the laws of the state of West Virginia with a capital stock of $250,000 and, desiring to do business in the state of Ohio, complied with the provisions of section 148c of the Revised Statutes, authorizing foreign corporations to do business in this state. The company has now increased its capital stock to $1,000,000 and the question is, shall the company therefore be required to file an increased proportion of its capital stock with the secretary of state of the state of Ohio?

To increase the capital of a corporation is in fact and effect a reorganization of the company. Said section 148c R. S. provides that:

> "The secretary of state shall determine the proportion of the capital stock of the company represented by its property and business in Ohio, and shall charge and collect from the company, for the privilege of exercising its franchise in Ohio one-tenth 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 Ohio * * *. Upon the payment of the said amount the secretary of state shall issue to the foreign corporation a certificate that such corporation has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its entire capital and the *proportion* of which is represented in Ohio."

It is clear from this section that the record of said company as made with the secretary of state in Ohio must show the actual authorized capital stock. This increase of capital stock on the part of the company means a change in the record thereof with the secretary of state of Ohio and it then remains for the secretary of state to again "determine the proportion of the capital stock of the company represented by its property and business in Ohio." Applying this rule to the company at hand it is required to file an increased proportion under section 148c of the Revised Statutes.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—ENDORSEMENT OF ATTORNEY GENERAL UNDER INSURANCE LAWS—AKRON RUBBER WORKS RELIEF ASSOCIATION.

April 27th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of the articles of incorporation of The South Akron Rubber Works Relief Association, on which you request the opinion of this department as to the proper fee for filing articles of this character, and whether the indorsement thereof is required by the attorney general under the insurance laws of the state.

Replying thereto, I beg to say that while these articles are somewhat irregular in form and contain surplus matter, they are a substantial compliance with the provisions of section 3631*a* Revised Statutes.

This is the incorporation of a class of mechanics for mutual benefit and charitable purposes and would therefore not be subject to the provisions of the insurance laws of the state. This association being incorporated under favor of said section 3631*a* Revised Statutes, does not possess the powers contained in section 3630 Revised Statutes and is only required to pay $2.00 for filing its articles of incorporation, as provided by paragraph 5 of section 148*a* Revised Statutes.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—INCREASE OF STOCK AND CHANGE OF NAME OF HOMESTEAD AID ASSOCIATION OF DAYTON, OHIO.

April 27th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit certificate of amendment to the articles of incorporation of the Homestead Aid Association of Dayton, Ohio, and inquire if the name of said corporation may be changed to "The Homestead Loan and Savings Association," and the capital stock of said association be increased from $2,000,000 to $5,000,000 by action of the board of directors of said association as appears in said certificate of amendment.

An affirmative reply to your inquiry will depend upon whether the provisions of "An act to provide for the organization, regulation and inspection of building and loan associations and savings associations," passed May 1, 1908, 99 O. L. 528, make an exception to the general rule of law applicable to such cases.

Section 5 of said act provides that:

> "Such corporation" (as described in section 1 of said act) "shall have all the powers set forth in the following sections of this act."

Following this section 5 is section 18, as follows:

> "To increase or decrease its authorized capital or the face value of its shares, or change the name of the corporation at any time by a majority vote of its board of directors; and a certificate of such action shall

be made by the president and secretary, and duly filed with the secretary of state, after which in the use of the changed stock and changed name all rights of all parties shall remain the same as before any such change was made."

It is my opinion that the language of these sections empower the board of directors, by majority vote thereof, to change the corporate name and capital stock of an association of this character without notice to or participation therein by the various stockholders of such association.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—STEINER COAL CO.—DISAPPROVED WITH COMMENT.

May 7th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of March 19th, enclosing the proposed amendment to the articles of incorporation of the Steiner Coal Company. You desire my opinion as to the validity of the purpose clause as set forth therein, viz:

"For the purpose of mining, manufacturing, quarrying, producing, handling, buying, selling and importing and exporting coal, clay, stone, minerals, marble, granite, terra cotta, lime, cement, asbestos, brick tile, builders' supplies, pottery, ceramic products, sand, gravel, plaster, natural and artificial ice, hay, grain, flour, feed; also to acquire, buy, build, sell, lease, mortgage, own, use, maintain and operate, any land, real estate or interest in real estate or any other equipment, works or appliances which may be or become necessary or advantageous in carrying out the purpose herein set forth, and to do all things necessary and incident thereto for the proper prosecution and conducting of said business."

The propriety of joining the principal powers of mining and manufacturing is questionable, but the joint effect of sections 3862 and 3864 R. S. would seem to permit such joinder. In view of these sections I approve this feature of the amendment.

I do not find, however, in section 3862 R. S., or in any other provision of the law, authority to incorporate with the principal purpose of mining that of manufacturing and dealing in natural and artificial ice, nor do I find authority to join with the principal purpose of mining that of dealing in hay, grain, flour and feed. If such powers are necessarily or conveniently incidental to the principal purposes authorized by the other provisions of the amended purpose clause they may be conducted by the corporation without specific authority. Their inclusion in the articles as amended constitutes them separate principal purposes which, not being authorized by the sections above cited, are prohibited by the familiar rule laid down in State ex rel v. Taylor, 55 O. S. 67.

I therefore advise you not to file or record the amendment to the articles of incorporation of this company until the words "natural and artificial ice, hay, grain, flour, feed" be stricken therefrom. Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—CONSOLIDATION OF ADENA EXCHANGE TELEPHONE COMPANY AND HARRISON COUNTY TELEPHONE COMPANY—APPROVED.

May 10th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 7th, enclosing proposed articles of consolidation of the Adena Exchange Telephone Company and the Harrison County Telephone Company, to be known as the Harrison and Jefferson Telephone Company.

You desire my opinion as to the right of such telephone companies to consolidate under the laws of this state.

Replying to your letter, I beg to state that section 3471 R. S. (not 3864, as is erroneously supposed by the person who submits the articles to you), authorizes telephone companies to consolidate in the manner and subject to the rules provided for the consolidation of railroad companies. Inasmuch as the papers submitted evidence a complete compliance with section 3381 R. S., which provides the conditions and restrictions applicable to consolidation of railroad companies, I am of the opinion that the articles of consolidation should be accepted, filed and recorded by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

WILLIS TAX—LIABILITY OF RECEIVER FOR.

Receivers of corporations should be required to file annual report and pay fee under Willis tax as long as they are permitted to use franchise.

May 18th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date, with the attached letter of Lawrence & Lawrence, counsellors at law, 120 Broadway, New York City, requesting an opinion as indicated by said attached letter, received.

Said letter raises the question as to the requirements of receivers of corporations to file reports and pay franchise fees under the Willis law.

It is the law that a state has a paramount right to collect taxes due on property in the hands of a receiver and the court should see that such taxes are paid before distribution to other creditors. Alderson on Corporations, section 169*a*, and cases cited.

Property in the hands of a receiver of a federal court is subject to the payment of state taxes in the same manner as any other property. Ex parte Chamberlain, 55 Fed. R. 704.

The United States statute provides that property in the hands of receivers shall be managed and operated according to the laws of the state in which the property is situated. United States Laws, Sec. 721. Sec. 17 of the Bankrupt act makes taxes a debt not affected by discharge in bankruptcy, and section 64 of the same act makes taxes a priority in the distribution of assets.

Our supreme court, in passing upon the constitutionality of the Willis law, decided that the tax was a franchise tax and was a tax upon the privileges and superior advantages possessed by corporations under the laws, over those possessed by individuals. Southern Gum Company v. Laylin, 66 O. S. 578.

Receivers of corporations are appointed either for the purpose of winding up the corporations and distributing the assets, or for some other purpose. Receivers appointed for the purpose of winding up the affairs of a corporation, and whose duties, as directed by court, are to preserve the property, collect the assets, and report the funds to the court for distribution, should, under the provisions of the court, be required to file the report and pay the franchise tax which became a lien on the property prior to the appointment of the receiver. Alderson on Corporations, Sec. 169*a*.

The certificate of the clerk of the courts, in the winding up of corporations, should also be filed, as required by section 8 of the Willis law.

The franchise tax under the Willis law is not a tax upon the business done, but upon the right of the corporation to do business, and receivers of corporations appointed for other purposes than the winding up of corporations, exercising the superior advantages and privileges granted them as corporations, and given privileges by the court to continue business using their franchises, should, by the court, be required to file the annual report and pay the annual fee as long as they are permitted to use the franchise. In the matter of George Mathers Sons Company, 52 N. J. 607.

While I am not informed what powers and duties are given the receiver of the above company, I think the above information sufficient to cover all cases under receivership matters.

Yours very truly,

U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION LAW—DEALER DEFINED.

Within meaning of Automobile Registration Law, a dealer is person or corporation having one fixed and definite place of business.

June 5th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 3d, in which you request my opinion in respect to the following statement of facts:

> "The Oldsmobile Company, Cleveland branch, located at 1926 Euclid avenue, complied with section 11 of the Automobile law on July 6th, 1906, by filing an application for registration, accompanied by fee of $20.00, of which $10.00 was fee for registration as dealers in motor vehicles and $10.00 for five certified copies of their certificate of registration and five duplicate sets of number plates.
>
> "No. 970 was assigned this company as their distinctive dealers' number,. We are now in receipt of a check for $6.00 for three additional sets of number plates, with the request that two of these sets be sent to the Oldsmobile Works at 717 Main street, Cincinnati, and one set to Oldsmobile Works, 1001 Jefferson ave., Toledo, Ohio.
>
> "Inasmuch as the paramount object of the Automobile law is to provide a means of identification of owners and operators of motor vehicles, this question is respectfully referred to your department for decision, as to whether the branch agencies of the Oldsmobile Company in Cincinnati and Toledo are not required to register individually and have a distinctive number assigned to each agency."

Section 11 of the Automobile Law, 99 O. L. 538, provides simply that:

> "A manufacturer or dealer in motor vehicles shall make application for registration * * * of each * * * make of motor vehicles so manufactured or dealt in, and pay a registration fee of $10.00 for each make * * * to be determined by the motive power of such vehicles. Thereupon the secretary of state shall assign to each make of motor vehicles therein described a distinctive number * *. Such manufacturer or dealer * * * may procure certified copies of such registration certificate upon the payment of a fee of $2.00 for each such copy."

Your question concerns the definition of the term "dealer" as used in the provision quoted. Many of the terms used in the Automobile law are defined in the first sections thereof, but the particular term now in question is not so defined. Section 11 itself affords no definition of the word "dealer," and in order to ascertain what that definition is, it is necessary, as suggested in your letter, to have regard to the object and purpose of the law as evinced in all of its sections read together. My conclusion upon such consideration is that the "dealer" within the meaning of section 11 is a person or corporation having one fixed and definite place of business. If, then, a person or corporation dealing in automobiles in one city opens a branch office or agency in another city, such branch office or agency becomes, within the meaning of the law, a separate "dealer." Such a construction of section 11 is necessary in order to effectuate the paramount object of the entire act, which is, as expressed in the title thereof, "To provide for the registration, identification and regulation of motor vehicles." Such being its object, the law is to be liberally construed in order to effect the same.

Under such a construction you would be obliged to insist that the branch offices of the Oldsmobile Works situated in Cincinnati and Toledo procure original registration certificates and that they be not permitted to use the placards of the Cleveland branch of the same concern.

I return herewith papers submitted by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—CASUALTY PROVIDENT COMPANY—DISAPPROVED.

June 1st, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 28th, in which you enclose an application for articles of incorporation of the Casualty Provident Company, with draft for $100.00, and letter attached thereto.

The files of this department disclose the fact that these incorporators have submitted other articles of incorporation of this same company, which seemed to follow section 3587 R. S., being the statute defining the powers of a life insurance company having a capital stock. The articles formerly submitted, however, did not comply with the law in other respects, and I so informally advised you at the time. The amended articles contain the following purpose clause:

"Said corporation is formed for the purpose of providing for the identification and protection of its members and contract holders at any time and place within the United States."

The foregoing purpose clause is vague and indefinite, and it is impossible for me to apprehend from its terms what may be the nature of the business which the company proposes to carry on. The purpose of this corporation should be more fully set forth in the articles, and I advise you not to file and record them until they are amplified as suggested.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—CASUALTY PROVIDENT COMPANY—PURPOSE CLAUSE DISAPPROVED WITH COMEMNT.

Purpose clause of corporation may not: 1. Join two unrelated purposes of identification and insurance. 2. Authorize a professional business. 3. Authorize an accident insurance business without complying with sections 3630i and 3641 R. S. 4. Authorize an insurance business when character is not specifically set forth.

June 9th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith the proposed articles of incorporation of the Casualty Provident Company submitted to me for the third time for my endorsement in accordance with the provisions of the Revised Statutes. I regret that I am unable to approve these articles. The purpose clause thereof as redrafted is as follows:

"Said corporation is formed for the purpose of providing for the identification and protection of its members and contract holders at any time or place within the United States, by rendering medical aid, care and sustenance for relief and recovery from physical injury occasioned by accident, or interment in case of death resulting from such injuries."

Without entering into a lengthy discussion of my reasons for disapproving the above purpose clause, I beg leave to point out the following defects therein:

1. It attempts, or seems to attempt, to join the two unrelated purposes of identification and insurance, which joinder is not authorized by any of the provisions of the Revised Statutes of this state.

2. It attempts, or seems to attempt, the authorization of a professional business contrary to the provisions of section 3235 R. S.

3. The phrase "protection by rendering medical aid * * relief and recovery from physical injury occasioned by accident, or interment in case of death resulting from such injury," apparently seeks to authorize some kind of an accident insurance business, but it is not clear from said articles whether the company is to be organized under section 3630*i* or under section 3641 R. S. In either event the provisions of these respective sections would have to be complied with before the company could do business in the state of Ohio.

4. If the company proposes to engage in any kind of insurance business the character of such business must be more specifically set forth. Corporations may not be organized for the purpose of engaging in the business of insuring either directly or indirectly unless the business proposed to be conducted is expressly authorized by the statutes of this state. (Section 289 R. S.)

I regret exceedingly the delay to which the incorporators of this company have been subjected, but there should be no difficulty in conforming the articles of incorporation of the proposed company to the provisions of the statutes of this state, and if it were indicated under what statute incorporation is sought, I should be glad to give consideration thereto. The corporation cannot be formed for more than one purpose, and if the parties are endeavoring to procure some power to be enumerated in the articles which is not authorized by the statute it will not avail them in any way. The articles of incorporation give no authority outside of that conferred by the statute, and the articles of incorporation should, therefore, conform to some section of the Revised Statutes which in this case, under the circumstances, should be indicated in the articles or to us so that we may be properly advised on the matter.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—SUMMIT HOSPITAL COMPANY—DISAPPROVED.

June 11th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 10th, enclosing proposed articles of incorporation of the Summit Hospital Company, with blank agreement and letter of Wilcox, Parsons, Burch & Adams attached thereto.

Complying with your request as to the validity of the purpose clause of this company, I beg to state that the same conforms substantially to that of the Cosmopolitan Sanitorium Company, heretofore approved by my predecessor in an opinion to your department under date of March 28th, 1908. To that opinion I adhere, and the general form of the proposed articles submitted is, therefore, approved.

In my judgment, however, the articles should not be filed without the addition of a clause restricting the power of entering into the annual contracts provided for therein, to such as may be made with residents of the county in which the hospital to be conducted by the corporation is to be located. Neither the articles in their present form nor the form of contract submitted, impose any restriction upon the power thus to contract with respect to the class of persons with whom contracts may be made.

Section 289 R. S., as amended, 99 O. L. 131, exempts from the application of the insurance laws of the state

> "the establishment and maintainance by * * * corporations, of sanitorium or hospitals for the reception and care of patients for the medical, surgical or hygienic treatment of any and all diseases * * * nor to the furnishing of any and all said services, care * * * in or in connection with any such institution *under or by virtue of any contract made for such purposes, with residents of the county in which said sanitorium or hospital is located.*"

Inasmuch as the articles submitted expressly limit the business of receiving and caring for patients to that

> "conducted on the basis of annual contracts with individuals or families"

I am of the opinion that failure to limit the power so to contract in the manner specified would subject the corporation to the insurance laws of the state.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARIES—WOMEN MAY VOTE AT FOR BOARD OF EDUCATION.

June 14th, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of June 12th, the receipt whereof is acknowledged, submits to me the question as to the right of women to vote at the coming primaries for candidates for nomination on the party tickets for members of the board of education.

Section 26 of the primary election law, 99 O. L. 214, provides that:

> "At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote."

Section 3970-12 R. S. provides that:

> 'Every woman born in the United States, or who is a wife or daughter of a citizen of the United States, who is over 21 years of age and possesses the necessary qualifications in regard to residence, as is 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."

The evident intention of section 3970-12 above quoted is to constitute women "legally qualified electors" for the purpose of choosing members of the board of education. As is evident from the opinion of the court in the case of State ex rel v. Board of Education, 9 C. C. 134, there is no distinction betweeen the term "voter" and the term "elector" as used in article V, section 1 of the constitution. Accordingly all persons who have the right to vote at any election are qualified electors at such election. In my judgment the phrase "general election," as used in section 26 of the primary election law above quoted, is to be contrasted with the term "primary election," and is not to be limited in its meaning to state and national elections. It follows, therefore, that an election for members of the board of education would be a "general election" within the meaning of section 26.

Upon the foregoing consideration, as well as that of the general purpose of the primary law, I am of the opinion that women may vote at the coming primaries for candidates for nomination on the party ticket for members of the board of education.

Yours very truly,

U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION LAW—PLACARD MUST BE DISPLAYED CONSPICUOUSLY.

July 21st, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 19th, in which you submit the following for my opinion:

> May the number plate or placard referred to in section 9 of the Automobile law be hung endwise on the rear or front of an automobile, that is, parallel with the body of the machine, and is such hanging or display a compliance with this section so as to avoid prosecution?

I beg to call your attention to section 9 of the Automobile law, which reads as follows:

> "That every motor vehicle, registered in accordance with the provisions of this act, shall have the distinctive number and registration mark assigned to it by the secretary of state, and furnished by the secretary of state, in accordance with the provisions of section 10 hereof, as hereinbefore provided, *displayed* on the front and rear of such motor vehicle, as an identification mark, securely fastened, so as not to swing."

It is necessary to look to section 10 of the same act to find what is required to be "displayed," as the real meaning of "displayed" can only be ascertained by knowing what is to be displayed. Section 10 is as follows:

> "That such distinctive number as an identification mark shall consist of a placard upon the face of which shall appear the distinctive number assigned to such motor vehicle as hereinbefore provided, in Arabic numerals, such numerals to be not less than four inches in length, each stroke not less than one-half inch in width. Such placard shall also contain the name or abbreviation of the name of this state, and the figures of the calendar year for which this distinctive number is issued. Such distinctive number or placard shall be of different color or shade each, such color or shade to be selected by the secretary of state."

It is plain from reading the above section that the printing of the number plate or placard is the thing to be "displayed," consisting of numbers and letters. "Displayed" when used relative to printing is defined, "made conspicuous." The latter part of section 9 may now be read as follows: "Made conspicuous on the front and rear of such motor vehicle."

I am therefore of the opinion that the number plate or placard referred to in section 9 of the Automobile law must be hung on the rear and front of an automobile so as to be conspicuous, and in case such number plate or placard is hung endwise so that the printing, consisting of numbers and letters, is not conspicuous, that such a hanging or display is not a compliance with section 9 so as to avoid prosecution.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

NOMINATION PAPERS FOR MUNICIPAL OFFICERS—SECRETARY OF STATE TO DESIGNATE WHERE FILED.

July 22d, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your favor in which you inquire where the nomination papers for municipal officers are to be filed when the village is situated in two or more counties and about equally divided as to territory and population.

In reply thereto I beg to say that there is no statutory law specifically governing conditions of this kind. It remains, then, to inquire if you, as state supervisor of elections and as state supervisor and inspector of elections, have authority to make such necessary rules and regulations for the proper conduct of a primary election in such municipalities that you may authorize the filing of such nomination papers.

By virtue of your office as secretary of state, you are by statutes, section 2966-2 and subsequent sections thereto, also made the state supervisor of elections and given certain powers therein enumerated. From a consideration of these sections I am of the opinion that as such state supervisor of elections you have authority to make such necessary rules and regulations, and I therefore suggest that you make and promulgate the same.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—FIRST MORTGAGE TRUST COMPANY—DISAPPROVED.

July 23d, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you submit the proposed articles of incorporation of The First Mortgage Trust Company with the inquiry as to whether said corporate name is legal and proper in view of the provisions of the purpose clause of said company.

From the name of this company it would be natural to infer that the purpose of this company is to be broad enough to include the receiving and administration of trusts. From the purpose clause, as follows, such intent is not evidenced:

> "Said corporation is formed for the purpose of lending money on notes or bonds secured by first mortgage on real estate; for lending money on the collateral security of bonds and stocks, and upon personal security; for selling such evidences of debt and securities without recourse on the corporation; for buying and selling bonds and stocks; and for doing all things incident thereto and authorized by the laws of Ohio."

No provision is here made for receiving on deposit or in trust any money, security or other valuable property. The inquiry therefore naturally arises as

to the source of the money to be loaned on first mortgage security or otherwise. The name of this company is the only evidence of a trust company appearing in the articles of the company. The company, therefore, would not be authorized to receive and administer trusts, and because of this fact the proposed name is misleading as to the true nature of the business to be conducted.

The superintendent of banks has made a ruling that the words "trust company" shall not appear in the corporate name of a banking institution without trust powers, and that no building and loan association may use the words "bank," "banking," or "trust" or any one or more of them in combination. As to the building and loan association there is express statutory authority to sustain the ruling. While the Thomas banking act does not expressly prohibit a corporation not a trust company from using the words "trust company" in the corporate name, I am of the opinion that to do so is to violate the general provision and intent of the Thomas banking act, and the right to do so should therefore be denied.

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION OF TOLEDO—MANNER OF ELECTING MEMBERS —VILLAGE SCHOOL DISTRICT MAY ONLY ELECT ONE BOARD OF EDUCATION.

The Toledo board of education may not fix manner of electing members as act in 99 O. L. 585 is unconstitutional.
A village school district may only elect one board of education.

August 6, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 5th, in which you request my opinion with respect to certain inquiries presented by the board of deputy state supervisors and inspectors of elections for Lucas county. The questions are as follows:

> "What is the proper law for electing members of school board in Toledo? In 1907, they were elected from districts and at large.
>
> "In 1908, the school board at a meeting passed a resolution voting the board, as a board, elected at large the same as Cincinnati; but some time ago the courts ruled that it was not legal, and Cincinnati board went back to the district plan. Would that be a general decision or can the board at Toledo fix how they shall be elected?
>
> "We also have in the village of Maumee two school districts, and for years past they have been electing a school board in each district. They have been notified by the county legal department that they were not legal boards, still they persist in being elected as separate boards each time."

The act of May 9, 1908 (99 O. L. 585), amending section 3897, was held by the circuit court of Hamilton county applicable only to the board of education of the city district of Cincinnati, and therefore, unconstitutional, being a law of a general nature, and having an operation not uniform throughout the state.

State ex rel Marvin v. Witherow, 11 C. C. N. S., 569.

While I am unable to reconcile the court's conclusion that the act is applicable only to Cincinnati, with the statement that the board of education of the Toledo city district has attempted to take action thereunder, I feel obliged to follow the court's ruling, which seems to have been acquiesced in by all parties interested, inasmuch as the case has not been taken on error to the supreme court.

In the case of State ex rel v. Witherow the court decided also that the act of 1908 being unconstitutional, section 3897 as amended in 1904 was to be regarded as in full force and effect. The court even went so far as to hold the act of 1904 constitutional, although the attack upon the validity of this act was, at the most, collateral. Under the act of 1904 the board of education of the city of Toledo consisted, and will continue to consist until after the next federal census, of five members, three of whom must be elected at large and two of whom are to be elected from subdistricts. In view of the decision of the circuit court above set forth, it is my opinion that the resolution of the board of education of the city of Toledo, described in your letter, is invalid, and that at the coming municipal elections the members of the board of education of the Toledo city school district should be chosen in the manner hereinbefore described.

With respect to the second question presented by the board, I beg to call attention to section 3909 Revised Statutes, which provides in part as follows:

> "In all incorporated villages not now organized as school districts, and in all villages hereafter created, there shall be a board of education elected as provided for in section 3908 of the Revised Statutes of Ohio."

Section 3908 provides in part, that,

> "The board of education of village school districts shall consist of five members elected at large at the same time, and in the same manner as municipal officers are elected, for the term of four years from the first Monday in January after their election * * *."

It will thus be seen that the village of Maumee should constitute but a single school district, and that a board of education consisting of five members should be elected at the coming municipal election.

Yours very truly,

U. G. DENMAN,
Attorney General.

CEMETERY TRUSTEES—APPOINTIVE NOT ELECTIVE.

August 12, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 10th, enclosing a communication addressed to you by Mr. M. E. Miskall, clerk of the board of deputy state supervisors of elections for Columbiana county, in which

he inquires whether cemetery trustees are to be elected in the city of Wellsville at the coming municipal election. You desire my opinion upon the question thus presented.

Section 141 of the Municipal Code of 1902, both in its original form and as amended by the so-called Paine law, 99 O. L. 562-563, vests in the department of public service control of all cemeteries owned by the city. The office of cemetery trustee is a village office and is appointive in any event.

It therefore appears that there will be no election this fall in any of the cities of this state for the office of "cemetery trustee."

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF ELECTIONS, ESTABLISHMENT OF TWO PRECINCTS IN ONE TOWNSHIP—AUTHORITY OF COMMISSIONERS TO PROVIDE TWO ASSESSORS.

August 13, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 12th, enclosing the communication addressed to yourself by Mr. Logan W. Marshall, clerk of the board of deputy state supervisors of elections for Shelby county, in which he presents the following question:

> "In 1908 the board of elections, after due legal procedure, established two precincts in Van Buren township; but no request having been made for the establishment under R. S. O. section 2966-15 (sec. 3) of the election of an assessor for each precinct there was no provision for the election of but one assessor for the entire township.
>
> "Now the question is whether or not the county commissioners under and by authority would have the right to provide for the election of an assessor for each precinct in accordance with section 1718 (91 O. L. 76) or, is the last named section in conflict with the latter part of section 2966-15, which in part provides that "but in all such election precinct subdivisions as aforesaid there shall be elected one assessor for each original precinct unless the deputy state supervisors, at the time of the division, shall order that an assessor be elected in each precinct. (April 28, 1908.")

You desire my opinion with respect to the foregoing.

Section 2966-15 is quoted in Mr. Marshall's inquiry.

Section 1718 (1517-1 Bates' Revised Statutes) contains the following provision:

> "Provided, that in any township, composed in part of a municipal corporation, or municipal corporations, the county commissioners may, by order entered on their journal, constitute the territory outside such municipal corporation or corporations, *one or more* assessor districts, in each of which an assessor shall be elected annually, in accordance with law. Provided, also, that nothing herein shall interfere with the duties now devolving upon deputy state supervisors of elections."

Assuming Van Buren township, Shelby county, to be composed in part of municipal corporations, I am of the opinion that the county commissioners may take the action suggested by Mr. Marshall.

Section 2966-15, in addition to the provision quoted in the inquiry, provides a method for the subdivision of election precincts, and contains a saving clause to the effect that such subdivision shall not of *itself* necessitate the election of an assessor in each subdivision, but that the board of deputy state supervisors of elections may order the election of such additional assessors in the manner described in the above quoted portion of the section. The two sections should, if possible, be construed together and, in my judgment, this may be done, as there does not seem to be a necessary conflict between them. If, therefore, the board of deputy state supervisors of elections has not exercised its power to require the election of additional assessors, the county commissioners may act. Such action on the part of the commissioners, however, must be taken in time to permit the observance of the provisions of law respecting coming elections and primary elections, and the duties of the board of deputy state supervisors of elections, and those of all other officers with respect thereto; if not so made, the order of the county commissioners will not be effective until after such election.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION PROVIDED FOR BY ORDINANCE—AUDITOR'S CERTIFICATE MONEY IN TREASURY NOT NECESSARY.

August 17, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 15th enclosing that of Mr. W. W. Woodbury, clerk of the board of deputy state supervisors of elections for Ashtabula county, in which he states that in March, 1909, the council of the city of Conneaut had passed an ordinance providing for the registration of electors in said city; that a question has arisen concerning the validity of said ordinance, inasmuch as at the time the same was enacted, the auditor of the corporation did not certify to council that the money required to pay the expense of registration was in the treasury to the credit of the fund from which it was to be drawn, etc., as provided for in section 45 M. C.; and that the deputy state supervisors desire to be advised concerning the validity of the ordinance and their duties in the premises.

You desire my opinion as to the question presented by Mr. Woodbury.

Section 2926*a*-1 Revised Statutes provides in part that:

> "The council of any city or village in which registration is not now required by law may provide for a general registration of electors * * *; in the manner, *and at the time*, and on the days now provided by law for registration in cities which now or hereafter may have quadrennial registration; and when the council so provides, no person shall be deemed or held to have acquired a legal residence in any ward or election precinct in any village, for the purpose of voting therein at any election * * * unless he shall have caused himself to be regis-

tered as an elector in such ward or precinct in the manner *and at the time* now required by law in cities which now have or hereafter may have quadrennial registration."

The ordinance of the council of the city of Conneaut must have been enacted under this provision.

Answering the specific question presented by the secretary for your own guidance in the future, I beg to state that in my opinion the ordinance is valid, as the same is not an "ordinance * * * for the expenditure of money * * *" within the meaning of section 45 M. C.

I reach this conclusion for the reason that the ordinance once passed is effective for an indefinite period of time, and is in no sense contractual, or in the nature of an expenditure. In other words, vouchers drawn under section 2926*t* for the registration expenses in cities and villages which have acted under section 2926*a*-1, must be paid by the city treasurer regardless of specific appropriation by council to meet such expenses.

I cannot understand, however, why the question should have arisen at this time. The act specifically provides for *quadrennial* registration in such villages and cities as act under its provisions.

Section 2926*h* provides in part that

> "In all cities which now or hereafter may have a population of 11,800 and less than 100,000, a general registration of all the electors therein shall *only be had at each and every presidential election.*"

Provision is also made in said section 2826*h* for partial registration of new voters, but this provision does not authorize registration before there has been a general registration, in a presidential year.

In my opinion, therefore, the ordinance of the council of the city of Conneaut cannot be operative until the next presidential year, viz: 1912. I therefore conclude that the deputy state supervisors of elections may not order registration in the city of Conneaut for the municipal election of 1909.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—MANSFIELD FIRE DEPARTMENT PENSION FUND ASSOCIATION—DISAPPROVED.

A purpose clause may not exact involuntary contributions from members of a fire department, who are, without any further act on their part, to be considered members of association.

August 18, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 16th, in which you request my opinion as to the fee chargeable for filing and recording the articles of incorporation of the Mansfield fire department and pension fund association, and also whether the powers of said association, as enumerated in the articles submitted to me are such as to render it subject to the laws governing insurance companies.

The articles of incorporation submitted to me are drafted upon the regular "not for profit" blank of your department. The purpose clause thereof is as follows:

> "Said corporation is formed for the purpose of affording mutual protection and relief to the members of the Mansfield fire department and their families exclusively by accumulating a fund in the manner following:
>
> "Each member of the Mansfield city fire department shall pay into said fund a stipulated sum each month, and the fund so created, together with whatever amounts may be added thereto, by donations, or otherwise, shall be a relief fund from which shall be paid stipulated amounts to the members of the Mansfield fire department or their families, in case of the sickness or death of themselves or any member of their family. Said association is limited in its membership to members of the Mansfield city fire department."

The articles have been subscribed by six persons. Upon a careful examination of all the statutes which might be deemed applicable to the question, I am in serious doubt as to the exact nature of this corporation. The membership of the association is said to be limited to members of the Mansfield city fire department, and the purpose of the corporation is stated as being that of affording protection and relief to the members of the Mansfield city fire department.

Again, it is specifically provided that each member of the *Mansfield city fire department*, not each member of the association, shall pay into a fund to be created, a stipulated sum each month. In other words, the incorporators apparently seek authority to exact involuntary contributions from the members of the Mansfield city fire department, who are, without any further acts on their part, to be considered members of the association. I do not find any statutory authority for the exercise of such power.

Section 3241 Revised Statutes provides that, when the incorporators of a corporation are members of a "church, religious, secret or benevolent society" all members of such societies in good standing shall, by virture of such membership, be members of such corporation. The Mansfield city fire department, however, is not within this classification.

Section 3631*a* Revised Statutes, by implication, provides for the organization of mutual benefit societies; its provisions apply to

> "Associations of religious or secret societies, or to 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 relations exclusively, or for purely charitable purposes."

The members of the Mansfield city fire department, in my judgment, could not claim membership in any of the foregoing classes.

Section 155 M. C. which adopts the act of April 23, 1902, as amended April 23, 1904, 97 O. L. 245, authorizes the creation of a fireman's pension fund by general ordinance. In addition to the provisions respecting the levy of taxes for the support of this fund, the following language is found therein:

> "The trustees of the firemen's pension fund may also receive such uniform amounts from each person, designated by the rules of the fire

department, as members thereof, as he may voluntarily agree to * * * and the monthly amounts so received shall be used as a fund to increase the pension * * *."

This statute clearly recognizes the lack of power of the trustees of the pension fund to exact involuntary contributions— a power seemingly granted to the corporation by the articles as drafted. Without determining whether the attempted incorporation of this association is in violation of the provision of the municipal code above referred to, I am of the opinion that the purpose clause is invalid.

Having reached the foregoing conclusion, the answers to the specific questions asked by you become of minor importance. However, it might be stated that any organization of firemen, either local or general, would, under existing laws, have to be organized either as a fraternal beneficiary association, in which case a "lodge system with ritualistic form of work and representative form of government" (section 3631-11 R. S.) would have to be provided, or, as a mutual protective association, under section 3630 R. S. The present scheme of the incorporators seems to me to demand organization under the latter section, in which case, of course, the fee chargeable by the secretary of state is $25.00, and the corporation thus organized becomes subject to the insurance laws of the state.

In view of the defects above noted in the articles, as drafted, I advise that until modified so as to eliminate the apparent compulsory features of the purpose clause the articles of incorporation should not be filed by you.

I herewith return the articles, together with the check of G. M. Cummings attached thereto.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION—SALOONS MUST BE CLOSED.

August 31, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 31st, requesting my opinion upon the following question:

"Does the primary election or the general election laws require the saloons to be closed on the day of holding the primary election?"

Section 43 of the primary election law, 99 O. L. 214-224 is as follows:

"All provisions and requirements of the law of the state to preserve and protect the purity of elections, and all the penalties for violation of such laws shall apply and shall be enforced as to all primary elections held under this act."

The above section, in my judgment, refers to and adopts the following sections of the Revised Statutes:

Sec. 6948.

"Whoever sells or gives away, any spirituous, vinous, or malt liquors on any election day, or, being the keeper of a place where any such liquors are habitually sold and drank, fails on any election day to keep the same closed, shall be fined not more than one hundred dollars, and imprisoned not more than ten days."

Sec. (1536-628a) R. S. sec. 1838.

"The mayor shall, three days previous to and on the day of any election, issue a proclamation to the public setting forth therein the substance of the enactments to prohibit the sale of intoxicating liquors on that day; and it shall be the duty of the mayor to take proper measures for the enforcement of such enactments."

In my judgment, therefore, it is the duty of the mayor to publish his proclamation respecting the closing of saloons on the day of holding the primary election, and it is unlawful for any person, whether located within or outside of a municipality, to sell or to give away any intoxicating liquors on said day.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—COLUMBUS MUTUAL AID—FEE TO BE CHARGED FOR FILING.

September 17, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 16th enclosing proposed articles of incorporation of the Columbus Mutual Aid, the incorporators of which desire to form a corporation not for profit under the general corporation laws of this state, for the following purpose:

"To mutually aid its members in good standing, who are sick and disabled, and in the event of the death of any of its members in good standing, to contribute the sum of one ($1.00) dollar, per member, which said sum shall be paid to the heirs of said deceased member, in accordance with its constitution and by-laws."

The foregoing purpose clause seems to me to define a business such as is contemplated by section 3630 R. S., which provides in part 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 plant, for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the family, heirs, executors, administrators, or assigns, of the deceased members of such company or association, as the member may direct, in such manner as may be provided in the by-laws, etc."

There is nothing in the articles quoted to indicate that the proposed corporation is entitled to the benefit of the exception provided for by section 3630*a*. nor that the special powers defined in section 3630*i* are proposed to be exercised thereby.

I am accordingly of the opinion that the provisions of the insurance law included within section 3630*a et seq.* Revised Statutes apply to the proposed company, and that the fee for filing the articles is that prescribed by paragraph 4 of section 148*a* Revised Statutes, viz., twenty-five dollars.

I return the articles of incorporation herewith.

Yours very truly,

U. G. DENMAN,
Attorney General.

"DOMINANT PARTY"—DEFINED.

September 17, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 16th, in which you request my opinion upon a question presented by Mr. Harry H. Loth, member of the board of state supervisors of elections for Auglaize county. Mr. Loth's question is as follows:

> "What is the meaning of the phrase 'dominant party,' as employed in section 2966-6 Revised Statutes, in describing the qualifications of the presiding judge in each precinct, and how is such definition to be applied in making appointments for the election in November, 1909, the last general election having been a presidential one?"

Section 2966-6 Revised Statutes is section 6 of the supervisory election law so-called, 97 O. L. 218. The pertinent provision thereof is as follows:

> "The deputy supervisors shall designate one judge in each precinct who shall be selected from the *dominant party* in such precinct, as determined by the next preceding November election, to act as presiding judge."

This section is *in pari materia* with section 2966-3, being section 3 of the same act, which provides for the appointment of the deputy state supervisors of elections. Among other provisions therein are the following:

> "One member (of the board of deputy state supervisors of elections) so appointed * * * shall be from the political party which cast the highest number of votes at the last preceding November election for *governor* or *secretary of state* * * *."
>
> "Appointments shall be made from two political parties which cast the highest and next highest number of votes at the last preceding November election for *governor* or *secretary of state*."

The phrase "dominant party" being nowhere specifically defined, it is my opinion that it should be construed in the light of the clauses last above quoted,

and that in ascertaining such "dominant party" in a given precinct for the election in November, 1909, the deputy state supervisors should be guided by the vote cast for governor in 1908. That cast for secretary of state may be disregarded, as the law was evidently framed to fit conditions as they were when there were annual elections for state officers, and the candidates for governor and secretary of state appeared alternately at the head of each ticket.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—LEWIS BROTHERS COMPANY DISAPPROVED.

September 21, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 20th, enclosing application for request of incorporation of the Lewis Bros. Company, and a check for $10.00, and letter of counsel attached.

You desire my opinion as to the legality of the purpose clause therein set forth, viz:

> "Said corporation is formed for the purpose of manufacturing, buying, selling, and dealing in, and trading in iron, steel, copper, brass, bronze and other metals, and all kinds of alloys, as *principal, agent, factor and broker;* and for the purpose of buying, selling and dealing in, and trading in all kinds of ores and coal, and iron and steel factory and mill and furnace and foundry *supplies* and products, as *principal, agent, factor and broker;* and for the purpose of manufacturing, buying, selling and dealing and trading in coke, as *principal, agent, factor and broker;* and for the purpose of owning, leasing, selling, controlling and managing and operating any and all kinds of ore and coal mines, and coke works, iron and steel factories, iron and steel mills, and furnaces of all kinds, as *principal, agent, factor and broker;* and for the purpose of owning, leasing, selling, dealing in and controlling and managing all real estate necessary and convenient for the transaction of such business, in the state of Ohio and elsewhere; and for the purpose of owning, selling, leasing, dealing in and managing and controlling all personal property, which may be required in the convenient conduct of the business."

In my opinion, the foregoing articles are objectionable in two principal respects, viz:

1. They attempt to authorize the conduct of certain businesses authorized to be carried on by the joint operation of sections 3862 and 3864 Revised Statutes, in the several capacities, "principal, agent, factor and broker." This department has repeatedly held that while a corporation may be authorized to sell products mined and manufactured by itself, and to supply its customers with such products, regardless of whether or not they are of its own production or manufacture, yet such business must be limited to that necessarily and properly incidental to the principal business of the corporation. In this case

such principal business is assumed to be mining and manufacturing. In my judgment, it is clearly not necessarily and properly incidental to such principal purposes to sell and deal in manufactured articles as "agent, factor and broker." or to buy and sell, control and manage mines and mills as "agent, factor and broker."

I may refer you to the opinions of the attorney general addressed to yourself under date of February 5, 1907, June 14, 1907, and September 30, 1907, for further elaboration of the principles here invoked and citation of authorities thereon.

2. The articles in question attempt to authorize the transaction of the business of dealing and trading in factory, mill, furnace and foundry *supplies*. The latter term is broad enough to include machinery of all kinds, and the business of dealing in such machinery is clearly incidental to, and entirely unrelated to, the principal purposes of the corporation. In this connection, reference may be made again to the opinion of June 14, 1907, above cited.

For the foregoing reasons I am satisfied that the proposed articles of incorporation of the Lewis Bros. Company attempt to authorize multiple purposes within the inhibition of section 3235 as construed in the case of State ex rel. v. Taylor, 55 O. S. 61 and I, therefore, advise that the same be not filed and recorded by you until so amended as to remove the infirmities above suggested.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—NATIONAL COUNCIL DAUGHTERS OF AMERICA FRATERNAL BENEFICIARY INSURANCE COMPANY—PURPOSE CLAUSE DISAPPROVED.

Association desiring to incorporate with power to do fraternal beneficiary insurance must file articles of incorporation with insurance department.

September 28, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me the proposed articles of incorporation of the National Council of the Daughters of America of the United States of North America, and request my opinion as to whether they may be filed in your department under the general incorporation laws of the state. The purpose for which the corporation in question is formed is specifically declared to be that of

> "engaging in the business accorded to fraternal beneficiary associations by the laws of Ohio, to-wit: 'An act regulating fraternal beneficiary societies, orders, associations' passed April 25, 1904, and approved April 26, 1904. Section 3631-11 and 3631-23 inclusive, of the act entitled 'an act to amend section 3631-13 of the Revised Statutes of Ohio, passed May 12, 1902,' and of the acts amendatory thereto and supplementary thereof."

Section 3631-22, being section 12 of the act in 97 O. L. 421, provides in part as follows:

"Seven or more persons, * * * who may desire to form a fraternal beneficiary association, as defined by this act, may make and sign * * * and acknowledge before some officer * * * articles of association * * *.

"Such articles of association * * * shall be filed with the superintendent of insurance * * *, and if the purposes of the association conform to the requirements of this act, and all the provisions of the law have been complied with, the superintendent of insurance shall so certify and retain and record the articles of association in a book kept for that purpose * * *.

"Upon receipt of said certificate from the superintendent of insurance said association may solicit members * * *.

"The articles of association and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, * * * unless such association shall have completed its organization and commence business as herein provided."

Section 31 of the same act, being section 3631-23r Revised Statutes, provides in part that

"The word 'association' as used in this act shall be taken and construed as meaning a fraternal beneficiary corporation, society, order, or voluntary association as defined in section 1."

The provision of section 1 thus referred to is as follows:

"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 a ritualistic form of work and representative form of government, and which shall make provision for the payment of death benefits is hereby declared to be a fraternal beneficiary association."

Section 4, Revised Statutes 3631-14 provides in part that,

"except as herein provided, such association shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose * * *."

Section 3235 Revised Statutes provides in part that,

"Corporations may be formed in the manner provided in this chapter for any purposes for which individuals may lawfully associate themselves except for carrying on professional business * * *."

Section 3587 and 3588, and similar sections in the insurance laws of the state provide a special method for the incorporation of insurance companies. While these sections are by the above quoted provision of section 4 made inapplicable to fraternal beneficiary associations, their existence is significant, inasmuch as it tends to show that section 3235 and succeeding sections do not necessarily govern the creation of all corporations, and that they constitute

exceptions to the otherwise general language of section 3235, wherein the formation of corporations thereunder for any purpose is authorized.

State v. Pioneer Live Stock Co. 38 O. S. 347.

Section 12 above quoted prescribes also the form for articles of association to be filed thereunder, and the same is substantially different from that set forth in sections 3236 and 3238 of the general incorporation act.

Construing all the above cited sections together and having regard to the manifest intent and purpose of the fraternal beneficiary act from which extensive quotation is above made, I am of the opinion that the purpose of engaging in the business of a fraternal beneficiary association is not one of those for which corporations may be formed under section 3235 Revised Statutes, but that the only proceedings authorized by law to be taken in order to effect the incorporation of a company or association formed for the purpose of doing such business, are those prescribed by section 12 of the fraternal beneficiary association act. The fact that the language of sections 31 and 1 of said act seems to recognize the possibility of fraternal beneficiary associations being either incorporated or unincorporated, does not, it seems to me, militate against this conclusion, inasmuch as it is evident from other provisions of the act that at the time the same was enacted there were in existence societies organized in both ways, and doing substantially the kind of business regulated by the act.

I conclude, therefore, that the articles of incorporation which have been presented to you may not be filed in your department, and that they should be presented to the superintendent of insurance, as provided in section 12 above quoted.

Very truly yours.

U. G. DENMAN,
Attorney General.

AUTOMOBILES—LIGHTS—MANNER OF DISPLAYING.

October 1, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an inquiry from the registrar of automobiles of your department, enclosing an inquiry from C. G. Meyer & Son, of Tiffin, Ohio, respecting the construction of section 12 of the automobile law, with regard to lights required to be displayed upon automobiles during the night season. The specific question is as to whether the law requires lights to be displayed upon a motor vehicle which is upon a public road or highway of the state, but which is not in motion; that is, which is left standing at the curb or roadside during the night season, as defined by law.

Section 12 of the automobile law, 99 O. L. 538, provides in part as follows:

> "Every motor vehicle *operated and driven upon the public roads or highways of this state* * * shall, during the period from thirty minutes after sunset to thirty minutes to sunrise, display three white lights, two on the front and one on the rear of each motor vehicle. * * And every motor vehicle shall also display, in addition to the foregoing, a red light on the rear thereof."

The word "operated," as repeatedly used in the act in question, apparently conveys various meanings, as used in different contexts. In section 12, above quoted, it is my opinion that the word means "used," within the broadest signification of that word. Any automobile upon the public highway would, in my opinion, be regarded as being in use and hence as being operated within the meaning of section 12.

It is, therefore, my opinion that the requirements of that section as to lights during the night season apply in case a motor vehicle were left standing in the public highway and that the question of Mr. Meyer should be answered in the affirmative.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION—WRITING NAMES ON BALLOT FOR OFFICE WHERE NO PETITION WAS FILED.

Persons receiving plurality of votes cast for a given office by electors writing name in on blank space on partisan ballot where there is no regular nomination for such office on partisan ballot, should be declared the nominee therefor and name placed upon official ballot.

October 1, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 30th, enclosing letter addressed to you by Mr. J. V. Murphy, clerk of the board of deputy state supervisors of elections for Mahoning county, wherein he submits a question regarding which you desire my opinion, viz:

> "Where there were no nomination petitions filed before the primaries and names were written in on the primary ballot for the office for which no petition was filed, should the names of the parties who received the highest number of votes by having their names written in have their names placed upon the November ballot?"

As pertinent to the inquiry thus submitted I beg to quote the following provisions of the primary election law, 99 O. L. 214 et seq.

Section 2:

> "Candidates for * * * public elective offices * * * of all * * * political parties * * * which at the next preceding general election polled * * * at least ten per centum of the entire vote * * * shall be nominated * * * in accordance with the provisions of this act * * *."

Section 14:

> "* * * election boards shall, with respect to primary elections, have all the powers granted and perform all the duties imposed by the laws governing general elections * * *; and *all statutory provisions*

relating to general elections shall, so far as applicable, apply to and govern primary elections."

Section 16:

"Nomination for places on the primary ballot shall be by nomination papers * * *."

Section 17:

"The name of no candidate for office shall be *printed* upon an official ballot used at any primary unless * * * nomination papers shall have been filed in his behalf."

Section 21:

"* * * If the board of elections finds that * * * the nomination papers did not contain the requisite number of names * * * the board shall withdraw his (the candidate's) name, and *it shall not be printed upon the ballot.*"

Section 23:

("Separate tickets shall be provided for each political party entitled to participate in such primary; such tickets shall contain the names of all persons whose names have been duly presented and not withdrawn * * *; such ticket shall conform as near as practicable to the form provided in the act of April 18, 1892, (O. L. 432), commonly known as the 'Australian ballot law,' and the acts amendatory thereof and supplementary thereto, except that no device or circle shall be used at the head of said tickets * * *.")

Section 28:

"At the close of the polls the judges and clerks shall proceed without delay to canvass the vote * * * and make return forthwith thereof to the board of elections * * *."

Section 29:

"* * * The board of elections shall meet and canvass the vote and declare the result in the manner provided by law for general elections * * *."

Section 30:

"When the primary has been held to make nominations of candidates to be voted for at the ensuing November election, the board of elections shall place the names of the persons so nominated upon the official ballot of the candidates of the respective political parties nominating them."

Section 35:

"* * * All expense of primary elections * * * shall be paid in the manner now provided by law for the payment of similar expenses for general elections * * *."

Section 43:

> ("All provisions and requirements of the law of the state to preserve and protect the purity of elections, and all penalities for violation of such laws shall apply and shall be enforced as to all primary elections held under this act.")

From the above quoted provisions, all of which are mutually related, and from a consideration of the evident general purport of the primary election law, it will be seen that said law provides a compulsory method of selecting the candidates of certain political parties for a given general election. The method thus provided is by election conducted by the use of ballots. There can be no doubt but that the general assembly intended that the election thus provided for should be in all respects wherein practicable essentially similar to any general election regulated by law in conformity to the constitution of the state.

Section 2 of article 5 of the constitution of this state requires that "all elections shall be by ballot." While the general assembly may not have been required to provide for the nomination of partisan candidates by an election conducted by the use of ballots within the meaning of this article of the constitution, I cannot escape the conclusion that by the enacment of the primary law it has chosen to do so, and that the primary election thereby provided is, in all respects, such an election as is contemplated by the constitution. (18 L. R. A. N. S. 412, Note.)

It seems indisputable to me that one of the requisites of a "ballot," as the word is employed in the constitution, is that it shall afford to each elector a means of indicating his free and untrammeled choice of persons qualified to be chosen at the election. Thus, that is not a "ballot" which limits the choice of the elector to one of two or three persons. The constitutional right is to vote for any person for the particular officer regardless of previous "nomination" or "candidacy."

The "Australian ballot law" referred to and certainly adopted in part by section 23 of the primary election law above quoted, embodies an effort on the part of the general assembly to preserve and protect the purity of elections, and at the same time to preserve the constitutional right to vote by ballot. While the general scheme of that law is one of official ballots containing the names of candidates duly nominated by political parties and by petition printed thereon, nevertheless the general assembly, having in mind the constitutional limitation above discussed, provided ample means for the expression of the choice of the elector, and did in no sense limit such choice to the candidates whose names appear on such official ballot.

In section 21, which prescribes the manner in which a qualified elector shall prepare his ballot, is found the following provision. Section 2966-35 Bates' Revised Statutes:

> ("If the elector desires to vote for any person whose name does not appear on the ticket, he can substitute the name by writing it in black lead pencil, or black ink, in the proper place, and making a cross mark in the blank space at the left of the name so written.")

Again, in an effort clearly to provide against all possible contingencies and more certainly to guarantee and preserve the right of free choice, section 21*a* was enacted (91 O. L. 119 section 2966-36 Bates' Revised Statutes):

("If there should be no nomination for a particular office by any particular party * * * and the elector desires to vote for someone to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket as though the name substituted had been originally printed thereon.")

I am of the opinion that it was the intention of the general assembly in enacting the primary election law to provide a compulsory election by ballot within the meaning of the constitution, and that in furtherance of this intention the general assembly, particularly in sections 23 and 43 above quoted, meant to adopt all provisions of the Australian ballot law, so-called, not inconsistent with the general scheme and purpose, or with any specific provision of the primary law; that the above quoted provisions of sections 2966-35 and 2966-36 Bates' Revised Statutes are not inconsistent with the general scheme and specific provisions of the primary law, excepting insofar as reference is therein made to voting a "straight" ticket; that had the general assembly not adopted these sections, or otherwise guaranteed the right of untrammeled choice the primary ballot referred to in section 23, and made up as provided in sections 16 and 17 of the primary election law, would not have been a "ballot" as the word is used in all the election laws and in the constitution.

From the foregoing conclusion it follows that an elector participating in a primary election is not limited in the expression of his choice for the partisan nomination, to the names *printed* on the primary ballot, and that he may substitute by writing any name in the proper space and placing a cross mark opposite the same.

The question submitted by the deputy state supervisors involves another point, viz: It is stated that no nomination petitions were filed, and questioned whether names may be written upon the ballot.

The particular question is thus raised as to whether in case there are no nomination papers filed the partisan ballot should contain blank spaces for each office to be filled at the ensuing general election. While the reasons above stated might tend to support an affirmative answer to this particular question, there is clearer authority for such an answer in section 18 of the Australian ballot law. That section is the one which prescribes the form of the ballot, and there can be no question whatever as to its inclusion by reference in the primary election law under section 23 thereof above quoted.

The provision of section 18 in question, Bates' Revised Statutes, section 2966-32 is as follows:

("If upon any ticket there be no candidate or candidates for a designated office, a blank space equal to the space that would be occupied by such name or names if they were printed thereon with the blank spaces (at the left side) herein provided for, shall be left.")

The fact that such a blank space must be left under this section, which is clearly adopted by the primary election law, not only gives electors the practical opportunity to write in names which are not printed upon the official primary ballot in case no nominations by petition are made for a given office, but it also indicates clearly that the general assembly intended that electors should have the right to do this. If it had not been intended that the electors

should have the right to fill such blank spaces with the names of persons of their choice for the offices in question, there would be no necessity for leaving such blank spaces; if it was not intended that such blank spaces should be left, the general assembly would have provided against leaving such blank spaces by an exception incorporated in section 23 of the primary election law above quoted.

That the board of deputy state supervisors of elections for Mahoning county has followed section 18 of the Australian ballot law, and has left such blank spaces, would seem to be the case from the letter of the clerk. If a blank space is left and the voter fills such blank space in the manner prescribed in section 18 of the Australian ballot law, his vote for the person whose name he writes upon the ballot in this manner should be counted, in my opinion, not only for the reasons above stated in discussing the nature of a ballot, but also because to refuse to count his vote would render meaningless and nugatory the provision respecting the leaving of a blank space.

If, then, the votes of electors who have written names in the blank spaces on a partisan ballot are to be counted in canvassing the vote, there can be no doubt but that the person receiving a plurality of such votes so cast for a given office, in case there is no regular nomination for such office on the partisan ballot, should be declared the nominee therefor, and that his name should be placed upon the ballot at the ensuing November election as the candidate of the political party for the office in question.

I herewith return the letter of Mr. Murphy.

Yours very truly,

U. G. DENMAN,
Attorney General.

ELECTOR MAY ERASE NAME OF PERSON ON OFFICIAL BALLOT AND SUBSTITUTE ANOTHER UNDER CERTAIN CIRCUMSTANCES.

A partisan elector may not cross the name or names printed on his political party ballot for any office and write therein the name of candidate from another party ticket, and attempting to do so would make vote illegal.

No partisan elector may erase name of candidate printed on his political party ballot for any office and substitute name of any person of different political faith from that represented by ballot on which elector is voting.

An elector may erase name of candidate for any office from ballot which elector is voting, and substitute name of another person of same political party faith, or he may write in blank space the name of person whose politics is same as that represented by ballot on which elector is casting his vote.

October 9, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of today, October 9, in which you ask my opinion on the following question:

> "In your opinion rendered me yesterday to an inquiry from the clerk of the election board of deputy state supervisors of Mahoning county, the question has been raised whether an elector could erase all the names for a particular office from his party ticket and substitute

therefor one of the candidates from the other party ticket, writing the name in and otherwise complying with the general election laws, and have the same counted for said candidate.

"This inquiry is submitted to you for the reason that this question, in my opinion, is of paramount importance in conducting the primary elections under this statute."

The opinion rendered you yesterday, October 8, was rendered upon a letter written to you from the board of deputy state supervisors from Youngstown, and upon certain additional facts given us by your office as to your understanding of the situation at Youngstown. The letter from the Youngstown board is as follows:

"Where there were no nomination petitions filed here the primaries and names were written in on the primary ballot for the office for which no petition was filed, should the names of the parties who received the highest number of votes by having their names written in have their names placed upon the November ballot?"

Our further understanding was that the names which *"were written in on the primary ballot for the office for which no petition was filed,"* were written in on the ballots of the Democratic party, and that the names so written in were names of Democrats, and on these facts, as we understood them, we held in our opinion of yesterday and still hold that such names of such Democrats written on such Democratic ballot should be counted, and that the party who received the highest number of votes should have his name printed upon the November ballot.

Your letter of today, October 9, however, as quoted above, submits an entirely different question, and that question in effect is whether an elector, either a Democrat or a Republican, or of any other political party, has a right under the law to erase all the names printed on his party ticket for any particular office and substitute therefor the name of one of the candidates from another and different party ticket, writing the name in and otherwise complying with the general election laws, and have the same counted for said candidate whose name is thus written in.

My opinion on this question is that such action on the part of the elector would be wholly illegal, and that such an attempted vote could not in any wise be counted for the candidate. The reasons why this is so plain are from the fact that the purpose of the Bronson primary election law is to provide for the conducting of partisan primary elections for the nomination of candidates to be voted for for the several offices to be filled at the following regular November election; that is, this law requires that all political parties which, at the last election, cast ten per cent. or more of the vote at that election, shall make their respective nominations by ballot under this law, and they are to make these nominations on the same day as specified in the act, the electors voting at the same place, but provision is made that there shall be provided a party ticket for each political party holding its primary on this day and at these voting places.

It is further provided that when an elector goes to a voting booth to participate in such a primary election, he must declare his party politics; that is if he is a Republican he must say so, and ask for the Republican ballot, and the booth officials must give him such a ballot; if he is a Democrat, a similar procedure must be followed, and so it is with every other party conducting its primary at that time.

The Bronson primary law provides that before a person who desires to be voted for at such primary election can have his name *printed* upon his party's official ballot as used at the primary election, he, or somebody for him, must file with the board of elections a petition signed by the requisite number of electors, which petition is a request on the part of these electors to the board of elections to place the name of the candidate for nomination for the office on the primary ballot of the party to which the candidate belongs. Each signer of the petition declares in that petition that he is a member of that political party and that he intends to support the candidate named therein. That candidate must file with this nominating petition a declaration that he will qualify as such officer if nominated and elected, and all of these matters must be done in the manner just stated before the candidate can have his name *printed* on his political party's official ballot for the primary election in question. By consenting to the use of his name in this manner, and declaring that he will qualify as such officer if nominated and elected, he thereby declares and makes known his political party faith.

Section 17 of the Bronson law provides in part as follows:

> "The name of no candidate for office shall be *printed* upon an official ballot used at any primary, unless * * * nomination papers shall have been filed in his behalf."

If the general assembly, in prescribing rules and regulations for the conduct of these primary elections, had gone no farther in prescribing rules, limitations, regulations, etc., than as indicated in this section 17 just quoted, the word "printed," in view of the purpose of the primary law, might well be construed to include the two words "or written," and in such a case it would, of course, be illegal for any elector to write on the ballot the name of any other person than the candidate's name which is printed thereon; but the general assembly did not stop with that regulation. On the contrary, by section 14 of the act it is provided as follows:

> "* * * election boards shall, with respect to primary elections, have all the powers granted and perform all the duties imposed by the laws governing general elections * * *; and *all statutory provisions relating to general elections* shall, so far as applicable, apply to and govern primary elections."

Section 23 of the Bronson law provides as follows:

> "Separate tickets shall be provided for each political party entitled to participate in such primary; such tickets shall contain the names of all persons whose names have been duly presented and not withdrawn * * *; such ticket shall conform as near as practicable to the form provided in the act of April 18, 1892 (O. L. 432), commonly known as the 'Australian ballot law,' and the acts amendatory thereof and supplementary thereto, except that no device or circle shall be used at the head of said tickets * * *."

Section 43 of the Bronson primary law provides as follows:

> "All provisions and requirements of the law of the state to preserve and protect the purity of elections, and all penalties for violation of

such laws shall apply and shall be enforced as to all primary elections held under this act."

The statutory provisions relating to general elections which, under section 14 of the primary law, as quoted above, we are required to consider in answering your inquiry of today, are as follows:

First. The Australian ballot law, section 2966-32 Bates' Revised Statutes provides that,

> "If upon any ticket there be no candidate or candidates for a designated office, a blank space equal to the space that would be occupied by such name or names if they were printed thereon with the blank spaces (at the left side) herein provided for, shall be left."

Section 21*a* of the Australian ballot law, being section 2966-36 Bates' Revised Statutes, provides as follows:

> "If there should be no nomination for a particular office by any particular party * * * and the elector desires to vote for someone to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket as though the name substituted had been originally printed thereon."

And section 21 of the Australian ballot law, being section 2966-35 Bates' Revised Statutes, provides as follows:

> "If the elector desires to vote for any person whose name does not appear on the ticket, he can substitute the name by writing it in black lead pencil, or black ink, in the proper place, and making a cross mark in the blank space at the left of the name so written."

Under section 23 of the Bronson primary act, as quoted above herein, it is provided that the primary ballot or ticket shall conform to the form of ballot prescribed by the Australian ballot law, except that no device or circle shall be used at the head of said tickets. This section 23 just referred to, if standing alone, would require the primary ballot to be the same as the regular election ballot, except as to the device or circle at the head of the ticket, and this, of course, would include blank spaces as provided for under section 2966-32 Bates' Revised Statutes just quoted, but in addition to that there is also in section 14 of the primary law herein above quoted, the provision that, "all statutory provisions relating to general elections shall, so far as applicable, apply to and govern primary elections." This language clearly requires the primary ballot to be the same as the regular ballot including blank spaces, where no nomination has been made or no nomination paper has been filed for any particular office, except that the primary ballot can have no device or circle at the head of the ticket, and by this same language quoted from said section 14 of the primary law, the sections 2966-35 and 2966-36 Bates' Revised Statutes are made to apply to the elector in making his primary ballot, except,

of course, that he cannot be allowed to do anything other than vote for a man of the same political party faith as is represented by the ballot which he asks for and receives, and upon which he must vote.

The Bronson primary law nowhere expressly prohibits an elector from writing a name of some person upon the ballot for a particular office other than the name which has been printed there by the board of elections, nor does this law expressly forbid the board of elections in making up the ballot from printing blank spaces for offices for which no nominating petitions have been filed, nor does this same law anywhere expressly prohibit the elector from writing in such a blank space the name of some person qualified to fill the office. On the contrary, the primary election law adopts the provisions of the general election laws insofar as they are practicable and applicable. This simply means that if any regulation is prescribed in the general election laws concerning which no regulation is made in the primary act, these regulations in the general election law prevail insofar as such general election regulations are not in direct conflict with the purpose of the primary law.

Section 23, as above quoted, of the primary election law, requires the primary ballot to be the same as the regular election ballot, except there shall be no device or circle at the head of the ticket.

If there are to be blank spaces, then what are they for? The answer very clearly is, to allow the elector to conform to section 2966-36 Bates' Revised Statutes as quoted above with reference to voting in such blank spaces. Of course, in voting for this person whose name is thus written in, the voter would make his mark at the left of the name as is required by the primary act.

On the whole it seems very clear that the general assembly meant to have the primary election conducted under the same regulations as the general elections, except that the elector, in voting at the primary election, must cast a political party ballot in every sense of the term. The purpose of the act is to permit a Democrat to participate in nominating a Democrat for each office to be filled, and to permit a Republican to participate in nominating Republicans for such offices.

The question you submit suggests another question, namely:

May an elector of any party strike out the name of any candidate printed on the ballot, and write in place thereof, or, if no such name is printed there, then may he write in the blank space left therefor the name of some person of the same political party faith as the voter, but which person is not a candidate on any other political party ticket, or who is not a candidate at all?

With reference to the regulations applicable in the printing of these primary ballots and the conduct of the primary election, the same reasoning applies to this question as is applicable to the question you submit, and I am therefore, of the opinion

First: That a partisan elector may not, under the law, erase the name or names printed on his political party ballot for any office, and write therein the name of a candidate from another party ticket, and that if he should do so, such attempted vote would be illegal and should not be counted.

Second: That no partisan elector may, under the law, erase the name of a candidate printed on his political party ballot, for any office, and substitute therefor the name of any person of a political party faith different from that represented by the ballot on which the elector is voting; that is, for instance, a Republican cannot erase a name from his political party ballot for any office and substitute in lieu thereof the name of a Democrat, nor can such elector write in a blank space, if such blanks there be, the name of a person of different political party faith than the party represented by the ballot.

Third: The elector may, however, erase the name of a candidate for any office from the ballot which the elector is voting, and substitute therefor the name of another person of the same political party faith, or he may write in the blank space, if such there be, the name of a person whose politics is the same as that represented by the ballot on which the elector is casting his vote.

In short, an elector who participates in a Republican primary election may vote for a Republican, and a Republican only, for any office for which nominations are to be made, and a Democrat who participates in a Democratic primary may vote for Democrats, and Democrats only, for any office for which nominations are to be made, and the same is true of any other political party coming within the provisions of this law.

It may be unfortunate that the general assembly has so drafted the law as to compel these holdings, but this office cannot change the law as it reads. It may be, on the other hand, that the general assembly had in mind that in certain cases no nomination petitions would be filed and that, therefore, no names would be printed on one partisan ballot for certain offices, and that if this should not be done, and no names of persons of that political party faith could be written on that ballot for such offices, then so far as partisan candidates are concerned, there could be no choice to the electorate at the regular November election; in other words, the political party which did file nomination papers for the office, would take the office at the November election by default, so to speak, unless someone should take interest enough in the matter to nominate himself by petition and run on an independent ticket.

It is only for us, however, to declare the law as we find it.

Very truly yours,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—METROPOLITAN GUARANTY COMPANY—DISAPPROVED.

October 11, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have referred to this department for an opinion thereon the proposed articles of incorporation of The Metropolitan Guaranty Company, a corporation not for profit, this purpose clause of which is as follows:

> "To secure the mutual protection of all persons engaged in the retail liquor business, and to provide counsel for them when necessary."

In my opinion this purpose clause is objectionable in several respects, among them the following, viz:

1. It employs the phrase "mutual protection" in describing its principal business and seeks to join therewith that of providing counsel for a certain class of persons. The phrase above quoted has a well-known significance in our insurance laws and would seem to describe a business unrelated to that of providing counsel, from which it follows that dual purposes are sought to be authorized.

2. The protection which the company seeks to accord is not to its members only, but to "all persons engaged in the retail liquor business." This is not

permissible. I refer you to my recent opinion to your department respecting the validity of the articles of incorporation of the Mansfield Fire Department Association as an elaboration on this point.

3. The business of providing counsel is one in which corporations may not engage in this state, as the same is a "professional business" within the inhibition of section 3235 R. S. State ex rel. Physicians Defense Co. v. Laylin, 73 O. S. 90. See also opinion of attorney general of May 11, 1906, page 50.

The purpose clause being defective, the question as to the fee chargeable by you for filing the articles of incorporation need not be answered.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—WARE PROGRESS ORCHARD COMPANY DISAPPROVED.

A corporation may not by amendment substantially change the original purpose of its organization.

October 11, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me the proposed amendment to the articles of incorporation of the Ware Progress Orchard Company, together with a draft of the purpose clause of the original articles of incorporation thereof, and have requested my opinion as to the power of the company to amend its articles in the manner desired.

The original purpose clause is as follows:

> "Said corporation is formed for the purpose of engaging in the business of farming, as well also as the general nursery business and especially that of fruit and the planting, cultivation and selling of trees, shrubs, plants and vines and of the fruit produced and raised therefrom and in general to transact such business and to exercise such powers as are necessary to carry out the intention and purpose aforesaid."

The purpose clause as proposed to be amended is as follows:

> "Said corporation is formed for the purpose of engaging in the business of farming and of buying and selling real estate, as well also as the general nursery business and especially that of fruit farming, the cultivation and selling of trees, shrubs, plants and vines and of the fruit produced and raised therefrom and in the business of manufacturing, especially that of preparing dried and canned fruits for the market, manufacturing cotton and cotton paper and making manufactured forms of tobacco and to engage in such mercantile operations as are necessary in conducting said business and of marketing the products thereof and in general to transact such business and to exercise such powers as are necessary to carry out the intention and purpose

aforesaid, said powers as to the purchase and sale of real estate to expire by limitation in twenty-five years, under the provisions of section 3235 of the Revised Statutes of Ohio."

In my opinion, the certificate of amendment should not be filed or recorded by you. Section 3238*a* Revised Statutes provides in part that, "nor shall any corporation by amendment change substantially the original purpose of its organization." A test as to what amounts to a substantial change in the purpose of the organization of a company was laid down in the case of State ex rel. v. Taylor, 55 O. S. 67. Applying the principle enunciated in that decision to the purpose clause of the proposed amended articles as compared with that of the original corporation, it appears that the new powers sought to be acquired by the amendment, viz., those of buying and selling real estate and manufacturing cotton and cotton paper are unrelated businesses, and the power to transact such business may not by amendment be joined to the original powers of the corporation.

Yours very truly,

U. G. DENMAN,
Attorney General.

ELECTION LAWS—RESIDENCE, WHAT IS SUFFICIENT TO ESTABLISH—FULLY DISCUSSED.

October 22, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you enclose a letter to Adolph Haas, Esq., and affidavit of William H. Baker. You inquire whether or not, under the statement of facts set forth in the affidavit of Mr. Baker, he is entitled to vote in precinct 1, ward 6, Cleveland, Ohio, at the election to be held Tuesday, November 2, 1909.

From the statements in Mr. Baker's affidavit it seems that on or about the 27th day of June, 1908, he broke up housekeeping at Worcester, Massachusetts, stored the household goods with the Central Storage Company, Worcester, Mass., and, as he says, "came to Cleveland with the full intention of making that city my permanent home *if I could find employment there in the line of my profession, that of civil engineer.*" At this time Mrs. Baker went to boarding at Springfield, Mass., under the arrangement that she was to follow Mr. Baker to Cleveland as soon as he had secured employment and found a home. Mr. Baker then states in the affidavit that he was employed in Cleveland first by Crowell & Sherman, *contractors*, and remained with them for a period of five weeks, whereupon he entered the employment of George A. Bartholomew for a period of three months. Then followed employment by the Vorce Engineering Company for a period of seven weeks, during which employment his work took him out of the state a portion of the time, which absences from the state were temporary and occasioned by the exigencies of the employment. The affidavit further recites that Mr. Baker was next employed by the Park Engineering Department of Cleveland, in which employment he still remains. On the first of

May, 1909, Mr. Baker sent to Massachusetts for Mrs. Baker and she came to Cleveland, and the household goods being shipped to Cleveland about this time, they took up a residence in precinct 1, ward 6, Cleveland, Ohio.

Section 2945 Revised Statutes provides in part that:

> "No person shall be permitted to vote at any election unless he shall have been a resident of the state for one year, resident of the county for thirty days, and resident of the township, village, or ward of a city or village for twenty days, next preceding the election at which he offers to vote."

Section 2946 Revised Statutes contains the rules to govern judges in determining residence. Subdivision 4 of said section provides that:

> "The place where the family of a married man resides shall be considered and held to be his place of residence, except where the husband and wife have separated and live apart * * *."

Subdivision 7 of the said section provides that:

> "The mere intention to acquire a new residence without the fact of removal shall avail nothing; * *"

Mr. Baker says that he came to the state of Ohio and to the city of Cleveland with the intention of making a home in said state and city if he could find employment therein, and that the arrangement was that the wife and household goods were to follow as soon as he had secured such employment and found a home, so that at this time in Mr. Baker's career he is not definite in his intention as to future residence. Then follows his employment for short time periods with the various persons and firms above mentioned and mentioned in the affidavit, during all of which times, I believe it is a fair construction of the affidavit to say that Mr. Baker had not as yet, because of the uncertainty of and changes in his employment, made up his mind conclusively to become a citizen of Cleveland, Ohio. Had he done this, from his own language, he would have sent for his wife and household goods. This he did not do until the first of May, 1909, when he procured employment with the Park Engineering Department of the city of Cleveland. With this employment Mr. Baker seems to have felt justified in reaching the conclusion to send for the wife and household furniture as per former agreement and establish a home and residence in Cleveland. The fact that Mrs. Baker and their household furniture were permitted to remain in Massachusetts apart from the husband until the first of May, 1909, is also significant as tending to show that until this time he had not been able to "find employment" that would justify his sending for them, and thereby establish a home and residence in Cleveland as per agreement when Mr. Baker left Massachusetts for Cleveland.

Applying the law above quoted to these facts I reach the conclusion that Mr. Baker is not such a resident of the state of Ohio as will entitle him to vote at the election in Cleveland, Ohio, on Tuesday, November 2, 1909.

Yours very truly,

U. G. DENMAN,
Attorney General.

COMMON PLEAS JUDGE—BALLOT ON WHICH CANDIDATES' NAMES TO BE PRINTED.

Names of candidates for common pleas judge to be elected under act in 100 *O. L.* 62 *may be printed on township ballot arranged in single tickets under respective party.*

October 25, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 21st, in which you submit the following question and ask my opinion thereon:

> "Upon what ticket should the names for common pleas judge be printed in Mahoning county under house bill No. 23, page 62 of the extraordinary session of 1909?
>
> "Should the ticket be a separate ticket or should the names of the various candidates be printed upon the township or municipal tickets?"

House bill No. 23, as mentioned in the question, was passed at the last session of the general assembly and is found in volume 100 of the laws of Ohio, pages 62 and 63, and provides for establishing the office and the election of one additional judge of the court of common pleas in the second subdivision of the ninth judicial district of the state of Ohio. (Mahoning county is in this subdivision.)

You further inform me that the Republican party and the Democratic party have each nominated a candidate to be voted for for this office at the coming November election, and that these nominations were made and certified to the board of deputy state supervisors under these respective political parties, and that the corporate limits of no city or village in question here are identical with those of the township.

Section 3 of house bill No. 23, above mentioned, reads as follows:

> "Said election for the election of said judge to be held on the first Tuesday after the first Monday in November, 1909, shall be held under the direction and control of the deputy state supervisors of elections, and shall be conducted in every manner as provided by the election laws of the state of Ohio for the conduct of November elections by the judges and clerks appointed for said November election, *and the names of candidates for said common pleas judge shall be printed on the ballots to be voted at said election.*"

This section must be construed in connection with section 3 of an act entitled "An act to amend section 483, 567, 581 and 1442 of the Revised Statutes of Ohio, and section 222 and 223 of the municipal code," and which is found in 97 O. L., pages 37 to 39, inclusive, but which section 3 was amended by the general assembly on May 9, 1908, and appears at page 399 of 99 Ohio Laws. Said amended section 3 reads as follows:

"The names of all candidate to be voted for on the first Tuesday after the first Monday in November hereafter, *shall be arranged in single tickets or lists under the respective party, political or other designation certified*, in the order and manner provided by law, and except as hereinafter provided shall be placed upon the same ballot; provided, *that the names of candidates for municipal officers* and the *names of candidates for township officers and justices of the peace* shall be printed upon separate ballots, unless the corporate limits of a city or village are identical with these of a township; and provided, further, that nothing in this section shall be construed to affect the provisions of 'An act to secure a voice in school affairs to the women of Ohio on equal terms with men,' passed April 24, 1894, or any special or general act providing for the election of school directors or members of boards of education and school councils."

When the general assembly at its last session passed house bill No. 23, including section 3 thereof, as above quoted, it was, of course, aware that certain elections, viz., municipal elections, township and justice of the peace elections, elections for school boards, etc., would be held at this coming November election, and in said section 3 of house bill No. 23 it was provided that "the names of candidates for said common pleas judge shall be printed on the ballots to be voted at said election." This quoted language cannot, of course, be interpreted literally; that is, it cannot be held that the general assembly meant that the names of candidates for said common pleas judge should be printed on the municipal ballots and on the school board ballots and on the ballots for township officers and justices of the peace, because this would result, or might result, in an elector casting three votes for one candidate when there is only one officer to be elected to the office of judge.

On the other hand, this language does not provide that a separate ballot shall be prepared by the board of deputy state supervisors and upon which only the names of these candidates for judge shall be printed for use at the coming election. The plain wording of the language is that, "the names of candidates for said common pleas judge shall be printed on the ballots to be voted at said election." My construction of this statute, therefore, is that the general assembly meant that these names of candidates for said common pleas judge should be printed upon some one of the ballots which the general assembly, at the time of the passage of the act knew would be in use at this coming election for other officers, and which would be appropriate so far as political parties are concerned to partisan ballots to be used in all parts of the territory in which electors could vote for such candiates. The question then is, on which ballot should these names be printed?

Amended section 3, as above quoted from 99 O. L., page 399, provides that:

"The names of all candidates to be voted for on the first Tuesday after the first Monday in November hereafter, *shall be arranged in single tickets or lists under the respective party, political or other designation certified*, * * * and except as hereinafter provided shall be placed upon the same ballot; provided, *that the names of candidates for municipal officers*, and the *names of candidates for township officers and justices of the peace*, shall be printed upon separate ballots, etc."

This language means that at this coming November election there must be a separate ballot for municipal officers and that there must be still another separate ballot on which shall be printed the names of candidates for both township officers and justices of the peace. That is, the names of candidates for township offices and for justices of the peace shall go on one ballot, but the names of candidates for municipal offices "shall be arranged in single tickets or lists under the respective party, political or other designation certified," and these shall be so arranged on the municipal ballot. The names of candidates for township offices and justices of the peace "shall be arranged in single tickets or lists under the respective party, political or other designation certified," and these must be so arranged on the township officer and justice of the peace ballot.

There will be other ballots used at this coming November election, viz., the ballots for boards of education and ballots for land appraisers, but these two ballots are not to be political party ballots, although there will be elections of both members of boards of education and of land appraisers throughout the territory electing the judge in question. Municipal officers will be voted for on political party ballots, but only in municipalities. Since the names of candidates for common pleas judge have been certified by the Republican and Democratic parties, respectively, these names cannot, therefore, be arranged under their respective parties if placed on either the land appraisers ballot or the board of education ballot, because, as said before, these two ballots are not political party ballots.

No municipality within the territory of the subdivision in question occupies an entire township, and if these names for common pleas judge were placed on the proper tickets of the respective parties on the municipal ballot it would then be necessary to print these names on such justice of the peace and township officer ballots as will be used in any township outside of municipalities, because if the names were placed only on the municipal ballots used in the subdivision of the district, then only such electors as live in municipalities could vote for judge. Each elector in the second subdivision of the ninth judicial district, however, must be given the right to vote for one of these candidates for common pleas judge, and it is his right, under the constitution, to cast that vote under the same circumstances and conditions, as nearly as possible and practicable, as those surrounding and secured to every other elector in the subdivision. If these names for common pleas judge are printed upon municipal ballots in municipalities then an elector in a municipality must vote upon a municipal ballot for common pleas judge, while the electors outside of municipalities in the townships or parts of townships outside of municipalities must vote upon township ballots. This would require these respective electors, should they see fit to participate at all in the election of a judge, to proceed under different conditions and methods. This, I believe, is not permissible and, therefore, was not intended by the general assembly.

From the above it appears that the only ballots upon which the names of candidates for common pleas judge can be printed and arranged in single tickets or lists under their respective party, as certified, and give each elector within the subdivision the right to participate in the election of one of the candidates under the same conditions and circumstances as every other elector may participate therein, is the township officer and justice of the peace ballot, and I am of the opinion that these names should be printed on the township ballot, arranged in single tickets or lists under the respective party, political or other designation certified. Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION AND PROBATE JUDGE—INCOMPATIBLE OFFICES.

A probate judge may not serve or be candidate for member of board of education.

October 26, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 25, in which you ask my opinion on the following questions:

> "1. May a probate judge serve on the board of education?
> "2. Is a probate judge now in office, and having some three years yet to serve, eligible to candidacy for member of the board of education?"

Answering your first question, I may say there is no statute forbidding this, and we must, therefore, determine whether these two offices are incompatible. The rules to be followed in determining whether two offices are incompatible are plainly stated in section 422, page 268 of Meachem on Public Officers, as follows:

> "This incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from consideration of public policy, for one person to retain both.
> "It seems to be well settled that the mere physical impossibility of one person's performing the two offices as from the lack of time or the inability to be in two places at the same moment, is not the incompatibility here referred to. It must be an inconsistency in the functions of the two offices, as judge and clerk of the same court, claimant and auditor, and the like. 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not,' say Folger J., 'that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other."

Throop on Public Officers, Dillon on Municipal Corporations, and all other authorities hold to the same rules as expressed in the language quoted above.

This office on October 26, 1907, rendered an opinion to Hon. John A. Eyler, prosecuting attorney, at Waverly, Ohio, upon this same question, and in that opinion held that these offices are incompatible. That opinion was rendered upon the rules stated above, and the other authorities referred to. That opinion also cited to Mr. Eyler the various sections of the Revised Statutes which define the duties of a probate judge and members of the board of education as follows:

"Under section 3895, in case the board of education refuses, on being petitioned, to transfer school territory from one district to another, a hearing of said petition shall be had before the probate judge and his decision shall be final, judgment for costs to be rendered against either the petitioners or the board of education.

"Under sections 3928 and 3929, the probate judge has exclusive jurisdiction in the creation of special school districts.

"Under section 3990, where the board of education and the owner of property desired for school purposes fail to agree, appropriation proceedings are brought before the probate judge.

"Under section (4022-8), after the truant officer has been requested by the board of education to examine into a case of truancy as provided in section (4022-7) and the truant officer has made a complaint that the child is a juvenile disorderly person, the probate judge shall hear such complaint.

"Under section (4022-11), the probate judge has jurisdiction to try the offenses described in sections (4022-1) to (4022-14).

"Section 3975 provides that the board of education may accept a bequest made to them by will. The probate judge in this case would be called upon to pass upon the validity of such bequest."

These sections of the statute defining these duties very clearly show that a probate judge, in the execution of his duty as such, would, in many instances, be compelled to pass judgment upon his own actions as a member of the board of education, or, at least, that he might at any time be called upon to, as such judge, pass judgment upon his own actions as a member of the board of education. You will find this opinion quoted in full in the annual report of the attorney general for the year beginning January, 1907, and ending January 1, 1908, at page 277.

It seems clear that these two offices are incompatible and that no one person may hold both at the same time.

Answering your second question, I am of the opinion that a probate judge now in office, and having three years or any other time yet to serve extending beyond the time when he would become a member of the board of education, should he be elected at this coming November election, is not eligible to even be a candidate for the office of member of the board of education unless he should resign the office of probate judge before election day, and this is because of the statutory provision which renders void any vote which might be cast for him as a candidate for member of the board of education on election day while he is holding the office of probate judge.

Section 2978 of the Revised Statutes provides in part as follows:

"All votes for any judge for any elective office, except a judicial office, under the authority of this state, given by the general assembly or the people, shall be void."

In my opinion, therefore, the name of a probate judge cannot be placed upon the ballot as a candidate for membership in the board of education until he has resigned the office of probate judge.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY TREASURER—PERSON APPOINTED HOLDS FOR UNEXPIRED TERM.

November 23, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 19th, enclosing letter of Mr. George H. Schauf, clerk of the deputy state supervisors of elections for Stark county, in which Mr. Schauf presents the following question:

> "Mr. Harry Knobloch, the treasurer, resigned the office in November, 1908, three or four days after the November election. The commissioners appointed Mr. Clark W. Metzger to fill the vacancy to the first Monday in September, 1909.
>
> "Mr. Knobloch was re-elected to the office of county treasurer at November election 1908. He failed to qualify on the first Monday in September, 1909, and the commissioners then reappointed Mr. Metzger to fill the vacancy, who qualified and is now treasurer of Stark county, Ohio.
>
> "Question: Does Mr. Metzger serve for the unexpired term of the treasurer elect, or does he only serve until the next regular election for the office which occurs in November, 1910?"

You request my opinion with regard to the foregoing.

Section 2 of article 17 of the constitution, being the biennial election amendment, so-called, provides in part that:

> "all vacancies in other elective offices (than state elective offices) shall be filled for the unexpired term in such manner as may be prescribed by law."

If there is any inconsistency between section 11 R. S. and the foregoing provision which it is not necessary to determine at the present time, the constitutional provision must prevail. Under it, as will be seen upon inspection, an appointee to fill a vacancy in any county office will hold for the remainder of the unexpired term.

See also Harte v. Bode, 4 N. P., 421.

I am, therefore, of the opinion that in the case submitted by Mr. Schauf, Mr. Metzger, the present incumbent, is entitled to hold his office until September, 1911, at which time his successor, who must be elected in November, 1910, will take office.

Yours very truly,

U. G. DENMAN,
Attorney General.

SECTION 158 REFERS ONLY TO EDUCATIONAL INSTITUTIONS MENTIONED IN SECTION 217.

November 29, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your request of recent date for an opinion upon the following question is received:

> "Please advise to what class of educational institutions the following clause in section 158 of the Municipal Code applies: 'Persons appointed or employed to give instruction in any educational institution.'"

In reply thereto I beg leave to submit the following opinion:
Section 158 of the Municipal Code (99 O. L. 565) reads in part as follows:

> "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, etc. * * *; *persons appointed or employed to give instruction in any educational institution;* * * *."

The underlined portion of the above quoted section, in my opinion, refers to educational institutions, recognition of the establishment of which by municipal corporations is found in section 217 of the code and section 4095 R. S. O. et seq., and does not refer to teachers or other employes in the public schools who are employed by the city boards of education. The regulation of the employment and qualifications of teachers in the public schools is fully dealt with by the Ohio School Code.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

ELECTION—VOTES CAST FOR OFFICE NOT MENTIONED IN NOTICE.

Votes cast for office where such office not mentioned in election notice are not to be counted.

December 2, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 1st, enclosing letter of Charles C. Chappelear, clerk of the board of deputy state supervisors of elections for Perry county. Mr. Chappelear states that in two townships of that county justices of the peace should have been elected at the late local election; that through misapprehension no notice of the election of such officer was given in either township, nor did the ballot prepared under section 2966-32 R. S., contain blank spaces for candidates for such offices; but that nevertheless when the ballots were counted in the two townships one ballot was found in each township upon which was written the name of a person under

the designation "for justice of the peace" also written upon the ballot by the elector. You request my opinion as to the legality of these votes for justice of the peace.

The object of all of the election laws of the state as particularly evidenced in section 445 R. S., is to give to the electors an opportunity to express their choice for offices to be filled at a given election. No other scheme of election would comply with the spirit and intent of the constitution of this state. To that end section 2966-32 also provides that:

> "* * * all ballots shall be printed * * * in black ink and * * * in brevier type, the *name or designation of the office* in lower case * * *; the name of each candidate shall be printed in a space defined by ruled line * *; if upon any ticket there be no candidate or candidates for a designated office a blank space equal to the space that would be occupied by such name or names, if they were printed thereon, with the blank space herein provided for shall be left * * *."

Again section 2966-35 provides in part that:

> "* * * if the elector desires to vote for any person whose name does not appear on the ticket he can substitute the name by writing it in black lead pencil or black ink in the proper place, and making a cross mark in the blank space at the left of the name so written."

Section 2966-36 R. S. provides:

> "If there should be no nomination for a particular office by any particular party, * * * and the elector desires to vote for someone to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office * *"

None of the foregoing provisions, it will be noted, authorizes an elector to add to the *designations* upon the ballot; he may erase names of candidates and write in names of candidates in proper blank spaces, but he may not provide a blank space not included within the official ballot and write therein both the designation of the office and the person of his choice therefor.

An examination of section 2966-35 R. S., which, with the supplementary section 2966-36 sets forth all the legal ways of marking a ballot, will disclose that the right of the elector to make such marks as have been described is not conferred by any provisions thereof.

In my opinion, therefore, there are two very good reasons why the votes described in Mr. Chappelear's letter should be regarded as illegal, viz:

1. The election officers having failed by notice or by the inclusion of a blank space with proper designation of the offices therein, to notify the electors of the necessity of electing a justice of the peace, there could not legally be any election for that office at the time of the local elections. The electors not having the opportunity to vote for any person for justice of the peace, votes actually cast for such office could not be regarded as representing their will.

2. No elector has the right to draw for himself blank spaces in the ballot in the manner prescribed in section 2966-32 and to write therein the designation of any office. Such blank space and official designations *must be printed* on the

official ballot, and when so printed constitute notice to the electors that such office is to be filled at the election, regardless of the failure of political parties or others to make nominations therefor.

I, therefore, conclude that the votes in question cannot be legally counted by the election officers, and that in neither of the townships in question was there a valid election for justice of the peace.

The letter of Mr. Chappelear, which is returned herewith, is not entirely clear as to the non-existence of a blank space in the official ballot in one of the two townships in question. It is assumed for the purpose of this opinion that the facts were identical in this respect in both townships.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—REPUBLIC LUMBER COMPANY DISAPPROVED.

December 14, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 11th, enclosing proposed articles of incorporation of the Republic Lumber Company, together with the correspondence and check attached thereto.

You have requested my opinion as to the legality of the purpose clause of the articles, which is as follows, viz:

> "Said corporation is formed for the purpose of buying, acquiring, receiving, holding, using, storing, developing, manufacturing, contracting, building, erecting, selling, transferring, consigning, shipping, advertising, promoting, appraising, advising, and generally dealing in, and with and regard to building materials and supplies and other personal property and rights and interest of every kind and description wherever situated or located, and to carry on any other lawful business whatsoever which the corporation may deem proper or convenient to be carried on in connection with or incidental to any of the foregoing purposes, or calculated indirectly to promote the interest of the corporation or to enhance or preserve the value of its property."

The principal purpose of this corporation, as may be gathered from the long clause above quoted, is that of producing and dealing in lumber and building materials. If the purpose of the corporation were thus stated there could be no objection to such statement. In my opinion, however, the other participial and infinitive phrases in the clause as framed are, at least, superfluous. While many of them would seem to authorize the conduct of business unrelated to the main purpose as above set forth, and hence subject to criticism under the decision of the supreme court in case of State ex rel. v. Taylor, 55 O. S. 67, to particularize, the authority to deal in

> "other personal property and rights and interest of every kind and description wherever situated or located"

clearly may not be conferred, while that,

> "to carry on any other lawful business whatsoever which the corporation may deem proper or convenient to be carried on in connection with * * * any of the foregoing purposes, or calculated indirectly to promote the interest of the corporation or to enhance or preserve the value of its property,"

is so obviously violative of the rules of law as to need no further comment.

I, therefore, advise that, until modified in accordance with the suggestions above made, the articles be not filed or recorded by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—CENTRAL OHIO OIL AND GAS COMPANY—DISAPPROVED.

December 15, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 14th, enclosing the proposed articles of incorporation of the Central Oil & Gas Company, with letter and check attached thereto. You have requested my opinion as to the legality of the purpose clause set forth therein, viz:

> "Said corporation is formed for the purpose of boring, drilling and prospecting for oil, gas and coal, to buy, sell, convert, manufacture and prepare the same and all by-products for the market, to purchase or otherwise acquire, exchange, sell, mortgage and deal in oil, gas, coal and timber lands, rights of way and franchises, to purchase, lease, erect, own, operate and dispose of oil refineries, gas works and power plants or plants for the manufacture of any of the by-products thereof: to build, purchase, lease or otherwise acquire and operate pipe lines for oil and gas, and in general to do any and all things necessary in carrying out the general business outlined above."

I cannot approve the above quoted articles for the following reasons:

1. The acquisition of timber lands and the power to deal therein may not be specifically authorized as incidental to the main purpose of mining oil, gas and coal, and manufacturing the minerals. See opinion of the attorney general, annual report for 1907, page 68. Indeed the power to acquire oil, gas, coal and timber lands may not be so generally conferred as it is attempted to be, as such power is, under section 3862 R. S., limited to the acquisition of such lands as may be necessary or convenient for the main purpose of the corporation, and the power would exist without specific recital in the articles.

2. The power

> "To purchase, lease, erect, own, operate and dispose of oil refineries, gas works and power plants, or plants for the manufacture of any of the by-products thereof"

would seem to authorize dealing in such properties apart from those employed by the corporation itself in its own manufacturing enterprises. This would be a species of real estate business and could and should not be authorized as a separate power.

3. The power to own and operate pipe lines may not be joined with the main purposes of this corporation. Such attempted joinder has been repeatedly condemned by this department. See annual report for 1907, pages 99 and 107; annual report for 1908, pages 69 and 79.

4. As a separate ground for the condemnation of the second class of powers above referred to, I beg to suggest that the production and sale of power which would seem to be inferentially sought from the power to own and operate power plants is clearly not related or incidental to the principal purpose of this company. See annual report for 1908, pages 73 and 79.

For the foregoing reasons I beg to advise that the articles of incorporation submitted by you should not be filed or recorded until so modified as to meet the objections stated.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION LAW—NOTICE OF DATE.

July 26, 1909.

HON. CARMI A. THOMPSON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you submit, with a request for an opinion thereon, the inquiries of the bureau of inspection and supervision of public offices as follows:

> 1. Does the Bronson primary election law provide that notice be published notifying electors of the time and place of holding the county primaries, and if so, by whom should the notice be given?
>
> 2. Under the Bronson primary election law should any notice be published to the electors of the time and place of holding primaries to nominate candidates for township and municipal offices and members of the school board, and if so by whom should such notice be given?

In reply, I beg to say the Bronson primary election law contains no provision, either express or implied, requiring such notice to electors as is mentioned in either of your inquiries. The legislature either considered that official notice for the holding of a primary was not necessary or else provision for the same was omitted by inadvertence. It is my judgment that the statutes requiring notice to be given of the time and place of holding general elections cannot be construed to authorize the giving of notice for party primaries.

I therefore conclude that while such notice of primary elections would undoubtedly be of good purpose, yet there is no authority of law therefor.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

(To the Auditor of State)

TRANSCRIPT MADE BY OFFICIAL STENOGRAPHER ON ORDER OF DEFENDANT IN FELONY CASE MAY BE TAXED AS COSTS AND PAID BY STATE.

January 14th, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following statement of facts with a request for an opinion thereon:

A cost bill has been presented to the auditor of state's office for payment in the case of the State v. Richard Flannery, in which said Flannery was convicted and sentenced to the penitentiary for life. Said cost bill includes an item of $64.00 for transcript of testimony and the charge of court made by the official stenographer on the order of the attorney for the defendant. Query: Should said item of $64.00 as contained in said cost bill be allowed and paid out of the state treasury?

In reply I beg to say section 474-9 of the Revised Statutes provides that "the costs of all transcripts made in criminal cases by official stenographers when ordered by the prosecuting attorney or defendant shall be taxed as costs in the case and colleced as other costs."

Section 7332 of the Revised Statutes provides that, "upon sentence of any person for felony, the officers claiming costs made in the prosecution shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and seal of the court, a complete bill of the costs made in the prosecution."

In as much as the official stenographer is an officer of the court, I am of the opinion that the cost of the transcripts made by him as provided in section 474-9 R. S., is a proper item to be placed in the cost bill and should be paid by the state.

Yours very truly,

U. G. DENMAN,
Attorney General.

DOW-AIKIN TAX—REMISSION OF.

Auditor of state may remit Dow-Aikin tax assessment after same has been certified to county auditor.

February 2nd, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Has the auditor of state any authority to remit, rebate or cancel liquor asessments, certified under the provisions of section 4364-14*a* R. S., after the same have been properly certified to the county auditor, and placed upon the liquor tax duplicate; or has the state board authority, under the provisions of section 167 R. S., to remit liquor tax assessments, after the same have been placed on the real estate duplicate, under the provisions of section 4364-12 R. S.?"

In reply I beg to say that section 4364-12 of the Revised Statutes provides for the certification of liquor taxes not collected by the county treasurer thereunder, and in that event

> "the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

Under the provisions of section 4364-14*a* R. S.,

> "the assistant commissioners and inspectors appointed by the dairy and food commissioner under section 409-10 of the Revised Statutes of Ohio, in addition to their duties under that section, shall determine from information furnished by the auditor of state or by personal visitation or otherwise, the names of all persons, firms or corporations liable to such assessment or increased assessment not already on the duplicate, and forthwith report the same to the auditor of state, together with a description of the real estate upon which such business is carried on; and thereupon the auditor of state shall cause the same to be entered upon the assessment duplicate of the proper county by the auditor thereof, together with the penalty of twenty per centum, which shall be collected the same as other assessments."

It would seem that these two sections provide the manner of placing the tax due and not paid by or collected from those engaged in the business of selling intoxicating liquor upon the tax duplicate.

Section 167 of the Revised Statutes provides in part that

> "the *auditor may remit such taxes and penalties thereon as he ascertains to have been illegally assessed and such penalties as have accrued or may accrue* in consequence *of negligence* or *error* of any officer required to do any duty relating to the assessment of property for taxation," and also provides that the "*auditor may correct any error in any assessment of property for taxation on any duplicate of* taxes in any county."

This section seems to be general in its application, and in my opinion the auditor of state has authority, under favor thereof, and may remit, rebate or cancel liquor assessments certified under the provisions of said section 4364-14*a* R. S., and also that the state board has authority thereunder to remit liquor tax assessments, after the same have been placed on the real estate duplicate, under the provisions of section 4364-12 R. S., in the manner provided in said section 167 R. S.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—LEGAL COUNSEL—TAX INQUISITOR.

Compensation of legal counsel employed by county commissioners under section 845 as tax inquisitor, must be paid out of county treasury, and not out of taxes collected, although fixed at percentage of omitted taxes added to duplicate.

February 8th, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

A board of county commissioners under the provisions of section 845 R. S. have employed legal counsel and directed him to act in the capacity of tax inquisitor, fixing his compensation at 20 per cent. of the amount he may add to the duplicate as omitted taxes, payable when the omitted taxes shall have been paid into the county treasury. Query: Has the county auditor authority at the time of making his semi-annual settlement to deduct from the amount due the state any part of the 20 per cent. compensation paid such legal counsel?

In reply thereto I beg to say said section 845 is in part as follows:

> "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 adviser 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, 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 attorney under sections 799, 1274, 1277, 1278*a* and 3977 of the Revised Statutes, and as may at any time be required by said board of county commissioners."

Under the provisions of this section the services to be performed by legal counsel so employed relate entirely to the county and its officers and the compensation received for services so rendered is to be paid out of the county treasury. It follows, therefore, that a county auditor is not authorized to make any deduction from the amount due the state at his semi-annual settlements on account of any compensation due legal counsel employed under the provisions of section 845.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATION—ASSESSMENT ORDINANCE—PUBLICATION.

Ordinances providing for special municipal assessment must be published in two newspapers of opposite politics, published in the municipality, and in

one newspaper printed in the German language, published in the municipality, if such there be; if only one English newspaper is published in the municipality, publication should be made in such newspaper; only in the event there is no such newspaper published in the municipality may publication be made in an outside newspaper having a general circulation within municipality.

February 13th, 1909.

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

DEAR SIR:—Mr. Tracy of the bureau of accounting has requested from me an opinion as to whether the assessing ordinance, adopted by the council of municipalities for the purpose of assessing the cost and expense of any street improvement upon the property abutting upon, or benefited by, such street and improvement, shall be published as other ordinances, requiring publication, are published.

Section 1536-61 R. S. (old section 1695), made applicable by section 124 of the municipal code, enacted October 22nd, 1902, provides, among other things, as folows:

> "Ordinances of a general nature or providing for improvements shall be published in some newspapers of general circulation in the corporation; if a daily twice, and if a weekly once, before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Section 1536-619 R. S., being municipal code section 124, provides that all ordinances 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 be in such municipality such a paper having a bona fide paid circulation within said municipality of not less than one thousand copies. And such ordinances requiring publication shall be published once a week for two consecutive weeks. These publications specified in this section 124 include the publications mentioned in old section 1695, and as quoted above; and a compliance with the provisions of such section 124 includes a compliance with the provisions of old section 1695.

I am of the opinion that the assessing ordinance is an ordinance "providing for improvements" within the meaning of the statute as quoted above. The improvement is not provided for when the resolution declaring the necessity, and the ordinance determining to proceed with the improvement, are passed, but since the improvement is to be paid for by special assessments upon abutting or benefited properties, it is further necessary to pass another ordinance to make such assessment, and thereby provide for the payment of the cost and expense of making the improvement.

I am clearly of the opinion that the assessing ordinance should be published in two newspapers of opposite politics, published and of general circulation in the municipality, if such there be; and in a newspaper printed in the German language, if there be in such municipality such a paper having the required circulation therein; and that these several publications must be made once a week for two consecutive weeks. If there is only one paper published in the English language in the municipality, and no German paper, then of course, the ordinance will be published in that paper. If there are two papers published, and of general circulation, within the municipality in the

English language, but not of different politics, then a publication once a week for two successive weeks in either one of them is sufficient. If no paper is published within the municipality, but some paper is of general circulation in the corporation, then the ordinance should be published in that paper once a week, for two successive weeks.

Very truly yours,

U. G. DENMAN,
Attorney General.

STATE AID FOR WEAK SCHOOL DISTRICTS—WARRANTS NOT TO BE ISSUED UNTIL CLOSE OF SCHOOL YEAR, AUGUST 31st.

February 27th, 1909.

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

DEAR SIR:—Your communication has been received in which you submit the following inquiry for an opinion thereon:

> Does the law passed April 2, 1906—Ohio Laws, Vol. 98, page 96—"To provide for state aid for weak school districts," authorize and direct this department to issue warrants for the deficiencies that may occur under the provisions of said act for the February distribution, or must we defer the issuing of such warrants until the close of the school year, August 31st?
>
> Referring thereto, I beg to say section 1 of said act provides
>
> "* * * that any board of education having such a deficit shall 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 said school district for the full amount of the deficit in the tuition fund.*"

This section is indefinite in that it does not provide the time at which the warrant by the auditor of state shall be issued. An answer to your question must, therefore, be arrived at from a consideration of the application of the law. The school year begins on the first day of September and ends on the 31st day of August. To construe this law as directing the state auditor to issue such warrants on the state treasurer in favor of weak school districts at the February settlement would necessitate the determination of the amount of state aid such school district would be entitled to before the amount of the revenue for such district would be fully collected and received This would mean an approximation of the deficit which the law does not seem to contemplate. On the contrary, to defer the issue of such warrants until the close of the school year, August 31, would afford opportunity to know with accuracy the amount of such deficits, such as miscellaneous items received to the credit of the tuition fund and any taxes that may be received subsequent to February.

I am, therefore, of the opinion that the requirement of the statute is best met by deferring the issue of vouchers on the state treasurer in favor of such weak school districts until the close of the school year, August 31st.

Yours very truly,

U. G. DENMAN,
Attorney General.

NEWSPAPERS AWARDED CONTRACT BY PUBLIC PRINTER—PRESUMPTION AS TO CIRCULATION.

Newspapers awarded contract by public printer for publication of constitutional amendments presumed to be qualified under statute; counter affidavit must destroy that presumption.

March 3rd, 1909.

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

DEAR SIR:—Your communication is received in which you request an opinion of this office relative to your right to pay the voucher issued to the Lawrence County Publishing Company by Mr. Johnson, Public Printer, for the publication of the constitutional amendments.

Among the enclosures accompanying your letter is a protest against the payment of this voucher by C. H. Moore, managing editor of the Register Publishing Company of Ironton, Ohio. This protest is supported by affidavits. There are also a number of counter affidavits. I find from an examination of the papers submitted that the ground of the protest against the payment of said voucher is that the Daily Star, a newspaper published by the Lawrence County Publishing Company, was not a paper of "general circulation" as is required by section 3 of the act passed by the general assembly May 1, 1908 (99 O. L. 261). Among the affidavits is one sworn to by T. A. Jenkins, who swears that he was a stockholder in the Lawrence County Publishing Company from its incorporation, and was the secretary-treasurer of said corporation. His affidavit also states that the Daily Star was published every day from the first day of May until the 12th day of November, 1908, and that said paper carried at the head of its editorial column a sworn statement made by the editor that the circulation was upward of fifteen hundred.

The term "general circulation" as applied to newspapers has not been clearly defined by any of our courts. It has been held, however, that a paper which is only published on Sunday is a newspaper of general circulation and that a newspaper which has a subscription book open to the public in which subscriptions are received from people in general is a newspaper of general circulation as distinguished from newspapers which are circulated to a particular class of citizens, such as an insurance journal, etc. I know of no case, however, that fixes any limitation upon the number of subscriptions.

Inasmuch as it is conceded that the contract was awarded the Lawrence County Publishing Company for the publication of the constitutional amendments by the public printer, the presumption is that the paper was qualified under the statute, and the counter affidavits submitted do not, in my judgment, destroy this presumption.

I am, therefore, of the opinion that it is your duty to honor the voucher given to the Lawrence County Publishing Company by the public printer and to draw a warrant on the state treasurer for its payment, provided the funds are available.

I herewith return enclosures.

Yours very truly,

U. G. DENMAN,
Attorney General.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—OHIO NATIONAL GUARD.

Bureau of inspection and supervision of public offices must examine accounts of officers of Ohio National Guard responsible for disbursement of public money.

February 13th, 1909.

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

DEAR SIR:—Your communication of recent date is received in which you submit the following inquiry:

> There are about 240 persons of the Ohio National Guard authorized by law to receive and disburse public funds, received from the state. Under the present system, the adjutant general, by regulation, examines these accounts, but no report is made by or required of him to this department.
>
> Query: Is the act creating the bureau of inspection and supervision of public offices of sufficient scope to include the examination and inspection of the accounts of commanding officers of military organizations of the Ohio National Guard?

In reply I beg to say section 2 of the act creating the bureau of inspection and supervision of public offices is as follows:

> "The auditor of state through said bureau shall formulate, prescribe and install a system of accounting and reporting, in conformity with the provisions of this act, that shall be uniform *for every public office and every public account* of the same class, and which shall exhibit true accounts and detailed statements of funds collected, received and expended *for account of the public for any purpose whatever*, and by all public officers, employes or other persons, such accounts to show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amounts due and received from each source, all receipts, vouchers and other documents kept, or that may be required to be kept, necessary to isolate and prove the validity of every transaction, and all statements and reports, made or required to be made, for the internal administration of the office to which they pertain, and all reports published, or that may be required to be published, for the information of the people, regarding any and all details of the financial administration of public affairs."

Under the provisions of this section it is the duty of the auditor of state, through said bureau, to inspect and supervise every public office and the accounts thereof in the state. If the 240 persons of the Ohio National Guard, mentioned in your inquiry, are public officers and perform public functions, then the act creating the bureau of inspection and supervision of public offices will apply. A public officer is one who exercises a part of the sovereign power of the state, and in my judgment, an officer of the national guard who receives and is responsible for the disbursement of public money appropriated by the legislature is a public officer. It therefore follows that as such officers they are amenable to the provisions of the act above quoted, and you, as auditor of state, are required to make the necessary examinations and install such system of accounting as is authorized by said act. Yours very truly,

U. G. DENMAN,
Attorney General.

JUVENILE ACT—COMMITMENT TO MANSFIELD REFORMATORY—COST OF CASES.

Cost and expenses of cases where delinquent child has been committed to Mansfield Reformatory to be paid by county and not state.

April 26th, 1909.

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

DEAR SIR:—Your communication of April 22d is received, in which you submit the following inquiry:

> Section 12 of the juvenile court act, 99 O. L. 194, provides that the juvenile court may commit to the Mansfield reformatory a delinquent child 16 years of age or over.
>
> Query: Are the costs and expenses in such cases a charge against the state or should they be paid by the county as provided in sections 11 and 40 of said juvenile court act?

In reply I beg to say section 12 of the juvenile court act provides that a delinquent child 16 years of age or over who has committed a felony may be committed to the Ohio State Reformatory at Mansfield; and section 40 provides:

> "All fees and costs in all cases coming within the provisions of this act, together with such sums as may be necessary for the incidental expenses of such court and its officers, and together with the cost of transportation of children to the place to which they may be committed shall be paid out of the county treasury of the county on itemized vouchers and certified to by the clerk of the court."

Under the above provisions of the juvenile court act said court has authority to commit to the Mansfield Reformatory, and all the costs and expenses are to be paid out of the county treasury.

Section 7332 and succeeding sections of the Revised Statutes provide a method for the making up of cost bills to be paid by the state in felony cases. These sections do not, however, in my judgment, apply to commitments by juvenile courts. It follows, therefore, that the costs and expenses in such cases as are referred to in your inquiry should be paid out of the county treasury and are not a charge against the state.

Yours very truly,

U. G. DENMAN,
Attorney General.

FEES, COSTS, EXPENSES, ETC., OF SHERIFF AND INTERPRETER—ITEMS INCLUDED IN COST BILL TO BE PAID BY STATE.

May 18th, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

Are the fees, costs and expenses of the sheriff, in serving a special jury under the provisions of section 7267 and succeeding sections of the Revised Statutes, expenses incurred by a sheriff under section 7283, and the mileage and other expenses of an interpreter appointed under the provisions of sections 474*a* and *b* R. S., proper charges against the state in cases of conviction and commitment to the penitentiary?

In reply I beg to say that you have been heretofore advised by this office that only such items of costs as are enumerated in section 7332 of the Revised Statutes are proper charges against the state in felony cases.

Section 1230 Revised Statutes fixes the sheriff's fees for services performed under sections 7267, 7268 and 7269 and further provides that such fees shall be paid by the county. Such fees should not, therefore, be included in the cost bill to be paid by the state in penitentiary cases.

No compensation is provided by statute for services rendered by a sheriff under the provisions of section 7283. Such services are therefore gratuitous. No compensation except a per diem fee of $3.00 is provided for an interpreter appointed under the provisions of section 474*a* R. S., which per diem is to be taxed in the bill of costs.

It follows, therefore, that none of the fees, costs and expenses enumerated in your inquiry are proper items to be included in the cost bill to be paid by the state except the per diem of the interpreter.

Yours very truly,

U. G. LENMAN,
Attorney General.

MONTHLY AVERAGE—DEFINED—CONSTRUCTION OF SECTIONS 2736 AND 2737.

May 18th, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry with a request for an opinion thereon:

Item 16 of section 2737 R. S. is in part as follows:

"The monthly average amount or value for the time he held or controlled the same, within the preceding year, of all moneys, credits or other effects within that time invested in or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April."

Query: Do the words "monthly average" mean the number of days such property is held as compared with the total 365 days in the year, or does it mean that 30 days or less shall be counted a full month? Do the words "other effects" include real estate?

In reply I beg to say the term "monthly average" as used in said section means, in my judgment, that the total amount of property held in each of the twelve months, without regard to the number of days such property is held, is to be divided by twelve, the result of which will be the monthly average of property held during the year.

Inasmuch as the property statement required in sections 2736 and 2737 R. S. applies only to personal property, the term "other effects" does not include real estate.

Yours very truly,

U. G. DENMAN,
Attorney General.

BRIDGEPORT BANK AND TRUST COMPANY—TAX ON BANKS—WHEN TO MAKE RETURN.

Banks are not required to make return for taxation until actively engaged in doing business.

Money paid in on stock to agent of bank prior to doing business must be listed for taxation by stock subscribers and not by agent.

June 8th, 1909.

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

DEAR SIR:—Your communication of June 7th, enclosing letter of the Bridgeport Bank & Trust Company, in which you ask my opinion on the following questions, is received:

> The Bridgeport Bank & Trust Company filed articles of incorporation December 24th, 1907, with the secretary of state. In January, 1908, 10% of the capital stock having been subscribed and paid as required by law, the company organized and elected directors. The 10%, amounting to $7,500, was paid to J. C. Heinlein, the designated agent to receive the same. The president, vice-president, secretary and treasurer were elected and qualified before the day preceding the 2d Monday of April, 1908. A call was made for the balance of the stock subscription to be paid as follows: 15% on April 15th, 1908; 25% on April 20th, 1908, and 50% on May 1st, 1908. A large part of the stock subscribed for was not paid until the morning of May 11th, 1908. just before the company commenced business on that day. Mr. Heinlein made a return to the auditor of Belmont county of the $7,500, which he had received as agent, and paid the tax thereon.
>
> 1. Was the company required to make return to the county auditor under the law for the year 1908?
>
> 2. Was the company liable for any tax for the year 1908?
>
> 3. Was the return of the $7,500 by Mr. Heinlein representing the original 10% paid in on stock subscription, properly made by him, or should it have been returned by the individual subscribers of stock as of the day preceding the second Monday in April, 1908?

In reply I beg leave to submit the following opinion:

The answer to all of your questions, it seems to me, is found in section 2758 of the Revised Statutes, which reads as follows:

> "Every company, association or person not incorporated under any law of this state or of the United States, for banking purposes, who shall keep an office or other place of business and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidence of indebtedness with a view to profit shall be deemed a bank, banker or bankers within the meaning of this chapter."

This section was framed by the legislature with the evident intention of including within that chapter all individuals or association of individuals doing a banking business in the state of Ohio, but it was not the intention of the legislature to place any duties on banks who were not "doing business," for we find the following in this section: *"Who shall keep an office or other place of business, and engage in the business of lending money, etc."* The placing of these two phrases in conjunction plainly shows the intention of the legislature to have been to require only such banking institutions to comply with the provisions of this chapter as were actually engaged in banking business at the time specified therein for making returns of personal property.

I am, therefore, of the opinion that as the Bridgeport Bank & Trust Company did not actively engage in the banking business until the 11th day of May, 1908, (1) it was not required to make return to the county auditor under the law for the year 1908; (2) it was not liable for any tax for the year 1908, and (3) Mr. Heinlein was not required to return the $7,500 in his hands when he did so.

The duty of listing for taxation the money paid to Mr. Heinlein on or prior to the day preceding the second Monday of April, 1908, by the stockholders of said bank rested upon such stockholders.

Yours very truly,

U. G. DENMAN,
Attorney General.

APPROPRIATIONS BY GENERAL ASSEMBLY—CONSTRUCTION OF.

June 11th, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The amendment to section 2745 as passed by the last general assembly contains this provision: "The auditor of state is hereby directed and empowered to draw his warrants on the state treasurer in favor of any insurance company which has paid taxes under the provisions of section 2745 of the Revised Statutes, when it is made to appear from the books and records of the superintendent of insurance that such taxes were paid on premiums remitted direct to the home office of the company. There is hereby appropriated for such purpose from any funds in the state treasury not otherwise appropriated, a sum not to exceed fifty thousand dollars."
>
> Query: Is the appropriation attempted to be made in the above paragraph such that the auditor of state is authorized to issue a warrant on the state treasurer?

In reply I beg to say section 22 of article II of the constitution is as follows:

> "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."

You will observe that this provision of the constitution requires a *specific*

appropriation. The word "specific" is defined in the Century Dictionary when used as adjective as something "distinctly named, formulated or determined, as a specific sum of money."

The appropriation made in the above quoted provision by the legislature is in this language: "There is hereby appropriated for such purpose from any funds in the state treasury not otherwise appropriated *a sum not to exceed $50,000.*"

Does this language meet the requirements of section 22, article II of the constitution? In other words, is this a "specific" appropriation? The purpose for which the appropriation is sought to be made is specified, but no specific sum of money is determined. "A sum not to exceed $50,000" is indefinite and indeterminate. In fact, the legislature has fixed a maximum, but it has appropriated no "specific" sum of money. It cannot be said that "a sum not to exceed $50,000" is a specific appropriation of $50,000 for the reason that the language used conveys no such meaning. Had the legislature intended to appropriate $50,000 it would have said "there is hereby appropriated for such purpose from any funds in the state treasury not otherwise appropriated the sum of $50,000."

I am, therefore, of the opinion that the language used by the legislature in making this appropriation is insufficient to meet the constitutional requirements, and that the auditor of state is unauthorized to draw any warrant on the state treasurer against said appropriation.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE OIL INSPECTOR—OFFICIAL BOND—PAYMENT OF PREMIUM.

Premium on official bond of state oil inspector may not be paid out of receipts arising from inspection of oil.

July 9th, 1909.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of July 2d, in which you request my opinion as to the legality of certain disbursements of the state oil inspector made by way of current expenses at different periods, beginning September 30th, 1906. The payments in question were for premiums on the official bond of the oil inspector.

In my opinion these expenditures were illegal, and should not have been paid out of the receipts arising from the inspection of oil.

The act of April 16th, 1906, 98 O. L. 359, amending sections 395 and 396 of the Revised Statutes, governed the department of oil inspection during the first portion of the period covered by your inquiry. Section 396 thereof provided in part that:

> "The state inspector of oils, shall, *before he enters upon the discharge of the duties of his office,* * * * execute a bond to the state in the sum of $20,000.00 * * * which bond shall be for the use of the state of Ohio, and of persons in any way aggrieved or injured by the acts or neglect of such state inspector * * *.
>
> "The state inspector of oils shall receive an annual salary of $3,500.00, payable monthly, together with an annual allowance of $500.00 for traveling expenses, and $600.00 for stenographer, payable

monthly, to be paid out of the moneys received by him * * * under this act.

"All fees for inspection under this act * * * shall be paid * * * to the state inspector of oils * * *.

"The state inspector of oils shall pay into the state treasury quarterly all moneys received by him directly or through deputy inspectors under this act after first paying therefrom all money due him * * * under the provisions of this act up to that date."

The act of May 9, 1908, 99 O. L. 513, succeeded the act above quoted, and is now in force as applicable to the department of oil inspection. Section 2 thereof provides in part as follows:

"Before entering upon the *discharge of the duties of his office*, the state inspector of oils shall * * * execute and deliver a bond to the state in the sum of $20,000 * * *."

Section 5 provides in part that:

"The state inspector of oils shall receive an annual salary of $3,500.00, which shall be in full for all services performed under this act, payable monthly, together with an annual allowance of $600.00 for traveling expenses, and $720.00 for stenographer, payable monthly, to be paid out of the moneys received by him under this act."

Section 9 provides in part that:

"The state inspector of oils shall pay into the state treasury, quarterly, all moneys received by him under this act, after first paying therefrom all money due him or said deputy inspectors, and all expenses incident to the proper conduct of his office under the provisions of this act before that date."

The following considerations support the conclusion above set forth, viz.:

1. The expenditure in question is not expressly authorized by either of the acts above quoted. Public moneys may not be expended in the absence of express or implied statutory authority.

2. The requirement that bond be furnished is not one of the duties of the office of state inspector of oils; it is an act of qualification, a condition precedent to the exercise by the inspector of the powers and duties of his office; it is an act committed by him as a private individual, and not in his official capacity. It is a thing which must be done before he enters upon the duties of his office, and is thus to be classified with the procurement of a commission. Accordingly, there would be as much ground for contending that the state should pay the commission fee of the inspector as that it should pay the premium on his bond.

3. The obligation to pay the premium is separate and apart from the obligation on the bond itself, and the premium does not constitute the consideration for the surety's undertaking.

Stearns on Suretyship, section 253.

Therefore, the state, which is the obligee, is a stranger to the agreement of the principal to pay the premium to the surety. This consideration would

operate to exclude the payment of the premium from the catalogue of "expenses incident to the proper conduct of his office" should it be sought to justify it under that language.

The disbursements, therefore, should not be allowed.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

OHIO PENITENTIARY—TRANSFERRING PRISONER AFTER JUDGMENT OF CONVICTON REVERSED—COST OF.

Where prisoner convicted and sentenced to penitentiary by common pleas court and such court reversed by reviewing court cost of transportation of such prisoner to custody of sheriff of county to be paid out of cash account of warden.

July 16, 1909.

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

DEAR SIR:—Your communication is received in which you make the following statement of fact and inquiry for the opinion of this department thereon:

> A party is convicted in the common pleas court of a penitentiary offense and sentenced and committed to the penitentiary. Thereafter a reviewing court reverses the judgment of the common pleas court and grants a new trial and the warden of the penitentiary returns the person to the county from which he came and delivers him into the custody of the sheriff.
>
> Query: (1) In case the prisoner is again convicted and committed to the penitentiary, how shall the cost and expense of the warden in transporting this prisoner be paid?
>
> (2) In case the prisoner is acquitted, how shall the cost and expense of the warden in transporting this prisoner be paid?

Crimes in the state of Ohio are statutory. The costs incident to the trial of a person charged with such statutory crime are fixed by statute.

Section 7366 R. S. provides that:

> "If a new trial is ordered, the warden shall forthwith cause the defendant to be conveyed to the jail of the county in which he was convicted and committed to the custody of the sheriff thereof."

This section does not provide for the expense incurred by the warden in making such conveyance of the prisoner to the jail of the county in which he was convicted. Furthermore, I find no other section of the Revised Statutes making express provision for such expenditure. This item of expense cannot legally be taxed as part of the costs in the trial court, neither can it be legally taxed as fees of any officer connected with the trial court or county in which the prisoner was convicted.

It remains, then, to inquire if the warden of the penitentiary has an available fund subject to his order out of which he can legally pay the expense incurred in making return of the prisoner. The prisoner, when committed to the

state penitentiary by sentence of the common pleas court, becomes a liability of the state, and in the absence of express provision to the contrary it would seem that the state must bear the expense of the prisoner's return in case of a new trial being granted him. The warden of the penitentiary should not be required to bear this expense himself, as an individual, if by any reasonable construction the fund can be charged to the statute governing the current expense fund subject to the warden's order and providing for the maintenance and incidental expenses of the institution. Therefore, I think it is plausible reasoning to so construe the statutes relating to the cash account of the warden, and particularly section 7400 Revised Statutes, as allowing and authorizing the warden to pay this expense occasioned by the return of the prisoner to the proper county out of said fund, and this would be true whether the accused might be acquitted or convicted upon new trial.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

MANNER OF ADVERTISING AND LETTING BIDS FOR PUBLIC BUILDINGS —SEC. 782 CONSTRUED.

April 6, 1909.

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

DEAR SIR:—I have your letter of March 30th in which you submit and ask my opinion upon the following facts and questions:

> Kindly give me your opinion on the following proposition involving the construction of section 782, Revised Statutes. In this section is found in parenthesis the following clause: "Excepting the penitentiary."
>
> This exception is made to apply in the general appropriation bill to the Boys' Industrial School and the Institution for Feeble-Minded Youth.
>
> I would like to know whether the exception above referred to excepts these institutions from the provisions of the other sections in this chapter, or any one of them, in addition to section 782.

Section 782 of the Revised Statutes, and the sections following this one in the chapter in which it appears, prescribe the method of advertising for bids and letting contracts for the construction of public buildings and structures, and for providing, in substance, that before any contract shall be let the board of trustees shall prepare plans, specifications, estimates, etc., and these shall be filed for the inspection of all persons who wish to bid; and it is further provided how the advertisements shall run and when the bids shall be opened, etc., on those plans.

In section 782, however, there is an express exception as to the penitentiary, and that section provides only for the making of the plans. But in all the sections following section 782, those plans are referred to, and, in my opinion, the sections following section 782 do not apply to the penitentiary, in making repairs on the same. The appropriation bill in appropriating money for repairs, or new construction at the Boys' Industrial School and at the Institution for Feeble-Minded Youth, provides that with reference to these two institutions the same exception shall apply in advertising the work as is provided for in section 782 with reference to the penitentiary.

I am, therefore, of the opinion that the exception referred to in your letter excepts these two institutions from the provisions of the other sections in the chapter, in addition to section 782.

Very truly yours,

U. G. DENMAN,
Attorney General.

COLE LAW—REPORTS—FILING OF BY CORPORATION.

All corporations required to file reports under Cole law doing business in this state on or after May 1st, are liable for tax even though they have ceased to do business before time of annual reports.

June 28, 1909.

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

DEAR SIR:—Your letter concerning the above company is received. You state in substance that this company went out of business some time in October, 1908, and inquire whether the company should file its report in May, 1909, and pay the excise tax under the Cole law for the current year.

The Cole law provides that any person or persons, joint stock associations, or corporations enumerated therein, doing business in this state, shall annually, between the 1st and 31st days of May, file with the auditor of state a statement showing, among other things, the gross receipts of the company for the year then next preceding the first day of May. This statement or report is submitted to the state board of appraisers and assessors, who determine the gross receipts of the company. It then becomes the duty of the auditor of state in the month of November, annually, to charge and collect thereon a fee in the nature of an excise tax of one per cent. upon the gross receipts of the company.

I am, therefore, of the opinion that all companies required to file reports and pay excise taxes under the Cole law, doing business in this state on or after the 1st day of May of any year are liable for the excise tax even though they may have ceased to do business before the time of filing the annual report or paying the annual excise tax. State v. Rodecker, 145 Mo. 450.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW—DIRECTOR OF PUBLIC SAFETY—AUTHORITY TO DRAW VOUCHERS.

Director of public safety appointed by mayor under section 146 Paine law is lawful and proper authority to draw vouchers for department of public safety; former board of public safety has no authority after August 1, 1909.

August 19, 1909.

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

DEAR SIR:—I have your letter of August 17th, requesting my opinion upon the following facts and questions submitted to you by Foster G. Burdell, director of public safety for the city of Columbus:

"Under the provisions of the Paine law, Mayor Charles A. Bond, of the city of Columbus, on August 1, 1909, appointed me the director of public safety for the said city of Columbus and abolished the old board of public safety.

"Mr. Connor, who was a member of the board of public safety, still insists upon acting in this capacity, signing pay-rolls, etc., upon the ground that the old board of public safety is still in existence.

"The city auditor and city treasurer refuse to honor vouches signed by me as the director of public safety under the Paine law. I would like an opinion from your department as to whether vouchers signed by me as the director of public safety should be honored by the city auditor and city treasurer, and also whether vouchers signed by me as the director of public safety and Mr. Connor as director of the board of public safety are legal and should be paid by the city auditor and city treasurer?"

The facts and questions above quoted from Mr. Burdell require a construction of the Paine law, and particularly that portion of it providing for the director of public safety. The last section—section 3—of this law reads as follows:

"Section 3. This act shall take effect and be in full force on and after August 1, 1909, provided that all elected officers shall serve out the terms for which they have been elected, except that the provisions of sections 157, 158, 159, 160, 161, 162, 163, 164 and 165 shall be in full force and effect from and after January 1, 1910."

The Paine law amends sections 129, 131, 138, 139, 140, 141, 144, 145, 146, 147, 153, 154 and 227 of the original code, in addition to the sections specifically mentioned in the above quoted section 3, and it supplements original section 154 by adding two new sections, namely, section 154-*a* and section 154-*b*.

The last section in the Paine law—section 3—as quoted above, provides in effect that the whole act; that is, the whole Paine law, shall take effect and be in full force on and after August 1, 1909, except that all elected officers of the cities shall serve out the terms for which they have been elected, namely: the balance of this year, 1909, and except further that the provisions of sections 157, 158, 159, 160, 161, 162, 164 and 165 as amended in the Paine Bill, shall not take effect until January 1, 1910. Section 163, as mentioned in this last section 3 of the act is not amended by the Paine Bill, and the number "163," included in section 3 as above quoted, was undoubtedly placed there through mistake; but, in any event, it has nothing to do with the question in hand.

The amended sections, therefore, in the Paine Bill which took effect August 1, 1909, under the language of section 3 of the act as above quoted, are sections 129, 131, 138, 139, 140, 141, 144, 145, 146, 147, 153, 154 and the supplemental sections to 154, namely: 154-*a* and 154-*b*. Sections 146, 147, 153 and 154 as amended in the Paine Bill, and which, according to the last section (section 3) of the bill, took effect and came into full force on August 1, 1909, read as follows:

"In every city there shall be a department of public safety which shall be administered by a director of public safety. The director of public safety shall be an elector of the city and he shall be appointed by the mayor and shall serve until his successor is appointed and qualified.

"The director of public safety shall be the chief administrative au-

thority of the fire, police, charity, correction and building departments and shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments, except as otherwise provided by law. He shall make all contracts in the name of the city with reference to the management of these departments, and for the erection or repair of all buildings or improvements in connection with said departments and for the purchase of all supplies necessary for said departments, subject to the restrictions imposed by law.

"He shall manage and make all contracts in reference to the police stations, fire houses, cemeteries, and reform schools, houses of correction, infirmaries, hospitals, work houses, farms, pest houses, and all other charitable and reformatory institutions now or hereafter established and maintained. And in the control and supervision of such institutions, said director shall be governed so far as consistent with this act by the provisions of sections 2050, 2051, 2052, 2053, 2053-1, 2053-2, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2081, 2092, 2093, 2094, 2099, 2100, 2102, 2105, 2106, 2165, 2168, 2169, 2171 and 2172, of the Revised Statutes of Ohio.

"The director of public safety shall classify the service 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 act.

"The director of public safety shall have power to make all contracts and expenditures of money for acquiring lands for the erection or repairing of station houses, police stations, fire department buildings, fire cisterns, and plugs that may be required, and for the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments, and for all other undertakings and departments under the supervision of the department of public safety; provided that no obligation involving an expenditure of more than five hundred dollars shall be created except when first authorized and directed by ordinance of council. In making, altering or modifying such contracts, the director of public safety shall be governed by the provisions of section 143 hereof, except that all bids shall be filed with and opened by the director of public safety.

"He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of the city council."

Section 146 just quoted provides that there shall be a department of public safety in every city, which shall be administered by a director of public safety; that he shall be appointed by the mayor and shall serve until his successor is appointed and qualified.

Sections 147, 153 and 154 define many of his duties, and, as above stated, these sections all went into effect and full force on and after August 1, 1909, and my conclusion is that beginning with that day, August 1, 1909, the boards of public safety in the various cities of the state were abolished, and that it was the duty of the mayor in each city to appoint a director of public safety, under section 146 as above quoted, and that, beginning with that day, the boards of public safety in office up to that time had no further powers, nor could they exercise any further duties under the law.

It would seem there can be no doubt about the correctness of this conclusion, not only because of the fact that the last section of the Paine Bill, section 3, puts all of the amended sections from 129 up to and including 154, into full force and operation on August 1. 1909, but from the further fact that the proviso in this last section 3 retains certain officers, namely: all elected officers, in office to serve out the terms for which they have been elected. Such elected officers are, of course, the mayor, president and members of council, boards of public service, city auditor, city treasurer, city solicitor, etc. The boards of public safety are appointed officers, but the statute does not provide that they shall remain in office during the term for which they were appointed.

In my opinion, therefore, the city auditor and city treasurer in each city, should honor and pay vouchers signed by the director of public safety appointed by the mayor, under said section 146, as quoted herein, assuming, of course, that such vouchers are drawn for lawful purposes. In other words, such director is the lawful and proper officer to draw vouchers in the department of public safety for such purposes as the law requires. The former boards of public safety have no authority under the law. A voucher signed for a lawful purpose by the director of public safety appointed under said section 146, is a valid voucher. If a person, or persons, formerly a member, or members, of the board of public safety, should see fit to sign such vouchers along with such director of public safety so appointed, that action on the part of such persons will not affect the voucher one way or another. The signing and issuing of the voucher by the director of public safety so appointed, under section 146, is the only authoritative action.

The question submitted presents another which I deem it my duty to suggest and answer at this time, namely: the question whether members of the former boards of public safety should be paid their salaries where they, for any reason, are still assuming to act, and on this question my opinion is that, since these boards were abolished by the Paine law, beginning with August 1, 1909, it will not be legal for them to draw any salary from that time on, and for that reason neither the city auditor nor the city treasurer should honor or pay any voucher for such salaries.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOND OF ASSISTANT QUARTERMASTER GENERAL—PREMIUM NOT TO BE PAID BY STATE.

August 30, 1909.

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

DEAR SIR:—Your letter of August 26th requests my opinion as to the legality of a voucher presented to your department by the Illinois Surety Company for the premium on the official bond of the assistant quartermaster general and disbursing officer in the department of the adjutant general.

The bond described in your letter is evidently given in compliance with section 14 of the act of congress passed June 21, 1903, which directs the governors of the several states and territories to designate officers of their command as disbursing officers for the purpose of distributing among the several states and territories the sums appropriated in accordance with the provisions of that act by the federal congress.

Surety company bonds are not required by the act or by the army regulations (see paragraph 566 of the latter), but are permitted thereby (paragraph 571).

Inasmuch as the assistant quartermaster general as disbursing officer could have secured a personal bond under the federal laws and regulations, I am of the opinion that the premium on his surety company bond is not payable out of the funds appropriated for the use of the adjutant general's department by the general assembly of the state of Ohio, although the duty to give bond is imposed upon him as an officer, and although in discharging this duty he and his superiors are vested with discretion as to the sufficiency of the bond to be furnished. I therefore advise that the voucher described by you be not honored.

Yours very truly,

U. G. DENMAN,
Attorney General.

LIQUOR TAX—COUNTY AUDITOR—DUTY TO ACCEPT APPLICATION TO ENGAGE IN BUSINESS.

County auditor may not accept application to engage in liquor business where applicant has violated provisions of Dean law, and auditor in dry county should not accept application to engage in liquor business.

September 13, 1909.

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

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

> 1st. Is it the duty of the auditor of a county, made dry on account of a Rose local option election, to accept the application of a person to engage in the liquor business and certify the same to the county treasurer before the person has violated the law by engaging in the sale of liquor within the dry territory?
>
> 2nd. May the county auditor refuse a license to a saloon-keeper who has violated any of the provisions of the Dean law?

The Dow-Aikin law in its present form contains no provision respecting the filing of an application on the part of a person who desires to engage in the business of trafficking in intoxicating liquors. The following are all the provisions of the law with respect to the commencement of such a business during the tax year and the duties of the county auditor in the premises:

Sec. 3, sec. 4364-11 R. S.:

> "When such business shall be commenced in any year after the fourth Monday in May, such assessment shall be proportional in amount to the remainder of the assessment year * * and be payable *upon the date of such commencement* * * *"

Sec. 5. Sec. 4364-13 R. S.:

> "* * If any assessment aforesaid shall not be paid when due there shall be added a penalty thereto of twenty per centum which shall be collected therewith."

Sec. 4364-14 (sec. 6) R. S.:

> "* * * Upon receiving satisfactory information of any such business liable to assessment * * not returned by the assessor (the

county auditor) shall forthwith enter the same upon such duplicate and upon the county treasurer's copy thereon."

Inasmuch as the statutes above quoted impose no mandatory duty upon the auditor to accept an application, i. e., a statement of intention to engage in the business before the business is actually begun, I am of the opinion that in a dry county the county auditor not only need not, but should not comply with the request that such a business be placed upon the duplicate. So to comply would seem in a sense to sanction a traffic illegal under the law and by the decision of the electors. Upon broad grounds of public policy, therefore, the auditor should not only refuse to honor a so-called application to be placed upon the tax duplicate, but he should in no event cause an assessment to be placed against a person under the Dow law until the local option law has been violated.

With respect to your second question, I may say that I have examined the Dean law (100 O. L. 89) and find therein no specific authority in the county auditor to refuse a license to a saloon-keeper for any reason whatever. The word "license" is a misnomer. Doubtless it is anticipated that an application similar to that described in your first question may be made by the person who has violated the act last above cited. In case such an application is made, the situation thus presented would be substantially identical with that supposed in your first question, and the duties of the auditor would, in my judgment, be the same in both instances.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE ARMORY BOARD—EXPENSES AND SALARY OF MEMBERS.

Per diem and expenses of state armory board may not be paid from appropriation of O. N. G. for inspection and examination when such services were rendered solely on authority of being member of board.

September 20, 1909.

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

DEAR SIR:—I beg to acknowledge receipt of the following letter from you under date of September 16th:

> "There has been submitted to this department by the adjutant general a bill of Col. B. L. Bargar, member of the state armory board, for per diem and expenses incurred by him in the performance of the duties entailed on that board. The adjutant general requests payment of this bill out of the appropriation for the Ohio National Guard for 'Inspections and Examinations' (Ohio Laws 100, page 31). In support of this request, reference is made to an act, known as the state armory board law (Ohio Laws 100, page 25, sections 3084 and 3085, Revised Statutes).
>
> "Please advise me if, in your opinion, payment of this bill can be made from the item in the bill above referred to on authority of the adjutant general."

An examination of the entire act found in 100 O. L. 25, being the state armory board act, so-called, discloses that the function of the board thereby

created relates exclusively to the management, care and maintenance of armories provided and maintained by the expenditure of a fund known as the "state armory fund," not available until after January 1, 1910, and such moneys as may come into the hands of the board from donations. No provision is therein made for inspection of such armories by military officers, nor, in short, for the exercise of any control, save that over the construction and business management of such armories. I have heretofore held, in this connection, that, at the time the act was passed and until after January 1, 1910, the armory board could exercise no power whatever, save in the expenditure of the moneys received from donations, etc.

From this conclusion the further conclusion follows that section 3085, which provides for the inspection of existing armories, remains in force, at least until January 1, 1910. That section is in part as follows:

> "The state, acting through the adjutant general, * * shall provide for each organization a suitable armory * * which armory shall be inspected and approved by an officer detailed by the commander-in-chief, whose report shall be filed in the office of the adjutant general * * and the sum of seven hundred dollars shall be paid to the adjutant general each year to pay for the expenses of inspecting such armories, * * which sum shall be provided for by general appropriation * *."

This general appropriation appears to be carried in the appropriation act found in 100 O. L. 30-31 and from the statement in your letter I assume that the item for "inspections and examinations" constitutes the fund from which the seven hundred dollars, payable under section 3085, should be taken.

Putting it in another way, the service of inspection is not one which, at present, devolves upon the members of the state armory board as such members; it is the duty of the adjutant general to detail officers to make such inspection of existing armories under section 3085; and for such service officers so detailed are entitled to compensation as provided by law. Section 3084 R. S. provides for the compensation of officers detailed upon inspection duty.

Payment of Colonel Barger's bill, as mentioned in your letter, cannot therefore be made by the adjutant general from the appropriation made under 100 O. L. p. 31 for "inspections and examinations" for the reason that from your letter it appears that he was never detailed by the adjutant general to make the inspections in question, but it does appear, on the contrary, that he simply made such inspections as a member of the state armory board. If, prior to the making of such inspections, the commander-in-chief had detailed Colonel Barger or any other officer, as provided under section 3085, to make such inspections the expenses incurred on such inspections could have been paid from the fund in question; but since it appears that no such detail was made and that the officer proceeded in the matter as a member of the state armory board, there is no way in which he can be reimbursed except through a future appropriation by the general assembly.

Yours very truly,

U. G. DENMAN,
Attorney General.

INTOXICATING LIQUOR—APPLICATION TO SELL—QUALIFICATION OF APPLICANT.

An applicant who desires to engage in sale of intoxicating liquors merely answering that "first papers have been taken out" does not comply with act in 100 *O. L.* 89.

A woman may be an unnaturalized resident.

October 15, 1909.

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

DEAR SIR:—I am in receipt from you, with request for an opinion thereon, inquiries submitted to you by Hon. D. T. Davies, Jr., auditor of Lucas county, Ohio, as follows:

> First: Under section 5, in making application for the privilege to engage in the sale of intoxicating liquors as provided for in section 5 of an act providing against the evils resulting from the trafficking in intoxicating liquors, as amended 100 O. L. 89, is the requirement thereof met with when the reply is that "first papers have been taken out?"
>
> Second: Can a woman be an unnaturalized resident?

Replying thereto I beg to say that question one of section 5 referred to in your first inquiry is as follows:

> "Are you or if a firm, is any member of your firm an alien or an unnaturalized resident of the United States?"

The said section 5 also contains the following provision:

> "And if, after one year from the passage of this act any of the questions, number one to five aforesaid, be answered in the affirmative, or if said person, corporation or co-partnership shall fail or refuse to answer the same and sign and verify them before such assessor then, if thereafter said person, co-partnership or corporation shall engage in the sale, giving away or furnishing intoxicating liquor as a beverage, he (or if a firm, the members of the firm or if a corporation the officers of such corporation) shall be guilty of a misdemeanor, etc."

Section 4 of the naturalization act of June 29, 1906, U. S. Statutes 1905-6 part one, page 596, provides the manner in which an alien may be admitted to become a citizen of the United States.

It is clear from a reading of this section that his declaration on oath to the clerk of the proper court that it is his bona fide intention to become a citizen of the United States, and "taking out his first papers" does not make him a naturalized resident of the United States. He is an unnaturalized resident of the United States until he has, after full time has elapsed as provided for in said section, taken the final oath prescribed therein to be administered to such applicant for citizenship, and further and subsequent to this oath not until the court is satisfied that

> "immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least,

and that he has behaved as a man of good moral character, attached to the principles of the constitution of the United States and well disposed to the good order and happiness of the same. In addition to the oath of the applicant the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the constitution shall be required, and the name, place of residence and occupation of each witness shall be set forth in the record."

Therefore, an applicant for the privilege of selling intoxicating liquors within this state, answering that he has taken out his first papers, or failing to answer such question thereby shows his disqualification to engage in such business. If a member of a firm or partnership proposing to engage in the business of selling intoxicating liquors is not a naturalized resident of the United States, as above defined, and therefore a citizen, then said partnership may not engage in said business.

In reply to your second inquiry as to whether a woman may be an unnaturalized resident, it is first necessary to determine the meaning of "unnaturalized resident" as used in the statute under consideration. In Bouvier's Law Dictionary the word "resident' is defined as "one who has his residence in a place." In consideration of this act this definition may be applied as meaning the place where a person dwells or abides and does not necessarily mean a citizen in a legal sense.

From this conclusion an "unnaturalized resident," as used in the act, may be defined as a person of foreign birth who has not become a citizen by adoption or naturalization, as distinguished from a native-born or natural born citizen or from a naturalized citizen, and it is applicable to both men and women.

Yours very truly,

U. G. DENMAN,
Attorney General.

QUADRENNIAL APPRAISEMENT ACT—SERVICES EXPERT ASSISTANTS MAY RENDER BOARD OF ASSESSORS.

November 24, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Senate bill No. 99, to provide for the election of assessors of real property, contains in section 7 thereof this provision: "Any board of real estate assessors in any city, elected under the provisions of this act, which shall deem it necessary to enable them to complete within the time herein prescribed the proper listing and valuation of the real property within such municipality, shall have power to employ a chief clerk and employ such *expert assistants* as such board may deem necessary."
>
> Query: What is meant by "expert assistants?" May such assistants be employed to gather information respecting the value of property to be assessed, and perform such other services as are necessary to assist the board in arriving at a proper valuation of the real estate of the city?

The above quoted provision of section 7 of the bill expressly provides that said board shall have the power to employ a chief clerk and appoint expert assistants for the purpose of enabling them "to complete within the time herein prescribed the proper listing and valuation of the real property within such municipality." It follows, therefore, that such expert assistants so appointed will be authorized to assist under the direction of the board of real estate assessors in listing and valuing the real property within the municipality.

Yours very truly,

U. G. DENMAN,
Attorney General.

DAIRY AND FOOD COMMISSIONER—LIQUOR TAX INSPECTORS' APPROPRIATION—CONSTRUCTION OF.

November 24, 1909.

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

DEAR SIR:—I have your letter of November 17th, enclosing the letter of R. W. Dunlap, dairy and food commissioner, in which Mr. Dunlap inquires whether the appropriation for "salaries of twelve deputy inspectors for the collection of the liquor tax under the Cain law at $1,300.00—$15,600.00," may be used to pay salaries of more than twelve deputy inspectors at any one time.

Mr. Dunlap in his letter states that at the time this appropriation became available and for some time thereafter there were fewer than twelve deputy inspectors in his department and that consequently the compensation of the full force of twelve inspectors payable from now until the end of the first quarter of the current fiscal year if paid out of this fund will not exhaust the same. He also states that during the remainder of the first quarter of the fiscal year there will be such additional work for inspectors to perform under the Cain law as to make it desirable, if legal, to employ additional inspectors and to pay their compensation out of the balance of the fund without, of course, exceeding the amount appropriated. You request my opinion on the query thus presented.

Neither the Cain law, so called, being section 4364-14*a* R. S., nor the act relating to the powers and duties of the dairy and food commissioner, section 409-10 R. S., limits the number of deputy inspectors which the dairy and food commissioner may appoint. The latter section expressly confers upon the dairy and food commisioner the power "to employ such * * inspectors * * * as may by him be deemed necessary for the proper enforcement of the laws, their compensation to be fixed by the commissioner."

The appropriation law, which is, of course, a general statute having force and dignity equal to that of the sections of the Revised Statutes above quoted, should, in my judgment, be construed so as to accord with those sections. Three limitations upon the power of the inspector are imposed by the act, viz:

1. That the aggregate amount of salaries paid shall not exceed $15,000.

2. That no deputy inspector shall receive a salary in excess of $1,300 per annum.

3. That no more than twelve inspectorships for the whole year may be created by the commissioner.

However, if the commissioner sees fit to create only six additional inspectorships during a portion of the year he may, in my judgment, appoint more

than twelve for the balance of the year so long as the foregoing limitations are not violated.

I therefore conclude that with the foregoing qualifications the query of Mr. Dunlap should be answered in the affirmative.

Yours very truly,

U. G. DENMAN,
Attorney General.

LIBRARY TRUSTEES—PAYMENT OF EXPENSES OF LIBRARIAN TO CONGRESS OF LIBRARIANS.

November 29, 1909.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of October 11th, in which you request my opinion as to the authority of the board of library trustees of the city of Toledo to send their librarian to a congress of librarians and to pay his expenses actually incurred in attendance thereat.

In my opinion, section 4002-23 R. S. confers upon the board of trustees of the Toledo library very broad discretion in the matter of the expenditure of the funds in its control to the end that "the spirit and intent of this act in establishing and maintaining the best public library and reading-room within the means at their disposal" may be carried out. I do not believe that so long as this discretion is not abused it may be disturbed and I am satisfied that the case constitutes an apparent, though not a real, exception to the rule that public moneys may not be disbursed save under authority of specific provisions of law. In other words, the broad and general language of the section cited is sufficient authority for the expenditure in question.

I herewith return the letter of Mr. Swayne, as requested by you.

Yours very truly,

U. G. DENMAN,
Attorney General.

GIRLS' INDUSTRIAL HOME—PAROLE OFFICERS—APPOINTMENT AND EXPENSES OF.

Trustees of Girls' Industrial Home only authorized to appoint one parole officer. Salary and expenses of such officer may not be paid out of appropriation for transportation and prosecution of convicts.

December 13, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following statement of facts with a request for an opinion thereon:

> The board of trustees of the Girl's Industrial Home have appointed two parole officers, to-wit, Laura A. Marlow and Maie Runyan. The duties of said officers are to find suitable homes for the girls committed

to the Girls' Industrial Home. The itemized statements for salary and expenses of each of these officers have been presented to your department for payment.

Upon this statement of facts you submit the following questions:

1. Is the board of trustees of the Girls' Industrial Home authorized to appoint more than one parole officer?
2. Should the salary and expenses of a parole officer or officers for the Girls' Industrial Home be paid out of the appropriation for prosecution and transportation of convicts?

In reply I beg to say chapter 12, title 5 of the Revised Statutes, which relates to the Girls' Industrial Home, contains no provision for the appointment of a parole officer for said institution, neither is there any provision for paroling the girls committed thereto, and I understand, as a matter of fact, no girls are paroled. However, section 33 of the juvenile act, passed April 23, 1908, (99 O. L. 192) does require the board of trustees of the Girls' Industrial Home

> "To maintain an agent of such institution, whose duty it shall be to examine the home of children *paroled* from such institution for the purpose of ascertaining and reporting to said board of trustees whether they are suitable homes; to assist children paroled or discharged from such institution in finding suitable employment, and to maintain a friendly supervision over paroled inmates during the continuance of their parole; such agent shall hold office subject to the pleasure of the board * * * and shall receive such compensation as such board may determine out of any funds appropriated for such institution applicable thereto."

Section 9 of the probationary act, passed May 9, 1908, (99 O. L. 339) is as follows:

> "The auditor of state shall issue his warrant upon the state treasurer to pay from the appropriation for conviction and transportation of convicts, the salaries and necessary expenses of the field officers, upon presentation of itemized vouchers properly approved by the board of managers. In the same manner shall be paid the salaries and expenses of the parole officers of the boys' industrial school and the girls' industrial home."

While this section provides for the payment of parole officers for both the boys' industrial school and the girls' industrial home, yet in the conduct of the two institutions there is a radical difference in regard to the parole of inmates. In the boys' industrial schools, boys, under certain conditions, are permitted to go on parole from the institution, while at the girls' industrial home the girls are indentured and placed in suitable homes. While the duties of the agent required to be maintained by the board of trustees of the girls' industrial home are to examine the homes of the children paroled from the institution, yet as a matter of fact no girls are paroled therefrom, and in my judgment such agent is not a parole officer within the meaning of section 9 of the probationary act.

I am, therefore, of the opinion that the board of trustees of the girls' industrial home are not authorized to appoint two parole officers, but they may,

and in fact are required by section 33 of the juvenile act to maintain an agent whose duties are prescribed in said section, and to pay the compensation of such agent "out of any funds appropriated for said institution applicable thereto." It follows, therefore, that you may not pay either of the itemized statements submitted to you out of the appropriation for prosecution and transportation of convicts. You may, however, pay the compensation of one agent out of any fund appropriated for the girls' industrial home that is applicable thereto.

I herewith enclose papers. Yours very truly,

U. G. DENMAN,
Attorney General.

LIQUOR TAX—PENALTY—MANNER OF COMPUTING.

December 17, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Under the provisions of section 4364-14*a* Revised Statutes, does the 20% penalty therein provided attach to the total assessment due for balance of year from date of assessment or does it apply only to amount of assessment due from date of assessment to time of discontinuance, or, in other words, if the total assessment for balance of year from date of assessment is $800, and it is shown that a discontinuance would require only the minimum of $200, would the 20% penalty to be collected apply to the $800 or to the $200?

In reply, I beg to say section 4364-14*a* R. S. is in part as follows:

> "The assistant commissioners and inspectors appointed by the dairy and food commissioner under section 409-10 of the Revised Statutes of Ohio, in addition to their duties under that section shall determine from information furnished by the auditor of state or by personal visitation or otherwise, the names of all persons, firms or corporations liable to such assessment or increased assessment not already on the duplicate, and forthwith report the same to the auditor of state, together with a description of the real estate upon which such business is carried on; and thereupon the auditor of state shall cause the same to be entered upon the assessment duplicate of the proper county by the auditor thereof, together with the penalty of twenty per centum, which shall be collected the same as other assessments."

Under this provision the auditor of state is required to give the auditor of the proper county to place the proper assessment for the remainder of the year on the duplicate together with the penalty of twenty percentum. It is evident that no refunder can be made as is authorized by law until after such assessment and penalty is paid into the county treasury. After that is done the county auditor, under the provisions of section 4364-11,

> "Whenever any person, corporation or co-partnership engaged in such business who has been assessed as aforesaid, and *who has paid the*

full amount of said assessment discontinues such business, the county auditor upon being satisfied of that fact, shall issue to such person, corporation or copartnership a refunding order for a proportionate amount of said assessment, so paid, but in no case shall the the amount of such assessment retained be less than $200.00."

This provision only authorizes a refunder of a proportionate amount of the tax or assessment and cannot, in my judgment, apply to the penalty. It follows, therefore, in the instance cited in your inquiry that the penalty will attach to the $800, and after the $800 together with the penalty of $160 is paid into the county treasury, the county auditor may issue a refunding order as provided in section 4364-11 for a proportionate amount of the said $800 so paid, but may not refund any part of the $160 penalty. This conclusion is sustained in the case of Simpson v. Serviss, 3 O. C. C. 433. Yours very truly,

U. G. DENMAN,
Attorney General.

TAXES AND TAXATION—BEQUEST FOR REPAIR OF CHURCH BUILDINGS AND CEMETERY.

A bequest for repairs for church buildings and cemetery is taxable, as it does not come within statutory exemption.

December 30, 1909.

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

DEAR SIR:—You refer to this department with a request for a written opinion thereon inquiries submitted to you by H. A. Buerhaus, auditor of Muskingum county, as follows:

"Are the bequests devised in the following item of a will exempt from taxation under the laws of this state?

"Item 4. I devise and bequeath to the trustees of the Goshen Bapitst church for the support of the ministry of said church, one thousand dollars, the interest only to be used for said purpose, the principal to be held in trust for said church. Also five hundred dollars as a permanent fund, the interest thereof to be used for keeping up the repairs on said church buildings and the cemetery contiguous thereto. If the said church ever be abandoned or cease to exist, then said bequest to be returned to my heirs."

After providing for taxing property generally by uniform rule the constitution, article 12, section 2 provides:

"* * but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value two hundred dollars, for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; * *."

From this it appears that the constitution is not self-operative, and no property is exempt until the general assembly has, by general law, so provided.

Exemptions are always strictly construed against the claimant. Exemptions from taxation are never implied. Even in cases where it is claimed that there has been an express grant of exemption, it is an invariable rule that further presumption must be in favor of the continuance of the taxing power and against any surrender thereof.

Erie Railroad Co. v. Pa., 21 Wallace, 498.
Cincinnati College v. State, 19 Ohio, 110.
New Orleans, etc., R. R. Co. v. N. O., 143 U. S. 192.

The general assembly has exempted from taxation by the enactment of section 2732 Revised Statutes the following property:

> "All public school houses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same and not leased or otherwise used with a view to profit * *."

In my opinion, the $1,000 bequest made in item four of this will is not exempt from taxation under this or any other section of the Revised Statutes of Ohio. The use of this bequest is not to be *exclusively for public worship.*

The supreme court of Ohio, in the case of Gerke v. Purcell, 25 O. S. 229, in construing this section above quoted from, and which at that time contained the same language as it now does as relating to this subject, laid down the following rule in paragraph 10 of the syllabus:

> "A parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of being used exclusively for public worship, it becomes a place of private residence. The exemption is not of such houses as may be used for the support of public worship, but of houses used exclusively as places of public worship."

This holding of the court has not since been changed. The court here distinguished between "support and public worship" and "houses used exclusively as places of public worship.".

The question as to the $500 bequest to be used for keeping up the repairs on said church building and the cemetery contiguous thereto is unlike the $1,000 bequest, because of the provision contained in section 3571 Revised Statutes, providing that:

> "A company or association incorporated for cemetery purposes may purchase, appropriate or take by gift or devise, and hold, not exceeding one hundred acres of land; also, any gift or devise, or any gift or devise in trust for the use of cemetery purposes, or the income from any such gift or devise for such cemetery purposes, according to the provisions of such gift or devise, or 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."

From an examination of the sections above referred to and other sections

relating to property of the character herein referred to, I reach the conclusion that the $1,000 bequest is not exempt from taxation, and that the $500 bequest is exempt under said section 3571 Revised Statutes.

Very truly yours,

U. G. DENMAN,
Attorney General.

OHIO SANITORIUM—SALARIES OF STOREKEEPER AND MATRON—AMOUNT THAT MAY BE PAID.

November 24, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiries:

> 1. May the trustees of the Ohio Sanitorium legally pay the storekeeper and matron of that institution salaries exceeding $600 and $400 per annum respectively?
> 2. If the storekeeper may not be paid more than $600 per annum, would it be legal to give him in addition to this salary a remuneration for services performed under any other title?

In reply, I beg to say section 640, which is a part of chapter II, title 5 Revised Statutes and refers to the control and management of the state benevolent institution, is in part as follows:

> "Upon the nomination of superintendents, boards of trustees may appoint stewards, but said steward so appointed shall not, at the time of his appointment, be a resident of the county in which said institution is located of which he is to be steward, matron, physicians, assistant physicians, one of which may be a female, and other needed officers, and may remove such appointees at pleasure They shall fix the compensation of each, not exceeding the *maximum* prescribed by law."

The above quoted provision of section 640 authorizes the appointment of a storekeeper and matron for the Ohio Sanatorium.

Section 651, which is a part of chapter III, title 5, provides for the appointment of a competent person to serve as "bookkeeper and storekeeper" for each *insane asylum*, and further provides that the appointment shall be for the term of two years and that the compensation shall be fixed by the trustees not exceeding $600 per annum. This provision, however, is not applicable to the Ohio Sanatorium for the reason that it applies only to the insane asylums. I am unable to find any general provision in the statutes fixing the compensation of matrons of the state institutions.

In 1906 the legislature passed a law in which the annual salaries of the appointive officers of state institutions are enumerated. That is to say, the salaries of certain appointive officers for each of the institutions therein enumerated are specifically fixed, but said section does not include the Ohio Sanitorium.

Inasmuch as there is no general provision fixing the compensation of storekeepers and matrons, it therefore follows that a maximum compensation for

the storekeeper and matron of the Ohio Sanatorium is not "prescribed by law."

I am, therefore of the opinion that the board of trustees of the Ohio Sanitorium have the authority to fix the compensation of the storekeeper and matron of that institution at such an amount as they may deem just and reasonable.

The answer to your second question, in a measure, depends upon what other office, aside from storekeeper, is contemplated. They may or may not be incompatible. Aside from the rule of compatibility, however, I have great doubt as to the advisability of paying the salaries of two distinct and separate offices in one state institution to the same person.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Bureau of Inspection and Supervision of Public Office, Department of Auditor of State)

SALARIES PAID TO DE FACTO OFFICERS—BOND OF VILLAGE COUNCILMEN.

Salaries paid to de facto officers cannot be recovered by village treasurer. Village council may release members from giving official bond.

March 15th, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, O.

GENTLEMEN:—I have your letter of March 11th in which you submit and ask my opinion on the following questions:

1. The clerk and members of council of the village of Rockford, Mercer County, Ohio, served said village in their official capacity from January, 1908, to January, 1909, when they were ousted by decision of the circuit court of said county. The question is, are said de facto officers liable to the village treasury for the salaries drawn by them during the year 1908?

2. Are village councilmen required by law to give bond, or may the council in fixing the bonds of village officials release councilmen from giving an official bond for the proper discharge of their duties?

Answering the first question, as quoted above, I may say that it happened to come to my knowledge that in the village of Rockord, after the last municipal election the persons who, at that election were elected to the council of the village, failed to qualify within the ten days prescribed by the statute for such qualification by taking the statutory oath and giving bond, where bonds are required, and thereupon the council then in office declared the newly-elected members of council to have forfeited their right to office, by reason of said failure to take the oath within the ten days. The controversy was taken to the courts and the litigation went along through last year, 1908, and a decision was finally rendered by the court where the matter was pending, holding that the statute providing that these officers should qualify within ten days after notice of their election, was directory only, and not mandatory, and these newly elected officers having taken the oath and qualified subsequent to the expiration of ten days, the court held that they were entitled to the office, and they accordingly went into office in January of this year.

These members of council who held over, under the circumstances above described, were *de facto* officers, and the rule of law in such cases is that such *de facto* officers cannot recover from the government the compensation provided for the positions which they fill, if the government resists payment of that compensation. But after it has once been paid to such officers it cannot be recovered back by the government, nor can the government be compelled to pay the money again to the persons who were in fact entitled to the offices, but who were excluded therefrom by the *de facto* officers.

The persons, however, who were thus wrongfully deprived of the office to which they had been elected, may recover the compensation from the *de facto*

officers. This now seems to be the settled rule of law in such cases, and I am therefore of opinion that in this case the village of Rockford cannot require these *de facto* members of council to return the money which was paid to them as salaries, to the village, nor will the village be required to again pay these salaries to the persons who were elected to the offices. But these persons who were so elected may recover the money from such *de facto* officers of council, if they care to press such suits.

The same ruling applies to the clerk.

Answering your second question, I am of the opinion that village councilmen are not required by law to provide that members of council shall give bond. I find no provision of law making such requirement, and there being no such provision it is then in the discretion of the council as to whether they shall provide that members thereof, before entering upon the duties of their office, shall give bond to the village for the proper discharge of their duties.

Very truly yours,

U. G. DENMAN,
Attorney General.

PUBLISHING OF MUNICIPAL ORDINANCES AND RESOLUTIONS—PURPOSES FOR WHICH MUNICIPALITIES MAY EXPEND PUBLIC FUNDS —RETURNING ASSESSMENT PROCEEDINGS.

Village ordinances need not be published in independent paper.

Where there is no paper of general circulation published in village, copies of ordinances are required to be posted at not less than five of most public places, except advertising bids for construction of public improvements, and these must be published in at least one newspaper of general circulation in corporation.

Resolution of council must be published same as ordinances.

Annual statement of city auditor need only be published in one newspaper.

An officer making return in special assessment proceedings not required to verify by oath each notice served.

Mayor or treasurer of village cannot be employed by council to revise or correct special assessment records.

Village mayor cannot be paid in addition to his salary for posting election notices.

Municipalities cannot use public funds to pay premium on surety bonds exacted from municipal officers or employes, nor pay expenses of such officers while in attendance upon meetings of state or national associations of which they are members.

Publication of ordinances fixing assessment in special assessment improvements may be in condensed form referring to schedule of names, etc.

March 16th, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, O.

GENTLEMEN:—I have your letter of some days since in which you submit, and ask my opinion on the following questions:

"1. In many villages of the state an independent newspaper is pub-

lished and has a general circulation within the village. In such village, is it required that the ordinances of the council be published in said newspaper? If not, in what manner should publication be made that the ordinances may be legal?"

"2. Are resolutions of council required to be published?"

"3. If publication of the annual statement of the city auditor be made in newspaper, is it required that same appear in two newspapers of opposite politics?"

"4. Is the return of the officer making return in special assessment proceedings required to be verified by oath of the officer on each separate notice served? If so made, is the notary fee of 25c for each notice a legal charge against the municipality?"

"5. Is it legal for the village council to employ the mayor or treasurer to revise or correct the special assessment records of the village and compensate them therefor from the village treasury in addition to their regular salary?"

"6. May the mayor of the village be paid in addition to his salary for posting election notices?"

"7. Is it a legal use of the public funds to pay the premium on surety bonds exacted by ordinance from municipal officers or employes?"

"8. Is it legal to use the public funds to pay the expenses of municipal officers in attendance upon the meetings of state or national associations of which they are members?"

"9. In the publication of the ordinance fixing the assessments in special assessment improvements, is it required that each lot, the owner thereof and the amount of assessment be published in detail, or may such ordinance be published in condensed form, giving the amount per foot front of the assessment only?"

These questions will be answered in the order as above quoted.

1. Section 124 of the municipal code provides in part as follows:

"In passing, recording, publishing and authenticating ordinances council shall be governed by the provisions of sections 1694, 1695, 1696, 1697, 1698 and 1699 of the Revised Statutes of Ohio and for all purposes such sections shall be and remain in full force and effect."

Said section 1695 Revised Statutes provides in part as follows:

"Ordinances of a general nature or providing for improvements shall be published in some newspaper of general circulation in the corporation; if a daily, twice, and if a weekly, once, before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Said section 1697 reads as follows:

"In all municipal corporations in which there is no newspaper published it shall be sufficient publication of ordinances, resolutions, statements, orders, proclamations, notices and reports required by 'An act to provide for the organization of cities and incorporated villages,' passed October 22, 1902 (96 O. L. extraordinary session, 1902), which require publication, to post up copies of such ordinance, resolution,

statement, order, proclamation, notice or report 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, except advertising for bids for the construction of public improvements, which shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks, and notices of the sale of bonds, which notices shall be published in such manner and for such time as is provided for in section 97 of 'An act to provide for the organization of cities (and) incorporated villages,' passed October 22, 1902 (96 O. L. extraordinary session, 1902.)

"The clerk shall make a certificate of such posting and the times (when) and places where done, in the manner provided in the preceding section; and such certificate shall be prima facie evidence that the copies were posted up as required."

Aside from the language first quoted above from section 124 of the municipal code that section, 124, further provides that:

"In addition thereto 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, and shall be published in a newspaper printed in the German language, if there be in such municipality such a paper having a bona fide paid circulation within said municipality of not less than one thousand copies. Proof of such circulation shall be made by affidavit of the proprietor or editor of such paper, which shall be filed with the city clerk of such municipality. Except as otherwise provided in this act, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this act, or the ordinances of any municipality to be published, shall be published in two newspapers of opposite politics of general circulation therein, if there be 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 bonds once a week for four consecutive weeks; all other matters shall be published once."

This last language quoted means that in addition to the publication provided for above as quoted from said section 1695 the ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics *published* and of general circulation in the municipality, and in a newspaper printed in the German language, if there are such papers. If there are no such papers then such publication, of course, cannot be had.

Your first question relates to municipalities where such papers do not exist, and this language just referred to need not therefore be further considered in this opinion.

The language last above quoted beginning with the words "except as otherwise provided in this act, etc.," requires the publication in two newspapers of opposite politics of *general circulation* therein if there be such in the municipality. This provision does not require publication within the municipality.

but only general circulation. Since, however, your first question does not contemplate two newspapers of opposite politics of general circulation in the municipality, then this language need not further be considered in this opinion. I may add, however, although this may seem unnecessary because of the plain wording of the language, that if two newspapers of opposite politics are published and of general circulation in any municipality, and there is a newspaper printed in the German language coming within the language quoted, then publication must be made in these papers, and in the same way, I may further add that if there are two newspapers of opposite politics of general circulation in the municipality, though not published therein, the publication of ordinances must be made in those two newspapers, "except as otherwise provided in this act."

Now it is otherwise provided in this act, and this other provision is found in said section 1697 as quoted above, and the provision, in effect, is that in all municipal corporations in which there is no newspaper published, it shall be sufficient publication of ordinances, etc, which require publication, to post up copies of the same at not less than five of the most public places in the corporation, except advertising for bids for the construction of public improvements, and these shall be published in at least one newspaper of general circulation in the corporation for not less than two nor more than four consecutive weeks, and notice of the sale of bonds shall be published in such manner as provided in section 97 of the municipal code.

Under these statutes and the discussion, your question number one suggests two situations: First. There may be a village in which a newspaper is published and of general circulation within the village, but in which there may be no other paper of general circulation, and in such a case as this it seems very clear that the ordinance required to be published must be published in that paper under the language quoted above from said section 1695 Revised Statutes.

Second. There may be villages in which an independent newspaper is *published* and of general circulation within the village and at the same time one other newspaper of any politics or no politics at all of general circulation within the municipality, but not published therein, or there may be any number of independent newspapers of general circulation therein but not published therein, or there may be any number of newspapers all of the same politics and of general circulation in the village but not published therein. In any of these cases, since there is a newspaper published in the corporation, it is clear that the ordinances of the village required to be published must be published in some newspaper of general circulation in the corporation under the language above quoted from said section 1695. If there were no newspaper published in the village, then under said section 1697 it would be sufficient to post the ordinances in not less than five of the most public places, but there being a newspaper published in the village, and there being a general circulation of one or more other newspapers of no politics at all or each of which advocate the policies of some one party, then the question is, must the ordinances required to be published be published in the newspaper which is published as well as circulated in the municipality? In other words, must these ordinances be published in the local paper under such circumstances? In arriving at the intention of the legislature in enacting these laws we must consider what is the purpose in requiring the publication of ordinances. Clearly this purpose is to secure publicity of the acts of the village or city officials, and that is the only purpose of such enactments, and if publicity is good at all in such matters, then the wider the publicity the better the results. Such being the purpose of

these acts, it might largely or wholly defeat such purpose if these statutes were construed as compelling the publication of ordinances in the independent newspaper published in the village when there is one or more other newspapers of general circulation in the corporation, though not published there, and which perhaps have a much larger and more general circulation than the one which is published in the village.

I am, therefore, of the opinion that the village council may select either one of these papers which would come within the terms of the language quoted above from said section 1695, and under these circumstances it must select one of them.

2. Your second question is as to whether resolutions of council are required to be published.

Section 122 of the municipal code provides that:

> "The action of council shall be by ordinance or resolution, and on the passage of every ordinance or resolution the vote shall be taken by 'yeas' and 'nays' and entered upon the journal, etc."

From this it will be seen that the general rule is that a council may act by either ordinance or resolution, and this is in fact the rule in all cases except where in certain instances the statute dealing with some particular subject provides that in acting on that subject the council shall pass an ordinance; and in some cases it is provided by statute that in acting upon some particular subject the council shall adopt a resolution. Illustrations of each of these cases may be found in the statutes providing for street improvements and other similar matters, but in such cases the particular statute prescribing that the action of council shall be by one or the other mode of enactment, that is an ordinance or a resolution, whichever it may be, also prescribed whether and how publication shall be made, if made. Where, therefore, it is expressly provided by statute that any particular action of council shall be by resolution rather than by ordinance, and that statute prescribes the method of publication of the same, that statute will control and the resolution must be published according to that statute.

Now the primary or general rule for evidencing the action of council is as quoted above from section 122 of the municipal code, that such action may be by ordinance or resolution, either one or the other, and this means that unless the statute expressly provides that with reference to some particular matter named in the statute an ordinance shall be passed by council, the council may take the same action or rather accomplish the same objects by a resolution, and it further means that unless the statute expressly provides in some particular instance that the council shall adopt a resolution to effect its purpose, then it may do the same thing by an ordinance. In other words, council may pass an ordinance or adopt a resolution, just as it sees fit in any case, unless the statute prescribes that some one of these must be used. Now the general and primary rule for the publication of the action of council for the purpose of giving publicity to that action is that "ordinances of a *general nature* or *providing for improvements* shall be published in some newspaper of general circulation in the corporation, etc." All other rules for publication as contained in the statutes are additions to or limitations upon this general rule, and some of these additions and limitations specifically mention resolutions as well as ordinances for publication. The reason for publishing the actions of council which are of a general nature is, as before stated, to give publicity to such action, because that action concerns or affects the public, and all the citizens of a particular political division in some way.

It has often been held by the courts, in construing statutes prescribing that certain action should be taken by *ordinance*, and prescribing the method of adopting the same, and the manner of publishing the same, that the same action may be taken by a resolution if the council goes through the same formalities in adopting and publishing the resolution as the statute prescribes for the ordinance. That is, if the council complies with the statute in every respect, except that it words its enactment in the form of a resolution rather than the ordinary form of an ordinance, the courts hold that such action by resolution is valid. It has also been held that the words "ordinance," "resolution" and "by-laws" are used indiscriminately as naming the legislative action whatever it may be of municipal councils, and so we have here in our statute the provision (sec. 122 of the municipal code), that council may act by either resolution or ordinance, and then we have the further provision in section 1695 Revised Statutes, that "ordinances of a general nature shall be published in some newspaper of general circulation, etc." Publication is not required of the council's enactment simply because it is an ordinance or a resolution, but it is required because of the nature of the subject matter with which the council is dealing, and if it were held that this statute means that if the council passes *an ordinance* in dealing with some matter of a general nature, it must then publish that ordinance, but that if it adopts a *resolution* in dealing with that same subject matter of a general nature, then it need not publish that resolution; then it would only be necessary for the council to put its action in the form of a resolution rather than in the form of an ordinance to avoid all necessity of giving publicity to its action.

I am, therefore, of the opinion that the words "ordinances of a general nature, etc." in section 1695 of the Revised Statutes include resolutions and that, except where the statute specifically provides otherwise, resolutions must be published the same as ordinances.

3. This question as to the publication of the annual statement of the city auditor is answered by section 1757 of the Revised Statutes, being section 1536-648 Bates' Annotated Ohio Statutes, sixth edition, in which it is provided that:

> "In any corporation having a population of over 2,000, the clerk shall have the detailed annual statement published once in some newspaper published and of general circulation in the corporation at least five days prior to the first Monday of April."

This section applies to the clerk of municipal corporations, but by section 134 of the municipal code it is made applicable to the auditors of cities. It is a special statute with reference to a particular matter and therefore controls the general rule prescribed in section 124 of the municipal code, and renders publication in two newspapers of opposite politics unnecessary with reference to the annual statement of the city auditor.

4. Answering your 4th inquiry, my opinion is that it is not necessary for the officer in making return in special assessment proceedings to verify by his oath each separate notice served; that is, it is not necessary for him to make a separate verification by oath for each individual property owner served. It is sufficient if he make up a tabulated list giving the name of the owner, the description of the property of that owner and the date on which the service was made, and stating the manner in which that service was made, and then subscribes a general oath and swears to the same that he did serve the individual owners as named in the list for the property and at the times and in

the manner as set opposite the respective names of said owners. My opinion is that the spirit of the code is that this is the manner in which this return should be made in order that notary fees may be saved. The notary fee is, of course, an expense which may be assessed against the property.

5. Next you ask whether the village council may employ the mayor or treasurer to revise or correct special assessment records of the village and pay them for the same in addition to their regular salary.

I am clearly of the opinion that this may not be done. Under section 197 of the municipal code it is the duty of the council to fix the compensation and bonds of all officers, clerks and employes in the village government, and it is provided that 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.

It is further provided in section 1746 of the Revised Statutes (sec. 200 of the municipal code), that the mayor shall perform all the duties prescribed by the by-laws and ordinances of the corporation. This places it within the power of council to make it the duty of the mayor to perform these duties concerning which you inquire, and by section 1767 of the Revised Statutes (sections 135 and 202 of the municipal code), it is provided that the treasurer shall perform such duties as may be required by ordinance of the corporation not inconsistent with his title and not incompatible with the nature of his office. The duties concerning which you inquire are not incompatible with his office and council may require the treasurer to perform them. The spirit of the code is to entirely avoid the fee system and that council should prescribe a fixed compensation, such as it intends the mayor or treasurer or any other officer shall receive, and then council should prescribe the duties of these officers in addition to what the statute specially lays upon them, and all of these duties must be performed for the compensation thus fixed by council.

6. In this question you ask whether the mayor of a village may be paid in addition to his salary for posting election notices, and I hold that my answer to question No. 5 is applicable to this one, and for that reason the mayor may not be allowed for these services anything in addition to his regular salary.

7. A municipality cannot legally expend its funds for any purpose except such purposes as are specifically designated by the general assembly or for purposes which are absolutely necessary and essential to the exercise of powers specifically conferred, and I am of the opinion, therefore, that it would not be legal for the municipality to expend its funds in paying the premium on surety bonds which the officers of the municipality may be required to give pursuant to legislation by the municipal council. This expenditure would not be within the performance by the officer of his duties in serving the municipality, because the giving of this bond is required to be completed before he becomes an officer. It is one of the steps necessary in perfecting his qualifications to exercise the duties and powers of his office. It is a debt which he must contract before he becomes a public officer, and this is another reason why the municipality cannot thus expend its money. It has no right to use its funds in defraying the debts of private individuals, and the officer is a private individual until he has taken the oath of office required by law and purchased his bond and filed the same with the proper official when any bond is required.

8. The courts have held many times in Ohio, and each time the question has come before them, that a municipality cannot use its funds in defraying expenses of municipal officers in attendance upon meetings of state or national associations of which they are members. No express authority is given in the statute for such expenditure, and such attendance upon such meetings is not a

service or duty necessary to the performance of the powers and duties imposed upon municipal officers, nor is such attendance necessary to carry out the powers expressly conferred by statute upon municipalities.

9. In publishing the ordinance levying the assessment in special assessment improvements it is not required that each lot owner thereof or the amount of assessment be published in detail, but such ordinance may be published in condensed form referring to a schedule of the names, the owners of property, description of the property so owned by each and the amount of the assessment thereon, which schedule may then be on file in the office of the clerk of council. In fact, it has been held by one of our circuit courts of the state, in a well considered case found in 19 Circuit Decisions, p. 599, that it is not necessary to publish the assessment ordinance at all. I, however, have always been fearful of this holding, because it seems to me that the assessment ordinance is one of the steps in providing for an improvement and comes within section 1695 of the Revised Statutes (sec. 124 municipal code), providing that ordinances of a general nature or providing for an improvement shall be published, etc. The supreme court has never passed upon the question and until that court has given a decision on the matter, I feel that the only safe course to pursue is to publish an ordinance which would cover the situation, and I have prepared a form for such an ordinance, which is herewith submitted, and you may send a copy of this to any municipality you may see fit.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROBATE JUDGE—FEE IN JUVENILE COURT CASES.

Probate judge not entitled to fee of $1.50 *under sec.* 546 *R. S. for each juvenile court case in which there is a hearing.*

March 17th, 1909.

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

GENTLEMEN:—I am in receipt of a communication from Probate Judge George M. Hoke, of Seneca county, Ohio, in which he submits for the opinion of this office the following inquiry:

> Does the provision for "holding examining court, $1.50 per day," as found in sec. 546 R. S., authorize a charge by the probate judge of $1.50 to be made in each juvenile court case in which there is a hearing in counties which, at the last federal census, had a population of 22,500 or more?

Owing to the limitations placed upon this department under sections 206, 207 and 208 of the Revised Statutes, I write the opinion to your department as follows:

Section 546 was enacted in its present form prior to the enactment of the present juvenile court act, and among the many services for which a probate judge may collect fees, under authority of said section, is found the provision "holding examining courts, $1.50 per day." It appears from an examination of

this section that this allowance is to be made when the court has made an examination of a charge on which the court has not final jurisdiction, such as a preliminary hearing. I am, therefore, of the opinion that a probate judge would not be entitled to a fee of $1.50 under said section for each juvenile court case in which there is a hearing.

Very truly yours,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR—COMPENSATION FOR SERVICES RENDERED IN POLICE OR MAYOR'S COURT.

Extra compensation of city solicitor for services as prosecuting attorney of police court or mayor's court may not be paid by council during term for which solicitor was elected, but county commissioners may allow solicitor compensation in addition to that fixed by council.

March 3rd, 1909.

MR. EDWARD K. CAMPBELL, *Chairman, Columbus, Ohio.*

DEAR SIR:—You, with the other members of a committee, on yesterday requested an opinion from this department as to whether, under section 137 of the municipal code, as amended May 9, 1908, the services of a city solicitor as prosecuting attorney of the police court or mayor's court, may be increased by the city council during the term for which the solicitor was elected, and whether under this same section as so amended, the county commissioners of the county may allow any compensation to the solicitor in addition to his compensation which had theretofore been fixed by the city council?

Section 137 of the municipal code was amended on May 9, 1908, by adding to the section as it was originally enacted the words "or mayor's court." Prior to this amendment city solicitors were required to act as prosecuting attorney in cities where there has been established a police court, but no such requirement was laid upon solicitors with respect to cities where there was no such court, but where the police prosecutions were conducted in the mayor's court.

On your first question as to whether the city council under this amended section may increase the city solicitor's compensation during the term for which he was elected, this department has heretofore, on December 16, 1908, given an opinion to the bureau of inspection and supervision of public offices, holding that the city council has no such power, and this is because it is provided in section 126 of the municipal code that:

> "The salary of any officer, clerk or employe so fixed shall not be increased or diminished during the term for which they have been elected or appointed."

The authorities supporting this rule are cited in the opinion just referred to, and I am convinced that that opinion was correct. A copy of this opinion is submitted herewith.

Answering your second question as to whether county commissioners may, after the city council has fixed a compensation to be paid to city solicitors by the city under section 126 of the municipal code, allow compensation additional

thereto, I am of the opinion that such additional compensation may be made and that such action on the part of the county commissioners would not be contrary to or in violation of section 126 of the municipal code.

Section 126 of the municipal code provides for the fixing of compensation to be made to the city solicitor or other officers out of the funds of the city and the language of section 137 of the code, conferring power on the county commissioners to give, and a city solicitor to receive from the county, compensation, expressly provides that it shall be such *additional* compensation as the county commissioners shall allow.

Yours very truly,

U. G. DENMAN,
Attorney General.

PARK COMMISSIONERS—TOWNSHIP TREASURER—WHO ENTITLED TO PARK FUNDS—MANNER OF PAYING WARRANT.

Township treasurer is entitled to custody of funds for park purposes, and such funds are subject to demand upon warrant of township clerk authorized by vouchers issued by park commissioners.

March 24th, 1909.

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

GENTLEMEN:—Your communication is received in which you submit to this department, for an opinion thereon, the following inquiry:

> Where a board of park commissioners has been organized under the provisions of an act of the general assembly passed April 25, 1904 (97 O. L. 411), is the treasurer selected by said board entitled to the custody of the funds raised by taxation or otherwise for park purposes, or shall said funds remain in the custody of the township treasurer subject to payment upon the warrant of the township clerk authorized by vouchers issued by said board of park commissioners; or, if, in your opinion, said funds should remain in the custody of the township treasurer, shall they only be paid out by an order signed personally by at least two of the township trustees and countersigned personally by the township clerk as provided by section 1512 R. S.?

To determine as to the right of the treasurer selected by the board of park commissioners to have the custody of the funds raised under provision of this act, it will be necessary to ascertain the power conferred upon such board by the provisions of the act.

Section 1 of said act provides that the said board of park commissioners shall be appointed by the township trustees of the township in which said proposed park is to be situated.

Section 3 of said act provides that the township trusteees shall have authority to and control over the submission, to the voters of the township, the question of whether or not such park shall be established, and upon a majority of the votes cast on that proposition being "yes," the park shall be established for said township.

Sections 4, 5, 6, 7 and 8 of said act provide that upon said affirmative vote the park commissioners appointed under said section 1, shall have full power to locate, establish, improve and maintain a free public park, with the power to appoint a guardian for such park and all necessary officers and employes, *fix their compensation* and prescribe their duties; to pass by-laws, rules and regulations for the government of such park; to condemn lands or materials for park purposes, in accordance with the provisions of law regulating the appropriation of private property by a municipal corporation, and to defray the expenses thereon; to levy a tax to defray the expenses of all the foregoing enumerated acts.

Said board of park commissioners may also issue the bonds of such township to be denominated "township park bonds" in any sum not in excess of the taxes herein authorized. In fact, it seems the purpose of the legislature to give to said park commissioners, when appointed, full authority and discretion in the matter of management and preservation of said park; but nowhere in said act is there a provision or authority for the selection of a treasurer of said board, as such. No provision is found in the act requiring any member, or members, of the park commission to give bond for the safekeeping and the disbursement of this park fund.

Section 4 of this act expressly states that these commissioners shall serve without compensation. On the contrary, the township treasurer is, by law, enjoined to a safekeeping of all township money and required to give bond for the faithful discharge of his duty as such officer, and is compensated for his service and responsibility in such connection.

It will be noted section 8 provides that:

> "Whenever any tax is levied as herein authorized the township park commissioners shall cause the same to be certified to the county auditor for collection, and the same shall be collected as other taxes."

This being a township fund will be regularly transferred to the credit of the township treasurer.

As this is the general law as to township funds, and no specific exception thereto being made in this act, I am of the opinion that the township treasurer is entitled to the custody of the funds raised by taxation, or otherwise, for park purposes under this act.

Your second inquiry is whether this park fund is to be drawn on by warrant of the township clerk, authorized by vouchers issued by said board of park commissioners, or by order signed personally by at least two of the township trustees and countersigned by the township clerk.

The general rule of law governing the manner in which township money shall be disbursed is found in section 1512 R. S. as follows:

> "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;" etc.

Unless an exception to this general rule is made by the provisions of this act, said section 1512 will govern such expenditure.

Section 9 of said act provides that:

> "Said commissioners shall make out, or cause to be made out an annual report for the public, showing in detail all *financial transactions*

of the board, which report shall be audited by a committee of two competent accountants to be appointed by the court of common pleas, and said auditing committee shall report a summary of their findings to said court for its approval, which summary, when approved, shall be entered upon the records of said court, said auditing committee and *costs of records in common pleas court to be paid by the park board.*"

Section 10 provides that the title to all park property and all money acquired for any township by any de facto park board shall pass to and be vested in the park board for park purposes.

It will be seen from these and prior sections in this act that the commissioners, upon assuming their duties as such commissioners, are in no wise restricted by the township trustees. The township trustees would have no authority to reject a voucher from the park commissioners in payment for services rendered to them in the management and control of said park. It would be an immaterial and burdensome procedure to require a compliance with the provisions of said section 1512 in the expenditure of this park fund.

I am, therefore, of the opinion that the authority conferred on said commissioners by sections 5, 9 and 10 of this act, will be sufficient authority to make this park fund, in the custody of the township treasurer, subject to demand upon the warrant of the township clerk authorized by vouchers issued by said board of park commissioners, and I so hold.

Very truly yours,

U. G. DENMAN,
Attorney General.

VILLAGE ASSESSORS—COMPENSATION OF—TAX MAPS—CONTRACT FOR BY COUNTY COMMISSIONERS — QUADRENNIAL APPRAISEMENT — TOTAL COST OF.

Quadrennial appraisement act does not permit village assessors to be compensated in any manner.

Act of March 12, 1909, does not repeal sec. 2789 and county commissioners may contract for making maps and still have discretionary power to cause such maps to be prepared.

Total cost of quadrennial appraisement payable out of county treasury includes employment of chief clerk and costs, incidental expenses of board and compensation of assessors, but such cost may not exceed the sum of $^1/_{20}$ of 1% of total tax duplicate of city for year in which quadrennial appraisement is made.

April 7th, 1909.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of April 2d, in which you submit certain questions relating to the construction of the act of March 12, 1909, providing for a quadrennial appraisement of real estate, viz:

1. Shall county commissioners fix the compensation of village assessors, and does section 6 of the law relating to township assessors apply to village assesors?

2. Is the repealing clause of the act sufficiently specific to effect a repeal of the provision of section 2789 R. S., authorizing county commissioners to contract for the making of maps?

3. What items are included in arriving at the limitation of the cost of the quadrennial appraisement in cities as said limitation is expressed in section 7 of the act?

The general assembly has neglected, in the act to which you refer, to provide specifically for compensation of village assessors. The new law creates three classes of real estate assessors, township assessors, village assessors and boards of city assessors. The compensation of the township assessors and the boards of city assessors is provided for in section 6 of the act, and the election of such assessors is provided for in section 1 of the act. The election of village assessors is provided for in section 9, which section confers upon such village assessors "the same powers and duties as are hereinbefore conferred upon such assessors for townships and cities."

Section 10, being the repealing clause of the act, operates to retain in force all of the provisions of the former acts relating to the appraisement of real estate insofar as such provisions are not inconsistent with the recently enacted law. However, an examination of the law as it existed prior to the enactment of the act in question will disclose that the assessors to whom the appraisement of real estate was intrusted by such former laws were to be chosen in districts and that there were no *village assessors* as such under the former acts. Accordingly the provisions of the old law are not available in the determination of this question. I conclude, therefore, that the quadrennial appraisement act does not authorize the county commissioners to fix the compensation of village assessors, and that it does not, in its present form, permit such assessors to be compensated in any manner. The general assembly at its next session will have an opportunity to amend the law so as to authorize such compensation to be paid, if such a course is deemed advisable.

With regard to the respective powers of the county auditor and the county commissioners regarding the preparation of tax maps for the use of assessors, I have already advised Hon. A. O. Dickey, prosecuting attorney of Gallia county, that in my opinion section 10 of the act of 1909 does not operate to repeal the provision of section 2789, authorizing county commissioners to contract for the making of maps, and that in my judgment the county commissioners still have the discretionary power to cause such maps to be prepared.

With respect to your third question, I am of the opinion that the phrase "total cost," as used in section 7 of the quadrennial appraisement act, includes all the items of expense set forth in the prior provisions of said section, viz: the employment of a chief clerk and assistants, and such incidenetal expenses as the board shall deem necessary, as well as the compensation of the assessors themselves. Accordingly, the total sum payable out of the county treasury on account of the compensation of the assessors, of the chief clerk and assistants and the incidental expenses of the board may not exceed the sum of $^1/_{20}$ of 1% of the total tax duplicate of the city for the year in which the quadrennial appraisement is made.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CONTRACTS—INTEREST OF PUBLIC OFFICIALS.

Stockholder of newspaper in which ordinances of city are required to be published may not serve as member of council; said paper may not do job printing for city and be legally paid therefor.

Board of public service may not award contract although let at competitive bid to firm of which a member of said board of safety is an active member.

An ex-mayor retired from office within the year may not be legally employed to codify ordinances of city.

A board of public service may employ teams owned by wife of member of board in hauling coal for municipal light plant.

A city official who is employe of firm may legally purchase supplies of firm for use of city when relation of employe does not amount to an interest.

A contract that was let at competitive bids affects application of sec. 6969 principally in its criminal aspect, but insofar as said section applies to municipal officers other provisions of law not affected by such fact.

Village clerk may not be employed by council to represent village in cases pending in courts.

April 13th, 1909.

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 6th, in which you call my attention to the provisions of sections 6969 and 6976 R. S. and of sections 45, 120 and 144, Municipal Code, all of which relate to the unlawful interest of municipal officials in public contracts. You state that your department has experienced considerable difficulty in the application of these sections and intimate that a set of general rules relating to the construction thereof would be of service to you. I have given this subject very careful consideration, and have investigated the law and the authorities relating thereto.

Upon such consideration and investigation I am convinced of the futility of attempting to lay down a rule or set of rules by which every possible question arising under these statutes may be answered. The law relating to the general subject matter is in such a condition that each specific set of facts may present a new question. I deem it advisable, therefore, to confine myself to the consideration of the particular questions submitted by you as indicating some of the difficulties which you have encountered, viz:

1. May the editor or business manager (if a stockholder) of a newspaper in which the ordinances of a city are required by law to be published, legally serve as a member of the council of said city? May said paper do job printing for the city and be legally paid therefor?

2. May the board of public service legally award a contract, let a competitive bid, to a firm of which a member of the board of safety is an active member?

3. May an ex-mayor, retired from office within the year, be legally employed to codify the ordinances of the city?

4. May the board of public service legally employ the teams owned by the wife of a member of the board in hauling coal for the municipal electric light plant?

5. May a city official who is an employ of a firm legally purchase supplies of said firm for the use of the city?

6. Does the fact that the payments from the city treasury were made on contracts let at competitive bids affect the application of the laws relating to this subject?

7. May the village clerk, if an attorney, be employed by council to represent the village in causes pending in the courts?

1. In answer to your first question I beg to state that a contract between a newspaper and a municipality of the council of which a stockholder of the newspaper is a member, is invalid, although ordinances are required to be published in such newspaper (section 45 M. C.). Such member, however, may continue to serve until his disqualification under section 45 M. C. has been established by proper proceedings, under section 1732 R. S. This point is the same as that involved in one of the questions answered in the opinion of July 17th, 1906, to which you refer in your letter.

The second branch of your first question must be answered in the negative. Sections 45, 120 M. C., and section 6976 R. S. operate to render contracts entered into in violation thereof absolutely illegal. This proposition is sustained by the unanimous opinion of the courts.

2. In my opinion the board of public service may not legally award a contract to let at competitive bid to a firm of which a member of the board of public safety is an active member (6976 R. S.), and such contract is of no effect.

3. An ex-mayor, retired from office within the year, may not be legally employed to codify the ordinances of the city (6976 R. S.).

4. The board of public service may legally employ the teams owned by the wife of a member of the board in hauling coal for the municipal electric light plant, if such teams are owned separately by the wife of such member, and if such member, as a matter of fact, has no interest or ownership in such teams. This question presents a possible instance of an interest in fact as distinguished from an interest in law. The statutes of this state relating to the status of married women permit the absolute separation of the respective estates of husband and wife. However, such a contract as that suggested by this question should be closely scrutinized, for while the mere relationship between the member and the owner of the team does not, in law, amount to an "interest," yet, in fact, the ownership of the wife might be merely colorable, and the real party in interest might be the member himself.

5. Your fifth question is similar to that last discussed in that the relation of employe, on the part of the official, does not in itself amount to an interest within the meaning of any of the sections above cited.

Here, again, there should be a careful examination of all facts present in the transaction. The determining principle here is that if the compensation of the employe is affected by the securing of the contract with the city, or its loss, however remotely, the act of the official is violative of the law and the contract is illegal; but if the compensation of the employe or the retention of his employment is not affected in any way thereby, then the transaction is lawful in every way. Thus, if a public official in his private employment secures a commission on the contract in question the transaction is clearly illegal; and, on the other hand, if the official is employed by the contractor on a salary, or other fixed compensation, and in a capacity entirely unconnected with the contract, it is equally clear that the transaction is lawful. A closer question is that presented in case the official is employed at a fixed compensation, but in a capacity which renders him the active agent of the company in the making of the contract.

I am of the opinion that such a situation would amount to an unlawful in-

terest on the part of an official, and that such a contract would be illegal under the sections above cited.

6. The fact that the contract was let at competitive bids affects the application of section 6969 R. S., principally in its criminal aspect. At least, insofar as that section applies to municipal *officers* the application of the other provisions of law is not affected by the presence of such a fact.

An examination of section 6969 will disclose that in the latter portion thereof an omission has occurred. The word "not," which was incorporated in the engrossed bill at the time this section was last amended, was omitted from the enrolled bill and cannot, therefore, be regarded at present in the statute. That portion of the section accordingly renders lawful, when the amount of the contract exceeds $50.00 and the contract is properly let on competitive bids, an interest on the part of any person holding any *office* of trust or profit in this state, or any agent, servant or employe of such officer in any contract for the *purchase of property, supplies or fire insurance.* However, such contracts are rendered unlawful by section 6976 and by the sections of the municipal code above cited, excepting as to employes of departments other than the department of public service. (See section 144 M. C.)

It appears, however, that in the case of the employes of such other departments, interested in public contracts for the purchase of property, supplies or fire insurance, the interested employe is exonerated and the contract rendered valid and enforcible, if the amount thereof exceeds $50.00 and the contract has been let on competitive bids duly advertised.

The sole effect of section 6969 as to *municipal officers*, however, is to afford to such officers, in case of prosecution under said section, a defense in the event that the contract exceeded $50.00 in amount, and was let on competitive bids, the contract itself would be illegal and void under the other section cited.

7. The village clerk, if an attorney, may not be employed by council to represent the village in causes pending in the courts. (Section 6976 R. S. and section 45 M. C.)

Very truly yours,

U. G. DENMAN,
Attorney General.

MUNICIPAL ANNUAL CONTRACTS—AUDITOR MUST CERTIFY THAT FUNDS ARE APPROPRIATED FOR PURPOSE.

No contract entered into by board of public safety for supplies to be delivered as required during period of one year is valid unless auditor has certified that maximum sum of money to be expended is in treasury to credit of proper fund not appropriated for any other purpose.

April 29th, 1909.

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 28th, in which you submit for my opinion the following question:

> "In contracting for coal, meat and other staples to be delivered as required during the period of one year, is it mandatory that

the auditor's certificate that the money is in the fund and not appropriated for any other purpose, be on file before such contracts can be entered into by boards of public service or boards of public safety of cities?'

Complying with your request, I beg to state that neither of the boards, concerning the powers of which you inquire, are exempted from the operation of section 45 M. C., which contains the provision as to the necessity for the auditor's certificate, by the sections of the code which define their respective general contracting powers. (Sections 143 and 147 M. C.; Pettinger v. Wellsville, 75 O. S. 509.)

Nor does the fact that the contracts concerning which you inquire are for ordinary supplies and not for improvements prevent the application of section 45 thereto. The question is made doubtful, if at all, by the fact that the contract does not obligate the municipality to the payment of any fixed sum of money, and therefore the exact amount to be expended thereunder cannot be with convenience or accuracy determined in advance as would be required in complying with section 45 M. C. This fact, however, does not serve as a reason for denying the application of the section, but rather, if compliance with the section in making such contracts is impossible, as a reason for denying the existence of the power to make such contracts. I do not regard the difficulty suggested as of great moment since the board in entering into such a contract may, and from considerations of business policy should, fix the maximum sum to be expended thereunder during the year; to compel such boards to impose such limitations upon the financial obligations of such contracts seems to be one of the objects of section 45 M. C.

I am of the opinion, therefore, that no contract entered into by a city board of public service or board of public safety for supplies to be delivered as required during the period of one year is valid unless the auditor has certified that the maximum sum of money to be expended under such contract is in the treasury to the credit of the proper fund and not appropriated for any other purpose.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROAD ENGINEERS AND LABORERS—EMPLOYMENT AND COMPENSATION OF—REPAIR OF ROADS.

Road commissioners may not appoint more than one engineer at a compensation to exceed four dollars per day, but may employ all labor necessary at $1.75 *per day. Engineers may not be paid for overtime, but laborers may.*

Wages provided for in constructing roads are different from that provided for in case of repair.

May 3d, 1909.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of April 29th, submitting for my opinion thereon the following questions:

"1. How many engineers (at not to exceed $4 a day) may road commissioners employ under the road district law (Sec. 4757-1, et sep.)?

"2. May said road commissioners pay any class of day laborers (other than the engineer) more than $1.75 a day? (See 99 O. L. p. 384, Sec. 7.)

"3. Is there any provision in said law authorizing road commissioners to pay employes for 'overtime?'

"4. Do the wages designated in section 4757-7, for the construction of roads, also apply to the repair of roads under the provisions of section 4757-19?"

Replying to your first question, I beg to state that I find no authority for the appointment of more than one engineer at a compensation of not to exceed $4 per day.

Section 4757-6 R. S. provides that:

"Such road commissioners shall have power to employ * * * a competent engineer and such assistants as they deem necessary, who shall make a map of the roads so designated, each year and make profiles of such roads, showing the grades thereof as they exist, and prepare such other information as may be required by the commissioners, all of which shall be kept on file in the county auditor's office for public inspection and shall be notice to the public."

Section 4757-7 (as amended 99 O. L. 384) provides in part that:

"The engineer employed by the road commissioners shall receive no more than $4 per day, and each assistant shall be allowed no more than $1.75 per day for each day actually employed, as may be agreed upon by the road commissioners."

Consideration of the foregoing sections compels the conclusion that one engineer at $4 per day is to perform all the engineering work of a given road district. It is expressly provided that the engineer employed by the commissioners shall make a map of all the roads designated for improvement in a given year. For making necessary surveys, assistant engineers may be employed and there is no limit to the number thereof. Such assistants, however, may receive only $1.75 per day.

The road commissioners are empowered by section 4757-5 to employ "any and all labor necessary to operate" such rollers and other machinery and appliances as they may deem it necessary to purchase in the improvement of the roads under their charge. Under section 4757-10 the work of construction of improved roads is required to be let by competitive bids, the contract to include all labor excepting the labor of the operators of the road roller, etc. However, if there are no bids or if the bids received are not satisfactory, the road commissioners "shall have the right to purchase any or all of materials and secure the performance of any or all labor in any other manner." The laborers authorized to be employed by the two sections above cited, are not to be confused with the "assistants" who are clearly to be employed in the performance of engineering work. There does not appear to be any limit upon the amount per day that may be paid to such laborers.

The engineer, the assistants and the clerk or bookkeeper may not be allowed compensation for "overtime." The day laborers employed under authority of the sections last above cited may, however, be paid for "overtime," if such "overtime" is expressly or impliedly provided for in the contracts of employment of such laborers.

In repairing improved roads under authority of section 4757-19, the road commissioners are authorized and directed to proceed "in the same manner as is provided by the general statutes for the repair of roads." The engineer and the assistants provided for by section 4757-6 are not to be employed in making such repairs and if engineering work is required to be done in connection with such repairing, the limitations of section 4757-7 would not apply. The compensation of the clerk or bookkeeper employed by the road commissioners is limited to $1.50 per day regardless of whether or not his time is in part devoted to work in connection with the repair of improved roads. As to the employment of day laborers for work in connection with repairing improved roads, the commissioners are to be governed by the general statutes applicable to such repairs.

Yours very truly,

U. G. DENMAN,
Attorney General.

NOTE—See supplemental opinion rendered The Bureau of Inspection and Supervision of Public Offices, May 26th, 1909.

ROAD COMMISSIONER—LABORERS EMPLOYED BY—PAY FOR OVERTIME

May 26t,h 1908.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of May 24th, requesting an opinion supplemental to that of May 3d, with respect to the compensation of laborers employed by road commissioners under the road district law, section 4757-1 et seq. and under the road repair law, section 4757-19 R. S. I note that in rendering the former opinion I overlooked the words "and each laborer" as used in section 7 of the road district law as amended 99 O. L. 384. The context in question is:

> "Each assistant and each laborer shall be allowed not more than $1.75 per day for each day actually employed as may be agreed upon by the road commissioners.'

In view of this provision, it is my opinion that no class of laborers employed by the road commissioners, other than the engineer, may be paid more than $1.75 per day, either for improvement work or for repair work. No pay for "overtime" may be allowed any of the employes of the road commissioners, unless the allowance of such pay, together with the per diem fixed by contract with the commissioners, will not cause the total sum allowed for any one day to exceed $1.75.

Yours very truly,

U. G. DENMAN,
Attorney General.

NOTE—See preceding opinion.

JUSTICES OF THE PEACE IN CLEVELAND—MAY NOT RETAIN ANY FEES FOR OWN USE.

May 22d, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 19th, requesting my written opinion upon the following question:

> "May justices of the peace of the city of Cleveland, Ohio, retain for their own use fees collected of litigants? Also, may they retain fees for performing marriage ceremonies?"

In my opinion, justices of the peace of the city of Cleveland may not retain for their own use fees collected of litigants. This prohibited by setcion 621*a* R. S., which provides that justices of the peace in Cleveland shall receive "*in lieu of all fees*" a salary of $1,800.00 per annum. The same provision is included in ordinance No. 44,512 of the city of Cleveland, a copy of which you have enclosed in your letter. Section 621*b* makes it the express duty of justices of the peace in Cleveland to pay all fees provided for in section 615 and 621 R. S. into the city treasury.

Justices of the peace of the city of Cleveland may not retain for their own use the fee of two dollars for marrying and making return of marriage as authorized to be collected by section 621 R. S. The joint effect of sections 621*a* and 621*b* R. S. and the ordinance referred to, prohibits such retention. Any sums paid to justices for performing marriage ceremonies or for other services in excess of the amounts receivable under section 621, may be retained by the justices for their own use.

Yours very truly,

U. G. DENMAN,
Attorney General.

NOTE—See page 214.

COUNTY COMMISSIONERS—FAILURE TO PROVIDE SALARY FOR CONSTABLE THROUGH MISTAKE OF AUTHORITY—COUNTY SALARY LAW.

In making annual allowance county commissioners fail through mistake of authority to provide salary for constable, commissioners may make allowance when error discovered.

June 28th, 1909.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit the following statement of facts, together with a request for an opinion thereon:

> In the insolvency court of Hamilton county the court constable has been heretofore paid out of the county treasury, but his compensation has not been included in the aggregate sum to be expended for the services of deputies, clerks and other employes of the office of insolvency judge, as fixed by the county commissioners under the salary law. The failure to include this compensation was based upon the theory that the compensation of a court constable was payable direct from the county treasury and was not to be included in the aggregate sum fixed

by the commissioners. The supreme court has held, however, in the case of State ex rel Currens v. Sayre, County Auditor, that court constables should be paid out of the officers' fee fund and should be included in the allowance made by the commissioners. Query: Does this decision apply to court constables in the insolvency court of Hamilton county, and, if so, how may said court now legally compensate its court constables?

In reply I beg to say, you have heretofore been advised by this office, under date of December 18, 1906, that the provisions of the county officers' salary law relative to probate courts were applicable to the insolvency court of Hamilton County. It follows, therefore, that the holding of the court in the Sayre case, above referred to, applies to the insolvency court of Hamilton County and that the duty devolves upon the county commissioners to include in the aggregate sum as fixed by them to be expended for deputies, clerks, etc., the compensation of court constables. The county officers' salary law provides, however, that:

> On November 24, 1906, and on the 20th of each November thereafter, the county officers therein provided for 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 of their respective offices, for the year beginning January 1st thereafter, and that the county commissioners shall, not later than five days after the filing of said statement, fix an aggregate sum to be expended for the period covered by said statement.

This duty, I assume, has been performed by the county commissioners of Hamilton County for the year 1909, and this office has heretofore held that when county commissioners have once acted under this statute their power is exhausted. In other words, when they have once fixed an aggregate sum to be expended for deputies, clerks, etc., such aggregate sum so fixed must stand for the year. But where county commissioners, through mistake of authority, omit to consider or take action relative to the compensation of any deputy, clerk, or other employe, the power in that particular has not been exercised and such commissioners retain the authority to fix an aggregate sum for the compensation of such deputy, clerk or other employe so omitted.

It follows, therefore, that the county commissioners of Hamilton County now have authority to provide compensation for the court constables of the insolvency court of said county.

Yours very truly,

U. G. DENMAN,
Attorney General.

CASH BAIL—ACCEPTANCE OF BY MAYORS' AND POLICE COURTS—DISPOSITION OF WHEN DEFENDANT FAILS TO APPEAR—FEES OF CHIEF OF POLICE.

A mayor or judge of police court may not accept cash bail, but where same is accepted and proceedings are regular, defendant not entitled to recover same.

Where defendant fails to appear or demand repayment money should be paid to city treasurer or county treasurer.

Fees taxed in name of chief of police when services are performed by patrolman should be paid into county treasury.

Fees of mayor and chief of police may not be allowed in cases where bail has been forfeited.

June 9, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of May 21st, in which you request my opinion upon the following questions:

> "1. May the mayor of a city not having a police court, or the police authorities of said city, accept 'cash bail' and release persons charged with the violation of the state laws or the penal ordinances of the city?
>
> "2. If such cash bail be accepted and the parties fail to appear, what is the legal disposition of such moneys?
>
> "3. If a defendant is convicted under the state laws of a misdemeanor in the mayor's court, and the costs assessed are paid by him, what disposition should be made by said court of the fees earned by patrolmen taxed in the name of the chief of police? May the chief retain such fees when he does not personally render the service for which the fee is charged?
>
> "4. May the mayor and chief of police be allowed their legal fees in cases in which bail has been forfeited for non-appearance of defendants?
>
> "5. We would ask your opinion upon the same questions as the same relate to the duties of the proper officers in the police courts of the larger cities of the state."

I have been unable to find any authority for the acceptance of "cash bail" by the mayor or the judge of the police court, or by any other municipal authority. If such bail be accepted, the transaction is illegal and void, and should there be any irregularity in the arrest of the defendant, he would be entitled to recover the amount of money so paid by him.

> "Where the person is arrested for improper purposes without just cause; or, for a just cause, but without lawful authority; or, for a just cause and by lawful authority, but for an improper purpose; and pays money to obtain his discharge, it may be recovered as so much money had and received for the plaintiff's use. Bull, N. P. 172, 173; 5 Com. Dig. Pleader, 2 W. 19; Richardson v. Duncan, 3 N. H. 508; Watkins v. Baird, 6 Mass. 506."

Reinhard vs. Columbus, 49 O. S. 257-270.

If, however, the proceedings are regular, aside from the receipt of cash bail, then the defendant is not entitled to receive such money even though he makes demand therefor.

Columbus v. Reinhard 1 C. C. 289.

In such cases, and in all cases in which the defendants fail to demand repayment, the money so paid in should be paid over to the city treasurer or to the county treasurer, under Sections 1536-838 R. S., 1536-864 R. S., and 1536-854 R. S.

Fees taxed in the name of the chief of police in state cases when the same have been earned by patrolmen, should, in my opinion, be paid into the county treasury.

In the case of Portsmouth v. Milstead, 8 C. C. N. S. 114, affirmed by the Supreme Court in 76 O. S., the court in holding that a chief of police may retain for his own use fees earned in state cases, seems to regard Section 1850 R. S., now Section 1536-863, as applicable to the fees of chiefs of police. That section in terms applies only to the marshal—an office formerly existing in many municipalities of the state, but which has been abolished as to cities by the adoption of the municipal code of 1902. There is no other provision under which the chief of police may be said to be entitled to receive any fees. The section in question provides that "he * * * shall receive the same fees as sheriffs and constables in similar cases for services actually performed by himself or his deputies, * * *; but in no case shall he receive any fees or compensation for services rendered by any watchman or other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court, any person arrested by himself or deputies, or by any other officer, a greater compensation than twenty cents."

Section 1536-823 provides that in the police court fees shall be taxed as in the probate court, or before justices of the peace in like cases, but neither this provision nor those authorizing mayors to tax costs in state cases contains sufficient authority for the chief to retain the fees earned by patrolmen. It appears from Section 1536-863 above quoted that for safekeeping, etc., the chief of police may receive a fee of not to exceed twenty cents for each prisoner, but that other fees, such as those prescribed for constables by Section 622 R. S., may not be retained by the chief, unless he has actually rendered the services for which they are taxed. The patrolman is not "his deputy" within the meaning of Section 1536-863, and assuming that section to govern the case, it seems to me to deny the right of the chief of police to the fees in question. The patrolman may not, of course, receive such fees and retain them for his own use, and in my judgment, they should be paid into the county treasury.

When bail is forfeited on account of the non-appearance of the defendant in a state case, the entire sum recovered thereby must be paid into the county treasury, and the fees of the mayor and chief of police may not be paid out of such sum so forfeited. (Sections 1536-838 etc., above cited, and 7181 R. S.)

The statements above made are applicable to the proper officers in the police courts of the larger cities of the state, as well as to those of cities not having a police court.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—AUTHORITY TO MAKE ADDITIONAL ALLOWANCE TO AUDITOR FOR CLERK HIRE—NOT TO BE CREDITED TO AUDITOR'S FEE FUND—ANNUAL ALLOWANCE MADE IN PRECEDING SECTION—MEANING OF.

June 29, 1909.

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

GENTLEMEN:—Your communication received in which you submit the following inquiry:

"Section 1076 Revised Statutes is as follows:

"The county commissioners of the several counties have authority, and are required, to make an additional allowance to the county auditor for clerk hire, not exceeding twenty-five per cent. of the annual allowance made in the preceding sections in the years when the real property is required by law to be reappraised.

"Since the passage of the salary law, may the county commissioners make the allowance as above provided, and if so, should the amount be credited to the auditor's fee fund, or should the additional clerks be paid direct out of the county treasury upon the allowance of the county commissioners? If the allowance is credited to the auditor's fee fund, may it be used in increasing the compensation of the present employes of the office, or must additional assistants be employed?"

You further inquire what is "the annual allowance made in the preceding section," as referred to in Section 1076?

In reply I beg to say you have been heretofore advised by this office that the enactment of the county office salary law does not repeal section 1076 R. S., and that in cases where the county commissioners, when fixing the aggregate sum to be expended by the auditor as provided in the salary law, make no provision for the additional work required by reason of the reappraisement of real estate, such commissioners have authority to make the allowance provided in Section 1076. It is my judgment when the county commissioners act under said Section 1076, that the sum so allowed may not be transferred to the fee fund of the county auditor, and that it must be used solely for the employment of additional assistance in the performance of the work in the auditor's office incident to the reappraisement of land.

"The annual allowance made in the preceding sections" referred to in Section 1076, means all the compensation allowed county auditors under Chapter 4, Title 8, of the Revised Statutes.

Very truly yours,

U. G. DENMAN,

Attorney General.

BOARD OF PUBLIC SERVICE—CONTRACTS FOR COAL USED IN WATER WORKS FOR ELECTRIC LIGHT PLANT AND FOR CONSTRUCTION OF SPECIAL ASSESSMENT IMPROVEMENT—CITY AUDITOR—CERTIFICATE THAT THERE IS MONEY IN FUND APPROPRIATED TO MAKE SAID CONTRACTS VALID.

It is not necessary for certificate from city auditor, that there is money in fund and appropriated for purpose required, to be filed to make valid contracts entered into by board of public service, for coal used in operating municipal water works or electric light plant, if obligations created by said contract are to be met by revenue resulting from the operation of plant.

Said certificate is not required to be filed to make valid contracts entered into by board of public service for pipe used in extension of mains of said plant. Same to be paid for from proceeds of bonds sold for such purpose, and bonds to be paid for out of surplus revenue derived from operation of plant.

Section 45a does not require said certificate to be filed for contract for construction of special assessment improvements.

July 16, 1909.

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 14th requesting the opinion of this department upon the following questions:

"1. Is a certificate of the city auditor that there is money in the fund and appropriated for the purpose required to be filed to make valid, contracts entered into by the board of public service for coal used in operating municipal water works or electric light plants, if the obligations created by said contracts are to be met by the revenue (water rentals) resulting from the operation of the plant?

"2. Is said certificate required to be filed to make valid, contracts entered into by boards of public service pipe used in extension of the mains of said plant, the same to be paid for from the proceeds of bonds sold for such purpose?

"3. Sec. 45*a* implies that said certificate is required to be filed in contracts for construction of special assessment improvements. What effect do you give to the provisions of said section?"

Sections 45 and 45*a* M. C. provide in part 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 of the corporation, and if there is no auditor, the clerk thereof, 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, which certificate shall be filed and immediately recorded; and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, 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, and no party 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, have any power to 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 limit, or release any party from an exact compliance with his contract under such ordinance, resolution or order; * * * * provided, however, that the council of any city or any village may make (subject to the provisions of sections 2491 and 3551 of the Revised Statutes of Ohio) 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 said corporation, or for the leasing of the electric light plant and equipment, or the water works 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; provided further, that such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health of any municipality, nor to contracts made by any village for the employment of legal counsel.

"Sec. 45*a*. Money to be derived from lawfully authorized bonds or notes sold and in process of delivery shall for the purpose set forth in section 45 of this act be deemed in the treasury and in the appropriate fund."

The first question presented by you seems to have been answered quite definitely by the courts of this state. The principle which seems to be deducible from the great mass of adjudications bearing upon this question (many of them conflicting) is as follows:

Sec. 45 M. C., does not apply to the expenditure of revenues other than those raised or necessarily to be raised by taxation. The reasoning upon which the courts have predicated the principle above stated is not clearly set forth in any of the decisions which have come to my notice. The conclusion is certainly not justified by the above quoted language in itself. The following are quotations from certain of the decisions in point:

"The requirement (of section 2702 R. S., of which sec. 45 M. C. is almost an identical paraphrase) 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 may be 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." Shauck, J., in Kerr v. Bellefontaine, 59 O. S. 446, 464.

"The section (2702 R. S.) 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 cases said section 2702 is applicable * *.

"In cases of street improvements * * 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 * *.

"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 * *.

"As to the part of the cost and expense to be assessed against * * the abutting * * 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 reason 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 govern or refer to money of individuals, that is, money to be raised by an assessment upon the property along the improvement * *. It is competent for the contractor to agree to take the assessment in payment of his labor and material * * and if he does so the money never goes into the treasury and no certificate can be filed as to the same."

Burket, J., in Comstock v. Nelsonville, 61 O. S. 288-294-295-296.

"A municipality may issue bonds in sufficient amount to pay the estimated cost and expense of an improvement and may levy a tax in addition to the other tax authorized by law, to pay the bonds issued and sold to pay its part of the cost of the improvement, * *. Sections 45 and 45*a* do not apply to improvements for which the city has authorized bonds to be issued to pay the entire estimated cost and expense."

Summers, J., in Emmert v. Elyria, 74 O. S. 145-197-198.

See also opinion of Price, J., in Village of Carthage v. Diekmeier, 79 O. S. 323-336 in which on a seemingly identical state of facts arising under section 2702 the supreme court reached a conclusion opposed to that reached in Emmert v. Elyria, *Supra*. It is not necessary for the purpose at hand to reconcile these decisions.

Of the foregoing decisions of the supreme court all but one, viz, Kerr v. Bellefontaine, *Supra*, refer to street improvement contracts, and without attempting to analyze the decision of Emmert v. Elyria, which might seem to go farther than the principle herein stated, the rule with respect to such contracts seems to be that the certificate of the auditor is only necessary when the entire cost of the improvement is to be paid out of the general fund of the city, or out of the proceeds of an issue of bonds payable ultimately out of the general fund of the city, or in case the improvement is to be partly paid for by assessment against abutting property, with respect to the city's portion of the expense only. The reasoning by which this conclusion is reached is most clearly set forth in the opinion of Comstock v. Nelsonville, *Supra*, wherein the inconvenience of applying section 2702 to contracts to be discharged out of money raised by assessment is pointed out. There is one assumption, however, that seems to me to have been made by the court and passed over without statement. I venture a suggestion on this point: When the court, as in the last opinion referred to, as well as the other opinions cited and quoted from, says that "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," the court apparently has in mind the relative location of section 2702 as compared with the other sections of the then existing municipal code. The position of that section and the position of section 45 in the Municipal

Code of 1902 is among those statutes relating to taxation and the appropriation of money raised by taxation.

Each of these sections may be correctly said to be in *pari materia* with such sections relating to the collection and expenditure of taxes. Any fund, therefore, that does not have to be appropriated by council is quite evidently not within the general scope of these related sections and therefore the broad and general terms employed in the first clause of section 2702 and in the first clause of section 45 M. C., are limited to contracts involving the expenditure of funds raised by taxation. This being the case, revenues not derived from taxation and those entirely within the control of some municipal board, without specific appropriation by council, may be expended without compliance with the remaining provisions of the sections.

The case of Kerr v. Bellefontaine, from the opinion of which quotation is made herein, presents a statement of facts more similar to those described in your first question than do the other cases cited above. The gas trustees of the city of Bellefontaine had under old section 2489 R. S., the general power to administer the gas works of the city. That section provided in part that:

> "Said trustees may also purchase material, employ laborers, etc., * * * and all money collected for gas works purposes shall be deposited weekly by the collectors thereof, with the treasurer of the corporation * *; and all moneys so deposited shall be kept as a separate and distinct fund subject to the order of the board."

The reasoning of the learned judge in holding that section 2702 was not applicable to the exercise of the powers enumerated in sec. 2489 seems to be substantially the same as that above outlined, although the opinion as reported is very brief upon this point. (See also Findlay v. Parker 17 C. C. 294-300.)

It is not to be assumed that because the contract is to be discharged out of the proceeds of bonds issued by the municipality the certificate of the auditor is not required. If such bonds are to be paid by a general levy, then the provisions of sections 45 and 45*a* apply, but if they are to be paid by special assessments then in accordance with the rule above stated, the certificate is not necessary except as to such part of the cost of the improvement as is to be paid by the municipality. Comstock v. Nelsonville, *Supra;* Village of Carthage v. Diekmeier, *Supra.* I make this statement in spite of the apparent holding of the court in Emmert v. Elyria, *Supra.*

Kerr v. Bellefontaine is strengthened in its application by the provisions of section 2411, etc., R. S. In said section 2411, which still remains in force, as defining the powers and duties of the boards of public service and the board of trustees of public affairs, it is in part provided:

> "For the purpose of paying the expense of conducting and managing the water works * * the trustees or board shall have the power to assess and collect * * a water rent of sufficient amount * *."

Section 2412 R. S. provides in general that the surplus "after paying the expense of conducting and managing the water works, etc.," may be applied to the repairs, enlargement or extension of the works. It is thus seen that the board of pubic service in administering the water works has substantially the same powers as those called in question in the case of Kerr v. Bellefontaine. In this connection, however, permit me to point out that section 2415 being a portion of the water works act authorizes the trustees or board "to make con-

tracts for the building of machinery, water works, buildings, reservoirs and the enlargement and repair thereof * * and for all other necessary purposes to the full and efficient management and construction of water works."

In proceeding under this section the board of public service may not bind the city. If the board does not keep within the surplus as referred to in section 2412 the execution of a contract under section 2415 is such an attempt to create an indebtedness against the municipality as is prohibited by section 45 M. C. Newton v. Toledo, 18 C. C. 756.

It must not be assumed, however, that there is any fundamental distinction between contracts in the nature of running expense and those relating to permanent improvements. Section 45 applies to ordinary running expenses when the same are to be paid out of the general revenue of the municipality.

Ampt v. Cincinnati, 2 N. P. 332.
Easton v. Hyde Park, 6 N. P. 257.

The conclusion of the court in Lima Gas Co. v. Lima 4 C. C., 22-28 does not seem to be well taken.

I conclude with respect to your first question that in contracting for coal to be used in operating a municipal water works or electric light plant, the board of public service is not subject to the provisions of section 45 M. C., if the obligation created by such contract is to be met by water and light rentals resulting from the operation of the plants.

With respect to your second question I beg to state that in my opinion contracts entered into by boards of public service for water pipe to be used in extending the mains are not governed by section 45 M. C., if such contracts are to be discharged out of the surplus revenue derived from the operation of the water works plant. If, however, the bonds mentioned in your question are to be paid out of the proceeds of a general tax levy, then such certificate is necessary. I have reached this conclusion upon the principles set forth in my answer to your first question.

In my opinion, section 45*a*, with respect to which you inquire in your third question, does not relate to assessment improvements as assumed in your letter. The effect of said section is to authorize the auditor to issue the certificate required by section 45 in case bonds have been issued to pay the obligation created by a municipal contract, which bonds are to be paid out of the proceeds of a general tax levy.

In my judgment, section 145 M. C. which requires the authorization of council in case of contracts involving more than $500, does not in any way affect the conclusions above reached. While said section 143 provides that contracts let thereunder upon competitive bids, "shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash," this language alone does not render such contracts, obligations "involving the expenditure of money" within the meaning of section 45 M. C. as construed by the supreme court.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TOWNSHIP TRUSTEES—AUTHORITY TO TRANSFER SURPLUS PROCEEDS OF SPECIAL TAX.

July 29, 1909.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of July 23d, in which you submit the following for my opinion:

> Pursuant to an act of the general assembly, 84 O. L. 344, there was erected in the city of Mansfield a memorial building, for the payment of which bonds were issued and sold, all of which have now been redeemed. The act was amended in 99 O. L. 743, authorizing the township trustees to provide, out of the general funds of said treasury, for the payment of a janitor to take charge of said building. The trustees, in making the last levy for the payment of the bonds, levied a higher rate than was necessary for the retirement thereof, which resulted in a surplus of $3,182.93 in the hands of the treasurer of the trustees of said memorial building. Query: What disposition shall be made of said surplus? May it be transferred under authority of section 2834 R. S. to the general fund of the township by an order of the trustees?

In reply, I beg to call your attention to section 2834 R. S., which is, in part, as follows:

> "Wherever there is, in the treasury of any * * * township, * * * any surplus of the proceeds of a special tax, * * * which surplus is not needed for the purpose for which the tax was levied, * * * such surplus may be transferred to the general fund by an order of the proper authorities entered on their minutes * * *."

This section applies to any surplus in the treasury of any township, while the surplus to which your inquiry refers is in the hands of the treasurer of the trustees of the memorial building, but, as the entire memorial fund has been raised by taxing the property of the township, I do not consider that distinction as material. The first part of this section clearly authorizes a transfer of the entire surplus, $3,182.93, to the general fund of the township.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY SURVEYOR—ASSISTANTS, DEPUTIES AND OFFICE FORCE MAY BE REIMBURSED FOR EXPENSES INCURRED.

December 13, 1909.

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

GENTLEMEN:—Your communication is received in which you submit the following inquiry:

> "Sec. 1183, as amended, 98 O. L. 247, provides that, 'the county surveyor shall appoint such assistants, deputies, draftsmen, inspectors,

clerks or employes as he shall deem necessary for the proper performance of the duties of his office, and shall fix their compensation, but such compensation shall not exceed in the aggregate the amount so fixed by the county commissioners as herein provided.'

"Section 1181 provides that 'the county surveyor and his assistants and deputies shall each be allowed his reasonable and necessary expenses incurred in the performance of his official duties.'

"*Query:* May such employes as draftsmen, inspectors, clerks, rodmen, axmen and markers, if employed regularly in the surveyor's office and paid out of the appropriation made by the county commissioners, legally receive their necessary expenses incurred in the performance of their official duties, as provided in said section 1181?

"What employes of the surveyor's office does the word 'assistants,' as used in section 1181, apply to?"

In reply, I beg to say the provision in section 1181 as quoted in your inquiry is as follows:

"The county surveyor and his assistants and deputies shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

In my opinion, the words "assistants and deputies" should be construed to include the "office force" of the county surveyor; that is, all the deputies and assistants who are regularly employed by him to assist him in the discharge of his official duties. Such deputies and assistants are entitled to be reimbursed for the reasonable and necessary expenses incurred in the performance of their official duties.

Yours very truly,

U. G. DENMAN,
Attorney General.

STREET PAVING CONTRACTS—MONEY RETAINED AS GUARANTEE, WHERE TO BE KEPT.

Where improvement contracts provide for retention by city of portion of consideration such money retained must be kept in city treasury or legal depositories.

November 18, 1909.

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

GENTLEMEN:—Complying with your request of November 15th, I beg to submit my opinion upon the following question:

"Should the moneys retained as guarantee on street paving contracts, and others of like nature, remain in the city treasury or its legal depositories to be disbursed to the contractor by the city treasurer on warrant of the city auditor at the expiration of the retention period named in the contract?"

The power of the department of public service, under section 143 M. C., to make on behalf of the corporation a contract of the sort generally described

by you is unquestioned. That section provides merely that "the corporation shall pay the contract price in cash," and does not in any manner restrict the power of the municipal authorities to agree with the contractor respecting the time when such cash payments shall be made. This being the case the contract may itself direct the time and the manner of making payments and may create any liability on the part of the contractor that may be agreed upon between the parties. It is primarily to the contractor, therefore, that recourse must be had in order to determine the question raised by you.

It seems to me that each particular contract should be examined with respect to the time when the cash payments directed by the statute to be made are to be completed. The provision for a guarantee might possibly be made in several different ways, but if the contract simply provides that *the city* shall *retain* from the amount of the final estimate any certain sum of money as a guarantee that the improvement will remain in good condition during any certain period of time, it is my opinion that such a provision without substantial embellishment operates simply to postpone the time of the payment of the money by the city to the contractor. The question is to be considered from the standpoint of the ownership of the money. The city might, under various forms of contracts, hold this money as bailee, or it might hold it as owner. That is to say, the money might be city money, or the contractor's money in possession of the city or some designated third party. Without passing upon the question whether, under the municipal code, the municipal authorities might lawfully agree that the city should hold the money of the contractor as bailee, or that the city should retain some special interest in the money for the purpose of guaranteeing the condition of the improvement, transferring the general property in the money to the contractor, and the right of possession to some designated third party, I express the opinion that the word "retain," if used alone in a contract providing for such a guarantee, means that during the period of such retention money so retained is city money. The time of payment is simply postponed and the contractor's right to payment does not accrue until the end of the stipulated time.

Cudworth v. Bostwick, 45 Atl. 408, 69 N. H. 536.

So long as the money remains that of the city, I am of the opinion that its custody is controlled by section 35 M. C., and that it should remain in the city treasury or its legal depository as provided thereby.

If, by your question, you mean to inquire as to the power of any other municipal authority to assume possession of or control over the money thus retained, I have no hesitancy in stating that the law creates no such power. The public funds are, under the municipal code, to be held in the possession either of the city treasury or of the board of sinking fund trustees. My predecessor has already advised your department that as among the various municipal authorities, and particularly as between the city treasurer and the sinking fund trustees, amounts retained in the manner suggested in your letter must be kept in the treasury. (Annual report of the attorney general for the year 1907, page 146.)

I therefore conclude that under improvement contracts providing simply for the retention by the city of a portion of the consideration, the money thus retained must be kept in the city treasury or its legal depositories.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICES OF PEACE IN CITIES—SALARIES IN PLACE OF FEES.

The various salaried justices of the state are not necessarily prohibited from receiving marriage fees, acknowledgment fees, etc., but in each case the city ordinances fixing salaries must govern.

May 28, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Since rendering you my opinion of recent date with regard to rights of justices of the peace in the city of Cleveland to retain for their own use fees received for marrying and making return of marriage, my attention has been called to the fact that section 621*a* and 621*b*, and other related sections, are not regarded by justices of the peace in the larger cities of the state as applicable to them. My information is that these sections are regarded as unconstitutional under the familiar decision of the supreme court regarding special legislation of this sort. While this view seems very reasonable to me, I do not at this time desire to pass upon the question of the constitutionality of these acts. Learning, however, that in certain of the other large cities of the state, the justices have repudiated these special acts, and are relying upon ordinances passed under section 3 municipal code for their compensation, and presuming that the justices of the city of Cleveland may be conducting their offices in this manner (which would seem to be the case in view of the ordinance submitted to me by you), I take this opportunity to amplify my former opinion in several respects. Section 3 M. C. provides that "when the corporate limits of a city or village become identical with those of a township * * * justices of the peace * * * shall continue to exercise their functions under municipal ordinances * * * regulating the disposition of their fees * * *, their compensation, etc." Under this section it is clear that the disposition of the fees of justices of the peace in any city is governed by the city ordinance enacted under authority thereof.

The provisions of ordinance No. 44512 of the city of Cleveland seem to me to be so broad as to include marriage fees. The reference is to "all fees," and this can mean nothing except all fees provided for by statute.

In section 621 R. S., fees taxable as costs in cases are included in the same catalogue with ministerial fees, and under language like that of the ordinance both classes of fees are to be dealt with in the same manner.

For your guidance in dealing with ordinances of this sort (assuming section 3 M. C. to be applicable), I may state, however, that if the ordinance expressly or by implication, assumes to fix the salary of the justices as a judicial officer, and to regulate the disposition of his fees as such judicial officer merely, fees such as those under consideration could be lawfully retained by the justices. Care must be exercised to ascertain the exact purport of such ordinances in such an inquiry. The principles set forth in the case of St. Louis v. Sommers, 148 Mo. 398 should be applied. I deem it unnecessary now to quote from this decision. Suffice it to say that there is nothing therein, nor in any other cases which I have been able to find, which would change my former holding with respect to the effect of the Cleveland ordinance.

Because I have been in receipt of inquiries from justices of the peace in other cities of the state, I deem it proper to state again that the various salaried city justices of the state are not *necessarily* in the same situation with respect to marriage fees, acknowledgment fees, etc., and that in each case the city ordinance fixing the salaries of such justices must be looked into.

Yours very truly,

U. G. DENMAN,
Attorney General.

NOTE—See page 201.

VILLAGE COUNCIL—COMPENSATION OF MEMBERS—ORDINANCE TO FIX.

Members of village council must pass ordinance fixing their compensation and are entitled to receive compensation from date ordinance goes into effect.

March 22, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 20th, in which you inquire as to whether members of council of villages are entitled to $2.00 for each meeting of council for attending not exceeding 24 meetings in any one year, without the enactment of an ordinance fixing their compensation; and you further inquire as to whether, if an ordinance is required to legalize the payment of such compensation, the several members are entitled to receive such compensation from the date of the going into effect of the ordinance or whether such ordinance would not become effective until the succeeding council assuming the duties of the office?

Section 197 of the municipal code, as amended in 97 O. L., p. 118, Bates' Anno. Ohio Statutes, 6 Ed. section 1536-851, provides as follows:

> "Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided in this act. 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; provided, that 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, and they shall have such other powers as are conferred upon councils of villages by section 1678 of the Revised Statutes of Ohio."

This section makes it the duty of the council to fix the compensation of all officers of the village government except as otherwise provided in the act. This section, however, is the only provision with respect to the compensation of village councilmen, hence this section must control. In my opinion the words:

> "provided that 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"

are words of limitation, as well as of authority. These words do not provide that members of council *shall* receive, as compensation, the sum of two dollars for twenty-four meetings in any one year, but the language is that they *may* receive such compensation. That is, under this section the council may provide that there shall be paid to members of council this compensation according to this statute; or they may provide that there shall be received by them any amount less than the limit set in this section; or they may provide that members of council shall receive no compensation; but in any event the council is required to fix the compensation by proper legislation in accordance with the first sentence of the section quoted before it would be legal for them to be paid out of the village treasury.

I am further of the opinion that this compensation may be drawn by members of council as soon as the ordinance fixing the same becomes effective.

Of course, after the compensation has once been fixed it cannot thereafter be changed to take effect during the term of office of the members of council then in office.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNCIL MAY NOT MAKE APPROPRIATION FOR HOME-COMING.

October 5, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of September 28th, in which you submit the following for my opinion:

> "May a city council appropriate municipal funds to be paid over to the treasurer of a home-coming organization, to be used by said organization to meet the expense of a home-coming celebration?"

I beg to advise that I am unable to find an express grant of power in a municipal corporation to pay the expenses of a home-coming celebration. All municipal corporations in Ohio derive their power by delegation from the legislature which has conferred upon them no authority to appropriate public moneys raised by taxation to the payment of expenses of a home-coming celebration.

This is supported by

Stem v. Cincinnati, 6 N. P. 15.
Moore v. Hoffman, 2 Cinci. Sup. Ct. Report 453.

Very truly yours,

U. G. DENMAN,
Attorney General.

BONDS—DISPOSITION OF INTEREST DERIVED FROM—MANNER OF CONSTRUCTING WATER WORKS, AUTHORITY OF COUNCIL AND BOARD OF SERVICE.

Interest received from bonds issued for special purpose need not be paid over to sinking fund trustees; council may appropriate it for purpose for which bonds were issued or other purpose.

Council may direct construction of water works and the board of service must let contracts according to ordinance of council and supervise construction after contract is let.

October 30, 1909.

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

GENTLEMEN:—I have your letter of October 19, in which you submit the following inquiries for my opinion thereon:

> 1. Does the interest received from a depository for the use of moneys received from the sale of bonds for a special purpose accrue to

the particular fund created by the issuance of said bonds, and may said interest be applied, by the administrative board or officer, in the construction of said improvement, or is such interest required by law to be paid over to the sinking fund trustees to be applied by them in meeting interest charges arising from the issuance of said bonds?

2. Bonds are issued by a municipality for the erection, construction and building of a municipal water works. The board of public service is authorized and directed through an ordinance passed by the council "to advertise for bids for the construction, erection and building of an extension to the pipe system of said plant, and to enter into a contract with the lowest and best bidder in the name of said city for said purpose." Said plant is a new one, and the work is one of original construction.

Under said authority, may the board of public service legally contract only for the material necessary to contruct said extension, employing day laborer to complete same, or is said board required to contract for both labor and material under said authority granted by council? The expenses of said extension is payable from the proceeds of bonds sold for the erection and building of the water works plant, and not from proceeds arising from the operation of the municipal plant. These bonds referred to in both these questions were authorized by a vote of the people for the special purpose of constructing, erecting and building a water works system in the city of Newark, Ohio.

In answer to your first question I take it that the moneys earned and received by the municipality for the use of moneys realized from the sale of bonds for a special purpose, is such money as the municipality has received as interest paid to it by a bank or banks acting as a depository or depositories under an ordinance passed by the municipal council pursuant to section 135 of the municipal code, establishing such depositories, and receiving bids from banks in the municipality for the use of the money. If I am right in this assumption of the facts, then I may say there is no statute providing as to what fund this interest money shall be accredited. Certain it is that such interest money belongs to the municipality, and in passing the ordinance authorized by section 135 of the municipal code, the council might provide that this interest money shall go to the particular funds which produced the interest, and in such case there would be credited to the money received from the sale of any bonds such an amount of interest as that money would produce at the rate which the bank or banks pay to the municipality under the bid and contract awarding the use of the money. Such earned interest is not required by the law to be paid over to the sinking fund trustees to be applied by them in meeting interest charges arising from the issuance of said bonds.

Your first inquiry suggests another question which naturally arises out of it, and that is whether the interest paid to the municipality for the use of money received from the sale of bonds for a special purpose may be expended for that special purpose alone with the money received from the sale of the bonds at their par value, but without further appropriation by the council?

This question must be answered in the negative because such earned interest was not contemplated by the electors in authorizing the bonds. By the vote of the people authority was given to erect the waterworks, and the bond issue was authorized in such an amount as at its par value would do the work. Any interest which such par value money might produce through the municipal depositories thereafter is an incidental matter, and is entirely separate and apart

from the authorization given by the people. The municipality in the prosecution of its business, according to law, acquires in a proper and legal way this interest, and no municipal officer is allowed to expend it until the legislative branch of the municipal government has appropriated it for some lawful purpose.

The answer to your second question must depend upon the provisions of the municipal code defining the powers of the municipal council and the board of public service respectively. Subdivision 15 of section 7 of the municipal code gives the municipal council power

> "To *provide* for a supply of water by the construction of * * * waterworks * * etc."

Section 140 of the municipal code provides that:

> "The directors of public service shall *supervise* the improvement and repair of streets * * * and the construction of all public improvements and public works except as otherwise provided in this act."

Section 143 of the municipal code provides that the directors of public service may make any contract for any work under their supervision not involving more than $500, but when any expenditure within their department, other than the compensation of persons employed therein, exceeds $500, such expenditure must first be authorized and directed by ordinance of council, and when so authorized and directed the directors 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. Provision is further made in this same section for the opening of the bids, reading of the same, what each bid shall contain, and if the work to be bid for embraces both labor and material, they must be separately stated.

Subdivision 15 of section 7 of the code, as quoted above, is one of the general powers given to municipalities, and the first paragraph of this section 7 provides that all municipal corporations shall have the general powers named in section 7, and council "may provide by ordinance or resolution for the exercise and enforcement of the same."

It will be seen, therefore, that the power of providing for and authorizing and directing the construction of waterworks is entirely with the council, and council may direct this to be done in any manner it may see fit. It is only for the board of public service, as the administrative authority of the city, to let the contract according to the ordinance of the council directing it, and to supervise the construction of the work after the contract is let pursuant to the terms of the ordinance. The ordinance mentioned in your question directed the board of public service to advertise for bids for the construction, erection and building of an extension to the pipe system of this new waterworks plant, the money for which was authorized by a vote of the people. The ordinance did not authorize the board to advertise for bids and let a contract for the material only, but it required the board to advertise for bids and enter into a contract with the lowest and best bidder for the construction, erection and building of the extension. This, of course, includes both labor and material, and under such an ordinance the board of public service is wholly without authority to let a contract for the material alone, and then hire labor indiscriminately or otherwise to do the work. The board might let one contract for the material separately, and it might let another contract to the lowest and best bidder for the labor necessary to do the work, but under the law and this ordinance the board would

clearly exceed its powers in simply letting a contract for the material and then employing labor to do the work independently of the contract.

The object of these statutes is to secure to the municipality the best work that can be gotten for the lowest price through the widest competition. Neither the letter of the law and the ordinance nor the spirit of the same would be followed in pursuing the plan which your question indicates was pursued.

Yours very truly,

U. G. DENMAN,
Attorney General.

RAILROAD POLICE—SECURITY FOR COST—JUSTICE OF PEACE, YOUNGSTOWN—VARIOUS QUESTIONS RELATIVE TO FEES—CASH-BOOK.

Railroad police not required to give security for costs in misdemeanor cases under provisions of section 7136.

Justice of peace may not be required to keep cash-book, even if volume of business seems to demand one.

August 3, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your communication of August 2nd, in which you submit the following for my opinion:

> 1. May the policemen of a railroad company be required to give securities for costs in misdemeanors under the provisions of section 7136 R. S., if not, is the company liable for its costs if the defendant be discharged or proves insolvent?
>
> 2. What disposition should be made of fees earned under the provisions of section 620 R. S.?
>
> 3. The statute does not prescribe a cash-book for justices of the peace, but the volume of business transacted would seem to demand one, and you desire to know if you may recommend the clerk of court's form with appropriate headings to the columns.

I beg to call your attention to section 7136 R. S., which provides when security for costs of prosecution may be required. You will note, however, the statute specifically provides that costs shall not be required of a sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer when in the discharge of their official duties.

Section 3428 R. S. defines the powers of a railroad policeman to be the same as those of policemen of cities of the first class.

I am, therefore, of the opinion that railroad policemen would not be required to give security for costs in misdemeanors under the provisions of section 7136, and I am further of the opinion that the company which employs such railroad policemen would not be liable for costs if the defendant be discharged or proves insolvent.

Answering your second question, which, from the context of your letter of above date I am led to believe applies only to justices of the peace at Youngstown, Ohio, I beg to call your attention, first, to section 621*f*, R. S., which provides that each justice of the peace in Youngstown township, Mahoning county, shall receive, in lieu of all fees, a salary of $1,200, while section 621*f*-1 provides

that the above section shall in no way affect the fees to which justices of the peace may be entitled on the performance of marriage ceremonies, taking acknowledgments, and administering oaths in matters not connected with any litigation in said court.

Section 620 R. S. provides that when a justice acts as coroner he is entitled to the same fees as are allowed by law to coroners in such cases, however, you will note that this section is limited by the above sections in its application to justices of the peace in Youngstown township, Mahoning county, as such justices may only receive fees for performing marriage ceremonies, taking acknowledgments, and administering oaths in matters not connected with any litigation in their court. Acting as coroner would in no way be a matter connected with any litigation in their court and, therefore, such justices would be entitled to the fees mentioned in section 621*f*-1 R. S. and the balance of the fees earned under section 621 R. S. should be disposed of as provided in 621*g* R. S.

Replying to your third inquiry, I beg to advise that I am of the opinion that, where the statutes do not require a justice of the peace to keep a cash-book, the same could not be demanded merely on account of the volume of business transacted.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

JUSTICES OF PEACE, YOUNGSTOWN—VARIOUS MATTERS RELATING TO FEES—OFFICERS AUTHORIZED TO ARREST AND COMMIT WITHOUT WARRANT—CASH SECURITY FOR COSTS—DISPOSITION OF—SUSPENSION OF SENTENCE—JURY TRIAL BEFORE JUSTICE OF PEACE.

Officers enumerated in section 7128 may detain and commit to jail without warrant only until warrant can be obtained.

Compensation of railroad police to be paid by company.

Justice of peace may accept cash for security for costs, but not for bail, and if defendant waives examination and is bound over, cash security should be returned to complainant or person depositing.

Magistrates may not remit fine and suspend sentence after sentence has been put in execution.

Justice of peace may not impanel jury and try case without special statute giving jurisdiction.

August 18, 1909.

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

DEAR SIRS:—I am in receipt of your request asking for my opinion upon the following:

> "1. What disposition is to be made of marriage fees when the ceremony is performed by the justice in connection with bastardy proceedings pending in his court? (See sections 621*g* and 621*f*-1.)
>
> "2. Is the township treasurer entitled to ten per cent. on fees collected from the clerk of courts in appeal and lien cases taken up on transcripts from the justices' court, and on criminal transcript fees allowed by the auditor and county commissioners, or shall these fees be paid to the justice and reported in the regular monthly statements?

"3. Is the township treasurer entitled to ten per cent. on fees collected in the office of the justice in the regular course of business after the cases in which said fees were collected have been previously reported under section 621*g*?

"4. What other officers, if any (except railroad police), are authorized to commit prisoners, arrested without a warrant, to the county jail before taking them before a magistrate for arraignment?

"5. To what fees, if any, is a railroad policeman entitled? The proceedings are as follows: Offenders. arrested generally at night, are put in county jail until morning, and then taken before justice and complaint filed.

"6. In the above cases (4 and 5) prisoners being in custody and before the court, is it necessary to issue a warrant for their arrest, or may the justice proceed with the arraignment without further process?

"7. Is there any authority of law for a sheriff or magistrate to demand or accept cash bail from person in custody charged with a crime for his appearance before court?

"8. If such deposit be accepted by said officers, and the accused fails to appear, what shall be done with the money?

"9. May a justice demand and accept a cash deposit from the complainants in a misdemeanor case as security for costs?

"10. If such deposit be accepted, and the defendant waives examination, and asks to be bound over, what should be done with the money?

"11. Has a magistrate the right to remit a fine and suspend the sentence after the defendant has been sent to jail?

"12. May justices of the peace impanel a jury and try misdemeanor after the defendant refuses to waive the same?"

Answering your first, second and third questions, my opinion is limited as applying only to the justices of the peace at Youngstown, Ohio, as, from the context of your communication, I am led to believe your first three inquiries relate only to the above justices.

In answering your first question, section 621*f* of the Revised Statutes provides that the justices of the peace of Youngstown township, Mahoning county, shall receive a salary in lieu of all fees. Section 621*f*-1 provides that the above shall in no way affect the fees to which justices of the peace may be entitled for the performance of marriage ceremonies. I am, therefore, of the opinion that the justice would be entitled to all fees earned for performing marriage ceremonies. I may add that the marriage ceremony referred to in your first question is not a matter connected with the proceeding before the court.

Answering your second question: Section 621*g* of the Revised Statutes provides that the justices shall make a monthly report under oath to the treasurer of the township, of all costs which have not been paid but have been taxed in each case, and section 621*h* makes it the duty of the township treasurer to proceed at once to collect or cause to be collected, all the fees returned by the said justice of the peace as due and unpaid, and the treasurer is authorized to retain ten per cent. of the amount he collects for his services, and shall account for the remainder as other funds coming into his hands as treasurer, and I am of the opinion that since section 621*g* specifically provides that the justice of the peace under oath shall make a report to the township treasurer of all the justices' costs not paid that have been taxed in each case, justices would be required to report all costs in such cases as mentioned in your second inquiry which have not been paid, to the township treasurer, and under section 621*h* the

township treasurer would be entitled to ten per cent. of the amount of the fees returned by the justice which he collects.

Answering your third question: I call your attention to part of section 621*h* which provides that, upon the application of the township treasurer, the justices of the peace shall issue execution for all fees returned by said justices to the township treasurer as provided in section 621*g*. This part of the section seems to specifically provide for the township treasurer collecting the fees returned to him by the justices in the justices' office in the regular course of business, and I am of the opinion that the township treasurer is entitled to ten per cent. of fees collected in the regular course of business in the justices' office, after the cases in which the fees are collected have been reported to him, under section 621*g*.

Answering your fourth question: I beg to call your attention to section 7128, which is as follows:

> "A sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer, shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village, *until a legal warrant can be obtained.*"

You will note the above section permits the enumerated officers to arrest and detain any person found violating any law until a legal warrant can be obtained. To detain such person would authorize such officer to commit to the jail.

Answering your fifth question: Section 3431 provides that

> "The compensation of railroad policemen shall be paid by the company for which they are appointed, and at such rates as may be agreed upon by the parties."

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 policeman is entitled is that mentioned in section 3431.

Answering your sixth question: I desire to call your attention to the above quoted section of 7129. You will note that the officers mentioned in section 7129 are only authorized to arrest and detain a person until a legal warrant can be obtained, and I am of the opinion that it is necessary to have a warrant issued for the arrest of persons violating the law before a justice may proceed with the arraignment.

Answering your seventh and eighth questions: I beg to call your attention to the opinion I rendered to you under date of July the 9th. The answer to the first two questions of that opinion will apply to these two questions in this opinion.

Answering your ninth question: Section 7136 provides that a magistrate may, before issuing a warrant, require the complainant to become bound for the costs in case the defendant be dismissed. I am of the opinion that this section is broad enough to include a cash deposit for security for costs. Accepting a cash deposit as security for costs and accepting a cash bail are to be distinguished, as "bail" has a technical meaning, and is defined by the common law.

Answering your tenth question: I beg to advise that if a cash deposit be accepted as security for costs, and the defendant waives examination and has

to be bound over, that the cash deposit should be returned to the complainant or other person depositing the same.

Answering your eleventh question: I beg to advise that the law seems clearly settled in this state that the court may not suspend sentence, or remit a fine after the same has been put into execution by order of the court.

Answering your twelfth question: I beg to advise that a justice of the peace is without authority generally to impanel a jury in criminal cases. The statutes do, however, provide for jury trials in certain cases. If there is any particular case which you are in doubt about the justices' authority to impanel a jury, I would be glad to have you submit the same to me.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP DITCHES AND ROADS—COMPENSATION OF ENGINEER, CHAINMEN, ETC.—COUNTY SURVEYOR EMPLOYED AS INDIVIDUAL.

Township trustees may not allow engineer for work on ditches more than four dollars per day for location, and three dollars per day for plat, etc., and if county surveyor is employed he is employed as an individual and not as an official.

Chainmen, rodmen and axmen may not be paid more than one dollar per day; engineers, chainmen, rodmen and axmen should not be paid by township trustees in excess of amounts mentioned in section 4664 for locating and establishing township roads. If surveyor employed on road he is employed as an individual.

August 20, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your letter of August 10th you ask my opinion upon the following questions:

> "1. Under sec. 4527 may township trustees allow an engineer for work on township ditches any sum in excess of $4.00 per day for location, and $3.00 per day for plat, profile and specifications?
>
> "2. If the county surveyor is employed by the township trustees for work on a township ditch, can he be paid the fees and expenses allowed him under sec. 1183, as amended 98 O. L. 296?
>
> "3. What fees may be allowed chainmen, rodmen and axmen for work on township ditches?
>
> "4. What per diem may the township trustees pay an engineer, chainman, rodman and axman for services in locating and establishing a township road? See sec. 4674 and 4678.
>
> "5. If the county surveyor is employed by the township trustees in locating and establishing a township road, what per diem may be paid him, his chainmen, rodmen and axmen?"

1. Section 4527 R. S. provides as follows:

> "The following fees shall be considered lawful allowances for locating and establishing ditches under this chapter: Township trustees, one dollar and fifty cents per day each; township clerk, for recording

> proceedings of trustees, ten cents per hundred words; for apportioning cost of locating and recording the same, twenty-five cents; for each notice or statement, ten cents per hundred words; chainmen and axmen, each one dollar per day; engineer, four dollars per day for locating, and three dollars per day for making plat, profile and specifications."

Since this section specifically fixes the lawful allowance for an engineer at $4 per day and $3 per day respectively, I am of the opinion that township trustees may allow less than the amount fixed but not more than is provided for in this section.

2. If the county surveyor is employed by the township trustees on a township ditch, he is employed not as county surveyor but as an individual and the township trustees are not authorized to pay him the fees and expenses provided under section 1183 R. S. as amended by 98 O. L. 296. Since a surveyor employed on a township ditch would do the work of the "engineer" mentioned in section 4527, the township trustees may pay such county surveyor or other surveyor the compensation provided for an engineer in section 4527.

3. Chainmen, rodmen and axmen may be paid not more than one dollar per day for work on township ditches, as provided in section 4527 R. S.

4. As to the per diem amount which the township trustees may pay to an engineer, chainman, rodman or axman for services in locating and establishing a township road under sections 4674 and 4678 R. S., I find no specific provision in the statutes upon this question. However, the duties of such persons, as prescribed in chapter 3, title VII, relating to township roads, are analogous to the duties prescribed in chapter 2, title VII, relating to county roads, and such references to chapter 2 as are contained in sections 4674 and 4675 R. S. indicate that the procedure and policy provided for the locating and establishing of county roads should be followed in locating and establishing township roads in cases where the township road law is silent and the county road law specific.

Section 4664 R. S. provides the following compensation for services rendered under chapter 2 in locating and establishing a county road:

> "Viewers and reviewers, chainmen and markers, two dollars each, and surveyor, five dollars, and actual and necessary expenses to be charged as costs and expenses, etc."

Taking the word "surveyor" in this section as equivalent in meaning to the word "engineer" in section 4674, and the words "chainmen, rodmen and axmen" in your question as meaning the same as the words "chain carriers" in section 4664, I believe that township trustees are not justified in paying compensation in excess of the amounts mentioned in section 4664 R. S.

In the case of repairing and improving a township road under section 4686-1 et seq., I find specific provision for compensation in sections 4686-6-15-16-36 and 43, but I am unable to apply those provisions to cases involving the location and establishment of a township road.

5. A county surveyor, employed by the township trustees in locating and establishing a township road, may be paid the same amount per diem as any other surveyor and such amount must not be in excess of the amount fixed in section 4664, as explained above in my answer to your question number 4.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY—AUTHORITY OF TO RECOVER ILLEGAL FEES FROM ROAD COMMISSIONER AND ENGINEER.

November 2, 1909.

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

GENTLEMEN:—Your communication enclosing a letter addressed to the auditor of state by the prosecuting attorney of Trumbull county, is received. The prosecutor in his letter inquires as to his right to bring an action for the recovery, for the use of road district No. 1, of certain fees illegally drawn by the road commissioners and engineer of such road district.

While there is no specific provision in either section 1273 or section 1274 of the Revised Statutes whereby the prosecuting attorney is required to represent the commissioners of road districts, yet I am of the opinion that such is the intent of section 1274 R. S.

I am, therefore, of the opinion that the prosecuting attorney has authority, by reason of his official position, to institute the necessary actions for the recovery of all illegal fees contained in your examiner's findings against the road commissioners and engineer of such road district.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TAX INQUISITOR—COMPENSATION PAID TO MAY NOT BE RECOVERED.

November 2, 1909.

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

GENTLEMEN:— Your communication enclosing a copy of a contract entered into between the board of commissioners of Montgomery county and Bosler & Emanuel, attorneys-at-law, is received.

Under said contract said attorneys were employed as legal counsel under the provisions of section 845 of the Revised Statutes, and their compensation fixed at $2,000 per year, and

> "In addition to said sum in all proceedings instituted by the county auditor of Montgomery county for the collection of taxes and penalties thereon, an amount equal to 7% of the amount recovered."

You request an opinion as to the legality of the provision providing a 7% compensation for services rendered in proceedings instituted by the county auditor in the collection of taxes.

I assume from the language used in the contract that the services rendered by said attorneys for which the 7% compensation was to be received were similar to those of a tax inquisitor. The tax inquisitor law was declared unconstitutional by the supreme court, not on the ground, however, that the legislature was without authority to provide for tax inquisitors, but because the law enacted violated the "uniformity clause" of the constitution.

Section 845 of the Revised Statutes expressly authorizes county commis-

sioners to employ legal counsel, and to fix their compensation, and the contract in question, in my judgment, comes within the provisions of this section. This section, however, has recently been declared unconstitutional by the supreme court on the ground that the duties prescribed therein in effect created a county office, and that such office could not be filled by appointment. The services rendered under this contract were performed and the compensation paid before the constitutionality of section 845 had been passed upon, and the courts have held that money paid under an unconstitutional law cannot be recovered.

I am, therefore, of the opinion that, notwithstanding the fact that the law upon which the contract was based has been declared unconstitutional, the compensation paid thereunder may not now be recovered.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

PROBATE JUDGE—FEES FOR SERVICES RENDERED UNDER 91 O. L. 791 —NOT REQUIRED TO FURNISH TRANSCRIPT TO STATE BOARD OF CHARITIES OF INVESTIGATION OF RESIDENCE OF INSANE PERSON —AUTHORITY OF COUNTY COMMISSIONERS TO PURCHASE AUTOMOBILE FOR SURVEYOR—ANNUAL BOARD OF EQUALIZATION—EMPLOYMENT OF PERSONS TO MAKE PLATS, ETC.—INMATES OF BOYS' INDUSTRIAL SCHOOL WHO VIOLATE PAROLE—WHERE TO BE CONFINED.

No allowance should be made by county commissioners to probate judge for services required to be rendered under act in 91 *O. L.* 791.

Board of State Charities have not authority to order transcripts of papers of investigation of residence of insane persons and no fees may be allowed probate judge for making same.

County commissioners are without authority to purchase automobile for surveyor.

Annual board of equalization may not employ clerks and other persons to make plats of lands, etc.

Inmates of boys' industrial school who violate their parole should be returned to institution, but may be confined in jail at expense of county until returned to institution.

November 2, 1909.

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

GENTLEMEN:—Your communication is received in which you submit the following inquiries:

> "1. Should the allowance authorized by section 4 of the act of May 19, 1894 (O. L. vol. 91, page 791), be allowed as therein authorized and paid into the probate judge's fee fund, or does the ruling of your department in reference to the allowance authorized under the provisions of section 6470 R. S., apply in this case?
>
> "2 Under the provisions of section 632*b* (99 O. L., p. 323), the board of state charities, either by committee or by its secretary or by such agent as it may designate, shall investigate the question of the

legal residence of insane persons reported to said board and 'shall have authority to send for persons and papers, and to administer oaths and affirmations in conducting such investigations.' Under this authority, if probate judges are required by the board of state charities to furnish transcripts of proceedings in insane cases, are such probate judges authorized to charge the legal fees for making such transcripts to the county, or should they be paid by the persons requiring such transcripts?

"3. May the county commissioners legally purchase an automobile for the use of the county surveyor in the discharge of his official duties and pay for the same out of the county treasury?

"4. May the annual county board of equalization employ competent persons to make plats of lands for the purpose of locating buildings erected thereon since the last decennial appraisement of real estate, the location of which buildings is indefinite and uncertain, and authorize the expense of such platting to be paid out of the county treasury under the provisions of section 2813*a* R. S., which provides that all expenses necessarily incurred in the performance of their respective duties shall be paid out of the county treasury upon the allowance of said boards, respectively?"

"5. Under the provisions of section 757*b*, the trustees of the boys' industrial school have authority to parole inmates of that institution, and while upon such parole such inmates are under the control of the trustees and subject at any time to be taken to said school. In the event that such paroled persons are taken into custody by the officials of their home county and placed in jail awaiting the action of the board of trustees of the boys' industrial school in regard to their return to such institution, who should pay the expense of their board in such jail? Should the county bear this expense, or may the parole officer of the institution pay the same and charge it in his expense account to the state, or should the institution itself make the payment? The acts of the legislature relating to this matter, so far as we are able to find, are as follows: 95 O. L., 648; 97 O. L., 23; 99 O. L., 341.

In reply, I beg to say these questions will be considered in the order as above set out:

1. Section 4 of the act of May 19, 1894, O. L. 91, 791, which enlarges the jurisdiction of the probate judge in certain counties, is as follows:

> "The county commissioners shall pay the probate judges of the respective counties out of the county treasury for their services in said cases."

That is, payment for all the services rendered by probate judges of counties for services rendered under the enlarged jurisdiction is to be paid out of the county treasury upon the allowance of the county commissioners. This section, however, is in direct conflict with section 18 of the county officers' salary law, which said section provides that the salary received "shall be in lieu of all fees, costs, penalties, percentages, allowances, and all other perquisites of any kind which any of the officials herein named may now collect and receive, etc."

It follows, therefore, that no allowances should be made by the county commissioners to probate judges for the services required to be rendered under the act in question.

2. The authority conferred upon the board of state charities, or its secre-

tary, or designated agent "to send for persons and papers" does not extend to the making of transcripts in proceedings had in the probate courts. "To send for persons and papers" means to issue process therefor, and to cause the same, if in existence, to be delivered in court, but does not give authority to order transcript of papers to be made. It follows, therefore, that no fees for the same should be allowed.

3. Section 1181 Revised Statutes requires the county to provide room for the county surveyor at the county seat, and furnish the same at the expense of the county, with all necessary cases and other suitable articles. Such section further requires that the county surveyor's office shall also be furnished at the expense of the county "with all necessary tools, instruments, books, blanks and stationery necessary for the proper discharge of the official duties of said county surveyor." These provisions, however, do not extend to the purchase of an automobile for the use of the county surveyor, and without such express provision by the legislature the county commissioners are without authority to purchase same.

4. The annual board of equalization for any county or city are entitled, under the provisions of section 2813*a*, "to all expenses necessarily incurred in the performance of their respective duties."

"The expenses necessarily incurred in the performance of their respective duties" as provided in said section, do not, however, in my judgment, include the employment of clerks and other persons to make plats of lands, etc. The appointment of the necessary clerks and messengers are expressly provided for in other provisions of the law.

5. Section 757*b* is in part as follows:

> "The trustees shall have full power to enforce the rules and regulations, and to retake any such inmate so upon parole, and their written order certified by the superintendent shall be sufficient warrant for any officer named therein to authorize such officer to arrest said inmate and return him to said school; and it is hereby made the duty of all officers who may be named in such order to arrest and return to said school any paroled inmate named therein."

No provision is contained herein whereby paroled inmates of the boys' industrial school are required to be placed in county jails. The legislature intended in the enactment of this law that all inmates who violated their parole should be returned directly to the institution. If, however, an inmate of the boys' industrial school who is out on parole is brought before the juvenile court, said court may, as is provided by law, detain such inmate at the expense of the county until the proper officer returns him to the said institution.

Very truly yours.

W. H. MILLER,
Assistant Attorney General.

COUNCIL—APPOINTIVE OFFICES—POWER TO CONSOLIDATE FULLY DISCUSSED.

November 5, 1909.

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

GENTLEMEN:—A letter addressed to your department by Mr. R. R. McIntire, city solicitor of Mt. Vernon, has been referred to me for opinion on the question submitted therein, viz:

May council of a city by ordinance, under sec. 227 M. C., amended 99 O. L. 562-567, provide for the consolidation of certain appointive offices and employments in the city government, viz:

1. Clerk of council and clerk of the department of public safety.
2. Clerk of the department of public service and clerk of any of the subdivisions of said department.
3. Superintendent of waterworks and chief of the fire department.
4. Director of public service and street commissioners.

By "consolidation" is meant the requirement that the duties of the two offices consolidated be performed by one person at a stipulated salary.

I find no provision of the municipal code expressly forbidding the action described by the city solicitor. It is perfectly clear that the duties of any of the several pairs of offices above mentioned may be performed by the same person, there being no such conflict therein as would render such offices mutually incompatible. The second, third and fourth questions of the solicitor all involve a consolidation with other offices and employments of positions within the department of public service. In order that council may make such consolidation these positions must have some permanent existence. It is true that the mayor, under section 129 above quoted, has authority to appoint heads of subdepartments in the department of public service, but by section 145 of the amended act,

> "The director of public service may establish such subdepartments as may be necessary, and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers, and other persons as may be necessary for the execution of the work, and the performance of the duties of this department."

By virtue of the foregoing section the mayor may not appoint, nor may council fix the salaries of any of the heads of departments or subordinate clerks in the department of public service, unless such subdepartments and clerkships have been established by the director of public service. Council may not "consolidate" any of such positions with other positions inasmuch as the very existence of them depends upon the will of the director of public service.

It follows that the action described in the second subdivision of the solicitor's question cannot be taken by council, inasmuch as the director of public service may at any time determine that there shall be no subdepartments in that department, consequently, no clerks of such subdepartments; or he may determine that there shall be no clerk of the department of public service.

Again, the position of superintendent of waterworks is one which exists only by virtue of the action of the director of public service, and accordingly may not be "consolidated" with the position of chief of the fire department, which is a statutory office.

The office of street commissioner has likewise no necessary existence, and unless created as the head of a subdepartment by the director of public service the duties of such position would devolve upon the director. No "consolidation," therefore, would be necessary or legal in this instance.

The answers to the last three questions are all based upon section 145 as amended by the Paine law, so called. This section will not become effective until after January 1, 1910, and it is probably true that until that time it would be legal to take the action contemplated in the question of the solicitor.

Inasmuch, however, as an ordinance now passed could not bind the director of public service when appointed, I have assumed that for all practical purposes such an ordinance would be of no effect, and that the solicitor's real desire is to be advised concerning the operation of the Paine law when the same shall become fully effective.

To summarize then, an ordinance such as that described by the city solicitor would be invalid in all of the particulars set forth by him.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—ORDINANCE WHICH MAKES APPOINTMENT TO OFFICE INVALID.

Council cannot by ordinance create and fill an office or supervise work which is given to board of public service.

November 12, 1909.

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

GENTLEMEN:—I have your letter of November 12th in which you submit the following question and ask my opinion thereon:

> "We respectfully request your opinion as to the correctness of the conclusions of law arrived at by our examiner, S. T. Quigley, in his report upon the contract made by council of the city of Greenville, as said opinion is expressed on pages 14, 15, 16 and 17 of his report upon said city, filed in this office on September 18, 1909.
>
> "The report, at the above cited pages, we believe clearly states facts necessary for your information in arriving at the determination of the law points involved."

From the above mentioned report by examiner, Quigley, it appears that the council of the city of Greenville, Ohio, on May 17, 1909, passed an ordinance entitled, "An ordinance to provide for the furnishing of plans and specifications for a sanitary sewer disposal works for the city of Greenville, Ohio, and to appropriate the money necessary for such purposes." This ordinance was thereupon approved by the mayor, and in substance it attempts to create the office of special civil engineer for the construction of the sanitary sewer disposal plant for the city of Greenville. This attempt was made under section 1782 of the Revised Statutes of Ohio, and the ordinance recites that an agreement had theretofore been entered into between the council of the city and one Charles S. Slade, under which said Slade was to draft the plans and specifications for said sewer disposal plant and to act as consulting engineer in the construction of said plant, and said ordinance attempts to authorize and empower Mr. Slade to draft the necessary plans, specifications and profiles for said plant and to make all necessary and proper surveys therefor and do all other preliminary engineering work and to make an estimate of the probable cost of the plant, and to report the same to the council in order that they may determine the amount of bonds to be issued for the construction of said plant; all of which work is to be done under the direction of the council of the city of Greenville.

The ordinance further provides, after designating said Charles S. Slade as such special civil engineer, for the construction of the sanitary sewer disposal plant, that said Slade, for making the necessary and proper surveys, drafting said plans, specifications and estimates, and advising the city council and other officers in the matter of receiving bids for the construction of said work shall receive the sum of $475.00, and that for all other services rendered by him as such consulting engineer during the progress of the construction of said work said special civil engineer shall receive as compensation 4% of the entire cost of the construction of said plant.

This ordinance attempts to create the office of special civil engineer and at the same time attempts to appoint a certain man, Mr. Slade, as the incumbent of said office, and accepts his agreement to do the work therein called for, and fixes the compensation for such work. The question involved is whether council had the power to do these things.

In your report as mentioned above, a copy of which is herewith attached and made a part hereof, you hold that the council did not have such power, and in my opinion your holding in that regard is clearly correct, and that the council was without power, and in fact is prohibited by the statutes of the state from doing the things it attempted to do by the ordinance.

Section 123 of the municipal code, 96 O. L., page 60, provides as follows:

> "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 may be otherwise provided in this act. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon."

Section 223 of the municipal code, 96 O. L., page 94, provides in part as follows:

> "All appointments authorized by this act or by any ordinance shall be made by the mayor unless otherwise specifically provided in this act."

Section 140 of the municipal code, 96 O. L., page 66, provides in part as follows:

> "The directors of public service shall supervise * * * the construction of all public improvements and public works, except as otherwise provided in this act."

Subdivision 25 of section 7 of the municipal code, 96 O. L., page 25, provides that council may provide by ordinance

> "for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal and *to establish, maintain and regulate plants for the disposal thereof.*"

By the sections just quoted it will be seen that it is for the council to, by ordinance, provide for such disposal plants as the one sought to be provided for

by the council of the city of Greenville, but under section 123 the powers of council are legislative only, and it is prohibited from performing any administrative duties whatever, and it is further provided that it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as may be otherwise provided in this act. It is nowhere provided in the act that the council may appoint a civil engineer, and the right therefore, to do what the council in this instance attempted to do is not within their powers. This same section further provides that all contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board of officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon. This, of course, prohibits the council from entering into the contract, which by the ordinance they attempted, because this contract is with reference to a sewage disposal plant and by the terms of section 141 the directors of public service have the management of all municipal water, lighting, heating and sewage disposal plants and farms, and by section 140 from which quotation is set out above, the directors of public service are commanded to supervise the construction of all public improvements and public works except as otherwise provided in the municipal code. There is no provision giving any such power to council.

The ordinance recites that the office of engineer is created under section 1782 of the Revised Statutes. This section does not confer any power upon the city council to create such an office nor any other office named in the section. It only says that if the city has a civil engineer or the other officers named in the act, that the council shall perform the duties prescribed by, "this title and such other duties not incompatible with the nature of their office, as the council may, by ordinance require, and that such officer shall receive such compensation for his services by fees or salary or both as may be provided by ordinance."

If it be granted that council may create the office of special civil engineer, it is perfectly clear that after the office is created the council would have no authority to appoint an incumbent thereof. Such appointment would have to be made in this case by the mayor under section 223, from which quotation is above set forth, because there is no specific provision in the municipal code allowing any other officer or authority to make such appointment aside from the mayor.

My conclusions, therefore, are that if this ordinance in question is simply a contract with Mr. Slade, the council was wholly without authority under section 123 of the code to make such contract. On the other hand, if it creates the office of civil engineer, it was the duty of the mayor to appoint a man to fill that office and the council had no authority, whatever, to make such appointment, and finally, since sewage disposal plants or works are under the management and control of the directors of public service, the ordinance is further invalid in its attempt to have the supervision of this work done under the members of the council themselves.

The ordinance states that the action recited therein is taken pursuant to an order of the state board of health directing the city to construct a sanitary sewer disposal plant. This opinion should be communicated to the state board of health in order that that board may know that the action thus far taken by the council of the city of Greenville is not in accordance with the statutes, and that this fact may bring serious difficulties to the city in the further prosecution of this work, and that if the board of health shall require that this work proceed it should further see that the steps which the officials of the city of Greenville take in constructing the plant to be taken according to law, and thus leave no

possibilities for the overthrowing of contracts and imposing upon the people of the city unnecessary expense in the way of litigation and uncalled for delays because of procedure in an unauthorized manner.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR—AUTHORITY TO CONFESS JUDGMENT AGAINST CITY.

December 1, 1909.

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 November 24th, requesting my opinion upon the following question:

> "A city auditor refuses payment of a bill because it is certified by the department against the wrong fund or appropriation. The party brings suits and the solicitor confesses judgment. Is said judgment a legal claim to be paid out of the funds under the control of the sinking fund trustees?"

The power to confess judgment in behalf of the municipality, without authority from council, is not expressly conferred upon the city solicitor by section 137 M. C., or by any of the related provisions of the Revised Statutes. It is true that the city solicitor is the proper officer to confess judgment on behalf of the municipality. (Walcutt v. Columbus, 13 Dec. 561.) However, the power to compromise litigation seems to be one of the residuary powers conferred upon council by section 127 which provides in part that,

> "All powers conferred by this act upon municipal corporations shall be exercised by council unless otherwise provided herein."

Undoubtedly a municipal corporation has the power to compromise claims against it which are good in equity and just, although not collectible at law. State ex rel. v. Brown, 4 C. D. 345; Walcutt v. Columbus, *Supra;* Guernsey Co. v. Cambridge, 3 C. D. 669.

The proper procedure, however, as recognized by all these cases, and as evident upon a careful examination of the provisions of the municipal code, is for council to pass an ordinance or resolution approving the compromise, directing the solicitor to confess judgment, and making an appropriation for the purpose of satisfying the claim. The certificate required by section 45 M. C. could then be furnished and all other steps provided for in the statutes could be taken. Such a judgment by confession would not be, in my opinion, a final judgment within the meaning of section 110 M. C.

I am, therefore, of the opinion that in the case presented by you the judgment confessed by the city solicitor, without the direction or consent of council, is not a legal claim to be paid out of the funds under the control of the board of trustees of the sinking fund.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TAXES AND TAXATION—BOARD OF EDUCATION—INFIRMARY DIRECTORS—AUTHORITY TO EMPLOY CLERK AND STOREKEEPER—COUNTY TREASURER—AUTHORITY TO EMPLOY ATTORNEY FULLY DISCUSSED.

Property sold to board of education becomes non-taxable, but accrued taxes may not be remitted.

Infirmary directors of Hamilton county may not employ clerk or storekeeper.

December 1, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 9th, in which you request my opinion upon the following questions:

> "1. When property is sold to a city or a board of education and thereby becomes non-taxable, may the taxes which have accrued at the time of the sale be legally remitted? For example, the board of education purchases a piece of property after the day on which the taxes for the year 1907 become a lien and on which the taxes for the year 1906 are delinquent. Is it proper to remit said 1906 taxes or any part of the taxes for the year 1907?
>
> "2. Sec. 961 refers to the selection of a clerk for the board of infirmary directors. Sec. 993 authorizes the secretary of the infirmary directors of Hamilton county to receive an additional sum of $100 per annum for his services as such secretary. Under these provisions, is the board of infirmary directors of Hamilton county authorized to employ a clerk other than the secretary selected and pay him a salary of $1,200 per year, and may the board legally employ a storekeeper at a salary of $50 per month in addition to such clerk?
>
> "3. Two actions were brought against the Union Central Life Insurance Company by the treasurer of Hamilton county to recover taxes claimed to be due. The first was filed August 3, 1903, and the second August 14, 1905. The first petition was filed by the county solicitor of Hamilton county, and the case was concluded by the regularly employed legal counsel under section 845. The second case was commenced and concluded by legal counsel. In both cases an attorney was employed by the commissioners as personal counsel for the treasurer, and said attorney was allowed and paid out of the taxes collected, in the first case, $1,955.26, and in the second case, $7,142.86. The total amount recovered by the county in the first case was $202,676.78 and in the second case, $750,000.
>
> "Question: Had the county treasurer any legal right to counsel at public expense other than the county solicitor and legal counsel, and if the money thus expended was without authority of law, may the same be recovered from the county treasurer or the attorney receiving the same?"

Authority for the remission of taxes is found in section 1038 R. S., which provides that:

> "The auditor shall, from time to time, correct all errors which he discovers in the tax list and duplicate * * when property *exempt from taxation* has been charged with tax. * *"

and 167 R. S., which provides that:

> "He (the auditor of state) may remit such taxes and penalties thereon as he ascertains have been illegally assessed."

It will be seen that in no case authority exists to remit taxes levied against property subject to levy. Accordingly, I am of the opinion that no officer has power to remit taxes which have become a lien upon property subsequently purchased by the board of education.

In answer to your second question, I beg to state that section 961 cited by you provides that:

> "The board (of infirmary directors) shall organize by appointing one member president and another clerk. * *"

Section 993 R. S. provides that:

> "In said (Hamilton) county, the directors of the county infirmary shall each receive the sum of three hundred dollars per annum, and the secretary shall receive the further sum of one hundred dollars per annum for his services as such secretary."

Section 986, being the section providing for special powers of the board of infirmary directors of Hamilton county, does not authorize the employment of a secretary as such nor does it authorize the employment of a storekeeper. The employment of a storekeeper is not authorized by any of the general statutes applicable to the powers and duties of infirmary directors. I conclude, therefore, first, that the word "secretary," as employed in section 993, should be construed synonomously with "clerk," as employed in section 961, and that the board of infirmary directors of Hamilton county may not appoint two clerical officers, one to be known as "secretary" and the other as "clerk." Second, that the board of infirmary directors of Hamilton county is without authority to employ a storekeeper, the duties of which officer would naturally devolve upon the superintendent of the infirmary under section 962 R. S.

With respect to your third question, I beg to state that, in my judgment, section 843 R. S. authorizes the employment by the county commissioners of counsel to represent the county treasurer in delinquent tax cases, or, in general, to perform legal services for any county officer in any case. Your letter does not disclose whether or not the employment of counsel, in the case presented by you, could be said to have been made under this section. I am satisfied that if the facts would justify such a conclusion, no legal criticism could be made of the allowance of the attorney's fees in question, notwithstanding the prior employment of permanent counsel as set forth in your letter.

On the other hand, if the facts disclose that the attorney was not employed under section 845, I am equally well satisfied that the employment, as such, was invalid. No other section of the Revised Statutes authorizes the employment by the county commissioners of counsel to represent the county treasurer in delinquent tax cases. Section 2862 R. S. authorizes the treasurer to receive reasonable counsel fees expended by him in *defending* any action brought against him for performing or attempting to perform any duty authorized or directed by any of the laws for the collection of public revenue. But this section clearly does not authorize the employment described by you.

If, therefore, the employment in question was made under any other section

of the Revised Statutes than section 845, it was without authority of law and the money expended was illegally expended. The expenditure, if illegal, however, cannot be charged against the county treasurer as he did not employ the attorney who received the illegal fees and as, in honoring the vouchers, if any, presented by such attorney, he was acting under authority of law. If the moneys are to be recovered for the use of the county they must be recovered from the attorney under section 1277 R. S., which provides in part that:

> "The prosecuting attorneys of the several counties of the state, upon being satisfied * * that any * * public moneys have been illegally drawn out of * * the county treasury, * * may apply by civil action in the name of the state, to a court of competent jurisdiction, * * to recover back, for the use of the county, all such public moneys * * so illegally drawn out * * from the county treasury. * *"

As is pointed out in Vindicator Printing Co. v. State, 68 O. S., 362-370, this statute was evidently designed to abrogate the common law rule respecting voluntary payments, as the same had been held to apply to municipal corporations and other subdivisions of the state, probably including counties. Whether and to what extent this evident object of the statute was attained by this enactment in the language employed by the general assembly, seems to be a matter of some doubt, in view of the apparently conflicting decisions of Printing Co. v. State, supra, and State ex rel. v. Froniser, 77 O. S. 7. In one case the statute was held to override the common law rule respecting voluntary payments made under a mistake of law, while in the later case it was held not to abrogate or modify the rule of equity and the common law that moneys paid under an illegal contract may not be recovered unless the party seeking recovery is able to and does offer to place his adversary, the recipient of the illegal payment, *in statu quo*. Hence, it was held, in the Fronizer case, that money paid for a county bridge under a contract void because of failure to comply with section 2834*b* R. S., after the bridge had been completed and accepted by the county, could not be recovered back for the use of the county under section 1277 unless the commissioners would and could place the contractor *in statu quo*. In the bridge case, as well as in the case presented by you, the physical impossibility of placing the defendant *in statu quo* was implicitly recognized and this impossibility of itself must be regarded as defeating a right of action.

The court in the Fronizer case draws a distinction between its decision therein and that in the Vindicator Printing Co. case. The distinction as drawn, however, is not altogether clear, and I am of the opinion that, should the case you present come before that tribunal for decision, and it should appear that the commissioners were without authority in the first instance to make the employment described by you, the principles well stated in State ex rel. v. Fronizer would be applied to its decision and the holding in Printing Co. v. State would be ignored.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BONDS ISSUED AFTER PASSAGE OF LONGWORTH ACT UNDER 95 O. L. 577 AND BEFORE SAID LAWS WERE REPEALED—EFFECT OF FULLY DISCUSSED.

December 3, 1909.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your communication in which you submit to this department for an opinion thereon the following inquiry:

> "Are bonds issued after the passage of the Longworth bond act, under volume 95 O. L., 677, 95 O. L., p. 709 and 80 O. L., p. 143, and before said laws were expressly repealed, to be considered in the limitation fixed by said Longworth bond act?"

In reply thereto, I beg to say that the purposes for which the issuance of bonds are authorized in the legislative enactments referred to in your inquiry are not enumerated in the purposes for which bonds may be issued under the provisions of the Longworth bond act. The question then remains, did the legislature intend the eight per cent. maximum bond issue, as provided in the Longworth act, to apply to bond issues for the purposes enumerated in said Longworth act and those only, or to apply to the total bond issue of any township, hamlet, village, city or other municipal corporation of the state of Ohio, whether enumerated in the Longworth act or not.

Section 2825 Revised Statutes, which is the first section of the Longworth act, provides:

> "That the trustees of any township or hamlet or the council, board of legislation or other legislative body or bodies of any city, village or other municipal corporation of the state of Ohio, shall have power to issue and sell bonds * * * for any of the purposes provided for in this act, etc."

Then follows an enumeration of purposes for which the bonds of the various political units above referred to may be issued. Following this enumeration and in the same section is the provision that:

> "The bonds herein authorized may be issued for any or all purposes enumerated herein, but the total bonded indebtedness hereinafter created in any one fiscal year under the authority of this act * * shall not exceed one per cent. of the total value of all property in such township, hamlet or municipal corporation, etc."

This section contains the following significant provision:

> "Provided, however, that the aggregate amount of all outstanding and unpaid bonds hereafter issued under authority of this act shall never exceed four per cent. of the total value of all property in such township, hamlet or municipal corporation, etc."

Section 2837 Revised Statutes, being the last section of the Longworth bond act, in providing a limitation for the amount of bond issue by any such political unit when the question is submitted to a vote of the qualified electors, fixes the rule:

"That no township, hamlet or municipal corporation shall hereafter create or assume an aggregate indebtedness of outstanding and unpaid bonds under the authority of this act in excess of eight per cent. of the total value of all property in such township, etc."

No place in the Longworth act is there the provision that the purposes provided for therein are the only purposes for which the political units referred to therein may issue bonds. Under the acts referred to in your inquiry the issuance of bonds was legalized for purposes not enumerated in the Longworth act. I therefore conclude that the bonds referred to in your inquiry are not to be considered in the limitation fixed by said Longworth act. In support of this conclusion see the case of Columbus v. Lazarus, et al., 15 Ohio Dec. at page 187.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—POWER TO FIX SALARIES OF DIRECTORS.

Present council may fix salaries of director of safety and service, but same may be changed at any time.

December 4, 1909.

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 1st, submitting for my opinion thereon the following question:

"As the directors of public service and public safety are subject to removal by the mayor, should the present council fix the salaries of said officers, and will such action be final for the period beginning January 1, 1910, and ending December 31, 1911?"

The question being as to *power* of the present council to fix the salaries of these officers, I am of the opinion that, while the Paine law is silent so far as express provisions are concerned, by fair inference from related provisions thereof the question is to be answered in the affirmative.

Section 3 of the act, 99 O. L., page 568, provides that:

"This act shall take effect and be in full force on and after August 1, 1909."

Section 227 of the act as amended, being one of the sections to which section 3 is applicable, provides simply that:

"Council * * * shall fix by ordinance or resolution the respective salaries, and compensation, and the amount of bond to be given for each officer, clerk or employe, in any department of the city government if any be required."

Aside from the mere fact that this section is now in full force and effect under section 3, the inclusion in the same clause of the language conferring

the power to fix salaries and language conferring power to fix the amount of bonds, is significant, as the latter should certainly be exercised before an anticipated change of administration, inasmuch as the filing of the bond in the amount fixed is an act of qualification on the part of each officer.

I conclude, therefore, that the present council may fix, by ordinance or resolution, the salaries of the director of public service and the director of public safety.

Your question is not answered, however, by determining the existence of the power to fix salaries. You desire to know whether such action, if now taken, will be final as to these officers for the period beginning January 1, 1910, and ending December 31, 1911; that is to say, during the term of office of the mayor who will enter upon the discharge of his duties on the first-named date.

Under sections 138 and 146 the tenure of office of these two directors is described as extending "until their successors are appointed and qualified." They, therefore, have no "terms of office" within the meaning of section 126 M. C. which provides that:

> "The salary of any officer, clerk or employe so fixed (by council) shall not be increased or diminished during the term for which he may have been elected or appointed."
>
> State ex rel. v. Massillon, 24 C. C. 249.

Accordingly, the salaries of the director of public service and the director of public safety, whether fixed by the present council or by the council as organized after January 1, 1910, may lawfully be changed at any time by council.

Very truly yours,

U. G. DENMAN,
Attorney General.

CITY AND JUSTICE COURTS, TOLEDO—FEES OF CLERK—FULLY DISCUSSED.

December 13, 1909.

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 November 24th requesting my opinion upon the following questions concerning the city and justice courts of Toledo, Ohio:

> "1. May the clerk of said courts retain for his personal use notarial fees received in taking acknowledgments for legal publications or other instruments of writing in connection with said courts?
>
> "2. May said clerk deduct and retain for his personal use 5% of all fees collected by him and payable to the city treasury? (See section 621-17 and 621-27 R. S.)
>
> "3. What is the legal disposition of unclaimed witness fees, jurors' fees and other unclaimed moneys remaining in the hands of said clerk for more than one year?"

By way of preliminary statement permit me to refer to an opinion of this department heretofore rendered in which it pointed out that section 3 of the municipal code authorizes city councils to organize justice of the peace courts

in municipalities, the boundaries of which are co-extensive with a township. Whether or not this section supplants such acts as that included within section 621-1 et seq., is a moot question which I do not desire to pass upon at the present time. However, if the council of the city of Toledo has acted under said section 3 M. C., by enacting an ordinance regulating the disposition of the fees of justices of the peace, their compensation, their clerks and their employes, this ordinance, and not the statute in question, should be looked to for answer to your question.

Assuming for the present that no such ordinance as has been described has been enacted by the Toledo city council, and that the city and justice courts of Toledo, Ohio, are being conducted under authority of section 621-1 etc., Revised Statutes, I beg to state with respect to your first question that, in my opinion, all legal fees received by the clerk of said courts, as such clerk, in matters connected with litigation therein should be paid by the clerk into the city treasury, excepting the 5% which may be retained by him for his personal use under section 621-17. Your question, however, relates to *notarial* fees. There is nothing in the law which prevents the clerk of this court from accepting a commission and acting as a notary in administering oaths and taking acknowledgments the same as any other notary public, and receiving the same fees as prescribed by law.

You mention in your first question the matter of taking acknowledgments for legal publications or other instruments of writing in connection with this court. Take, for instance, a publication of a notice for attachment, or any other legal publication, proof of which must be made by the publisher that the publication was run for the required number of times in the newspaper, the publisher, or some person under him, must make an affidavit before a notary public or other officer authorized to administer oaths. If such proof should be made before a notary public in some law office, the fee of forty cents therefor would be charged up in the costs along with the cost of publication in the newspaper, and both of these charges, the notary fee and the cost of publication, would be taxed in the costs in the case, and both charges would be collected by the clerk of the city and justice court, and the notary fee would be paid to the notary administering the oaths and the publication charges would be paid to the newspaper publishers. In other words, the matter of making proof as to the manner of the publication is a proceeding entirely outside of the court. It is not one of the matters which the clerk or the judge or justice of the court is required to do or to charge any fee therefor. There are many things which the clerk of the court is required to do by statute and to charge fees therefor. Such fees, except the 5%, belong to the city, but in my opinion, if the clerk of the city court has also taken out a commission as a notary public and administers an oath to some person or takes an acknowledgment of some person with reference to some paper the same as any outside notary might do, the acknowledgment or oath not being one which he is required to administer as clerk of the court in the proceedings there pending, the clerk is entitled to that fee for his own use as a notary public, the same as any other notary public, and it does not belong to the city.

Answering your second question, I beg to state that section 621-17 R. S. provides that:

> "The clerk of said court shall receive an annual salary of fifteen hundred ($1,500) dollars * * *; and he shall also receive as compensation for his services five (5) per centum of all fees collected and paid over by him to said city, to be retained and deducted by him from the money for paying it over."

This section, in my judgment, embodies an exception to the general language of section 621-27, which provides in part that:

> "The money so paid to said clerk or into said court shall be paid for the use of said city and be disposed of by him according to law."

and to the language of sec. 621-23, which provides that:

> "The clerk shall also receive and collect all costs * * of every description, * * and shall pay the same monthly to the treasurer of said city and take his receipt therefor."

It is my opinion, therefore, that the clerk of the city and justice courts of Toledo may receive, as part of his compensation, a sum equal to five per cent. of all fees collected and paid over by him, whether for services similar to those described in your first question or in payment of costs taxed and collected by him in cases disposed of in said courts. In other words, the percentage is to be based upon the moneys actually *collected* by the clerk and not merely upon fees payable to him as clerk.

Answering your third question, I beg to state that the act in question makes no provision for the legal disposition of unclaimed witness fees, etc., in the hands of the clerk.

Section 593 R. S., however, being of general application to justices of the peace, provides that:

> "All such moneys (referring to unclaimed fees, etc.), * * * as remain in the hands of the justice * * at the expiration of one year after the time of such advertisements (as are provided in sec. 592 R. S.), shall be by him paid over to the treasurer of the county * *."

I believe that the procedure outlined in section 593 and related sections should be employed in the case of unclaimed fees in the hands of the clerk of the city and justice courts. I do not regard this section 593, however, as mandatory; that is, in my opinion, it is not mandatory upon the clerk at the end of the year, regardless of any and all circumstances, to turn such unclaimed witness fees, juror fees and other unclaimed moneys, remaining in the hands of the clerk at the end of the year, into the county treasury, but the clerk may make further effort to find or notify the persons to whom these fees legally belong that they are in his hands to be paid to them. The clerk, of course, cannot keep them indefinitely for such persons or spend an unreasonable amount of time in getting them to the proper parties for whom they were taxed. The object of this statute, the same as many others of its kind, is to secure reasonable dispatch in the disposition of the business, but it does not require that the clerk be studious in taking advantage of the expiration of the exact time named in the statute, and thus prevent the persons who gave their time to this service from receiving what the general assembly meant they should have as compensation. Of course the clerk is not in any event authorized to appropriate these moneys to his own use. He must at some time or another, if they are not claimed by the proper outside parties, turn them into the county treasury. This statute not being mandatory, but directory only, I do not see that any rigid rule can well be made in such cases. Many circumstances may intervene accounting for the failure of the proper parties to call for this money which the law allows them, and I am clearly of the opinion that it is within the

power of the clerk to give further time for the claiming of these fees. If at any time after the expiration of a year it appears to him from honest investigations that this money will not be claimed, it is then his duty to turn it into the county treasury.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—PURCHASE OF LIGHT PLANT.

Council has authority to purchase for municipality an electric light plant but purchase may not be made until money in treasury.

December 16, 1909.

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

GENTLEMEN:—Your Mr. Tracy has submitted to me a letter addressed to him by Hon. O. L. Aumiller, city auditor of Nelsonville. From the letter and from statements made by Mr. Tracy I have gathered the following statement of facts, concerning which my opinion is requested:

> The city of Nelsonville owns and operates, through its department of public service, an electric light plant which furnishes current not only for the municipal lights but also for private consumption. There is in the city a private electric light plant having antiquated machinery and fixtures which has been operating in competition with the municipal plant. As a result of this competition neither of the plants is being operated at a profit, and the proprietors of the private plant are now willing to sell the same, and the fixtures, wires, poles, etc., appurtenant thereto, to the city. The purchase of the plant, as a means of removing competition injurious to the municipal plant, is conceded to be desirable. However, there is doubt, and some controversy, as to the department of the municipal government which is empowered by law to act for the city in making the purchase, and as to the procedure to be followed by such department in the premises.

Under the general scheme of government outlined in the municipal code, but two departments of the city government suggest themselves for consideration in this connection, viz: the council and the department of public service. The powers of these two departments are set forth in the following sections of the code:

Section 116:

> "The legislative power of every city shall be vested in, and exercised by a council * * *"

Section 123:

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever * * *. All contracts requiring the authority of council for their execution shall be entered into

and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon."

Section 127:

"* * * all powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein."

("The power of the municipality to make the purchase in question is clear and no authority is cited thereon.")

Section 139:

"The directors of public service shall be the chief administrative authority of the city, and shall manage and supervise all public works and all public institutions, except where otherwise provided in this act."

(After January 1, 1910, the department of public service will, of course, be administered by a single director, but the powers of such director may be regarded for the purposes of this discussion as identical with those of the present board of public service.)

Section 140:

"The directors of public service shall supervise the improvement and repair of streets * * * and the construction of all public improvements and public works, except as otherwise provided in this act."

Section 141:

"The directors of public service shall have the *management* of all *municipal* * * * lighting * * * plants * * * as well as all * * * other property of the corporation not otherwise provided for herein."

Section 143:

"When any expenditure within said department (of public service) * * * exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council, and when so authorized and directed, the directors 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 said etc."

Section 144:

"All contracts made by the directors of public service shall be executed by them in the name of the city * * * and no liability shall be created against the city as to any matters under the supervision of said departments except by its express authority * * *."

Careful examination of the foregoing and related provisions of the municipal code applicable to the department of public service, and the corresponding

provisions of the Paine law, 99 O. L. 562, discloses the fact that the powers of that department are limited strictly to the management, maintenance and control of public utilities once established. The power to create a public utility, such as a municipal water works or lighting plant, clearly does not rest with this department, but it is a legislative power to be exercised by council under its general grant of power as above set forth. Again, the contracts which, in the exercise of its general powers, the department of public service is authorized to execute, are those which may be executed in conformity with the requirements of section 143 above quoted, and it does not seem to have power to make an out and out purchase of a particular thing such as that contemplated in the question submitted. I think it may at least be said that the question as to the power of the department of public service to execute a contract such as that in question is doubtful. That being the case, the doubt must be resolved in one direction or the other by either strict or liberal construction of the sections conferring power upon the department. It is very well settled that the powers of boards and officers, such as the department of public service, must be strictly construed. In addition to those expressly set forth in the statutes they have only such as may arise by fair implication because essential to carry out the express powers. The power to make the purchase in question does not, it seems to me, by fair implication, arise from the power to *manage* existing municipal utilities, and in this connection the fact that the municipality already owns and operates an electric light plant is significant.

Having determined that the power to make the purchase in question does not exist in the department of public service, the conclusion is reached that council must exercise the same. This would follow without difficulty from the general language of section 127 above quoted, were it not for the negative language of section 123. The code does not define "administrative duties." By fair inference, however, from the section and other sections of the code which are in point, it may be determined that the prohibition against the exercise of "administrative duties" by council is inserted to prevent council from interfering, after it has appropriated the necessary money, with the expenditure of the same by the various departments in the executive branch of the municipal government, in the exercise of the powers expressly conferred upon them. The prohibition, in other words, does not appear to deprive council of the residuary powers, nor to confer upon any executive or administrative board power or jurisdiction over a subject-matter not within its province by virtue of express provisions of statutes or fair implication therefrom.

That council may itself expend moneys without the intervention of any executive department is fairly inferable from section 45 M. C., which provides in part that:

> "No contract, agreement, or other obligation involving the expenditure of money, shall be entered into, nor shall any ordinance * * * for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation unless the auditor shall first certify to council that the money required * * * * is in the treasury, etc. * * *."

The section last quoted suggests the proper procedure in the matter. If the money needed to make the purchase is now in the treasury, and the auditor can and does certify to that fact, council may appropriate the money and make the purchase by the enactment of a single ordinance, and without any further steps on the part of any municipal authority.

By the information furnished me, however, I have been led to understand that such is not the case, and that it will be necessary to issue bonds in order to obtain funds to make the purchase contemplated. Such bonds may be issued under the Longworth act, section 2735 R. S. In making such issue, of course, the requirements not only of that act, but of all the sections of the municipal code relating to the sale of bonds must be followed. The contract may not be entered into, in case bonds are issued, until the bonds have been legally sold and are in process of delivery, for not until then may the certificate of the auditor that the money is in the treasury, etc., as required by section 45 M. C., be made. The power to make such certificate in the case of money to be derived from the issue of bonds is found in section 45*a* M. C.

It thus appears that in case bonds are to be issued they must first be advertised for sale, according to law, and must be actually sold and in process of delivery before council may lawfully pass an ordinance purchasing the property in question.

Very truly yours,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—COMMISSIONERS MUST REQUIRE SURVEYOR TO COMPLY WITH SECTION 4919-1.

December 17, 1909.

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

GENTLEMEN:—Your communication is received in which you submit the following inquiry:

> Section 4919-1, 99 O. L., page 361, contains the following provision:
> "For the purpose of repairs, the commissioners shall annually between the first day of January and the first day of March, cause the surveyor of the county to go upon all of the improved roads within the county, and make written reports to the county commissioners on or before the first day of April, annually, of the amount and nature of the repairs needed on said various roads for the ensuing year, which report shall contain an estimated cost of such repairs, both as to labor and material, and said surveyor shall separately estimate the cost of the labor and material necessary for the making of such repairs."
> Query: Is this provision mandatory on the part of the county commissioners?"

In reply I beg to say: The above quoted provision of section 4919-1 is contained in an act entitled an act "To amend and supplement section 4919 of the Revised Statutes of Ohio, to provide for the repairs and maintenance of highways by county commisioners by direct labor, passed and approved May 9, 1908."

This act applies to all counties in the state, and is, therefore, uniform in its operation, and since the supreme court has declared the turnpike director law unconstitutional, the repair of all improved roads comes under the provisions of this act.

From the language used in the above quoted provision, towit:

> "For the purpose of repairs, the commissioners *shall annually between the first day of January and the first day of March cause the sur-*

veyor of the county to go upon all the improved roads within the county, and make written reports to the county commissioners on or before the first day of April, annually."

It is my opinion that the duty therein required of the county commissioners is mandatory. That is to say, the county commissioners must, without the exercise of any discretion, cause the surveyor to go upon all the improved roads of the county and make reports annully to the board of county commissioners as required in this section.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—TERM FOR WHICH CLERK MAY BE ELECTED.

A board of education may not elect clerk for term extending beyond term of majority of board.

December 20, 1909.

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

GENTLEMEN:—Your letter of December 14th, in which you request my opinion upon the following statement of facts, is received:

> "Township school boards consist of five members elected for terms of four years. A township board of education in which three members were elected in November, 1909, elected a clerk in January, 1909, for a term of two years, the term of said clerk thus extending beyond the term of the majority of the board that elected him.
>
> "Query: Can said clerk so elected hold his office for the year 1910 or has the new board the right to elect its own clerk upon its organization, the first Monday of January, 1910?"

In reply thereto, I beg leave to submit the following opinion: Section 3915 R. S. reads in part as follows:

> "The board of township school districts shall consist of five members elected at large at the same time and in the same manner as the township officers are elected, for the term of four years from the first Monday in January after their election (or) until their successors are elected and qualified. At the first township election held after the passage of this act, there shall be a board of education elected in all township districts as provided for herein, two to serve for two years and three to serve for four years, and at the township election held every second year thereafter, their successors shall be elected for the term of four years. * * *"

Section 3920 R. S. reads in part as follows:

> "Boards of education of township school districts shall organize on the first Monday in January *after the election of the board*, by the

election of one of their members president and the election of a clerk who may or may not be a member of the board, the president to be elected for one year, *and the clerk to be elected for a term not to* exceed two years; * * *."

By the first of the above quoted sections the township school board becomes virtually a new board every two years because of the retirement of either two or three of its members, as the case may be, and the election of their successors.

Section 3920 specifically provides that the boards of education of township school districts shall organize on the first Monday in January after the election of the board by the election of a president and a clerk whose term shall not exceed two years. From the above quoted provisions of the statutes it would seem clear, and I am of the opinion that the legislature have evinced the intention to limit the power of township boards of education in the election of clerks to the period during which such boards shall be in existence, and that as such boards are renewed in part, and thereby become new boards, every two years, a board of education may not elect a clerk to hold office for a period of time which shall extend beyond such "two year existence" of the board of education so electing.

I am, therefore, of the opinion that the clerk of the township board of education in your statement of facts elected by such board for a term of two years to run through January, 1909, cannot hold such office after the first Monday in January, 1910, because of the election of three new members to such board this past November. By virtue of the election of these three members in November, the township board becomes a "new" board of education upon the taking office of such members on the first Monday in January, 1910, and, therefore, the new board has the right to elect its own clerk upon its organization the first Monday in January, 1910.

Very truly yours,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—STATE AID FOR REPAIRS.

Levy of commissioner to secure state aid money must be made on property of every township in county.

Three townships which have enjoined the commissioner from making state aid levy on property in such townships, are not entitled to any state aid money.

December 23, 1909.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter with enclosure inquiring as to the distribution to townships of money received by Wood county under the state highway law for state aid for repairs to roads. The facts presented are as follows:

Under section 4889 et seq. R. S., each township in certain named counties constitutes a separate road district.

Under section 4896 and 4897 it is provided that each of the other counties of the state shall be divided into three separate road districts.

Wood county comes under the latter provision, but the three townships of this county have, under sections 4686-1 to 4686-25, become separate road dis-

tricts. It appears, however, that in making the county levy provided for under section 31 of the state highway law the county commissioners have made no levy upon such three townships, and it further appears that such three townships have a permanent injunction against such county commissioners forbidding them to make any levy whatever for road purposes upon the property of such three townships. Because of these facts the county commissioners have distributed state aid money only to the seventeen townships upon the property of which they have made a levy under section 31 of the state highway law and have refused to make any distribution of state aid money to such three townships.

You ask my opinion as to the legality of the action of such county commissioners.

The present complicated condition of our road laws is indicated by the second paragraph of the syllabus of our supreme court in the recent case of Thorniley, auditor, et al. v. State ex rel., 81 O. S. This paragraph reads as follows:

> "Section 4903, being an essential part of a statute providing for the management and control of highways by essentially different methods in different counties of the state, is void because repugnant to section 26 of article II of the constitution that all laws of a general nature should have a uniform operation throughout the state."

While the supreme court in this case declared only section 4903 to be unconstitutional, the reasons therein set out apply likewise to classifications contained both in sections 4889 et seq. and 4896 and 4897 et seq. I do not believe, however, that this decision applies to the provisions of 4686-1 et seq. for the reason that this latter law is a general law applying to "any township in this state."

To my mind, however, the question of constitutionality is not the most important factor in the determination of the particular question asked. Section 31 of the state highway law makes it the duty of the county commissioners who receive state aid money to "levy on the total tax duplicate of said county a tax sufficient to equal the amount so apportioned to such county by the state," and further that "such appropriation and levy shall become a part of the pike repair fund of the several townships and shall be apportioned to the townships or road districts composed of not less than one township pro rata to the amount of the fund arising in each township or such road district by said levy."

Under this provision of law it was the duty of the county commissioners to levy upon such three townships, since the state highway law specifically provides that the levy shall be made upon the property of every township and permits of no exceptions. The county commissioners, however, were prevented from making such levy upon such three townships by a permanent injunction. It may be true that they should have made application to the court to modify the injunction so as to permit a levy in this particular case, but the fact that the three townships insisted upon their injunction and refused to permit such levy estopped them from claiming any benefits which they could have derived had such levy been made. When, therefore, the county commissioners came to the distribution of this fund among the townships and complied with that provision of the law which provides that such fund "shall be apportioned * * pro rata to the amount of the fund arising in each township or such road district by said levy," they could distribute no part of such fund to any of these three townships for the reason that no fund had arisen in any of such three townships by said levy of the county commissioners. In addition to this, the whole spirit of the state highway law is to give the aid of the state to counties and

townships only on the condition that such counties or townships contribute an amount of money equal to or greater than the amount given by the state.

I am, therefore, of the opinion that outside of the intricate questions of constitutionality and legality involved in this case, the township trustees are estopped by their own conduct and by the letter and spirit of the state highway law from claiming any part of the state aid money which has been paid to Wood county under section 31 of the state highway law.

Very truly yours,

U. G. DENMAN,
Attorney General.

JUSTICE OF PEACE—SHERIFF SPECIAL CONSTABLE—DISPOSITION OF FEES.

December 28, 1909.

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

GENTLEMEN:—Your communication is received in which you submit the following inquiries:

> "May a sheriff or deputy sheriff be designated by a justice of the peace as a deputy or special constable, and if so may he legally retain the fees of the constable for writs issued from a justice's court, or must such fees be turned into the county treasury to the credit of the sheriff's fee fund?
>
> "In the event the docket of the justice of the peace does not indicate the appointment of a sheriff or deputy as a special constable, but the return of the writs are signed as special constable, should the fees be turned into the county treasury to the credit of the sheriff's fee fund?"

In reply I beg to say section 1211 of the Revised Statutes, which fixes the general powers and duties of sheriffs, contains this provision:

> "and shall execute all warrants, writs and other process to him directed by the *proper and lawful authority.*"

Section 7137 Revised Statutes provides that warrants issued by magistrates in misdemeanors

> "shall be directed to the sheriff or to any constable of the county, or, when it is issued by an officer of a municipal corporation, then to the marshal or other police officer of such corporation * * who shall command the officer forthwith to take the accused and bring him before the magistrate or court issuing the warrant."

Under the above quoted provision of section 1211 it is the duty of the sheriff to execute all warrants directed to him by "the proper and lawful authority," and under the provision of section 7137, above quoted, the magistrate has the authority to direct a warrant in a misdemeanor case to a sheriff.

I am, therefore, of the opinion that in the absence of an appointment by a magistrate whereby the sheriff is to act as special constable, the sheriff's fees when earned in the magistrate's court shall be turned into the fee fund. How-

ever, when a magistrate appoints a sheriff as a special constable and the docket so shows, and the warrant is issued to him as such special constable, it is my opinion that the fees so earned will not be required to be credited to the sheriff's fee fund.

Yours very truly,

U. G. DENMAN,
Attorney General.

EXPENSES OF MUNICIPAL LIBRARIAN TO CONGRESS OF LIBRARIANS MAY BE PAID OUT OF MUNICIPAL FUNDS.

December 30, 1909.

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

DEAR SIRS:—By your favor of December 24th, receipt whereof is hereby acknowledged, I am advised that the information upon which an opinion of this department rendered November 29, 1909, with relation to the board of library trustees of the city of Toledo was based, was erroneous in that said board of library trustees instead of being organized under and governed by the provisions of section 4002-23 R. S. is organized under and subject to section 218 M. C.

At the suggestion of the city auditor of Toledo you have requested me, in view of the misapprehension, to reconsider the former opinion, and I have carefully done so.

Section 218 provides in part as follows:

> "The custody, control and administration * * * of free public libraries established by municipal corporations, shall be vested in six trustees * * * said 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 library and all property belonging thereto, and exercise all the powers and duties connected with and incident to the government, operation and maintenance thereof * * *."

Said section 218 does not, nor does any of the other sections of the municipal code prescribe the duties of the librarians. It is very clear from the language above quoted that the power to prescribe such duties is vested in the trustees. Subject only to the limitation that the same shall not be abused there is here found that broad discretion which cannot be controlled by judicial or other administrative action. The librarians are specifically referred to as employes and are in no sense officers of the city. Their compensation need not be in the nature of salary. Their duties may be whatever are prescribed by the trustees, and these may include attendance upon conventions or conferences pertaining to library management.

I therefore conclude that the expenses questioned by the city auditor are legal charges and should be paid.

In your letter it is suggested that the fund from which the expenses are to paid, if at all, is that raised by special taxation under said section 218. Permit me to remark in passing that if this was the case the tax so levied was void, as the power of the municipality to levy a special tax for library purposes under section 218 is limited to the purpose of paying the proceeds thereof

"to a private corporation or association maintaining and furnishing a free public library for the benefit of the inhabitants of a municipality."

As I now understand the situation, the Toledo public library is a municipal enterprise, and is not conducted by a private corporation or association. As a municipal enterprise it is supported by funds appropriated by council. It may be that the appropriation was so made as to prohibit the payment of the expenses in question, but if the trustees have the use of a general fund appropriated by council I am of the opinion that the vouchers should be paid.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Treasurer of State)

SAFE DEPOSIT AND TRUST COMPANY—AMOUNT OF DEPOSIT REQUIRED TO DO BUSINESS.

February 20th, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Replying to your inquiry as to the amount of deposit required by law to be made with the treasurer of state by safe deposit and trust companies before they shall accept any trusts which may be vested in, transferred or committed to them by any individual or by any court, I refer you to section 69 of the "Thomas Banking Act," passed May 1st, 1908, which answers your inquiry in the following language:

> "The capital of such corporation shall, with all its property and effects, be absolutely liable in case of any default whatever in any of the trust positions aforesaid, and the probate court, or any other court committing a trust to the custody of such corporation, may, at any time it deems proper, require additional security in any amount necessary. *Provided, however, that no such corporation, either foreign or domestic, shall accept any trusts which may be vested in, transferred or committed to it by any individual, or by any court, until the paid-in capital of such corporation shall be not less than one hundred thousand dollars, and until such corporation shall have deposited with the treasurer of state* $50,000.00, *provided its capital is* $200,000.00, *or less, and* $100,000.00, *provided its capital is more than* $200,000.00, *such deposit to be in cash;* provided the full amount of such deposit so to be made by any such corporation may be made in bonds of the United States or of the state of Ohio, or of any municipality or county within said state, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past has paid dividends of at least three per cent. on its common stock * * *."

Yours very truly,

U. G. DENMAN,
Attorney General.

TERRITORIAL BONDS—NOT WITHIN DEPOSITORY ACT.

March 13th, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter in which you submit the following inquiry:

> "Will you advise me whether or not territorial bonds would be considered the same as U. S. bonds under sec. 5 of the depository act, the kind of security defined that must be put up to secure funds placed in banks designated as depositories."

In reply permit me to say that section 5 of the state depository act provides:

> "The treasurer of state, before making such deposits or selecting any state depository or depositories under this act, shall require each and every national bank, state bank or trust company selected by him as a state depository, to deposit with the treasurer of state, United States government bonds, or state bonds of this state, or county or municipal bonds of counties or municipalities of this state, or surety companies bonds, at not less than their par value, in an amount equal to the amount of money to be deposited with such bank, banks or trust companies, conditioned for the receipt and safekeeping and payment over to the treasurer of state or his written order of all money which may come into the custody of such bank, banks or trust companies, under and by virtue of this act, and the interest thereon when paid, shall be turned over to the bank or trust company, so long as it is not in default, etc."

I am of the opinion that territorial bonds do not come within the provision of this statute and the treasurer of state is not authorized to receive the same.

Very truly yours,

U. G. DENMAN,
Attorney General.

SAVINGS DEPOSIT BANK AND TRUST COMPANY OF ELYRIA—AMOUNT OF SECURITIES TO BE KEPT ON DEPOSIT.

March 16th, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your letter has been received in which you inquire what amount of securities should be kept on deposit by the Savings Deposit Bank and Trust Company of Elyria, Ohio, to secure the faithful performance of trusts assumed by it.

I am not informed in your inquiry whether or not said trust company has availed itself of the privileges and powers of the Thomas banking act, 99 O. L. 269.

If it has, then sec. 69 of said act governs, and therefore, if its capital stock is not over $200,000.00 it is required to deposit cash or the securities mentioned in said section amounting to $50,000.00.

If said trust company has not complied with the provisions of the Thomas banking act, its deposits should be made under the provisions of sec. 3821*d* of the Revised Statutes, which provides that if the principal place of business of the company is in a city which, by the last preceding federal census, had a population of less than 33,000, such trust company shall make deposits with the state treasurer amounting to $25,000.00.

Very truly yours,

U. G. DENMAN,
Attorney General.

TRUST COMPANIES---CLASS OF BONDS TO BE DEPOSITED TO SECURE FAITHFUL PERFORMANCE OF TRUST.

Columbus Light, Heat and Power Co. bonds do not come within provision of statute governing deposits by trust companies regardless of the fact that such trust companies have or have not complied with the Thomas banking act.

March 16th, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter in which you inquire:

> "Will you advise me whether or not The Columbus Light, Heat & Power Company bonds come within the statute governing the class of securities to be deposited with this department by trust companies for the faithful performance of all trusts assumed by such corporations. The above named company was formerly the old Columbus Public Service Company."

I am not informed in your inquiry whether or not the trust company offering such bonds has availed itself of the privileges and powers of the Thomas banking act (99 O. L. 269).

If it has, then sec. 69 of said act governs; if it has not, then sec. 3821*d* R. S. governs.

Sec. 69 of said act is in part as follows:

> "That no such corporation, either foreign or domestic, shall accept any trusts which may be vested in, transferred or committed to it by any individual, or by any court, until the paid-in capital of such corporation shall be not less than one hundred thousand dollars, and until such corporation shall have deposited with the treasurer of state $50,000.00, provided its capital is $200,000.00 or less, and $100,000.00, provided its capital is more than $200,000.00, such deposit to be in cash; provided the full amount of such deposit so to be made by any such corporation may be made in bonds of the United States or of the state of Ohio, or of any municipality or county within said state, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past has paid dividends of at least three per cent. on its common stock."

Since the bonds mentioned in your inquiry do not come within the terms of the above section, it is my opinion that you are not authorized to receive the same if offered by a company which has complied with the other provisions of the Thomas banking act.

However, trust companies by the terms of sec. 91 of said act, are not required to comply with sections 1 to 77 before April 1st, 1910, and all such companies which do not comply must make their deposits in accordance with the provisions of sec. 3821*d*, which authorizes a deposit "in cash or in securities in which said company is allowed by law to invest its capital."

By the terms of sec. 3821*a* the capital of trust companies may be invested:

> "In the authorized loans of the United States, or of the state of Ohio, or cities, counties or towns of this state, or the stocks or bonds

of any state in the union that has for five years previous to such investment being made regularly paid the interest on its legal bonded debt in lawful money of the United States, or cities, counties or towns of such states, which shall have so paid the interest on the legal bonded debt of such cities, counties or towns, or stocks of national banks organized within this state, or the first mortgage bonds of any railroad company within the states above named, which has earned and paid regular dividends on its stock for five years next preceding such loan, or investment, or first mortgages on real estate in this state, or of individuals with a sufficient pledge of any of the aforesaid securities, or may be loaned to this state, or to any county, city or town therein"

By the provisions of sec. 3821*g*, any safe deposit and trust company engaged (exclusively) in the business of a safe deposit and trust company is further authorized to invest its capital:

"In the stocks or (of) gas light and coke companies, gas companies, gas and electric light companies, or stocks of street railway companies which have paid regular dividends on their stock for five years next preceding such loan or investment, and are located in the county in which such safe deposit and trust company is located, or in which it has its principal office."

The last section above quoted does not include "bonds" of the companies therein mentioned, but is confined to investments in stocks.

I am of the opinion that the bonds mentioned in your inquiry do not come within the provisions of the sections governing deposits by trust companies which have not complied with the Thomas banking act.

It follows, therefore, that the Columbus Light, Heat and Power Company bonds do not come within the provisions of the statutes governing deposits by trust companies regardless of the fact that such trust companies have or have not complied with the Thomas banking act.

Very truly yours,

U. G. DENMAN,
Attorney General.

TRUST COMPANIES—CLASS OF SECURITIES TO BE DEPOSITED WITH TREASURER OF STATE.

March 26th, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter with reference to the authority of the treasurer of state to receive the common stock of a shoe company as a deposit by trust companies, to secure the faithful performance of all trusts assumed by them.

The provisions of law relating to such deposits were given you in an opinion by the attorney general on the 16th inst.

The stock mentioned in your inquiry does not come within the class of securities provided by law, and I am of the opinion that you are not authorized to receive the same. Very truly yours,

U. G. DENMAN,
Attorney General.

TITLE GUARANTEE & TRUST COMPANY—AUTHORITY OF STATE TREASURER TO MAKE DEPOSITORY.

April 22, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Complying with your request for an opinion as to whether the Title Guarantee & Trust Company of Columbus is such a trust company as may be designated as a depository of state funds by the depository board, I beg to advise that in my opinion the board is authorized under the statute to designate this company as one of the state depositories if the company's financial condition is such as, in the opinion of the board, will warrant the same.

Section 200-3 of the Revised Statutes provides that:

> "It shall be the duty of said board of deposit to meet on the first Monday in October of each year, or any time after the annual meeting, upon the call of the chairman, and designate such banks, and trust companies within this state, as they may, under the provisions of this act, deem eligible to be made state depositories for the purpose of receiving on deposit funds of this state."

This statute just quoted controls in the matter and leaves the board free to select any bank or trust company which the board may deem financially responsible and properly managed as a state depository.

Yours very truly,

U. G. DENMAN,
Attorney General.

SUBSTITUTING STREET RAILWAY BONDS FOR RAILROAD BONDS BY TRUST COMPANY.

April 28, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Replying to your oral inquiry as to whether the Valley Savings Bank and Trust Company may legally substitute Columbus Light and Power Company bonds for Hocking Valley Railway Company bonds now deposited by said company with you as treasurer, I may say that having considered the matter, I believe the opinion rendered you under date of March 16, 1909, is, as you suggest, applicable to this inquiry and should govern.

The term "railroad company" as used in section 3831*a* Revised Statutes is generally understood to have been intended to apply to steam railroads only, and in the absence of judicial construction to the contrary I am not disposed to advise that you can legally accept the Columbus Light and Power Company bonds as a substitute for the Hocking Valley Railroad Company bonds.

Yours very truly,

U. G. DENMAN,
Attorney General.

BANKS AND TRUST COMPANIES—CERTIFICATE OF DEPOSIT—SECURITY FOR FAITHFUL PERFORMANCE OF TRUSTS TO BE DEPOSITED WITH TREASURER OF STATE.

Certificates of deposit given by banks may not be accepted by treasurer of state from trust companies and banks as security for faithful performance of trusts assumed and undertaken by law.

June 8, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit for an opinion of this department thereon the following inquiry:

> "Will you kindly advise me whether or not certificates of deposit given by banks can lawfully be accepted by this department from trust companies and banks as security for the faithful performance of all trusts assumed or undertaken as provided by law?"

A reply to this inquiry involves consideration and construction of several sections of the Revised Statutes of considerable length and I shall, therefore, make reference to the sections by number and not copy the same herein.

It is expressly provided in section 3821*d* Revised Statutes and in section 69 of the act relating to "the organization of banks and the inspection thereof" which amends section 3821*d*, that the treasurer of state shall hold a deposit in money or securities of a character provided for by law as security for the faithful performance of all trusts assumed by banks and trust companies. The legislature has expressly provided that this deposit shall be in cash or in certain particular securities. The fact that the legislature has enumerated the numerous forms of indebtedness that will be acceptable as such deposit for the faithful performance of all the trusts assumed by any corporation is to be construed as meaning that all other forms of security must be rejected by the treasurer of state as not meeting the requirements of the law in this particular.

We turn now to the statutes enumerating such deposits as are authorized to be made with the treasurer of state, and it may be remembered in this connection that section 3821*d* Revised Statutes authorizes a deposit "in cash or in securities in which said company is allowed by law to invest its capital." If, therefore, "certificates of deposit given by banks" are set forth in any of the sections of the Revised Statutes as being such securities as may be deposited with the treasurer of state or as being a proper legal investment duly authorized by the company tendering the same to the treasurer of state, such certificates of deposit will be acceptable, otherwise not.

Turing then to sections 3821*a* and 3821*aa* (98 O. L. 395), 3821*d* and 3821*g* R. S., and if the company offering to deposit securities with the treasurer of state for the faithful performance of any trusts to be assumed by such corporation has complied with the provisions of the Thomas banking act (99 O. L. 269) we must look to section 69 and 70 of said act.

In none of the sections of the Revised Statutes above mentioned or referred to do we find "certificates of deposits given by banks" designated as proper security to be deposited with the treasurer of state for the faithful performance of trusts, nor do we find any such companies after having made the legally required deposit with the treasurer of state having any authority to invest its funds in certificates of deposit.

I have, therefore, reached the conclusion that certificates of deposit given by banks may not be accepted by you as treasurer from trust companies and banks as security for the faithful performance of all trusts assumed or undertaken as provided by law. This same rule will apply to and govern in the construction of "An act to provide a depository for state funds," being section 200-6 Revised Statutes, passed April 25, 1904, and section 5 thereof as amended March 12, 1909, 100 O. L. 13. Yours very truly,

U. G. DENMAN,
Attorney General.

TRUST COMPANY—CLASS OF SECURITIES THAT MAY BE ACCEPTED BY TREASURER OF STATE.

Treasurer of state may accept corporate stock certificates issued by New York City, as provided in section 69 of Thomas banking act, from trust company doing business in Ohio, as security for faithful performance of all trusts assumed by such companies in Ohio.

September 1, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> Is the treasurer of state authorized to accept as security for the faithful performance of all trusts assumed or undertaken by trust companies doing business in Ohio corporate stock certificates issued by the city of New York as provided in sec. 69 of the Thomas banking act or any other section of the Revised Statutes?

In reply thereto I beg to say that the kind of securities which may be deposited with the treasurer of state by trust companies as a guarantee for the faithful performance of trusts which may be assumed and administered by such companies are designated in sections 3821*a*-3821*d* Revised Statutes and section 69 of "An act relating to the organization of banks and the inspection thereof," 99 O. L. 284. It will be noted that the legislature limits the deposit to be made with the treasurer of state to "bonds." The quesion, therefore, presented in your inquiry is, does the word "bonds" as used in the statutes above referred to include corporate stock certificates issued by the city of New York? The word "bond" is a generic term, and if the faith and credit of the city of New York is pledged under seal for the payment of such stock certificates so as to give the same legal effect as if the municipal obligation were designated "bonds" instead of "corporate stock certificate" then, in my opinion, you would be authorized to accept as security for the faithful performance of trusts by trust companies these corporate stock certificates.

It seems logical to conclude that municipal bonds or bonds as used in these statutes mean any negotiable obligation by which a municipality is bound to repay money which it has borrowed, and is not used in the narrow sense of an instrument in the strict common law form of a *bond.*

It is provided in the charter of the city of New York (laws of the state of New York of 1901, chapter 466) section 169, as follows:

> "All bonds issued by the city of New York on and after January 1, 1898, in pursuance of laws already passed or which may hereafter be

passed or in pursuance of the provisions of this act, excepting assessment bonds and revenue bonds, shall be known as 'corporate stock of the city of New York.' For the redemption or payment of such corporate stock and interest thereon the faith and credit of the city of New York shall be and is hereby pledged. Such corporate stock shall be in such form as may be designated by the comptroller and shall be signed by the said comptroller and the mayor of the city of New York and sealed with the common seal of the city of New York and attested by the city clerk."

It is further provided in section 117 of the charter as follows:

"The mayor may designate by an instrument in writing a clerk or subordinate in his office whose duty it shall be to sign corporate stock or bonds of the city of New York whenever under any provision of this act or other statute the mayor is required to sign such corporate stock or bonds."

Furthermore, as a matter of custom and usage, the words "corporate stock" and "bonds" of the city of New York are treated as meaning the same thing. It seems unnecessary to go into an elaborate review of the subject and the historical reasons for the use of the different terms meaning, for all practical purposes, the same thing.

I am, therefore, of the opinion that you are authorized to accept as security for the faithful performance of all trusts assumed or undertaken by trust companies doing business in Ohio "corporate stock certificates" issued by the city of New York, if issued in accordance with the law providing for the issuing of such stock certificates as above indicated and copied.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE BOARD OF AGRICULTURE—REMOVAL OF MEMBER FROM OFFICE INTEREST ON FUNDS IN BANK—ACCOUNTABLE FOR.

September 3, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you state that on October 10, 1903, the Ohio state board of agriculture made a deposit with the Citizens Savings & Trust Company of Cleveland in amount of $10,000; that said deposit remained with said bank with accrued interest until December 18, 1908, when the same in amount of $11,030.40 was withdrawn from said bank and the pass-book surrendered to the banking company. You further state that the trust company has paid, or agrees to pay, interest on this deposit up to and including September 30, 1908, but refuse to pay interest from October 1 to December 18, 1908, inclusive, for the reason that the deposit was made in accordance with the established rule of the company relating to interest on deposits, which provides that deposits must remain for a period of three months in order to accrue interest thereon. You then inquire if this trust company is liable for the interest on this deposit of the department of agriculture from

October 1 to December 18, 1908, and if not so liable, is the Ohio state board of agriculture or its treasurer liable for the interest on this deposit from October 1 to December 18, 1908, because of the provisions of the act passed May 1, 1908, relating to the reorganization and duties of the state board of agriculture.

Replying thereto, I beg to say that prior to the act of 99 O. L. 592*a*, relating to the handling of funds and the rendering of statements as to the Ohio state fair there was no provision of law that required the Ohio state board of agriculture to turn its receipts into the treasury of the state immediately upon receipt of the same or until the expenses of conducting the state agricultural exhibition had been paid.

That part of section 3694 Revised Statutes which is pertinent to and controlled the funds of the Ohio state board of agriculture in this connection prior to May 1, 1908, provided that:

> "The board shall have the power to audit and pay its ordinary expenses, including the necessary personal expenses of the members in their attendance on the meetings of the board out of any funds in its possession or out of the state agricultural fund, and shall, in its annual report make a complete showing of its financial transactions."

The facts in regard to this deposit sustain the conclusion that it was made on the same basis as a deposit would be made by an individual and under the established rule of the company that a deposit should remain with the company for a period of three months before such depositor would be entitled to interest thereon, and must remain for periods of three months thereafter in order to draw interest. The trust company's willingness to pay interest up to and including September 20th, but refusing to pay interest on the account after September 30th to and including December 18th, or a fractional part of said three months' period is a compliance with its rules relating to deposits under which this deposit was made, and it is, therefore, my opinion that the trust company cannot be made to pay interest on this deposit for the fractional period of three months or the 78 days after the three months period ending with September 30, 1908, during which this deposit was permitted to remain with the trust company.

The question now remains who, if anyone, is liable to the state for interest on this money belonging to the state from October 1 to December 18, 1908?

Section 3691-25 R. S. provides in part that:

> "All receipts from whatever source received by said state board of agriculture shall be immediately turned into the treasury of the state to the credit of the fund of the state board of agriculture as provided by law for other state institutions * * * provided, that whenever it becomes necessary to pay out premiums and the expense of conducting a state agricultural exhibition the board may retain from its receipts a sufficient sum therefor, and pay such premiums and such expenses on vouchers of the secretary and shall thereafter immediately certify the balance in its hands into the state treasury, rendering an account of such premium payments, and the expenses of conducting such agricultural exhibition as provided in section 2 hereof." (Act of 99 O. L. 592.)

From this section it is seen that there is an exception made to the requirement that the board shall turn into the state treasury all receipts from whatever source immediately upon receipt of the same in order to permit said board of

agriculture to determine and meet the premiums and expenses of conducting a state agricultural exhibition. Whether this deposit in the Citizens Savings & Trust Company of Cleveland was held out of the state treasury by said board for the 78 days mentioned in your inquiry for the reason that the same might be needed in the payment of premiums and expenses in conducting a state agricultural exhibition could only be ascertained from an examination of the records of the board of agriculture. If this fund was not required to meet the expenses of an agricultural exhibition the board should have turned the money into the state treasury and not permitted it to remain on deposit for 78 days under the control of the board. But if it be so that the state board of agriculture did not need all or any part of this deposit to pay the premiums and expenses of an agricultural exhibition I find no provision of law that would hold the state board of agriculture or a member thereof liable for the interest that might have accrued on any part of this sum had it been turned into the state treasury on September 30, 1908, and been in turn deposited by the treasurer of state for the 78 days above mentioned. In this connection the legislature seems to have contented itself with the provision contained in section 3691-25 Revised Statutes as follows: "The governor shall have the power to remove a member or members at any time." From this provision it is seen that in case of dereliction of duty on the part of the Ohio state board of agriculture or a member thereof the recourse of the state would be in their removal from office by the chief executive of the state.

Yours very truly,

U. G. DENMAN,
Attorney General.

BONDS—"RAILROAD" AS USED IN THOMAS BANKING ACT DOES NOT INCLUDE INTERURBAN ELECTRIC RAILROAD.

October 29, 1909.

HON. D. S. CREAMER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> "Is the treasurer of state authorized to accept bonds of electric interurban roads as security for the faithful performance of all trusts assumed by trust companies in this state under section 69 of the Thomas banking act which provides that 'first mortgage bonds of any railroad corporation that has for five years last past paid dividends of at least 3% of its common stock' shall be accepted for the purpose above named?"

Your inquiry raises the question as to whether or not the words "railroad corporation" as used in said section 69 were intended by the legislature to include "interurban electric railroads." A review of the legislation and court decisions relating to railroads, both steam and electric, will be necessary to a proper determination of your inquiry.

The supreme court of this state in the case of Massillon Bridge Co. v. Iron Co., 59 O. S. 179, decided in 1898, holds that the term "railroad" does not include street railroads, and the court in its opinion in this case found and held that:

"From a careful examination of the course of legislation on the subjects of railroads and street railroads, it appears that the legislation as to each has been carefully kept separate, and the statutes as to railroads do not apply to street railroads unless made to do so by clear reference."

The construction and operation of interurban electric railroads is authorized by the act of May 17, 1894, 91 O. L. 285, and carried into Bates' Revised Statutes, sections 3443-8 to 3443-13.

Section 6 of the act (sec. 3443-13) provides that:

"Such companies shall be subject to the same regulations now provided for street railroads, insofar as the same are applicable, and shall have all the powers, insofar as they are applicable, that other street railroad companies have."

The superior court of Cincinnati in the case of the Rapid River Railroad v. R. R. Co., 28 Bull. 245, held that the word "railroad" means steam or commercial railroads. The supreme court of Ohio in the case of C. L. & A. Electric Street Ry. Co. v. Lohe, 68 O. S. 101, held in the first paragraph of the syllabus that:

"An interurban electric railroad is classed as a street railroad by the statutes of this state."

This classification is expressly provided for in section 2780-18 R. S.

From these statutes and the court decisions construing them, and other sections of the Revised Statutes relating to "railroads" on the one hand, and electric railways and street and interurban railways on the other, it will be seen that they have always been considered as distinct from each other, and that the word "railroad" has been used by the legislature since long before the advent of the interurban electric railroad as applying exclusively to steam railroads. There is nothing in the statute under consideration to indicate that the legislature intended to enlarge upon its defined meaning of the words "railroad" or "railroad company." Therefore, the recognized application of the word "railroad," as used in the statutes, must govern here until the broader meaning is shown by clear reference. This the legislature has not done.

I am, therefore, of the opinion that the words "railroad corporation" as used in section 69 of the Thomas banking act (99 O. L. 284) were not intended by the legislature to include the bonds of interurban electric railways.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State Board of Public Works)

BOARD OF PUBLIC WORKS—LEASE OF OHIO CANAL LANDS TO CITY OF NEWARK.

March 17th, 1909.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN:—In your letter of March 13th, you submit the following resolution of the city council of Newark, Ohio:

> "Be it resolved by the council of the city of Newark, state of Ohio: That the board of public service be instructed to confer with the state board of public works in regard to obtaining terms for the purpose of leasing the Ohio canal from corporation to corporation. This resolution to take effect and be in force from and after its passage. Passed February 1st, 1909."

You ask whether the board of public works has the right to grant such a lease to the city of Newark.

There is no authority given the board of public works by law to lease the bed of this canal or any part of the tow-path, except the outer slope. Other parts of the canal, such as the berme bank, outer slope of the towing path, spoil banks, borrow pits, etc., may, under the provisions of sections 218-225 and 218-226 R. S., be leased if the use of such lands "in the opinion of the board of public works and the chief engineer of the public works, if leased, would not materially injure or interfere with the maintenance or navigation of any of the canals of this state."

While the portion of the Ohio canal within the city of Newark is at present in disuse, so far as the navigation of boats is concerned, nevertheless, the laws of the state relating to canals, apply just as much to a portion of a canal not now in active service as they do to portions of a canal in full operation. There can, therefore, be no lease of the entire portion of the canal within the city of Newark.

I am informed that there is a movement on foot to fill up that portion of the Ohio canal within the city of Newark and occupy it for municipal and other purposes, regardless of the canal laws and the action of the board of public works as to leasing such lands. I desire, through your board, to inform the city of Newark and others, that this department stands ready to prosecute civilly and criminally those who trespass upon or interfere with any portion of the canal property of the state of Ohio, whether such part of the canal system is in active use for canal purposes or not. The disposition to be made of such lands is in the hands of the general assembly, and unless the general assembly, by law, changes the policy of the state as to such canal lands as those in Newark, such lands must continue to be subject to all the existing canal legislation of the state.

Very truly yours,

U. G. DENMAN,

Attorney General.

LEASE OF MIAMI AND ERIE CANAL PROPERTY IN CITY OF DAYTON BY BOARD OF PUBLIC WORKS—POWER OF BOARD TO MAKE.

March 25th, 1909.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of a letter from you enclosing an application for leasing a portion of the Miami & Erie canal property in the city of Dayton, on the south side of Fifth street, for a distance of about one hundred and fifty-five feet, for the purpose of erecting a permanent structure several stories in height over the canal, such structure to leave the canal clear for a width of about fifty-four feet and to provide an arch over the canal reaching a height of twenty-five feet clear of the center at the top-water line. It is stated that this structure is in no wise to interfere with the maintenance and navigation of this part of the canal and that the applicants agree to keep the portion of the canal over which such structure is built permanently lighted and open for navigation.

You ask an opinion as to the right of the board of public works to grant a lease for such purpose.

Under section 218-225 R. S., the board of public works and the chief engineer of the public works are empowered to lease the berme bank and the outer slope of the towing-path, provided that the use for which such lands are leased "would not materially injure or interfere with the maintenance and navigation of any of the canals of this state."

Under section 218-226 R. S.:

> "The board of public works and chief engineer of the public works may lease, for the term of fifteen years, at six per cent. per annum, the rental to be paid semi-annually in advance, * * the right to erect buildings across any of the canals not less than ten feet above high water line, to be constructed under the direction of the chief engineer of the public works, in all respects so as not to interfere with the maintenance of the embankments and operation of the canal under said buildings."

In view of these provisions the board of public works have the power to make such a lease as is applied for, for the period of fifteen years, under the restrictions set out in sections 218-225 and 218-226 R. S. No portion of such structure may be built upon any part of the bed of the canal at the high-water line or upon any portion, except the outer slope, of the towing-path, and no portion of such structure may be less than ten feet above high-water line over that portion of the canal extending from the beginning of the outer slope of the towing-path to the line between the berme embankment and the bed of the canal at high-water line.

I understand that the boundary line of this portion of the canal on the berme side was settled some time ago. However, the boundary line of the state's property on the side of the towing-path has not been permanently settled, although I believe that a minimum towing-path 15.68 feet in width, in accordance with specifications for constructing this portion of the canal, is conceded. Before granting such lease, therefore, I should advise that all the boundary line questions be settled. This can be done under section 218-224 by award of the board of public works upon application of those owning land abutting on this portion of the canal.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS—CULBERTSON OR DYE DAM AT TROY—OWNERSHIP OF.

State is owner in fee of Culbertson or Dye Dam and Mill Race at Troy and also water running through same.

Before constructing new dam below Dye Dam as part of public works contention of those claiming to own such dam and race-way should be settled and appropriation proceedings completed as prescribed by sections 218-21 *to* 218-31.

June 8, 1909.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN:—You inquire of this department as to the ownership of what is known as the Culbertson or Dye Dam at Troy, Ohio, as to the ownership of the race-way leading from this dam and running for a distance of several miles to the point where it empties into the Miami and Erie Canal, and as to the rights of the state in a water power situated at the side of such race-way at a point where what is known as the Dye Mill obtains water from a pond on such race-way several acres in extent and turns such water back into the race-way a short distance below such pond.

You also ask what legal steps must be taken before the board of public works can let a contract for the construction of a new dam across the Miami River at a point about three thousand feet below the present dam, the top of the new dam to be on a level with the top of the present dam. You submit certain agreements of abutting property owners consenting to the construction of such dam by the state and inquire as to the validity of these agreements.

My understanding is that this Dye Dam, mill race and mill site existed prior to the construction of the Miami and Erie Canal in practically the same physical condition as at present, with the exception that the mill race formerly emptied into the Miami River, but was, in 1846, diverted into the Miami and Erie Canal at a point near the place where it formerly emptied into the river.

On January 22, 1846, the general assembly adopted the following joint resolution (44 O. L. 300):

> "RESOLVED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That the board of public works be, and they are hereby authorized to take possession of the mill race and dam owned by the Messrs. Culbertson & Company, in and near the town of Troy, in Miami County, and adopt it as a state work, and part and parcel of the Miami Canal Extension; provided, said board deem the arrangement more advantageous to the state than building a new dam at any other point for the purpose of supplying the canal with water between Dayton and Troy; and provided, further, that the dam and race may at any time be abandoned as a state work, when, in the opinion of the board of public works, the interest or convenience of the state shall require it; that before taking possession of said dam and mill race, the board of public works shall obtain of the said Culbertson & Company, an agreement, in writing, that they will so arrange their water works as to give a constant passage to the water from the river through their mill race without cost or charge to the state, except only a reasonable part of the cost of the ordinary repairs of the dam, which shall not, however, in any case, exceed fifty dollars in any one year."

On the same day, January 22, 1846, the Messrs. Culbertson Company agreed as follows:

"Know All Men by These Presents, That the firm of Culbertson Company of the town of Troy, in the county of Miami, state of Ohio, do hereby agree to and with the state of Ohio, that they will so arrange their water works at their mill race and mills near said town of Troy, in such manner as to give a constant passage to the water from the river through their mill-race, without cost or charge to the state, except only a reasonable part of the cost of the ordinary repairs of the dam, not to exceed the yearly sum of fifty dollars—in consideration of which, and that the board of public works do adopt the said dam and mill-race as a part and parcel of the Miami Canal Extension, they, the said Culbertson Co., enter into this agreement, and bind themselves as aforesaid; said adoption of said dam and race, and the payment for keeping said dam in repair being made in accordance with a joint resolution of the general assembly of the state of Ohio, passed the 22d day of January, 1846.

(Signed) Culbertson Co."

Columbus, January 22, 1846.

On the same day the board of public works by a resolution recounting such joint resolution of the general assembly and the agreement of the Messrs. Culbertson Company took the following action:

"*Ordered*, That the said mill-dam and race of the said Messrs. Culbertson Co., be and are hereby adopted as a state work, and part and parcel of the Miami Canal Extension, subject to the conditions and limitations contained in said resolution of the General Assembly."

In construing this agreement and the action of the board we must remember that the agreement of the Messrs. Culbertson Company must conform with the joint resolution in its terms in case of dispute as to language and must remember, too, that both the agreement and the joint resolution are dependent upon the statutes existing at such time relating to the appropriation of property for canal purposes.

Since, as was held in the case of State v. Kinney, 56 O. S. 721:

"The statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly,"

the appropriation of this dam and race-way must necessarily have been made under the provisions of section 5 of the act of February 4, 1825, which section reads as follows (23 O. L. 50):

"That it shall and may be lawful for the said canal commissioners, and each of them by themselves, and by any and every superintendent, agent and engineer, employed by them to enter upon, and take possession of, and use all and singular any lands, waters, streams, and materials, necessary for the prosecution of the improvements intended by this act; and to make all such canals, feeders, dykes, locks, dams, and other works and devices as they may think proper for making said improvements; doing, nevertheless, no unnecessary damage; and that in case any lands, waters, streams or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to

them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three or more than five discreet disinterested persons as appraisers, who shall before they enter upon the duties of their appointment, severally take an oath or affirmation, before some person authorized to administer oaths, faithfully and impartially to perform the trust and duties required of them by this act, a certificate of which oath or affirmation, shall be filed with the secretary of the canal commissioners, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises, so required for the purposes aforesaid, and the said appraisers, or a majority of them, shall make regular entries of their determination and appraisal, with an apt and sufficient description of the several premises, appropriated for the purposes aforesaid, in a book or books, to be provided and kept by the canal commissioners, and certify and sign their names to such entries and appraisal, and in like manner certify their determination as to these several premises which will suffer no damages, or will be benefited more than injured by, or in consequence of the works aforesaid, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in this state; *Provided, however*, That all such applications to the board of canal commissioners, for compensation for any lands, waters, streams, or materials so appropriated, shall be made within one year after such lands, waters, streams or materials shall have been taken possession of, by the said commissioners, for the purposes aforesaid."

It is to be noted that under this section "the fee simple title of the premises so appropriated shall be vested in this state." It has been repeatedly held by the supreme court of Ohio in State v. Railroad Company, 63 O. S. 189 and in a large number of other cases, that under such section above quoted the state obtained a title in fee to all lands of which it acquired possession for canal purposes or used in the construction or maintenance of the canals, and that the only requisite for obtaining a fee in the state of Ohio under such section was for the canal commissioners to enter upon and use such lands for canal purposes. Applications for compensation were to be made by the owners of such lands within one year of their taking, and upon failure of the owner of such lands occupied and used for canal purposes to make claim for damages within such period of one year, a title in fee simple vested in the state without payment of such damage. Specific acts of occupation were not requisite and the boundary lines of such lands were determined not by surveys but by the amount of lands reasonably necessary for the use and maintenance of the canals with their necessary feeders, etc. No joint resolution such as that of January 22, 1846, was necessary in order to authorize the appropriation of such lands.

When, therefore, the board of public works adopted such dam and mill race "as a state work and part and parcel of the Miami Extension Canal," it followed by reason of the statutes under which they acted that the state thereby obtained a title in fee to all lands appropriated and thus adopted. The reference to the payment of fifty dollars a year in the joint resolution and agreements of the Messrs. Culbertson Company could not be an agreement binding upon the state to pay such sum each year, for such an agreement could not have been valid under the holding of our supreme court in the case of State

v. Medberry, et al., 7 U. S. 522. See also Art. I, sec. 21 of the Constitution of 1802 and Art. II, Sec. 22 of the Constitution of 1851.

That the title of the state to such dam and mill race was openly asserted is shown by the following language of the joint resolution of the general assembly adopted March 14, 1873 (70 O. L. 396):

> "Whereas, For several years past, there has been a large deficiency of water in the Miami and Erie Canal, requisite for navigation; and
>
> "Whereas, It is alleged that by the repair of the state dam across the Miami River, at Troy, constructed for the purpose of supplying what is known as Dye's mill-race, (but which is, and ever since 1846, has been adopted and used by the state of Ohio as part of its public works, a very largely increased volume of water will be passed into the canal; therefore be it
>
> "RESOLVED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO, That the acting commissioners of the board of public works for the Miami and Erie Canal, in connection with the resident engineer, be required to make an examination of said dam and race-way, and report to the general assembly at its present session, as to the benefits likely to result to the state and to the lessees of the public works from improving the same, and as to what repairs are necessary, and the probable cost thereof."

An examination of all the acts of the general assembly since 1873 shows that no law has been passed during such period authorizing in any way the abandonment of any part of such dam or mill race or a conveyance from the state of any interest in the same. The state still uses such dam and mill race as a feeder for the Miami and Erie Canal and no officers of the state have been empowered since 1846 to part with any interest in such lands. Even had this dam and mill race been abandoned by the state at any time during this interval, the state would, under the laws relating to canals, retain a fee in such lands regardless of such abandonment. Malone v. Toledo, 34 O. S. 541.

In view of the above, I am, therefore, of the opinion that the state of Ohio is the owner in fee simple, not only of the Dye dam across the Miami River, but also of the race-way throughout the entire distance from the point where it leaves the river, a few feet above such dam to the point where it empties into the Miami and Erie Canal, including the pond above the mill, which appears to be part and parcel of this race-way.

I have no information as to the ownership of the land upon which are located the mill and small race-way leading from the main race-way through the mill and back to the main race-way. I believe, however, that it was in no wise essential under the canal laws in force at the time the dam and mill race were acquired, that the state should have acquired the ownership of this small piece of property, and many such mill sites have been, from that day to this, owned by private individuals. It has, however, always been the policy of the state of Ohio, from the earliest days, to retain in the state full dominion over the entire water supply of the various parts of the canal system of this state and to permit the use of surplus water by private individuals only upon the payment of compensation to the state and such use of water power has always been held subservient to the uses of the water for canal purposes. It seems to me, therefore, under the laws relating to this subject and in accordance with the policy of this state, that the state acquired all the water passing from the dam through this race-way and that the use of any surplus water passing through this race-way became the subject for subsequent agreements between owners of the mill and the state board of public works.

In contradiction to the rights of the state in the property above described, there has been presented to me an abstract showing a number of conveyances of the Dye dam, mill race and mill property since the adoption of this dam and race as a part of the public works of the state in 1846. This dam, mill race and mill property are at the present time claimed in fee by Mrs. M. B. Hurst, by reason of a deed to her dated September 22, 1906. In view of this dispute as to ownership, it seems to me that before a contract can be let without danger of having the work interrupted by proceedings in court, it will be necessary either for the present claimant to give to the state a quit claim deed to this dam and mill race or else it will be necessary for the state to bring proper proceedings in court for a final determination of the ownership of such lands. It seems to me that this question should be settled before further legal steps are taken.

In addition to the above legal steps which must be taken before the board can let a contract for the construction of the new dam proposed, the board must proceed to appropriate all lands necessary for such dam and its appurtenances in the manner provided and fully set out in Section 218-21 to 218-31, inclusive, of the Revised Statutes. I am of the opinion a title in fee simple should be acquired at least in all lands which will be covered by water when at high water mark and also to all the land on the left bank of the river necessary for the construction and maintenance of an adequate levee.

The agreements submitted to this department consenting to the construction of such dam are not in conformity with the statutes and must be disregarded. In procuring conveyances for public works under the provisions of the statutes above cited great care should be taken in describing particularly the lands to be conveyed and in setting out the interest which the state is acquiring in such lands. Conveyances of property by a church or by a corporation must be made in the particular manner provided for such cases by statute.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC WORKS—WARRANTS ON TREASURY FOR SALARY AND TRAVELING EXPENSES OF MEMBERS—AUTHORITY OF STATE TREASURER TO WITHHOLD PAYMENT—ENTIRE TIME DEFINED—EFFECT OF TITLE TO OFFICE—STATE SALARY LAW.

State treasurer refused to honor and pay two warrants drawn by state auditor in favor of members of board of public works for amount of traveling expenses incurred and of salary as prescribed by law, both warrants and both vouchers for warrant were regularly drawn. Treasurer refused to pay warrants on ground that members of board of public works were not giving entire time and attention to care and maintenance of canals and public works of state, and also on ground that they are not entitled to be reimbursed out of state treasury for actual traveling expenses incurred in discharge of official duty. Held: The state salary law does not repeal statute giving certain traveling expenses to the members of boards of public works, and that where warrants have been regularly drawn on state treasury for salary and expenses of members and there is money in treasury to the credit of proper fund, the state treasurer is without authority to withhold payment.

Members of state board of public works are only required to devote such time to duties of their office as the faithful and honest discharge of same demands, and so long as they retain the legal title to the office they are entitled to the emoluments thereof

Columbus, Ohio, September 18, 1909.

HON. GEORGE H. WATKINS, *President State Board of Public Works, Columbus, O.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts, together with a request from your board for an opinion thereon:

> The state treasurer on September 14, 1909, refused to honor and pay two warrants drawn by the state auditor in favor of the members of the board of public works, one of such warrants being for the total of the current month's salary and the other for the total of the current month's traveling expenses of the members of the board.
>
> These warrants are drawn in the regular way and for the amount of traveling expenses incurred and of salary respectively as prescribed by law. We enclose both warrants.
>
> The treasurer informs us that he refuses to pay these warrants upon the order of the governor on the ground that they claim that the members of this board are not giving their entire time and attention to the care and maintenance of the canals and the public works of the state, and also on the ground that we are not entitled to be reimbursed out of the state treasury for the actual traveling expenses incurred in the discharge of our official duty.
>
> The expense voucher enclosed is made out for the sum of the itemized statements made by each member to the auditor of state of the traveling expenses actually incurred and amounts to $117.96 for the current month.
>
> If it is not conceded it can be easily shown that the board is faithfully devoting their time in superintending and caring for the canals and public works of the state. That they are carrying on the improvements of the canals as directed by the general assembly with all dispatch and the best economy possible, and are maintaining the canals and public works in the very best condition that the funds at their disposal will warrant. We believe that as duly elected public officers of the state we are entitled to the salary and expenses provided by law, and we, therefore respectfully request you to officially advise us as to the authority of the state treasurer to withhold the payment of said vouchers.

In reply I beg to say the answer to your inquiry involves a consideration of all the existing laws relating to the compensation and duties of members of the board of public works.

Section 12 of article VIII of the constitution contains this provision:

> "So long as this state shall have public works which require superintendence, there shall be a board of public works to consist of three members, who shall be elected by the people."

Under this language of the constitution, so long as the state maintains the present canal system a board of public works is and will be required, and the members thereof are entitled to receive such compensation as is provided by law.

Prior to the enactment of the state officers' salary law, passed April 2, 1906, 98 O. L. 365, members of the board of public works received their compensation in accordance with the following sections of the Revised Statutes: Sections 218-2, 218-4 and 1287.

Section 218-2 is in part as follows:

"Each member of the board shall receive $800 per annum salary and not to exceed $50 per month traveling expenses during the time the state has possession of the public works, and $800 per annum salary thereafter, but shall not receive any traveling expenses. Said salary and expenses shall be paid monthly after the services are rendered and expense incurred, upon the order of the board out of the canal fund on the warrant of the auditor."

Section 218-4 is in part as follows:

"Members of the board of public works shall be and are hereby made superintendents of the canals of the state, and shall give their entire time and attention to the care and maintenance of the canals and public works of the state and each shall receive a compensation of $1,500 per annum as such superintendent; such compensation to be paid out of the canal fund of the state."

Section 1287 is as follows:

"The members of the board of public works shall receive nothing in addition to their salary for traveling expenses, or otherwise, except that during the time the state has possession of the public works they shall, each, be entitled to their traveling expenses, not to exceed $50 a month."

Under the above quoted provisions of these statutes members of the board of public works were each entitled to an annual salary of $800 a year together with traveling expenses not to exceed $50 per month, and as superintendents of the canals, $1,500 per annum, all of which was to be paid out of the canal fund of the state.

On April 2, 1906, the general assembly passed a general salary law, fixing a stated salary for all state officers, both elective and appointive. Prior to the passage of this law the compensation of many of the state officers was derived from different sources. The auditor of state received a fixed salary and in addition thereto compensation as member of the board of assessors and appraisers and as chief of the bureau of inspection and supervision of public offices. The attorney general, in addition to his salary, received compensation as a member of the board of appraisers and assessors and also fees upon all collections. The secretary of state in addition to his salary received compensation as a member of the board of appraisers and assessors and also fees derived from the revenues of his office. The treasurer of state in addition to his salary received compensation as a member of the board of appraisers and assessors and fees derived from money loaned under the state depository law. The members of the board of public works in addition to their salary received compensation as canal superintendents together with traveling expenses.

The enactment on April 2, 1906, of the salary law abolished this method of compensating state officers and placed each of them upon a flat salary, to be paid out of the general revenue fund of the state upon the specific appropriation of the general assembly and that law expressly provides that "no additional remuneration whatever shall be given any of such officers under any other title than the title by which such officer was elected or duly appointed," and further provides that "all acts or parts of acts, the provisions of which are in conflict with the provisions of this act are to the extent of such conflict repealed."

Whereas each member of the board of public works theretofore had received an annual salary of $800 a year together with his actual traveling ex-

penses as such member, not exceeding $50 per month, and a salary of $1,500 a year as superintendent of canals, all of which was paid out of the canal fund, he now receives a flat salary of $2,900 a year and his actul traveling expenses, not exceeding $50 per month, all of which is paid out of the general revenue fund of the state and is provided for by specific appropriation of the general assembly. (100 O. L. 33.)

It is true that the portion of section 218-2 R. S., quoted herein, under which the annual salary of $800 was formerly paid to each member, was reenacted by the legislature on the same day that the state officers' salary law was passed, yet that fact affords no basis for conflict or confusion relative to the salaries of the members of the board of public works.

This provision of law was originally enacted in 1878 in the identical words as it now appears in the statutes and has remained unchanged since that time. On April 2, 1906, the general assembly, in order to provide for the election and terms of the members of the board of public works; to abolish the Ohio Canal Commission; to confer all the powers and duties of said commission upon the board of public works; to define the duties of the chief engineer of public works and limit the said board of public works in leasing canal and state lands, amended section 218-2 of the Revised Statutes and carried into the amended section the part above quoted in the identical language in which it was originally enacted in 1878.

It cannot be contended, however, that it was the legislative intent to provide two separate and distinct salaries for the members of the board of public works. From a careful examination of the act amending section 218-2 as found in 98 O. L. 304, it is conclusive that there was no intention upon the part of the legislature to provide an annual salary for the members of the board of public works in that amendment and that this portion of the section was permitted to be carried into the new act simply because it was a part of the original section and had no connection whatever with the subject-matter of the amendment. It is not, therefore, to be regarded in determining the present salaries of the members of the board of public works. This conclusion is sustained by the opinion of the attorney general rendered to the prosecuting attorney of Holmes county on September 29, 1904. In that instance the legislature, in order to revise the laws of Ohio relating to the conduct of elections; to abolish city boards of elections in registration cities and boards of deputy state supervisors of elections in certain counties, etc., amended section 1448 of the Revised Statutes and carried into the amendment as contained in the original section, this provision:

> "That at the next annual election after the passage of this act, and at the first election of any new township, a treasurer shall be elected for one year and a clerk for two years, and thereafter a township treasurer and clerk shall not be elected at the same annual election."

In view of the fact that the election of township clerks and treasurers in the townships of Holmes county already alternated, the prosecuting attorney requested an opinion as to whether or not under the amended section township clerks and township treasurers were required to be elected at the November election in 1904 as therein provided. The attorney general held that the above quoted provision which was carried into the amended section was the same provision contained in the old statute and that it could apply only to the succeeding election after its original enactment and need not, therefore, be regarded except at the first election of any new township. It follows, therefore, that the salary of a member of the board of public works as fixed in the state officers' salary law controls.

Inasmuch as the appropriation bill for the current year carries an appropriation of $1,800 for traveling expenses of the members of the board of public works, there can be no question as to the right of said members to be reimbursed therefrom for all traveling expenses actually incurred in the discharge of their official duties, not in excess of $50 per month, and that the treasurer of state is without warrant of law in refusing the payment of the same upon regular vouchers issued by the auditor of state.

In the facts submitted by you the statement is made that payment was refused on the salary warrant for the reason that "the members of the board of public works are not giving their entire time and attention to the care and maintenance of the canals and public works of the state."

The above quoted portion of section 218-4 does provide that:

> "Members of the board of public works shall be and are hereby made the superintendent of the canals of the state and shall devote their entire time and attention to the care and maintenance of the canals and public works of the state."

This language, however, does not, in my judgment, require the members of said board to occupy more time than is necessary to the faithful and honest discharge of all the duties imposed upon them by law. In other words, if it requires all their time to care for and maintain the canals and public works of the state then all their time must be given. If not, then such time as is necessary for the faithful performance of all their duties is only required. An attempt to place a strict literal construction on the words "shall devote their entire time and attention" as used in this provision would result in an absurdity. "Entire" means all; "devote" means to occupy. Therefore, literally construed the members of the board are required to occupy all their time and attention to the exclusion of everything else in caring for the canals and public works of the state whether the same is needed or not. No time given to said members to look after individual interests or husband and protect their private property. No time to discharge the obligations due their families and society because all of their attention must be given to the canals. This course of reasoning applied to this statute affords one of the best illustrations of the well known rule of statutory construction adhered to by all courts, that the words of a statute cannot always be literally construed.

This view is sustained and more aptly stated by the supreme court of Mississippi in the case of Fairley v. Telegraph Co., 73 Miss. Rep. 9, and is the only case I have been able to find bearing directly upon the question. In this case the superintendent of the state institution for the blind, who was a practicing physician, brought suit against the telegraph company for damages by reason of the negligence of said company in delivering a telegram whereby the physician claimed to have lost a fee of $75.00. The telegraph company defended on the ground that the superintendent had no right to practice medicine as the constitution of the state required him to devote all of his time to the discharge of the duties of his office as superintendent of the state institution.

Section 267 of the Constitution of Mississippi is as follows:

> "No person elected or appointed to any office or employment of profit under the laws of this state, or by virtue of any ordinance of any municipality of this state, shall hold such office or employment without personally devoting his time to the performance of the duties thereof."

The court in delivering the opinion, after quoting this provision of the constitutin said:

"It requires neither philological research and definition, nor legal interpretation, to properly interpret this language and ascertain its meaning. It forbids not only the farming out of a public office, but it requires that the official shall give his own time and personal services to the performance of the duties of his office. Having been elected or appointed to a public office because of his supposed fitness for the proper performance of the duties of his place, the official himself shall be required to give his time, his attention and his services to the discharge of his official duties. This is eminently wise and just, and involves no hardship upon the official who seeks and accepts public station. But will the voluntary absence of an officer for two or three days from his place of official residence or business, when his sole public duty consists in the general care of the public property over which he has the superintendency, violate either the letter or spirit of the constitutional provisions we are considering? Must the superintendents of all our charitable institutions never leave their official residence or offices? Must nearly four score sheriffs of the state, who are charged with the care of the various courthouses, never depart from their several county seats, either when the public service seems to require such absence, or when a brief absence may be had without any detriment to the public good? Shall the secretary of state never leave the capitol building and grounds, of which he is the keeper by law? These questions must have reasonable answers. If the public duties of an office require all the time of the public servant, then the whole time must be given. If all the time of the officer be not required for the complete and faithful execution of his trust, then he shall give such time and devote such service as shall suffice for the full and faithful discharge of the duties of his office.

The construction of this constitutional provision contended for by appellee's counsel goes only skin deep, and does not touch the core of the matter, and is not maintainable."

In view of the law as laid down in this case, I am clearly of the opinion that the members of the state board of public works are only required to devote such time to the duties of their office as the faithful and honest discharge of the same demand. However, should a strict construction of this section be followed, the treasurer of state is without authority to withhold payment of the officer's salary on that ground alone. So long as a person retains the legal title to an office so long is he entitled to the emoluments thereof.

"It has been often held that an officer's right to his compensation does not grow out of a contract between him and the state, or the municipality by which it is payable. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office; and although, during the time for which he claims it, he has earned money in other employment."

Throop on Public Officers, section 443.

In the case of Andrews v. City of Portland, 79 Maine, it is held:

"The legal right to the office carries with it the right to the salary and emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited."

68 N. Y. 274; 80 N. Y. 185; 102 N. Y. 536 and 77 Maine 231.

If the members of said board are guilty of dereliction of duty or incompetency, the law provides a method by which they may be removed from office, but it is not within the province of the treasurer of state to assume the prerogative of a judicial office and determine whether or no such officer is discharging the full duties of his office and upon his determination of the question refuse payment of the salary provided by law.

I am, therefore, of the opinion that you, as members of the board of public works, are entitled to receive out of the state treasury the moneys called for in the two warrants herewith enclosed, and that the treasurer of state is acting wholly without authority of law in refusing payment thereon.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Dairy and Food Commissioner.)

FOOD AND DRUG ACT—DRUG INCLUDES MEDICINES USED FOR BEAST ONLY.

July 22, 1909.

HON. R. W. DUNLAP, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 21st in which you submit the following for my opinion:

> "Does the general food and drug law of March 12, 1909, regulate the manufacture and sale of all drugs, even if the same are to be sold for beasts only?"

I desire to call your attention to section 2 of the food and drug law as amended March 12, 1909, which is in part as follows:

> "The term 'drug' as used in this act, shall include all *medicines* for internal or external use or for inhalation, antiseptic, disinfectant and cosmetics."

This section is very clear in its terms and includes all medicines. I am strengthened in this opinion from the fact that the general assembly, in the same section which defines the term "*drug*," defines the term "*food*" and limits food to man only, and the only conclusion one can reasonably draw is that if the general assembly intended to limit the term "drug" to medicine used by man only it would have said so, as was done in the case of food and not have left the same to be inferred.

I am, therefore, of the opinion that the general food and drug law of March 12, 1909, regulates the manufacture and sale of all drugs, even if the same is to be sold for beasts only.

Herewith I enclose the correspondence which you mailed to me in your letter of July 21st.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

DAIRY AND FOOD—SECRET FORMULAS—MAPELINE—MANNER OF BRANDING PACKAGES.

Articles of food or drink manufactured by secret formula must be labeled "Artificial" or "Imitation" and formula printed on package in English.

May 18, 1909.

HON. RENICK W. DUNLAP, *State Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—Your request for an opinion on the following question is received:

> Is the product known as "Mapeline," sold under that name with the additional statement on the package that it is a "vegetable product producing a flavor similar to maple," misbranded within the meaning of "An Act to provide against the adulteration and misbranding of food and drugs," as amended March 12, 1909?

In reply, I beg to say that the provision which seems to apply exactly to the above question is that of section 3 (b) (4) (5) of said act which reads as follows:

> "An article shall be deemed to be misbranded within the meaning of this act: (b) (4) In case of any flavoring extract for which no standard exists, if the same is not labeled 'artificial' or 'imitation' and the formula printed in the same manner hereinafter provided for the labeling of 'compounds' or 'mixtures' and their formulae; (5) * * * provided that the provision of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each and every package sold or offered for sale be distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of 100 per cent. of each ingredient therein. The word 'compound' or 'mixture' shall be printed in letters and figures not smaller in either height or width than one-half the largest letter upon any label on the package and the formula shall be printed in letters and (figures) not smaller in either height or width than one-fourth the largest (letter) upon any label on the package, and such compound or mixture must not contain any ingredient that is poisonous or injurious to health."

Under the above provision your question resolves itself down to what meaning shall be given to the word "standard" as used in the above quoted sections of the act.

The definitions of the word "standard" as given in the Standard Dictionary are as follows:

> "1. Any measure of extent, quantity, quality or value estabished by law or by general usage or consent."
>
> "2. Hence any type, model, example or authority with which comparison may be made; * * * a criterion of excellence, test."

Under the above definitions, in my opinion, the word "standard," as used in this act, means such a criterion as is specifically established by section 3 (c) of the act for the various flavoring extracts there enumerated, or as is established by the 8th Decennial Revision of the United States Pharmacopoeia, or the 3rd Edition of the National Formulary or in some other pharmacopoeia, or some other standard work on materia medica, or such a standard as was so well known and established at the time of the passage of this act as to have been included within the meaning of the term "existing standard" as used in section 3 (b) (4). As the formula of "Mapeline" is a secret one, no standard for it, in my opinion, does exist within the meaning of the term as used in the act, regardless of the length of time which this product may have been manufactured and vended throughout the United States, for to my mind the establishment of a standard is analogous to the establishment of a custom, and the former must come into existence in the same manner as the latter, to-wit, it must be an article of more or less common manufacture, so that the ingredients entering into it have become, by general usage, well known. In my opinion, the very object of the provision of the act involved was to reach just such "secret formula" articles of food or drink as is this, and although in some cases its enforcement may work hardship on the manufacturers of really meritorious food compounds and flavoring extracts, nevertheless there can be no discrimination in its enforcement in favor of any article coming within its scope

I am, therefore, of the opinion that the product "Mapeline" comes within the meaning of section 3 (b) (4) of this act, and must therefore be labeled "artificial" or "imitation" and the formula under which it is manufactured must be printed on each package in words of the English language with the name and percentage, in terms of 100 per cent. of each ingredient used in it as provided in section 3 (b) (5) of "An Act to provide against the adulteration and misbranding of food and drugs" as amended March 12, 1909.

Yours very truly,

U. G. DENMAN,
Attorney General.

DOW-AIKIN TAX—WHISKY SOLD IN ORIGINAL PACKAGES IN OTHER STATES NOT SUBJECT TO.

August 9, 1909.

HON. RENICK W. DUNLAP, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of July 22nd, enclosing a letter from H. L. Cheney & Company, of Dayton, in which they state that they propose to sell whisky in original packages by the mail order method to consumers in other states. You desire my opinion regarding their inquiry as to whether or not this method of doing business would subject them to the Dow tax.

Without citing authorties, it may be stated that the filling of mail orders, in the manner described in your letter, would cause the respective sales to be consummated in the state of Ohio; but, that such a business would constitute interstate commerce and, as such, would not be subject to the liquor tax of this state.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

DAIRY AND FOOD DEPARTMENT—LIQUOR TAX INSPECTION—MANNER OF CERTIFYING TO AUDITOR—ERRONEOUSLY OR ILLEGALLY CERTIFIED—WHAT IS.

On May 27, 1907, liquor was purchased in Cleveland by liquor tax inspectors and party was certified for tax by dairy and food department June 10, 1908. County treasurer failed to levy on property of party at once and party moved. Owner of property not notified of assessment until August, 1909. Such assessment was not illegally or erroneously certified and auditor and dairy and food commissioner may not remit same; however, same has been erroneously and illegally placed on tax duplicate and by virtue of section 167 the governor, auditor and attorney general may remit same.

October 13, 1909.

HON. R. W. DUNLAP, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication of September 18th, in which you ask my opinion upon the following statement of facts, is received:

> "On the 27th day of May, 1907, three of the liquor tax inspectors of this department called on Mabel Williams, at 1011 Hamilton street,

Cleveland, Ohio, and made three purchases of intoxicating liquors. This party was certified for the tax on June 10, 1908. The county treasurer failed to levy on the property of Mabel Williams at once, and she has moved and her present location is unknown. The owner of the property was not notified of the assessment until August or September, 1909.

"Is it your opinion that this case has been 'erroneously or illegally certified' within the meaning of section 4364-14*a* Revised Statutes, as amended in 100 Ohio Laws 65, or is there any way by which the tax in this case could be remitted?"

In reply thereto, I beg leave to submit the following opinion:

The sections of the statute which, in my opinion, govern this case are, so far as they apply hereto, as follows:

4364-14*a*:

"The assistant commissioners and inspectors appointed by the dairy and food commissioner, under section 409-10 of the Revised Statutes of Ohio, in addition to their duties under that section, shall, by personal visitation or otherwise, make investigations to secure the names of all persons, firms or corporations, liable to such assessment or increased assessment, and whose names are not already on the duplicate, and report the same to the dairy and food commissioner; the dairy and food commissioner from the reports and information submitted to him, shall determine and forthwith *certify* to the auditor of state the names of the persons, firms and corporations, liable to such assessment or increased assessment, and whose names are not already on the duplicate, together with a description of the real estate upon which such business is carried on; and thereupon the auditor of state shall cause the same to be entered upon the assessment duplicate of the proper county by the auditor, thereof, together with the penalty of twenty per centum collected, the same as other assessments * * *.

"The dairy and food commissioner shall have and keep a record of all such cases so certified by him to the auditor of state. Upon the request of the dairy and food commissioner, the auditor of state and the county treasurer shall forthwith make and report to the dairy and food commissioner of any action taken by such officials on all such cases so certified as aforesaid until the tax and penalty thereon are paid to the county treasurer. The auditor of state, with the consent and approval of the dairy and food commissioner *may correct any errors or remit any such assessments or increased assessment, together with the penalty thereon, where the same is found to have been erroneously or illegally certified.*"

Section 4364-15:

"The county treasurer shall collect and receipt for all assessments so returned to him, *and if any assessment shall not be paid when due, he shall forthwith proceed as provided in section* 4364-12 *of the Revised Statutes of Ohio to collect the same, and in case he shall fail to make such assessment from the goods and chattels therein described, then said treasurer shall immediately proceed as provided in section one*

thousand one hundred and four of the Revised Statutes of Ohio, to enforce the lien for the same with the penalty thereon. And the provisions of said section one thousand one hundred and four, and all other provisions of the laws of this state relating to the assessment and collection of taxes are hereby made applicable to the enforcement of liens and the collection of such assessments and penalties * * *."

Section 4364-12:

"That if any person, corporation or co-partnership shall refuse or neglect to pay the amount due from them under the provisions of this act within the time therein specified, the county treasurer *shall thereupon forthwith* make said amount due with all penalties thereon, and four per cent. collection fees and costs, by distress and sale, as on execution, of any goods and chattels of such person, corporation, or co-partnership; he shall call at once at the place of business of each person, corporation or co-partnership; and in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation or co-partnership, wherever found in said county, or on the bar, fixtures, or furniture, liquors, leasehold and other goods and chattels, used in carrying on such business, * * *. In the event of the treasurer, under the levy provided for under this act, being unable to make the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

Section 1104:

"When any taxes or assessments stand charged against any lands or lots or parcels thereof upon the tax duplicate for any purpose authorized by law, and the said taxes or assessments, or any part thereof, are not paid within the time prescribed by law for the payment of the same, the county treasurer in addition to all other remedies provided by law, may, and when requested by the auditor of state shall, enforce the lien of such taxes or assessments, or either and any penalty due thereon, by a civil action in his own name as county treasurer for the sale of said premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced; * * *."

Section 167:

"He (the auditor of state) may remit such taxes and penalties as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and he may from time to time, correct any error in any assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his

assistance the governor and attorney general, and any and all such cases may remit no more than shall be agreed upon by a majority of the officers named."

Section 4364-14*a* merely authorizes the auditor of state, with the consent and approval of the dairy and food commissioner, to correct any errors or remit any assessments or increased assessments, etc., where such assessments, etc., are found to have been erroneously or illegally certified. From the facts as you have stated them I can find nothing to show that the assessments in this case have been either erroneously or illegally certified. Therefore, under this section I am of the opinion that the auditor of state cannot with your consent and approval, remit this assessment, but by section 4364-15, it is provided that in case any assessment shall not be paid when due, the county treasurer shall "forthwith" proceed as provided in section 4364-12.

Section 4364-12 empowers the county treasurer to make the amount of such assessment due with all penalties thereon, by distress and sale, as on execution, out of the goods and chattels of the person who has carried on the business of trafficking in intoxicating liquors, and said section further provides that:

"in the event of the treasurer under the levy provided for under this act being unable to make the amount due thereunder or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

Section 1104, which is referred to in section 4364-15, empowers the county treasurer to enforce the lien of such taxes or assessments, etc., by civil action in his own name as county treasurer for the sale of the premises in the same way that mortgage liens are enforced.

In the above quoted sections it is plainly shown, and especially so in section 4364-12, that there is a condition precedent to the placing of the assessments referred to on the duplicate against the real estate in which the trafficking in intoxicating liquors is carried on, which, by virtue of this act, is assessed. That condition is the inability of the county treasurer to make the amount of the assessment out of the goods and chattels, etc., of the person, corporation or copartnership carrying on the business of trafficking in intoxicating liquors, and it is only in such event that the county auditor is authorized by section 4364-12 to "place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on."

I am, therefore, of the opinion that whereas the assessment in this case may have been correctly and legally certified to the auditor of state by yourself, nevertheless it has been erroneously and illegally placed upon the tax duplicate against the real estate in which the trafficking in intoxicating liquors was here carried on.

It follows, therefore, that by virtue of section 167 above quoted, the auditor of state may remit the taxes and penalties in this case, for it is provided in that section that

"he may remit such taxes and penalties as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do

any duty relating to the assessment of property for taxation, or the levy or collection of taxes,"

but should the amount of these taxes and penalties to be remitted exceed one hundred dollars it will be necessary for him, as provided in the latter half of section 167, to take to his assistance the governor and attorney general, and the majority vote of these three officers will be decisive as to the amount which may be remitted in this case.

I enclose herewith copy of report of Inspector Chas. A. Gasser, affidavit of W. G. Crowe, affidavit of William R. Ryan, and affidavit of Morris Weil enclosed by you in your letter of September 18th.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Commissioner of Common Schools.)

SCHOOL LEVY—IN PROCESS OF COLLECTION.

Where board of education has certified school levy to auditor such tax arising from levy is not in process of collection and is not considered as such until duplicate is in hands of county treasurer.

April 5th, 1909.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of April 3rd, in which you request my opinion as to the meaning of the phrase "in process of collection," as used in section 2834b R. S. You submit two inquiries in this connection, viz:

> "First. When a board of education has certified the school levy to the county auditor, can said tax arising from such levy be said to be in process of collection?
>
> "Second. If the first question is answered in the negative, can the tax arising from said levy be considered to be in process of collection at any date prior to that on which the county auditor has filed the tax duplicate with the county treasurer for the collection of taxes?"

The answer to your first question must be in the negative, for the reason that the statute itself requires that the certificate must be to the effect that the money "has been levied *and* placed on the duplicate," clearly indicating that a certificate that the levy only has been made, is insufficient.

As to your second question, I am of the opinion that a tax cannot be considered as being in process of collection within the meaning of this section, until the duplicate is in the hands of the county treasurer. I have been unable to find any adjudications on this point, but am led to the view expressed by the fact that the treasurer is the collecting officer of the county, and by the additional fact that, if the phrase in question should be construed as descriptive of the condition of the tax while the duplicate remains in the hands of the auditor, there would be no reason for the inclusion of the phrase in the statute and its presence therein would be mere surplusage. In the interpretation of statutes that construction should be adopted which will give a meaning to all the language employed by the legislature.

I therefore conclude that the school tax is not in process of collection within the meaning of section 2834b R. S. until the county auditor has filed the tax duplicate with the county treasurer.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—ISSUE OF BONDS—SUBMITTING TO VOTE.

Boards of education maintaining joint high schools may not issue bonds in anticipation of income under Sec. 3994 for improving high school, without submitting to vote.

May 27, 1909.

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

DEAR SIR:—Your communication of May 24th at hand, in which you request an opinion upon the following question:

Where boards of education have united for the purpose of establishing and maintaining a joint township high school, can each board make the levy of two mills, without a vote of the people, provided for in section 3994 Revised Statutes, in order to enlarge their present building, when the amount that would be received therefrom would be sufficient for that purpose?

In reply, I beg leave to submit the following opinion: Section (4009-15) sec. 1 Revised Statutes reads in part as follows:

"The boards of education of two adjoining township school districts, or of a township district and of a village or special school district situated partially or wholly within the township, may, by a majority vote of the full membership of each of said boards, unite said districts for high school purposes and each board 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 may issue bonds as provided for in sections 3991, 3992 and 3993 of the Revised Statutes of Ohio, but said question of tax levy must carry in both districts before it shall become operative in either."

Section 3991 Revised Statutes reads in part as follows:

"When the board of education of any school district determines that it is necessary for the proper accommodation of the schools of such district to purchase a site or sites to erect a school house or houses, to complete a partially built house, to enlarge, repair or furnish a school house, or to do any or all of said things, and that the funds at the disposal of said board or that can be raised under the provisions of section 3994 of the Revised Statutes, are not sufficient to accomplish said purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purposes and at a general election, or a special election called for that purpose, shall submit to the electors of the district the question of the issuing of bonds for the amount so estimated; * * *."

Section 3994 Revised Statutes reads in part 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, may, from time to time, as occasion requires, issue and sell bonds, under the restrictions and bearing a rate of interest specified in section 3992 * *; but in no case shall a board of education issue bonds under the provisions of this section in a greater amount than can be provided for and paid with the tax levy provided for under section 3959 of the Revised Statutes of Ohio, and paid within forty years after the bond issue on the basis of the tax valuation at the time of the bond issue."

Under the above sections your question resolves itself into whether there is a sufficient reference in section 3991 Revised Statutes, *supra*, to section 3994 to incorporate by such reference the provisions of section 3994 in section 3991. For if there were such incorporation of 3994 in 3991 by reference, the provisions of

section 3994 would thereby be incorporated by specific reference in section (4009-15) sec. 1 into that section and the districts maintaining joint township high schools would thereby have the power to issue bonds under section 3994. In my opinion, however, this is not the case.

In 2nd Lewis' Sutherland Statutory Construction, page 1009 we find the following statement of the law in regard to the delegation of the power of taxation:

> "The power (to lay taxes) can be delegated by the legislature, but only in plain and unambiguous words. Statutes for that purpose will be construed strictly, and they must be closely pursued; a departure in any material part would be fatal. Any doubt or ambiguity arising out of the terms used by the legislature must be resolved in favor of the public."

And in Cooley on Taxation, 469 is the following:

> "The mischief of a strict construction (of statutes delegating the power to lay taxes) is easily obviated by the legislature; but the mischief of a liberal construction may be irremediable before it can be reached."

Following this well-known rule of statutory construction it is my opinion that had the legislature desired to confer upon school districts in the establishment and maintenance of a joint high school as in section (4009-15) sec. 1, the power conferred upon school districts by section 3994 it would have done so by explicit reference to that section in section (4009-14) sec. 1 and would not have left the question of the exercise of so important a power of taxation to mere inference. It also seems to me, from a careful reading of section (4009-15) sec. 1, that the intention of the legislature throughout said section is evidently to require such districts to submit all questions of raising revenue for the establishment and maintenance of such a joint high school to the vote of the electors of such districts.

I am, therefore, of the opinion that such boards of education maintaining joint high schools cannot issue bonds as provided in section 3994 Revised Statutes.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—LEASE OR PURCHASE GROUND FOR ATHLETIC PURPOSES—MODE OF PAYMENT.

A board of education may lease or purchase grounds for athletic purposes, and pay for same from funds raised by taxation for maintenance of school.

June 3, 1909.

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

DEAR SIR:—Your communication of May 29th, in which you request my opinion on the following question, received:

> May a city board of education lease or purchase grounds for athletic and other purposes, and pay for the same from funds raised by taxation for the maintenance of schools?

In reply, I beg leave to submit the following opinion: The general power in boards of education of acquiring by lease or purchase lands for school purposes is given by sec. 3987 of the Revised Statutes, which reads as follows:

> "The board of education of any district is empowered to build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefore, or rights of way thereto, to rent suitable school rooms, provide all the necessary apparatus and make all other necessary provisions for the schools under its control; also, the boards shall provide fuel for schools, build and keep in good repair all fences enclosing such school houses, plant when deemed desirable shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

In no place in this section is the power specifically given to any board of education to purchase or lease grounds for athletic purposes, nor, in my opinion, does the broad provision "and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts" give them such power, for the whole intent of this section would appear to be that of giving boards of education the necessary powers incident to the establishment, support and maintenance of the physical apparatus requisite for educational purposes only. The legislature has further provided in (4020-17), sec. 1, for the establishment of courses in physical training in the public schools in city subdistricts, but the physical training contemplated by this act is such as may be taught without the use of special grounds or apparatus and, in my opinion, was not intended to cover those branches of physical training popularly included in the term "athletics."

I am, therefore, of the opinion that a city board of education is not empowered to lease or purchase grounds for athletic purposes and pay for the same from funds raised by taxation for the maintenance of schools. I wish, however, to specifically state that by the term "grounds for athletic purposes," I take it you mean grounds upon which the athletic teams of the city schools may hold contests with the athletic teams of other schools, the use of such grounds being thus limited to a comparatively small number of school students.

In your question you speak of leasing grounds "for athletic and other purposes." Taking your letter literally, I should be unable to express any opinion on the question, for the reason that it is too indefinite and the "other purposes" which might be included in your question, might be such as would authorize a city board of education in leasing such grounds. As I am unable to express an opinion on the question as rendered, I have excluded from my consideration the phrase "other purposes" and have regarded it merely as dealing with the board's power to lease or purchase grounds for athletic purposes.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE SCHOOL DISTRICT—RELIEVED FROM ORGANIZING BY LEGISLATURE.

A village school district which had never organized or elected board of edu-

cation, and was relieved from doing so by legislature, was never out of township school district.

June 4, 1909.

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

DEAR SIR:—Your communication of May 29th, in which you ask opinion on the following statement of facts and questions received:

> "Under section 3909 the village of Nashville, Holmes County, Ohio, never held an election for the purpose of electing village board of education, and, therefore, never organized as such, but requested the legislature (section 3888) to relieve them from organizing, which request was granted. The total tax valuation of said village is, and has been, only about $37,000.00."
>
> "Question. Was the village of Nashville ever out of the township district under section 3909?"
>
> "Question. Is it now, after the lapse of three years, necessary for the village of Nashville to take a vote requesting to be put back into the township district?"
>
> "Question. Has the township board of education a right to hire teachers for the Nashville district (No. 3) without allowing Nashville a vote?"

In my opinion, all of these questions should be answered in the negative.

Section 3888 as it appeared originally in the Harrison School Code, read as follows:

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

As I understand your statement of facts, however, the village of Nashville never organized under this section by electing a board of education, as provided for in section 3909. Therefore, when section 3888 was amended by the 77th general assembly 98th O. L. 217, said village of Nashville was, by virtue of such amendment, continued as a part of, and a district of, the Washington Township school district.

Said section 3888 as so amended reads in part as follows:

> "* * * provided that each incorporated village now existing or hereafter created, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits, detached for school purposes, with a tax valuation of less than $100,000.00, shall not constitute a village school district; provided, at any general election a proposition to dissolve or organize such village school district be submitted by the board of education to the electors of such village, and be so determined by a majority vote of such electors."

The evident purpose of such amendment by the legislature was to meet just such situations as are presented by your statement of facts, and the two provisos contained in section 3888 show this plainly.

I am, therefore, of the opinion that the village of Nashville was never out

of the Washington Township school district; that it is not now necessary for the village of Nashville to take a vote requesting to be put back into the township district, and that the Nashville district (No. 3) should be allowed representation on the township board of education.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—VILLAGE INCORPORATED FROM PARTS OF TERRITORY OF SUBDISTRICTS—OWNERSHIP OF SCHOOL BUILDING.

A village was incorporated from parts of territory of two subdistricts in same township school district. Situated within corporate limits of newly-formed village are two school houses, one is used for elementary purposes, other for elementary high school purposes. Board of education of village claim both school buildings. Township board claim building used for elementary and township high school purposes.

Held: 1. *Upon incorporation of village it became a village school district.*
2. *Title to school buildings within village district intended and used for pupils residing in said village, vested in board of education of village school district.*
3. *Township board lawfully holding elementary and high school building within said village which is intended and used for pupils throughout township.*
4. *Board of education may enlarge any building used for pupils residing throughout township school district as title to building will not vest in village board of education so long as building is used for pupils throughout the township.*

June 8, 1909.

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

DEAR SIR:—Your communication of June 3rd, in which you resubmit for my opinion the following propositions, is received:

> "On April 14, 1906, a village was incorporated from parts of territory comprised in each of two subdistricts in the same township school district. The tax valuation of the village at the time of the incorporation was $167,000. Situated within the corporate limits of the newly formed village are two school houses. Prior to the time of the incorporation of the village, one of the buildings was used for elementary school purposes, the other for elementary and township high school purposes. The village board of education at once claimed the school buildings. The township board abandoned all claim to the building used for elementary school purposes only, but continued to hold the building for elementary and township high school purposes, and the township board is now maintaining in said building an elementary school for pupils residing in the township, and a township high school to which pupils living in the village are admitted by mutual agreement between the two boards.

"1. Upon the incorporation of said village, did it become a village school district?

"2. If said village became a village school district, did the title to both of said school buildings or either of them remain in the board of education of the township, or did the title to said buildings become vested in the board of education of the village?

"3. Is the township board lawfully holding and using for elementary and high school purposes the building situated within the present corporate limits of the village?

"4. If the township board is legally in possession of said building, may the board enlarge said building, the additional rooms to be used for both elementary and high school purposes, with the reasonable assurance that, by operation of law, the title to said building will not become vested in the village board of education?"

In my communication to you of May 20th concerning the same questions I stated that the opinion heretofore rendered by Attorney General Ellis to Hon. Karl T. Webber, prosecuting attorney, Columbus, Ohio, on Oct. 29, 1906, to be found in the Annual Report of the Attorney General of Ohio, 1906-1907, page 280, seemed to answer your inquiries.

On a careful re-reading of said opinion I have decided that it does not answer, or pretend to answer, the above questions. The question submitted, concerning which that opinion was written, dealt with subdistrict school property which was used for the exclusive benefit of school children within such school subdistrict and did not in any way decide the question as to the title of the board of education of a village school district, carved out of a township school district, to township high school property.

In regard to your inquiries above, therefore, I beg to submit the following opinion:

Section 3888 Revised Statutes reads in part as follows:

"Each incorporated village now existing or hereafter created, together with the property 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 $100,000 shall constitute a village school district, * * *."

Under this provision of the statutes the village concerning which you are inquiring became, by virtue of its incorporation, and of the fact that the total tax valuation of such district was $167,000, a village school district.

Section 3972 Revised Statutes reads in part as follows:

"All property, real or personal, which has heretofore vested in and is now held by any board of education for the use of public or common schools in any district, is hereby vested in the board of education provided for in this title, having under this title jurisdiction and control of the schools of such district; * * *"

This provision of the statutes, unless limited by rules of construction, would vest the title of the township high school property in the board of education of the village school district above referred to, but under the well-known rule of statutory construction that general words used in a statute should be limited to the objects to which it is apparent the legislature intended to apply

them. This does not happen, for the intention of the legislature appears throughout the school code to vest the title of school property in the boards of education of the districts within which it lies where such school property was designed and intended for use of the pupils residing in such school district.

It follows, therefore, that the township high school property, which was intended for the use and benefit of all the pupils of the township does not, by virtue of the mere fact of incorporation of the said village and its thereby becoming a village school district under section 3888, vest in the board of education of said village school district. This question has been squarely passed upon by the supreme court in the case of the Board of Education v. Board of Education, 46 O. S. 595, the syllabus of which case reads in part as follows:

> "Public school property, real or personal, that has been appropriated and set apart by a township board of education for the purpose of a public school of a higher grade than primary, for the benefit of the youth of the whole township, does not pass to or vest in the board of education of a separate school district that may be afterwards organized out of the territory within which the property happens to be situated, although the property falls within the letter of section 3972 R. S., which is the section of the school law relating to the subject."

As section 3972 was not amended in regard to the above provision by the new school code (97 O. L. 854), I am therefore of the opinion that,

1. Upon the incorporation of said village it became a village school district.
2. The title to such schools within such village school district as were intended and used for the youth residing in said village school district vested in the board of education of said village school district.
3. The township board is lawfully holding and using for elementary and high school purposes any building within said school district which is intended and used for the education of youth throughout the township.
4. The board of education may enlarge any building which is intended and used for the education of youth residing throughout the township school district with a reasonable assurance that by operation of law the title of said building will not become vested in said village board of education so long as said building continues to be used for said purposes.

I do not desire to express any opinion upon the question whether the title to said building would vest in said village board of education should the township board of education discontinue the use of said building for general township school purposes.

Yours very truly,

U. G. DENMAN,
Attorney General.

BENEVOLENT INSTITUTIONS—TEACHERS IN—MUST HOLD CERTIFICATES.

July 26, 1909.

HON. JOHN M. ZELLER, *State Commissioner Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "May a teacher be legally employed to teach in schools at children's

homes, orphans' asylums and infirmaries without the qualifications of a teacher's certificate valid in the county in which said children's homes, orphans' asylum or infirmary is located?"

In reply I beg to say section 4010 Revised Statutes requires that:

"The board of education in any school district in which a children's home or orphans' asylum is or may be established by law or in which a county infirmary is or may be established shall, when requested by the board of trustees of such home, asylum or infirmary, establish in such home, asylum or infirmary a separate school so as to afford the children therein the advantages and privileges of a common school education."

Said section further provides that:

"The board of trustees of such institutions shall in the control and management of such schools, as far as practicable, be subject to the same laws that boards of education and other school officers are who have charge of the common schools of such district."

You will observe that the first quoted provision of said section requires the board of education of the school district to establish the school, and that the second quoted provision requires the board of trustees of the institution in which such school is established to control and manage the same, as far as practicable, in accordance with the laws that govern boards of education in the control and management of the common schools of the district.

I am, therefore, of the opinion that teachers employed to teach in such schools so established are required to hold teachers' certificates the same as though they were employed in the public schools of the school district.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TUITION—PAYMENT OF BY BOARDS OF EDUCATION.

July 28, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 26th, in which you submit the following for my opinion:

One who is a Boxwell-Patterson graduate and resides in a township district in which no high school is maintained, tuition has been paid by the board of education of his school district to a high school other than a first grade high school.

Query: After said Boxwell-Patterson graduate graduates from said high school, other than a first grade, is the board of education of said high school other than first grade, required to pay the tuition of said graduate through a first grade high school?

I beg to call your attention to section 4029-3 Revised Statutes as amended

by House Bill No. 17, 100 O. L. 74, which applies to the payment of tuition of two classes of pupils. First, pupils holding diplomas (under Boxwell-Patterson law) and residing in township, special or joint subdistrict, not maintaining a high school. Second, pupils graduating from high schools other than first-grade high schools and residing in the district in which the high school from which they have graduated is located.

In the question submitted you will note that the Boxwell-Patterson graduate does not reside in the school district in which the high school is located from which he has graduated, and therefore is not entitled to tuition in a first-grade high school, to be paid by the board of education of the high school other than first-grade from which he has graduated.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF SCHOOL EXAMINERS—DISCRETION IN GIVING EXAMINATIONS—NEED NOT TAKE ALL SUBJECTS AT ONE TIME.

August 19, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter of August 14th, in which you request my opinion on the following questions received:

> "1. Can a board of county school examiners permit an applicant to select a number of the subjects enumerated in section 4074 and write upon these selected subjects (being a less number than the whole number required) and then complete the list of subjects required by coming back to a subsequent examination and write the examination out in the subjects remaining over from the preceding examination day?
>
> "2. Would a certificate so acquired be valid?
>
> "3. Must the clerk of the board of examiners collect the fee again from the applicant upon his or her return the second (or third) time to complete the aforesaid examination?"

In reply, I beg leave to state that, in my opinion, the board of county school examiners is, by section 4071 R. S., invested with a certain amount of discretion in the conduct of examinations held under such section, and, while there is no express authority therefor, I am of the opinion that such board may, in the sound exercise of such discretion permit an applicant to select a number of the subjects enumerated in section 4074 R. S., and write upon such selected subjects at one examination, and then complete the list of subjects required by section 4074 at a subsequent examination to be taken within a reasonable time thereafter. A certificate acquired by an applicant's passing such examination in the above manner, would, in my opinion, be valid. In regard to the fee to be collected from applicants, under section 4071, I am of the opinion that the board of examiners may, in the exercise of their discretion, charge and collect a second fee of 50 cents from the applicant upon the taking of the second section of such examination.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOLS—TRANSPORTATION OF PUPILS.

September 3, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your request of even date for an opinion upon the following statement of facts, received:

> Wayne Township, Montgomery County, has no high school, and is situated nine miles from Steele high school, Dayton, and three miles from Osborn high school. In the township there are several families having children who have passed the Patterson examination. These families are so situated financially that they are unable to furnish means of transportation for their children to either of the above mentioned high schools. Query: Can the board of education of Wayne Township legally furnish transportation for such children to either of these two high schools?

In reply, I beg leave to submit the following opinion: The only provisions appearing in the school code authorizing boards of education to furnish transportation to pupils residing within their jurisdiction are those of sections 3922 and 3934 R. S. O., which deal respectively with townships which have centralized their schools by suspension of one or more subdistrict schools, and special school districts. Section 4029-3 R. S. O. as amended in 100th Ohio Laws 74, provides for the payment of tuition of pupils in some high school by boards of education not maintaining a high school, but no place in this act is there any provision which would cover a case such as is presented by your statement of facts.

I am, therefore, of the opinion that the board of education of Wayne Township cannot legally furnish transportation for the pupils included by your statement of facts.

Yours very truly,

U. G. DENMAN,
Attorney General.

TEACHERS—PROFESSIONAL CERTIFICATES—RENEWED ONLY BY SCHOOL EXAMINERS OF COUNTY GRANTING.

March 27, 1909.

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

DEAR SIR:—Your communication is received in which you submit for the opinion of this department thereon the following inquiry:

> "Section 4073, Ohio school laws, as amended May 9, 1908, provides that certificates granted for five years and eight years shall be regarded as professional certificates and shall be renewed without examination at the discretion of the examining board under specified conditions. It further provides that such professional certificates shall be valid in any county in the state. Is it within the discretionary power of the board of school examiners in any other county than that in which the certificate was originally granted to renew the same at the time of its expiration?"

That part of section 4073 which controls the issuing and renewal of five and eight year certificates is as follows:

> "County boards of school examiners may grant teachers' certificates for * * * five and eight years from the day of examination; * * * * * * *. All certificates granted for five years, or eight years, shall be regarded as professional certificates and shall be renewed without examination at the discretion of the examining board, provided that no such certificate shall be renewable if the holder thereof has not been actively engaged in teaching within the four years preceding. Such professional certificate shall be valid in any county in the state. County boards of school examiners may at their discretion issue certificates without formal examinations to holders of certificates granted by other county and city boards of school examiners."

Considering the special provision in the statute that such professional certificates shall be renewed without examination at the discretion of the *examining board* and that *county boards of school examiners* may at their discretion *issue* certificates without formal examination to holders of certificates granted by other county and city boards of school examiners, I conclude that while the original examining board may *renew* such certificates, this right is not given by the statute to county boards of school examiners in counties other than that in which the certificate was originally granted. Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—TERM FOR WHICH SUPERINTENDENT MAY BE APPOINTED.

A board of education can only appoint a superintendent for three years and cannot by means of resignation, etc., cause an appointment to be made for a longer period.

May 12, 1909.

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

DEAR SIR:—Your communication of May 8th received, requesting opinion on the following question:

> "Can a board of education extend the time for which a superintendent in a village school district is appointed, provided they do not make the term extend beyond the number of years specified by section 4017*a* Revised Statutes, where the original term of such appointee was created by such board to exist for the term of three years, and whether the same object may be accomplished by the resignation of such superintendent during the existence of such term, and his reappointment by the board of education for a term of three years, to commence from date of such resignation."

Section 4017*a* Revised Statutes reads in part as follows:

> "The board of education of each village, township and special school district, may appoint a suitable person to act as superintendent, * * *

for a term not longer than three years. The term to begin within four months of the date of the appointment."

The evident spirit of the statute, as expressed by this provision, was to render it impossible for an existing board of education to appoint a superintendent for a term of office which would materially extend beyond the term of office of such appointing board, and to also prevent such boards of education from making such appointments to commence after their retirement form office. This is plainly indicated by the clause "for a term not longer than three years, the term to begin within four months of the date of the appointment."

Such a proceeding as is indicated in your inquiry would, in my opinon, be directly contrary to the spirit of the statute, as indicated in the above clause, and would be an attempt to accomplish indirectly what, under the statute, the board has no power to do directly.

I am, therefore, of the opinion that there is no power in the board of education of a village school district to make such appointment as is suggested in your question.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL SUPERINTENDENT—TERM OF APPOINTMENT.

August 2, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter of August 2nd is received, in which you submit the following to this department for an opinion:

"On July 6, 1907, a superintendent was appointed in a village district for a term of two years. On April 10, 1909, the same superintendent was apointed for a term of three years, said term to begin on the sixth day of July, 1909. Query: Is the latter appointment valid?"

I beg to call your attention to the latter part of section 4017*a* Revised Statutes, which is in part as follows:

"The board of education of each village, * * * school district, may appoint a suitable person to act as superintendent, * * * for a term not longer than three years, *the term to begin within four months of the date of appointment;*"

From the above quoted statute you will note that the board of education of a village district may not make an appointment for a term longer than three years, and that the term must begin within four months of the date of the appointment. In the case submitted, the superintendent was appointed for three years on April 10th, and took office within four months of said appointment, on July 6, 1909.

I am, therefore, of the opinion, from the facts submitted to me, that the above appointment is valid. Yours very truly,

W. H. MILLER,
Assistant Attorney General.

SCHOOLS—BOARD OF EDUCATION—PAYMENT OF TUITION OF GRADUATES FROM OTHER THAN FIRST GRADES.

Boards of education maintaining second grade high schools must pay tuition of graduates at first grade high school for one year.

Boards of education maintaining third grade high school not required to pay tuition for two years at a first grade high school, but may elect and pay one year at second grade and one year at first grade.

August 9, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 9th, in which you submit the following for my opinion:

> A pupils having legal school residence in a village maintaining a high school below first grade has graduated and received a diploma. Query: Is the board of education of said village maintaining a high school of the second grade required to pay the tuition of said pupil at some first grade high school for one year, and if maintaining a third grade high school, is said village board of education required to pay the tuition of said pupil for two years at some first grade high school?

I beg to call your attention to section 4029-3 R. S., as amended by House Bill No. 17, 100 O. L. 74, which is in part as follows:

> "A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from said school residing in the district at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year. A board of education providing a second grade high school as defined by law shall be required to pay the tuition of graduates residing in the district at any first grade high school for one year; provided, however, any such board of education maintaining a second or third grade high school shall not be required to pay any such tuition after the rate of taxation permitted by law for such district shall have been reached and all the funds so raised are required for the support of the schools of said district."

You will note that the above quoted part of section 4029-3 provides that a board of education providing a third grade high school shall be required to pay the tuition of graduates at any first grade high school for two years, or at a second grade high school for one year and a first grade high school for one year, and that a board of education providing a second grade high school is required to pay the tuition of graduates at any first grade high school for one year, with the following proviso, that no board of education shall be required to pay any such tuition after the rate of taxation permitted by law for such district shall have been reached, and all the funds so raised are required for the support of the schools of said district.

In the case of a board of education providing a third grade high school, I am of the opinion that it is required by law that said board of education shall pay the tuition of its graduates at any first grade high school for two years or at a second grade high school for one year and a first grade high school

for one year, and I do not believe if said board of education decided to pay the tuition of its graduates at a second grade high school for one year and a first grade high school for one year, it could be compelled to pay the tuition of its graduates at some first grade high school for two years. But, in the case of a board of education providing a second grade high school, then said board of education must pay the tuition of its graduates at a first grade high school for one year. However, it is understood that in both cases the board of education is not required to pay any such tuition after the rate of taxation permitted by law for said district shall have been reached and all the funds so raised are required for the support of the schools of said district.

I am, therefore, of the opinion that a board of education maintaining a high school of the second grade is required to pay the tuition of its graduates at some first grade high school for one year and, if maintaining a third grade high school, said board of education is not required to pay the tuition of its graduates for two years at some first grade high school, but may elect to pay the tuition of its graduates at a second grade high school for one year and a first grade high school for one year.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONER AND MEMBER OF BOARD OF EDUCATION—INCOMPATIBLE OFFICES.

August 26, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your inquiry of this date requesting my opinion upon the following question is received:

> Can the offices of county commissioner and member of the board of education of a school district within said county be held by the same man at the same time?

In reply, I beg leave to state that I have been unable to find any inhibition in the statutes against the holding of these two offices by the same person, and the test, therefore, to be applied in this case is the common law rule of the compatibility of the two offices.

I am of the opinion that these two offices are incompatible for the reason that under section 3969 of the Revised Statutes the board of county commissioners is empowered and required to perform the duties of the board of education of any school district in their county upon the failure of such board to perform such duties, and upon the board of county commissioners being advised and satisfied of such fact.

A county commissioner, therefore, in my opinion, cannot hold the office of member of the board of education of any school district within the county for which he is such commissioner.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TEACHERS' PENSION FUND.

A teacher who has taught in high school for thirty-one years after retiring may accept position in another school without forfeiting right in pension fund.

September 30, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have your request for an opinion upon the following statement of facts:

> "A teacher has taught in the Springfield city schools for thirty-one years. That teacher now has an opportunity to go to Maryland to teach. Could such a teacher accept such a postion after retiring from teaching in the Springfield schools and not thereby forfeit her right in the pension fund of the Springfield school district upon her eventual retirement from teaching at any place, said teacher having kept up her two dollar monthly payments to said pension fund to the present time?"

I beg leave to submit the following opinion upon the above statement of facts and query.

The act authorizing and regulating the administration of school teachers' pension funds is a remedial one and should, therefore, be liberally construed and in such manner as will produce the most beneficial results for the teachers included within its provisions.

Section 3897*d* of the Revised Statutes of Ohio reads in part as follows:

> "* * Any teacher shall have the right to retire and become a beneficiary under this act who shall have taught for a period aggregating thirty years, whether before or after, or partly before or after, the passage of this act; provided, that three-fifths of said term of service shall have been rendered in the public schools or in the high school of said school district, or in the public schools or high schools of the county in which said district is located, and the remaining two-fifths of said term of service in the public schools of this state or elsewhere. Each teacher so retired or retiring, shall be entitled during the remainder of his or her natural life, to receive as pension, annually, the sum of ten dollars for each and every year of service rendered as teacher, but in no event shall such pension, paid to any teacher, exceed the sum of three hundred dollars in any one year, and said pension shall be paid monthly during the school year; but in no event shall such pension be paid to any teacher until such teacher shall contribute, or shall have contributed, to such fund, a sum equal to twenty dollars a year for each and every year of service rendered as teacher, but in no event shall this sum exceed six hundred dollars; but should any teacher retiring be unable to pay the full amount of this sum before receiving a pension, the board of trustees shall, in paying the annual pension to such retiring teacher, withhold on each month's payment, twenty per cent. thereof, until the full amount as above provided, shall have been thus contributed to the fund; * *."

Section 3897*h* reads in part as follows:

> "Any teacher who shall resign or be removed for cause, as aforesaid, shall, upon application within three months after such resignation

or removal takes effect, be entitled to receive one-half of the total amount paid by such teacher into such fund. * *."

Section 3897*d* plainly evidences the intention of the legislature in enacting this statute, to reward long and faithful service in the public schools of this state and the qualifications necessary to entitle a teacher to such reward are plainly stated in the following words:

"Any teacher shall have the right to retire and become a beneficiary under this act *who shall have taught for a period aggregating thirty years whether before or after, or partly before or after, the passage of this act;* provided, that three-fifths of said term of service shall have been rendered in the public schools or in the high schools of said school district, or in the public schools or high schools of the county in which said district is located, and the remaining two-fifths of said term of service in the public schools of this state *or elsewhere.*"

The teacher in question has fulfilled the necessary qualifications in regard to the service of three-fifths of the required thirty years in the public schools of Springfield, and the remaining two-fifths of such service may be carried out, under the terms of the statute, either in some other school district of this state "*or elsewhere.*" It does not, in my opinion, make any difference if "the remaining two-fifths" of such service is rendered after the necessary qualifying three-fifths service in the Springfield schools.

I am, therefore, of the opinion that this teacher may retire from service in the schools of Springfield and this state and may teach in the public schools of another state without forfeiting her right in the pension fund of the Springfield school district. This right, however, will not, in my opinon, mature until her final retirement from teaching anywhere, and another condition precedent to the maturity of such right is the payment by her into the school pension fund of the Springfield school district of a sufficient sum to make up the requisite amount of six hundred dollars. This sum must be completed before the time at which she shall claim her pension and may, in my opinion, be made up by monthly payments of whatever amount she may see fit, or by the payment of a lump sum at any time before she shall claim such pension; or she may take advantage of the following provisions of this section:

"But should any teacher retiring be unable to pay the full amount of this sum before receiving a pension, the board of trustees shall, in paying the annual pension to such retiring teacher, withhold on each month's payment, twenty per cent. thereof, until the full amount, as above provided, shall have been thus contributed to the fund."

Section 3897*h* does not, in my opinion, rule in this case. That section was, undoubtedly, intended to cover cases where a teacher should, for any cause, resign or be removed for cause, before completing the term of service requisite to entitle him or her to the pension provided for by section 3897*d*.

Yours very truly,

U. G. DENMAN,
Attorney General.

TEACHERS' INSTITUTE—PRESIDENT AND SECRETARY MAY VOTE TO ELECT LECTURERS AND INSTRUCTORS.

October 13, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of September 21st, in which you ask my opinion on the following question is received:

> "Under section 4086 of the Revised Statutes of Ohio have the president and secretary of a teachers' institute a legal right to help elect lecturers and instructors for such institutes; or, what is their power as compared with the three members of the executive committee provided for by such section?"

In reply thereto I beg leave to submit the following opinion. Section 4086 of the Revised Statutes of Ohio reads in part as follows:

> "A teachers' institute may be organized in any county, by the association of not less than thirty practical teachers of the common schools residing therein, who shall declare their intention in writing to attend such institute * * * such institute shall elect annually by ballot, a president, secretary, and one member of an executive committee. Said member of an executive committee to serve for a term of three years; provided, that at the first annual election held after the organization of any institute, there shall be elected three members of the executive committee, the one receiving the highest number of votes to serve for three years; the one receiving the next highest number of votes to serve two years; and the one receiving the next highest number of votes to serve one year. *The president and secretary of the institute shall be ex-officio members of the executive committee, and shall act as chairman and secretary of said committee.* * * * *It shall be the duty of this executive committee to manage the affairs of the institute;* which committee shall enter into a bond, payable to the state of Ohio with sufficient surety, to be approved by the county auditor in double the amount of the institute fund in the county treasury, for the benefit of the institute fund of the county, and conditioned that the committee shall account faithfully for the money which shall come into its possession, and make the report to the commissioner of common schools, required by section 4088, * * *."

Bouvier defines the phrase "ex-officio" as follows:

> "By virtue of his office,"

and the following definition of the word "member" is found in the Century Dictionary, at page 3703:

> "A part of any aggregate or whole. A person considered in relation to any aggregate of individuals to which he belongs."

It would appear, therefore, from the above quoted parts of section 4086 R. S. O., and definitions, that under this section the president and secretary of the

institute are, by virtue of their being such officers of such institute, members or parts of the executive committee; and it therefore follows that by the latter part of the section it becomes their duty along with the other three members of such executive committee "to manage the affairs of the institute."

I am, therefore, of the opinion that the president and secretary of such institute, who would, under section 4086, be chairman and secretary of the executive committee of such institute, have a legal right to take part and have a voice in all the business conducted by such executive committee, and their powers, in my opinion, are in no way different, or either more or less extensive, than those of the other three members of such committee.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY AUDITOR—MEMBER BOARD OF EDUCATION OF VILLAGE DISTRICT—OFFICES INCOMPATIBLE.

October 13, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letter of October 13th, in which you request my opinion on the following question, is received:

> "May a man holding the office of county auditor legally serve as member of the board of education of a village district?"

In reply thereto, I beg leave to submit the following opinion:

There is no positive inhibition in the statutes against a county auditor being also a member of a village board of education, and the question, therefore, to be decided is whether these offices are compatible under the old common law rule.

Section 4044 R. S. O. reads in part as follows:

> "The treasurer shall, annually, within the first ten days of September, settle with the county auditor for the preceding school year, and for that purpose shall make a certified statement showing the amount of money received, from whom, and on what account and the amount paid out, and for what purpose; he shall produce vouchers for all payments made; if the auditor, on examination, finds the statement and vouchers to be correct, he shall give the treasurer a certificate of the fact, which shall, *prima facie* be a discharge of the treasurer for the money paid; * * *."

The supplement to section 4042 R. S. O., passed April 27, 1908, and approved on the same day, reads in part as follows:

> "When a depositary has been provided for the school moneys of any district, as authorized by section 3968 of the Revised Statutes of Ohio, the board of education of such district may, by resolution duly adopted by a vote of the majority of its members, dispense with a treasurer of the school money belonging to such school district; and in

such district the clerk of the board of education thereof shall perform all the service, and discharge all the duties and be subject to all the obligations that are required of the treasurer of such school district by the statutes of Ohio. Whenever such treasurer is dispensed with as herein provided, then all the duties and obligations required by the statutes of Ohio of the county auditor, county treasurer, or other officer or person, relating to the school moneys of such district, shall be complied with by dealing wtih the clerk of the board of education of such district. * * *."

Under the above quoted sections it becomes the duty of the county auditor to pass upon the validity of the acts of a board of education, for it is his duty under section 4044 to refuse the certificate specified in such section to the treasurer of the school district when, in his opinion, any vouchers upon which the treasurer has paid out money are illegal, and, therefore, should he be a member of the board of education upon the validity of whose acts he is required to pass by section 4044, he would be in the position of passing upon the validity of his own acts.

I am, therefore, of the opinion that the office of county auditor and member of a board of education of a village school district located within the county for which he is auditor are incompatible, and that, therefore, a man holding the office of county auditor cannot legally serve as member of the board of education of a village school district located within the county for which he is auditor.

Very truly yours,

U. G. DENMAN,
Attorney General.

SCHOOLS—INMATES OF COUNTY CHILDREN'S HOME—TUITION.

Inmates of county children's home are entitled to free tuition in the public schools.

October 14, 1909.

HON. J. W. ZELLER, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of September 24th, in which you ask my opinion on the following question, is received:

"Children from the Morgan county children's home situated in Malta, Ohio, some eight or ten in number, have attended the Malta school. The Malta board of education have presented a bill to the board of trustees of said home for the tuition of these pupils, and demand payment. The board of trustees of said home are of the opinion that these children are entitled, under section 4013 R. S., to free tuition.

"Query: Are these children, in your opinion, so entitled to free tuition under said section 4013 R. S.?"

In reply thereto, I beg leave to submit the following opinion. Section 4013 R. S. reads in part 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*

*or may be inmates of a county or district children's home located in any such school district, at the discretion of the board of education of said school district; * * *."*

The only question in interpreting this section of the statutes is as to what meaning shall be put upon the phrase "at the discretion of the board of education of said school districts," and I am of the opinion that the discretion here given to such board of education is not intended to give them the right to charge tuition to pupils coming within the meaning of this section. The section evinces the intention that the schools of each district shall be free to all school children of proper age, who are or may be inmates of a county or district children's home located in any such school district, and the discretion given to the board in this section is such as it may exercise in the case of any school child of proper age coming within the scope of this section, and pertains to the educational, moral and other qualifications of such children. This discretion is by this section given to the board of education in all cases, and if the board were empowered under this section to charge tuition for inmates of county or district children's homes, it would also be possible for them to charge tuition for children of school age, "who are children, wards or apprentices of actual residents of the district," for the phrase "at the discretion of the board of education" is a limitation upon all of the section that precedes it.

I am further strengthened in this opinion by the provisions of section 4010 of the Revised Statutes, which makes it mandatory upon the board of education of a school district, upon request by the board of trustees of a county or district children's home located in said school district to "establish in such home * * * separate school, so as to afford to the children therein, as far as practicable, the advantages and privileges of a common school education; * * * such schools * * * shall be continued in operation each year * * * at such homes * * * not less than forty-four weeks. If the distributive share of the school funds to which such school at any such home or asylum is entitled by the enumeration of children in the institution is not sufficient to continue the schools hereby required, the deficiency shall be paid out of the funds of the institution; * *."

This section shows that it was the intention of the legislature to furnish free schooling in one of two ways to the children who are or may be inmates of a county or district children's home.

I am, therefore, of the opinion that the children of the Morgan county children's home are entitled, under section 4013 R. S., to free tuition in the schools of the Malta school district, if otherwise qualified.

Very truly yours,

U. G. DENMAN,
Attorney General.

TUITION—BOARD OF EDUCATION—SUSPENSION OF SCHOOL IN PART OF DISTRICT.

Board of education of township district suspending schools in part of district is not exempt under section 4029-3 from payment of tuition of high school pupils residing in suspended subdistricts.

October 14, 1909.

HON. J. W. ZELLER, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of September 21st, in which you ask my opinion upon the following question, is received:

"Is the board of education of a township school district exempt, under section 4029-3 of the Revised Statutes of Ohio, from the payment of tuition of its high school pupils, in case the schools of such district be suspended, and transportation furnished in only a part of the districts in such township school district?"

Section 4029-3 of the Revised Statutes of Ohio, as amended in 100 Ohio Laws, reads in part as follows:

"* * * when the elementary schools of any township school district in which a high school is maintained, are *centralized*, and transportation of pupils is provided, *all pupils* resident of the township school district holding diplomas shall be entitled to transportation to the high school of said township school district, and the board of education of said school district shall be exempt from the payment of the tuition of said pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education may include."

Section 3922 of the Revised Statutes of Ohio as amended in 99 Ohio Laws, authorizes boards of education of any township school district to *suspend* the schools in any or all subdistricts in the township, and makes it mandatory upon the board, in case of such suspension, to provide for the conveyance of the pupils residing *"in such subdistrict or subdistricts"* to a public school in said township district, or to a public school in another district, etc.

Section 3927-2 of the Revised Statutes of Ohio provides for the submission by a township board of education of the question of *"centralization"* of the schools of such district to a vote of the qualified electors of such township district. The apparent distinction made in the last two mentioned sections of the statutes between the "centralization" of the schools of a township school district, and the "suspension" of one or more subdistrict schools in such township district, and the fact that the term "centralization" is used in both section 3927-2 and section 3922 to apply to total suspension of subdistrict schools as distinguished from the use of the word "suspension" in said sections to apply to the abandonment of a less number of subdistrict schools, leads to the conclusion that in section 4029-3 of the Revised Statutes as amended, the legislature intends to make a distinction between partial suspension of schools in a township and entire suspension by centralization; and I am strengthened in this opinion by the fact that any other interpretation of this section would lead to an unreasonable conclusion, for if the word "centralization," as used in section 4029-3 supra, were held to include townships which had suspended a part only of the subdistrict schools therein, we should have a situation where *any* pupil residing in such township school district, and holding a diploma, would be entitled as a matter of right to demand transportation to the high school of said township school district, regardless of his residence in or out of a subdistrict in which the school has been suspended. This follows from the wording of the section, *"all pupils* resident of the township school district holding diplomas shall be entitled to transportation to the high school of said township school district, etc."

Such a situation was not, in my opinion, intended by the legislature, and I am, therefore, of the opinion that section 4029-3 of the Revised Statutes of Ohio as amended in 100 Ohio Laws, page 74, does not apply to township school dis-

tricts in which a high school is maintained, and in which the schools have been suspended in a part only of the subdistricts of such township school district, and transportation furnished the pupils residing in such suspended subdistricts.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—TUITION OF PUPIL ATTENDING ANOTHER SCHOOL UNDER MILE AND A HALF RULE—LENGTH OF TIME TO BE PAID.

Board of education maintaining school for eight months must pay tuition of pupil, who, under mile and a half rule, attends another school maintained for nine months, for full period attended.

October 14, 1909.

HON. J. W. ZELLER, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your communication of October 7th, in which you submit the following question for my opinion, is received:

> "If the board of education of a district in which a pupil resides maintains a school for eight months in a year, and the board of education of a district which he attends under the mile and a half rule, as established by section 4022*a* R. S. O., maintains a school nine months in a year, must the board of education in the district in which said pupil resides pay for his tuition in a school which he attends as aforesaid for the full nine months?"

In reply thereto, I beg leave to submit the following opinion. Section 4022*a* R. S. O. reads in part as follows:

> "When pupils live more than one and a half miles from the school to which they are assigned in the district in which they reside, they are entitled to attend a nearer school in the same district, or if there be no nearer school in said district, they may attend the nearest school in another school district, in all grades below the high school, and in such case the board of education in the district in which they reside shall be compelled to pay the tuition of such pupils without an agreement to that effect, * * *."

Section 4022-1 R. S. O. reads in part as follows:

> "Every parent, guardian or other person having charge of any child between the ages of eight and fourteen years shall 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 less than twenty-four weeks, and said attendance shall begin within the first week of the school term, unless the child is excused from such attendance by the superintendent of public schools, etc. * * *."

Section 4022*a* as above quoted entitles a pupil coming within the provisions of such section to attend a nearer school in the same district in which he re-

sides, or if there be no nearer school in such district, to attend the nearest school in another school district, in all grades below the high school, and makes it compulsory upon the board of education of the school district in which such pupil resides to pay the tuition of such pupil in such other school.

Section 4022-1 makes it compulsory upon every parent, guardian, or other person having charge of any child between the ages of eight and fourteen years, to send such child to a public, private or parochial school *for the full time that the school attended is in session.* Section 4022-1 thus evinces the intention of the legislature that children of the ages specified shall attend school for the full school year as that full year is fixed by the board having control of such school attended, thereby showing that the legislature took cognizance of the fact that the same amount of work might, by the policy of the authorities running a school, be made to extend over a longer or shorter period of time in each year, and it would, in my opinion, be unjust for the board of education of the school district in which a pupil resides who is entitled, under section 4022*a*, to attend a nearer school, not to pay the tuition of such child for the full time which he attends such other school, although such other school may continue over a longer period in the year. To so interpret the law would result in detracting from the benefit which such child would receive from the schooling in such nearer school, and I am of the opinion that this was not the intention of the legislature in framing section 4022*a*.

I am, therefore, of the opinion that the board of education in the district in which this pupil resides must pay his tuition for the full school period of nine months in the school which he attends, by virtue of section 4022*a*.

Very truly yours,

U. G. DENMAN,
Attorney General.

SCHOOLS—TUITION—INMATES BAPTIST MISSIONARY HOME.

Inmates of Baptist missionary home who are children of parents who are in foreign countries and their maintenance is provided for by their parents who are not residents of Granville school district, must pay tuition to Granville public school.

October 19, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Your letters of September 22nd and October 19th, in which you request my opinion on the following question are received:

> "There is located at Granville, Ohio, a Baptist missionary home. The inmates of said home are children of parents who are in foreign countries as missionaries. These children are not maintained at public expense, but their maintenance is provided for entirely by their parents. The parents are not, and never were residents of the Granville village school district.
>
> "Are these children who are inmates of said home entitled to the privileges of the Granville public schools, free of tuition?"

In reply thereto, I beg leave to submit the following opinion. The section of the statutes covering this question is 4013, which reads in part 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 * * *."

The question here involved has, I think, been squarely passed upon by our supreme court in State ex rel. the German Protestant Orphans' Asylum of Cincinnati v. The Directors of School District No. 14, Millcreek township, Hamilton county, 10 O. S. 448. Although the facts of this case are not given in the report, it would seem from the title of the asylum itself that the inmates of the German Protestant Orphans' Asylum of Cincinnati stood on the same footing as do the inmates of the Baptist missionary home at Granville in regard to their free admission to the public schools of the district in which such institutions are located.

The holding in the above entitled case is as follows:

By the court, Held, "that the children, inmates of the German Protestant orphan asylum of Cincinnati, are not 'children, wards, or apprentices of actual residents' in the school district within which said asylum is located, and therefore, under the 10th section of the act of February 21, 1849, 'for the better regulation of the public schools in cities, towns,' etc. (Swan. Rev. Stat. 860), not entitled to gratuitous admission to the privileges of the public schools of said district."

The wording of the 10th section of the act of February 21, 1849, under which this decision was rendered, to all intents and purposes is the same as section 4013 above and reads in part as follows:

"Admission to said schools shall be gratuitous to the children, wards and apprentices of all actual residents in said district, who may be entitled to the privileges of the public schools, under the general laws of this state; * *."

I am of the opinion, therefore, that under the statement of facts as given in your request, and under the authority of the above quoted decision of the supreme court, the children who are inmates of the Baptist missionary home at Granville, Ohio, are not entitled to the privileges of the Granville public schools free of tuition.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—CONSTRUCTION OF NEW BUILDING.

Board of education may not enter into contract for construction of new building before bonds have been issued, sold and money in treasury to credit of proper fund.

November 17, 1909.

HON. J. W. ZELLER, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of even date in which you submit the following for my opinion:

"May a contract be entered into by a board of education for the construction of a new building before bonds have been issued, sold, and

the money for the same in the treasury to the credit of the proper fund, as required by section 2834*b* of the Revised Statutes, as amended May 9, 1908, 99 O. L. 520?"

I desire to call your attention to section 2834*b*, 99 O. L. 520, which is in part as follows:

> "The * * * board of education of any school district, shall enter into no contract, agreement or obligation involving the expenditure of money, nor shall any resolution or order for appropriation or expenditure of money be passed by any * * * board of education, unless the * * * clerk thereof shall first certify 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, or has been levied and placed on the duplicate, and in process of collection, and not appropriated for any other purpose; which certificate shall be filed and immediately recorded, and the same so certified shall not thereafter be considered unappropriated until the * * * board of education, is fully discharged from the contract, agreement or obligation, or so long as the order or resolution is enforced, *and all contracts, agreements or obligations, and all orders or resolutions entered into or passed contrary to the provision of this section shall be void.* Provided, that none of the provisions of this section shall apply to the contract authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

The above quoted section makes it absolutely necessary, before any contract may be entered into for the expenditure of money by a board of education, that the clerk of such board shall first certify that the money required for the payment of such obligation is in the treasury to the credit of the proper fund from which it is to be drawn, or has been levied and placed on the duplicate and is in the process of collection, and not appropriated for any other purpose, and in case a board of education enters into such a contract without such certificate, such contract is void.

If the board of education to which your inquiry applies intends to pay for the construction of the new building by issuing bonds, it will be necessary for the bonds to be sold and the money in the treasury to the credit of the proper fund, and a certificate from the clerk of such board to that effect before any valid contract for such a building may be entered into by the board, and in no event may a contract be entered into by the board of education without a certificate of the clerk to the effect that the money is in the treasury to the credit of the proper fund, and not appropriated for any other purpose.

In conclusion, I am of the opinion that the board of education may not enter into a contract for the construction of a new building without complying with section 2834*b* Revised Statutes.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEMBER OF COUNCIL MAY NOT BE MEMBER BOARD OF EDUCATION.

December 24, 1909.

HON. JOHN W. ZELLER, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I have before me your letter of December 23rd, in which you submit the following for my opinion:

> "May a person be a member of a village council and a member of a village board of education at the same time?"

I beg to call your attention to section 196 of the municipal code, which is in part as follows:

> "Councils of villages shall be governed by the provisions, so far as applicable, of sections * * * 120 * * * of this act."

Section 120 of the municipal code is in part as follows:

> "* * * Every 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 state militia."

You will note from section 196 of the municipal code that section 120 is made to apply to villages as well as cities, and section 120 specifically provides that a member of council may hold no other public office or employment except the ones enumerated in the statute.

I am, therefore, of the opinion that a person who is a member of a village council may not at the same time be a member of a village board of education.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Various Appointive State Officers)

(To the Adjutant General)

OHIO NATIONAL GUARD—LIABILITY OF OFFICER FOR INJURY TO HORSE.

Neither the state nor mounted officer of Ohio National Guard is liable to liveryman for damages for injury of horse hired by officer in compliance with order of adjutant general, when such injury occurs without fault or neglect of officer or of any agent of state; facts of this particular case considered.

February 16th, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of February 9th, in which you request my opinion on the following statement of facts:

> Certain regiments of the Ohio national guard were ordered by the adjutant general into camp at Fort Benjamin Harrison, Indiana. The general orders providing for said encampment directed that all mounted officers should provide themselves with horses and grooms at their own expense. The officer commanding the first brigade of the national guard entered into a contract with a liveryman whereby the latter was to furnish horses for the officer and his staff, and grooms for the care of such horses while in camp, all at a certain stipulated price per day for each horse. One of the horses so furnished was injured while at camp.

You request my opinion as to whether the state or the officer, or either, is liable to the liveryman in damages for the injury to the horse.

The information contained in your letter has been supplemented by verbal information given to me by Col. Worthington Kautzman, retired, inspector general, who states to me that the horse was picketed with other horses used by the staff, and while so picketed broke loose and ran away, coming into contact with a barbed-wire fence and injuring itself in this manner.

I am of the opinion that neither the state of Ohio nor the officer so contracting with the liveryman is liable to the latter on the above statement of facts. In this connection permit me to state the general principles applicable to facts of this kind: The law of bailments of this nature is that where a horse is hired for a specific use and while being devoted to this use by the bailee is injured without fault or neglect of the bailee, the latter is not liable to the bailor for such injury; but if the animal is used in a manner substantially different from that contemplated by the contract of hire, or if while being used in the manner contemplated, is injured by the fault or neglect of the bailee, then the latter is liable. In this case it must have been understood by the liveryman that horses in camp cannot be housed and cared for in the same manner that they could be cared for elsewhere. Furthermore, the grooms furnished under the contract were the agents of the liveryman, and the horses, while not actually being ridden by the officers were in charge of these grooms.

It is my conclusion, therefore, not only that neither the state nor the officer in question are liable to the liveryman in the particular instance cited, but

that there is no liability on the part of the state or its officers for any injuries to horses while in camp, under contracts similar to this, occurring without the fault or negligence of any of the officers or agents of the state.

Very truly yours,

U. G. DENMAN,
Attorney General.

OHIO NATIONAL GUARD—MEMBER KILLED IN SERVICE.

February 19th, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Your communication of February 9th is received, in which you submit the following inquiry:

> On the 4th of July, 1908, Daniel E. Daly, while on duty with a detachment of his company, under proper orders, at target practice, was shot through the head by a bullet which passed through the concrete butt, causing his death some eight hours later. Said Daly was the sole support of his mother, Eliza Daly. He also had a sister, Jeanetta Daly, living at home. The mother died some six months after the death of Daly. Prior to her death, Eliza Daly presented claims to the adjutant general for expenses and damages she had suffered by reason of the death of her son. The daughter Jeanetta Daly is now pressing the claim, alleging she was dependent upon the brother, Daniel E. Daly, for support. *Quere:* Is Jeanetta Daly the rightful claimant for said damages and expenses?

In reply I beg to say that the said Jeanetta Daly has no legal claim that is enforcible against the state. It may be, however, that a moral obligation exists. If so, the legislature is authorized to make such appropriation as it deems proper for her relief.

I suggest that the claim be presented to the finance committee of the house, together with a full statement of all the facts relative thereto, and if, in the judgment of said committee, the state is under any moral obligation to recognize the claim a specific appropriation for the payment of the same may be properly included in the sundry appropriations and claims bill.

Very truly yours,

U. G. DENMAN,
Attorney General.

ADJUTANT GENERAL—APPROPRIATION FOR CLERK HIRE—INCREASE OF SALARIES.

Where appropriation for salaries of clerks specifies amount to be paid same may not be increased.

March 15th, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You submit to this department the inquiry whether or not it would be legal to apply the appropriation for clerk hire, carried in the general

appropriation bill, as passed by the late session of the general assembly, to the increase of salaries of the chief clerk, the bookkeeper and the stenographers in your department.

In my opinion this application of the funds so appropriated may not be made. The appropriation for the salaries of the clerks in your department is specified as follows:

> "Salary of chief clerk $1,400.00.
> Salaries of seven clerks at $1,200 each, $8,400.
> Salaries of two stenographers at $720 each, $1,440."

Section 2 of the appropriation act provides in part that

> "No bills for extra clerk hire in favor of any clerk or clerks while drawing salaries from the state shall be allowed from any amount herein appropriated."

While none of the offices involved in your inquiry are creatures of a general statute, yet the appropriation bill has the force and effect of law, and its provisions fix the maximum amount receivable by way of salaries therein provided for. In my opinion, the above quoted provision of section 2 is applicable to those clerks whose salaries are specifically fixed by section 1.

Yours very truly,

U. G. DENMAN,
Attorney General.

ARMORY BOARD—COMPENSATION OF MEMBERS—WHEN TO BE APPOINTED—STATE MILITARY FUND.

Members of state armory board need not be appointed until January 1st, 1910, unless gifts and donations are made to board before that time. Members are to serve without compensation.

It is not mandatory upon the general assembly to appropriate and divide the state military fund.

March 30th, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Some time ago this department was in receipt of a letter from you requesting an opinion as to certain provisions in senate bill No. 37, as passed by the last general assembly, being an act to establish a state armory board. An authenticated copy of the amended bill having just come into my possession, I hasten to take the first opportunity to answer the questions you have presented.

You inquire, first, as to when the governor shall appoint the members of the board created by the act in question.

Section 1 of the act provides in part as follows:

> " * * * there is hereby authorized and created a state armory board, which shall consist of four officers of the Ohio National Guard, to be appointed by the governor, by and with the advice and consent of the senate, one of whom, as indicated by the governor upon the first

appointment, shall serve for one year, one for two years, one for three years, and one for four years, and upon the expiration of the term of each, his and that of his successor, shall, in like manner, be filled for the term of four years from and after January 1, 1910."

Standing by itself this provision is extremely ambiguous, and I am unable to say that the language "from and after January 1, 1910," conveys any clear meaning whatever. However, the other sections of the act make it clear that the act as a whole will not be effective until January 1, 1910. The duties of the state armory board, as created by the bill, relate exclusively to the expenditure of funds at its disposal under sections 2 and 4. Section 2 authorizes the board to receive gifts and donations, while section 4 provides for the creation, out of the general revenue fund of the state, of a "state military fund," which shall not be available until January 1, 1910. Unless, therefore, gifts and donations of land, money or other property shall be offered to the state for armory purposes between the present time and January 1, 1910, the state armory board, if now appointed, will have nothing to do.

You inquire further what compensation, if any, is receivable by the members of the state armory board when appointed.

Replying to this inquiry, I may say that the act does not authorize the members of the board to receive any compensation for their services in this capacity, and it seems to be the clear legislative intent that they shall serve without reward.

Your third question relates to the appropriation and apportionment of the "state military fund," to be created under the provisions of section 4 of the act.

That section makes it the duty of the auditor of state from and after January 1, 1910, to credit to the "state military fund," from the general revenues of the state, a sum equal to ten cents for each person who, it shall appear from the last preceding federal census, was a resident of this state. It is further provided that:

> "The fund herein provided for the support of the organized militia of Ohio shall be a continuing fund, and available only for that purpose, and shall not be diverted to any other fund or used for any other purpose, and the general assembly shall annually appropriate and divide into two funds the amount authorized by the provisions of this act, to be known as the 'state armory fund' and 'maintenance Ohio National Guard,' the adjutant general shall pay the per diem, transportation, subsistence, incidental expenses of military companies, inspections and incidental expenses of camp, including horse hire, fuel, lumber, forage for horses, and medical supplies.
>
> "From the amount allotted and appropriated as 'state armory fund,' the state armory board shall provide armories by lease, purchase or construction, as provided in sections 2 and 3 of this act."

You inquire specifically whether the duty of the general assembly to appropriate and divide the fund known as the "state military fund" is mandatory.

In my opinion this duty is not mandatory. One general assembly cannot bind another to the appropriation of money or to the performance of any other legislative act whatever, and any session of the general assembly might, if it saw fit, refuse either to appropriate the amount necessary to replenish the "state military fund" or to divide the latter into its own constituent funds.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO NATIONAL GUARD—AUTHORITY TO ORGANIZE MORE THAN TWO CAVALRY TROOPS—CONTRIBUTING MEMBERS EXEMPT FROM JURY SERVICE.

Adjutant general has not authority to organize more than two troops of cavalry within Ohio National Guards. Contributing members are exempt from jury service.

April 21st, 1909

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 21st, enclosing a communication from Col. Charles Hake, Jr., commanding the First Infantry, O. N. G. In your letter you state that two troops of cavalry have been organized in this state; that this force is insufficient as measured by the regulations of the United States government, and that it is desired to organize another troop of cavalry in order to comply with such regulations.

In my opinion the authority to organize more than two troops of cavalry within the Ohio National Guard, does not exist. Section 3033 of the Revised Statutes provides in part as follows:

> "The organized militia, known as the Ohio National Guard, shall consist of * * * not to exceed, * * * two troops of cavalry, * * * to be organized the same as is now, or hereafter be prescribed, for the regular and volunteer armies of the United States * * *. The governor is authorized and empowered to change the *tactical* organization of the National Guard, or any part thereof, from time to time, to make it correspond with that prescribed for the regular and volunteer armies of the United States and 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."

The express limitation of the number of organizations of cavalry imposed by the first clause above quoted is conclusive of your question unless the subsequent provisions of this section, defining the powers of the governor in the premises, overrides such express limitation. The power to change the *tactical* organization cannot be invoked for this purpose. As I understand the meaning of the term "tactical," it is to be distinguished from "administrative;" you inform me that this is the significance of the word and that in your department a troop or company is an administrative unit or organization.

The power to fix the maximum strength of organizations imposed upon the governor by the above quoted language may not be employed to organize an additional troop. This power relates quite clearly to the numerical strength of the organizations referred to in the prior clauses of the section and not to the number of such organizations. Therefore, the governor is without power to override the express provision of the first clause of section 3033 and it is immaterial that in certain cases he has power to conform organizations of the National Guard to the regulations of the United States government.

Col. Hake's inquiry relates to the exemption of contributing members of the National Guard from jury service. He states in his letter that the several judges in Hamilton county have refused to recognize the certified lists filed under section 3055 of the Revised Statutes on the ground that said section has been repealed. The section in question provides that, upon the filing of certified lists of officers, enlisted men, and contributing members, with the clerk of the court of the county in which a company or organization is located,

"All such * * * contributing members shall, for the ensuing year, or until discharged, be exempt from * * * service as jurors."

I have been unable to find any act of the general assembly repealing or amending this action. I should be pleased to give consideration to any such act if the same were cited to me, but in the absence of such information I am of the opinion that contributing members are entitled to exemption from service as jurors and that certificates filed under section 3055 must be received by the several clerks of courts and recognized by the courts themselves.

Yours very truly,

U. G. DENMAN,
Attorney General.

O. N. G.—RETIRED OFFICERS—JURY SERVICE.

Officers of Ohio National Guard on retired list are not exempt from jury service.

June 23rd, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 21st, enclosing a communication from Major Charles T. Atwell, retired, in which he inquires whether officers of the National Guard on the retired list are exempt from jury duty, under section 3055 Revised Statutes.

You desire my opinion with respect to the question submitted by Major Atwell. Section 3044 R. S. provides in part that

"the officers of the Ohio National Guard, excepting as provided for in * * * section 3049, shall serve during good behavior and faithful performance of duty * * *."

Section 3049 R. S. provides in part that

"an officer may be honorably discharged by the commander-in-chief * * *. Any commissioned officer who shall have served as a member of the Ohio National Guard for a period of ten years, five of which shall have been as a commissioned officer, may, at his own request, be placed upon the retired list * * *. Officers so retired shall receive no compensation for their services except as hereinafter provided, but shall be permitted to wear the uniform of the grade upon which retired, on all occasions of ceremony; provided, that all officers so retired may, in the discretion of the commander-in-chief, be detailed upon duty other than in the command of troops, and when so detailed, they shall receive the same pay and allowance as officers on the active list detailed or employed under like conditions."

Section 3055 Revised Statutes provides that

"a certified list of officers, enlisted men and contributing members shall be filed by the commanding officer of each company, troop and battery, with the clerk of the court of the county in which such company or organization is located. Such lists shall be filed on or before the first day of October in each year, and all such officers, enlisted men and

contributing members shall, for the unsuing year, or until discharged, be exempt from labor on the public highways and service as jurors."

The provision for a retired list has been incorporated in section 3049 by amendment since the revision of the title by the act of April 28th, 1886, 83 O. L. 95. As included within the said act of revision, section 3049 provided merely for the honorable discharge of line and staff officers. Section 3044 as included within the same act provided that the term of service should be five years, unless the officer were sooner discharged. It is clear that the provision of section 3055, which has not been amended since 1886, did not then apply to officers discharged under section 3049, and that the intention then was to extend the exemptions created by the former section to officers in active service only. Upon consideration of all the aforementioned sections in their present form, and having regard to the legislative history thereof, it is my opinion that officers on the retired list are not entitled to exemption from jury service under section 3055. Therefore, the commanding officer of each company should not include the names of any such retired officers in the certified list filed annually by him, under section 3055, even if the names of such officers could properly be included in such list, as being attached to any "company, troop or battery," which it seems to me is not the case.

Yours very truly,

U. G. DENMAN,
Attorney General.

SQUIRREL HUNTERS—NAMES MUST BE RECORDED IN OFFICE OF ADJUTANT GENERAL BEFORE MAY 9, 1908.

July 28th, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 23rd, in which you submit the following for my opinion:

> "Mr. Charles Ford, of Mainville, Ohio, was captain of a company of 'Squirrl Hunters' from Warren County, when Governor Tod requested that all rolls of the different companies be sent in for record. Mr. Ford failed to do this. He has now sent in this roll for record, together with his claim for 'Squirrel Hunter' pay. Query: Considering the fact that he was the captain of this company, may he legally be paid 'Squirrel Hunter' pay and have the names of his men placed upon the rolls?"

I beg to call your attention to the opinions rendered by this department under date of June 30th, 1908, and July 1st, 1909, to the adjutant general's department, in which it has been held by this department that the only classes of individuals who are entitled to "Squirrel Hunter" pay under joint resolution No. 76, adopted May 9, 1908, 99 O. L. 639, are as follows:

First. Those whose names were, at the time of the adoption of the resolution, reported on the files of the adjutant general's office.

Second. Those whose names were not so recorded at the date of the adoption of the resolution, but who held certificates of service and discharge from Governor Tod.

I am, therefore, of the opinion, since no such roll was recorded in the office of your department on or before May 9, 1908, and since the present applicants do not present a certificate of discharge from Governor Tod, that such applicants do not come within the classes specified in joint resolution No. 76, adopted May 9, 1908 (99 O. L. 639). It is to be regretted that the general assembly by the above resolution limits the paying of "Squirrel Hunters" to the two classes I have set out, as there is no doubt that all the "Squirrel Hunters" should be entitled to the same benefits.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

REGULATIONS BY WHICH OHIO NAVAL MILITIA IS GOVERNED.

October 16, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department for an opinion thereon the following inquiries submitted to you by Lieutenant Clifford B. Haskins, commanding the Second Ohio Naval Militia:

> (a) Is the Ohio naval militia a part of the Ohio National Guard?
>
> (b) Is the Ohio naval militia governed by the articles of war or by the articles for the government of the navy?
>
> (c) Do the regulations for the government of the Ohio National Guard apply to the government of the naval militia, except when there is nothing in the regulations for the government of the navy and the articles for the government of thenavy which covers the cases in question?

Of the three questions submitted by Lieutenant Haskins, the first is so general that I find myself unable to answer it. I assume, however, that the lieutenant desires to know whether or not the Ohio naval militia is a part of the Ohio national guard respecting the government thereof as inquired about in the remaining two questions submitted by him. These two questions may be answered together by applying to their solution the provisions of section 12 of the act found in 92 O. L. 109, section 36, 17 Bates' Revised Statutes, which is as follows:

> "The commander-in-chief is hereby authorized to make such rules and regulations from time to time as he may deem expedient for the government and instruction of the naval militia, but such regulations shall conform to this act and as nearly as practicable to those governing the United States navy; and when promulgated they shall have the same force and effect as the provisions of this act. The naval militia shall be subject to the articles and regulations for the government of the United States navy, and to the same extent as, and under the same circumstances as members of the national guard as subject to the articles of war and regulations for the government of the United States army. When not otherwise provided for the naval militia shall be governed by the provisions of the military code as applied to the national guard."

Under the above quoted section it is apparent to me that the government of the Ohio naval militia is regulated as follows:

1. By the provision of the act creating and regulating the naval militia of the state of Ohio above cited, such provisions, when inconsistent with any regulations, govern, to the exclusion of such regulations. The words "this act," as used in section 12 above cited, refer to the act in 92 O. L. 109 and not to the remainder of that title and chapter relating to the organization of the militia of the state.

2. By the regulations, if any, adopted by the commander-in-chief, particularly for the government of the naval militia in section 12 above quoted.

3. By the articles and regulations for the government of the United States navy—not the articles of war adopted for the government of the United States army.

4. In the absence of any rules or regulations, except by virtue of the specific provisions of the naval militia act, any rules and regulations made by the commander-in-chief or any appropriate provisions of the articles and regulations for the government of the United States navy, the naval militia is to be governed by the regulations for the government of the Ohio national guard, as provided in the last sentence of section 12 above quoted.

It is quite evident that such regulations of the Ohio national guard do not apply when inconsistent with any of the other rules and regulations above described, and, generally speaking, may only be said to be applicable in the absence of any other provision governing a particular case.

Lieutenant Haskin's inquiry does not seem to call for an answer more specific than above outlined.

I trust that by applying the principles herein stated to particular cases, all questions arising in the administration of the naval militia may be readily solved.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO NATIONAL GUARD—JURY SERVICE OF CONTRIBUTING MEMBER.

Contributing members of the Ohio national guard are exempt from jury service.

October 27, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You ask whether persons enlisted as contributing members of organizations of the Ohio national guard, as provided in section 3039 R. S., are exempt from service as jurors.

Section 3039 R. S. provides as follows:

> "In time of peace the officers commanding companies, troops, batteries, and detachments of the hospital corps may enlist contributing members, not to exceed one hundred and fifty. Such members shall be subject to such contributions, dues and services as may be ordered by the council of administration of the respective organizations, but the dues of such members shall in no case be less than five dollars each, per annum, and the whole number of active and contributing members belonging to the active militia in any county, shall not exceed fifteen per centum of the voting population of such county."

Section 3055 R. S. provides as follows:

> "A certified list of officers, enlisted men and contributing members shall be filed by the commanding officer of each company, troop and battery, with the clerk of the court of the county in which such company or organization is located. Such lists shall be filed on or before the first day of October in each year, and all such officers, enlisted men and contributing members shall, for the ensuing year, or until discharged, be exempt from labor on the public highways and service as jurors."

In the case of Hall v. Burlingame, 88 Mich. 438, it was held that a law exempting from jury duty and poll tax "contributing members in each company and battery of state troops" is constitutional. The court say:

> "It is the province of the legislature to determine the qualifications of jurors, and to provide who shall be exempt. It is not the province of the courts to say that these exemptions, or any of them, are against public policy, so long as the right of trial by jury is maintained. This duty belongs to the legislature, a co-ordinate branch of the government. With the wisdom of such exemptions courts are not concerned."

In the case of Albert v. White, 83 Md. 297, it is held that:

> "An honorary member of any legally organized voluntary company of the militia of the state, is, by virtue of section 22 of the act of 1870, chap. 182, entitled to exemption from jury duty for the period of one year from the date of his certificate of membership, provided the same be filed with the clerk of the court before the drawing of the jury."

In the case of Miller v. Commonwealth, 80 Va. 33, it is held that a contributing member of a volunteer military company, "The Danville Grays," who has complied with the statute in such case provided, is exempt from such service as a juror and it is held by the court that inasmuch as a list of those members who are exempt was regularly left with the clerk of the courts by the chief officer of the military company, as provided by law, "a person exempt by law from service on a jury, is in like manner exempt from being summoned to serve on a jury."

In King v. State, 90 Ala. 612, it is held that:

> "Exemption from jury duty, granted by statute, to the members of 'The Alabama state troops,' is conclusively proved by the certificate of the commanding officer of the particular company."

In ex parte Will, 61 Cal. 121, the court held that one who has served in the organized militia of the state for seven years and who has received from the adjutant general a certificate to that effect, is exempt from jury duty under section 1936 of the political code.

In Dunn v. The People, 94 Ill. 120, it is held that an act exempting an active member of a company of the state militia from serving upon juries is a valid and constitutional law.

In Stewart v. State, 23 Ga. 131, the court recognized the exemption of mem-

bers of militia organizations, but hold that such exemptions are to be strictly construed and that honorary members are not exempt from jury duty unless specifically made so by the provisions of the act.

The only exception to this list of decisions which I have been able to find is contained in Green v. State, 15 Tenn. 708, in which case a militia act is declared unconstitutional for a number of reasons, one reason being that the exemption of active and honorary members of militia companies from jury duty was invalid because the limitations as to the number of persons who could become members of such companies prevent a large class of citizens from the choice of bringing themselves within the class which was exempted from jury duty by such act.

In addition to the cases above cited, all the opinions of previous attorneys general upon this question have held that contributing members of organizations of the Ohio national guard are exempt from jury duty. See Opinions of the Attorneys General of Ohio, vol. 2, page 334; vol. 3, pages 248, 382; vol. 4, page 164; vol. 5, page 310; and Opinions of the Attorney General for 1905, page 140.

I am, therefore, of the opinion that contributing members who comply with the provisions of sections 3039 and 3055 of the Revised Statutes are exempt from service as jurors.

Yours very truly,

U. G. DENMAN,
Attorney General.

WHETHER THE OHIO NAVAL MILITIA IS A PART OF THE OHIO NATIONAL GUARD FULLY DISCUSSED.

November 3, 1909.

GENERAL CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You request my opinion upon further inquiries presented by Lieut. C. B. Haskins, commanding 2nd battalion, Ohio naval militia. The lieutenant desires that my former opinion be supplemented by a more definite answer to the first question asked in his former letter, viz., "is the Ohio naval militia a part of the Ohio national guard," and mentions another particular in addition to those enumerated in his prior inquiry in which this question becomes of importance, viz., does section 4 of the act in 100 O. L., 25-27, apply to the Ohio naval militia?

Upon careful consideration of the main question submitted by Lieutenant Haskins I still find myself unable to return a complete and satisfactory answer thereto. I shall endeavor, however, to be as specific as possible, in view of the conflicting and ambiguous provisions of the statutes relating to military affairs.

Article III, section 10 of the constitution provides:

> "He (the governor) shall be commander-in-chief of the military and naval forces of the state * * *."

Article IX, section 1, provides:

> "All white male citzens * * * shall be enrolled in the militia, and perform military duty in such manner * * * as may be prescribed by law."

Section 3023 R. S., being the first section of the title relating to militia and military affairs, provides:

> "The militia of this state shall be divided into two classes, the *organized militia* to be known as the Ohio national guard, and the Ohio naval militia, and the remainder to be known as the reserve militia. Every able bodied male citizen * * * shall be enrolled in the militia and perform military duty, in the manner hereinafter prescribed."

Chapter II, of title 15 purports to relate to the organization of the organized militia. Section 3033 Revised Statutes, however, provides simply for the organization of the "organized militia known as the Ohio national guard."

Section 3056-6, which has been properly placed by the publisher in said chapter, provides that:

> "There shall be allowed in *addition* to the companies of the national guard of the state of Ohio * * * not more than eight companies of naval militia * *."

Section 3034 R. S. provides that:

> "The Ohio national guard may be ordered by the governor to aid the civil officers to suppress or prevent riot or insurrection or to repel or prevent invasion."

Section 3056-21 R. S., being section 16 of the act providing for the organization of the naval militia is to the effect that:

> "All male citizens of this state * * * who are engaged in the navigation of the waters of the state shall be enrolled in the naval militia and perform military duty in the manner hereinbefore prescribed * *."

Chapter 3 of title 15 purports to provide for the discipline and government of the organized militia. Section 3057, the first section thereof, is limited however to "the national guard," and all the provisions of that chapter, among which is that authorizing the publication of regulations (sec. 3058) seem to relate exclusively to the national guard.

Section 3056-17 authorizes the commander-in-chief to make rules and regulations for the government of the naval militia.

Chapter 4, of title 15 purports to relate to the uniform, arms, drill and pay of the organized militia. The first section thereof, section 3070 R. S., refers wholly to the Ohio national guard, while section 3036-10 of the naval militia act and succeeding sections provides for uniforms and pay of that branch of the organized militia.

Chapter 5 of title 15 purports to contain miscellaneous provisions relating to the organized militia, and upon examination of section 3086 and succeeding sections I am satisfied that all of them were intended to apply to both branches thereof.

From an examination of these related sections, I am satisfied that, properly speaking, the Ohio naval militia is not a part of the Ohio national guard. The rules and regulations of the latter do not apply to the former, but the commander-in-chief has the same authority with respect to the formulation of rules

and regulations for the naval militia as that which has been exercised with respect to the national guard. The naval militia is subject to the supervision and control of the department of the adjutant general and in many practical respects is to be administered in the same manner as the national guard is governed.

The two subdivisions of the organized militia have, however, been so loosely treated by the general assembly that I do not feel warranted in saying that there might not be some respect in which the Ohio naval militia might be governed by laws purporting to relate only to the Ohio national guard. Such laws would not be necessarily unconstitutional and would have to be given effect if their meaning could be ascertained.

With the general statement therefore that, broadly speaking, the Ohio naval militia is not a part of the Ohio national guard, and the remark that in construing statutes, that construction should be adopted which would regard the two branches of the service as independent, I feel obliged to dismiss this inquiry without more definite answer.

That "the state military fund" provided by section 4 of 100 O. L. 25-27 and particularly the subdivision thereof known as "maintenance Ohio national guard" may not be applied to the payment of the expenses of the Ohio naval militia seems very clear to me. Not only is the reference therein to the "Ohio national guard," but the items of expense incurred in the last clause of the first paragraph of the section are those ordinarily incurred by military forces as distinguished from naval forces.

It is my opinion, therefore, that the adjutant general may not devote any of the fund referred to, when the same becomes available, to the payment of any expenses of the Ohio naval militia.

Yours very truly,

U. G. DENMAN,
Attorney General.

SHERIFF OR MAYOR MAY CALL OTHER TROOPS THAN THOSE LOCATED IN COUNTY OR CITY.

September 10, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 1st, in which you request my opinion upon the following question:

> "Referring to section 3096 R. S., is it understood that the sheriff of a county may call troops from another county and the mayor of any municipal corporation may call troops other than those located in his own city?"

In my opinion, any of the civil authorities mentioned in your letter may call out troops from any locality in the state. The commander-in-chief, under the general scheme of the military laws of this state, may call out any number of troops, while a strict construction of section 3096 would seem to limit the power of the civil authorities mentioned therein, to a single regiment. The question of the number of troops which may be called out is not, however, raised in your question and the same is not now passed upon. I am unable to find, however, any limitation as to the locality from which troops may be called.

Section 3096 R. S. in full is as follows:

"Whenever, in any county, there is a tumult, riot, mob, or any body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence to break or resist the laws of the state, or there is reasonable apprehension thereof, the commander-in-chief, the sheriff of the county, the mayor of any municipal corporation therein, or a judge of any court of the state or United States, may issue his call to the commanding officer of *any regiment, battalion, company, troop, or battery*, to order his command, or *any part thereof*, describing the same, to be and appear, at a time and place therein specified, to act in aid of the civil authority."

An examination of the related sections, sections 3096*a*, 3097, 3098 and 3099 R. S., discloses no provisions which might tend to modify or limit the meaning of the language above quoted, which, standing by itself, is susceptible of the meaning above set forth, and that only.

Yours very truly,

U. G. DENMAN,
Attorney General.

O. N. G.—CONTEMPT OF COURT—REARREST AFTER RELEASE BY HABEAS CORPUS.

A rearrest after release on writ of habeas corpus is not contempt when superior court in another case holds court granting writ had no jurisdiction.

November 12, 1909.

HON. CHARLES C. WEYBRECHT, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion on the following statement of facts submitted by Captain Arthur S. Houts, 5th Inft. Ohio national guard:

One William Kuchta, a minor, enlisted in the Ohio national guard. After serving for some time as a private he became dilatory in the matter of drill to such an extent as to necessitate disciplining him. He was tried and convicted for failure to attend drill at summary court-martial. He was sentenced to a short term of imprisonment. To release him from this imprisonment an effort was made by his father who made an application for that purpose to the common pleas court of Cuyahoga county. That court refused the writ and remanded the prisoner. (In re Kuchta 8 N. P. n. s. 613.)

The father prosecuted error to the circuit court, where the judgment of the common pleas court was reversed and the young man was ordered released. The military authorities then caused error to be prosecuted to the supreme court, wherein the circuit court was reversed and the decision of the common pleas court was affirmed following the case of McGorray v. Murphy, 54 Bulletin 240, 80 O. S. ....., decided June 8, 1909.

While this case was pending in the supreme court, Kuchta was arrested by the military authorities and tried at a field court-martial for

the offense of fraudulent enlistment. He was convicted thereof and again sentenced to imprisonment. The common pleas court released him therefrom by habeas corpus. No further proceedings have been had in this matter.

Query: May Kuchta be rearrested and imprisoned under his sentence for fraudulent enlistment without subjecting any of the authorities causing him to be so arrested or arresting him to the penalties of contempt of court?

The rule applicable to the subject of contempt of court is that refusing to obey an order of court made without jurisdiction does not render the person so refusing liable for contempt. 7 Am. & Eng. Enc. of Law, page 56 and cases cited. In re Grear 9 O. D. 299.

The distinction is here to be observed between a void order and one which is merely erroneous. Want of jurisdiction of the subject-matter or the person renders an order absolutely void and of no effect within the meaning of this rule. In case jurisdiction in both these respects has been acquired, however, mere error in the proceeding, resulting, say from a false conclusion of facts on the part of the court, will not avoid its order in this respect.

It remains, therefore, to inquire what the effect of the order of release granted by the court under the writ of habeas corpus in the second case brought by the father of young Kuchta was.

It has been unequivocally held in the two cases mentioned in the statement of facts, McGorry v. Murphy and in re Kuchta, that the state courts are without jurisdiction to inquire into the validity of the sentence imposed by a court-martial when the latter is shown to have had jurisdiction to try the alleged offender. On the above statement of facts the whole question before the court in the second habeas corpus proceeding was the validity of the sentence, the jurisdiction of the court-martial not having been challenged.

The ordinary rule as to the effect of a discharge upon habeas corpus is that the original cause of prosecution against the prisoner thereby becomes *res judicata*, and other proceedings founded upon the identical cause of prosecution are at least void, and under some circumstances, might doubtless amount to a contempt of the court issuing the order of release. However, where the court had not jurisdiction of the subject-matter or of the person and consequently had no power to issue the order of release, the latter is a nullity and the prisoner may again be confined. Cornielison v. Toney, 12 Ky. Law Reporter, 746; Splading v. People, 7 Hill (N. Y.) 301, 6 Am. Dec. 290.

On the foregoing authorities, which by no means exhaust the decisions which might be collated in support of the principles on which they are cited, I conclude that the order of the common pleas court releasing young Kuchta from imprisonment under his second sentence was, in the light of the subsequent decision of the supreme court, absolutely void and of no effect, and that his rearrest and imprisonment could in no wise be a contempt of court. I am strengthened in this conclusion also by the fact that to insist that error proceedings—quite *pro forma* in view of the decision of the supreme court—be instituted and a reversal secured before the rearrest of the prisoner could be sanctioned, would be to insist upon a vain thing, necessitating considerable expense, and I do not believe that any court would take such an attitude.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Superintendent of Banks)

TRUST COMPANY—SECURITIES DEPOSITED BY.

Personal mortgage notes may be deposited with treasurer of state by safe deposit and trust companies to secure trust business under section 3821a; such notes may not be so deposited by trust company organized under provisions of act in 99 O. L. 269.

January 4th, 1909.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have the honor to acknowledge a request from you for an official opinion upon the question whether trust companies may deposit mortgage notes with the treasurer of state as security for their trust business.

Replying thereto, I beg to say the question presented does not specify whether the same relates to a trust company sought to be organized and incorporated pursuant to the provisions of the act of the general assembly, approved May 5th, 1908 (99 O. L. 269-296), or whether it pertains to a trust company at present organized under section 3821*a* of the Revised Statutes.

Section 69 of the first mentioned act provides that:

> "The full amount of such deposits so to be made by any such corporation may be made in bonds of the United States or of the state of Ohio, or of any municipality or county within said state, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past has paid dividends of at least 3 per cent. on its common stock."

The foregoing would forbid the acceptance by the treasurer of state of "mortgage notes," meaning thereby mortgages on real estate in this state executed by other corporations or individuals. He is permitted to accept the first mortgage bonds of any railroad corporation that for five years last past has paid dividends of at least 3 per cent. on its common stock.

If I am to understand that the trust company was one organized under section 3821*a* R. S., it would be permitted to deposit with the treasurer of state securities of the following character, to-wit:

> "Any of the authorized loans of the United States or of the state of Ohio, or cities, counties, or towns of this state, or of the stocks or bonds of any state in the Union that has for five years previous to such investments being made, regularly paid the interest on its legal bonded debt in lawful money of the United States, or cities, counties or towns of such states which shall have so paid the interest on the legal bonded debt of such cities, counties, towns, or stocks of national banks organized within this state, or the first mortgage bonds of any railroad company within the states above named, which has established and paid regular dividends on its stock for five years next preceding such loan or investment, or first mortgages on real estate in this state or of individuals with a sufficient pledge of any of the aforesaid securities."

The foregoing, you will see, includes mortgage notes which were permitted under section 3821*a* R. S.

Yours very truly,

U. G. DENMAN,
Attorney General.

BANK COMPLYING WITH ACT IN 99 O. L. 269 NEED NOT CHANGE PAR VALUE OF SHARES OF STOCK.

January 14th, 1909.

HON. B. B. SEYMOUR, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication of January 8th is received, in which you submit the following inquiry:

Shall a commercial bank, trust company savings bank or safe deposit company incorporated before the passage of the act regulating the organization of banks and the inspection thereof, and whose shares of stock are for $50.00 only, be required to change the amount of its shares to $100.00, as provided in section 2 of said act, before availing themselves of the privileges and powers conferred by said act?

In reply I beg to say the provision in paragraph d of section 2 of the act, in my judgment, only applies to those banks which incorporate under the provisions of the act, and that banks heretofore incorporated who desire to avail themselves of the privileges and powers conferred by the act are not required to change the amount of their shares of capital stock if they be in denominations other than $100.00 each.

Yours very truly,

U. G. DENMAN,
Attorney General.

TRUST COMPANIES ORGANIZED UNDER ACT IN 99 O. L. 269 MAY NOT DO REAL ESTATE OR FIRE INSURANCE AGENCY BUSINESS.

February 9th, 1909.

HON. B. B. SEYMOUR, *Superintendent Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "I would respectfully ask for your opinion as to whether a trust company organized under 'the Thomas law' would be permitted to have included in its incorporated rights that of soliciting real estate for sale and advertising the same, renting and leasing on commission and doing all of the business of a real estate agent and of soliciting as agent and writing fire insurance."

The Thomas law does not expressly grant the power to deal in real estate, or to do all of the business of a real estate agent, or to combine the further business of conducting a fire insurance agency, or to act as agent for fire insurance companies. The rule of law is well settled that corporations have such powers,

and such only, as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred.

I am therefore of the opinion that the right of soliciting real estate for sale and advertising the same, renting and leasing on commission and doing all of the business of a real estate agent, or of soliciting, as agent, and writing fire insurance, cannot be united with that of a banking corporation. They are not necessary nor convenient powers, which a corporation incorporated under the Thomas law might have in order to carry into effect those expressly granted to accompish the purposes of its creation, and should, therefore, be denied.

Yours very truly,

U. G. DENMAN,
Attorney General.

BANKS AND BANKING—MERCANTILE CORPORATION RECEIVING DEPOSITS.

Receiving of deposits in open account or issuing certificates with right to withdraw on demand is not an incident to main purpose of mercantile corporation. Quo warranto is proper proceeding against such corporation.

February 17th, 1909.

HON. B. B. SEYMOUR, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "I would respectfully ask your opinion as to whether a company, incorporated under the laws of Ohio for the purpose of carrying on the buying and selling of dry goods, is permitted, under its charter, to solicit and receive cash deposits either in open account or by issuing certificates therefor, as described in the pamphlet enclosed herewith, and if they are not permitted, what action should be taken, and by whom, to stop it?"

The pamphlet enclosed is a communication from The Fair Company to the general public, advising of the advantages offered to persons who make so-called "deposit purchase accounts" with said company. The company describe their "deposit purchase account" in said pamphlet as follows:

> "A deposit purchase account is a system by which persons may deposit any sum of money which they desire. While this money is on deposit it draws interest at the rate of 4 per cent. per annum, and is compounded semi-annually, so that if the money remains for a length of time, it not only draws interest, but at the end of each six months it begins to draw interest also on the interest money it has earned in the previous six months. In this way a small sum of money deposited and kept at interest eventually grows to be quite a sum."

Under the heading of "withdrawals" the company further says *the money on deposit or any part of it can be withdrawn on demand by signing a receipt for the money received.*

On page 11 of said pamphlet, under the head of "Coupons Double Money," the company illustrates the advantage of its system of deposit, as follows:

> "For example—If you deposit with us $5.00 on account, you don't lose the spending power of your $5.00 at all, but you receive in its place $5.00 in A. D. C. coupons, which gives back the value of your money, as you make purchases of your daily necessities from us or the other stores that redeem the coupons. *Then you still have the $5.00 with us to your credit, which you can draw at any time.* It is a real case of where you eat your cake and still have it."

A reply to your inquiry involves the question of whether the Fair Company, an Ohio corporation, is violating its corporate rights under the law and charter in opening, maintaining and conducting such a "deposit purchase department" as is described in the enclosed pamphlet. The purpose for which the incorporation was formed, as expressed in the articles thereof, is that of

> "purchasing, selling and dealing in dry goods and merchandise of every description, and for conducting and transacting a general mercantile business and all things incident thereto, and for owning and holding such real and personal property as may be necessary or convenient thereto."

It is a general and well settled rule of law in this state that corporations, in addition to the powers expressly granted, have, by necessary implication, the power to do whatever is needed to carry into effect those granted, and to accomplish the *purpose* of its creation, unless the particular act is forbidden by law or charter.

> Section 3239 R. S.
> Bank v. Flour Co., 41 O. S. 552, 558.
> Central Ohio Nat. Gas Co. v. Capital City Dairy Co., 60 O. S. 96.
> State ex. rel. v. Taylor, Sec'y of State, 55 O. S. 61.

Section 3236 R. S. provides that the form of the articles of incorporation which shall be prescribed by the secretary of state must contain the *purpose* for which it is formed. The legislature evidently has used the word "purpose" advisedly. To have used the word "purpose" in the plural would be to clothe corporations with capacity to unite all classes of business under one organization, which would tend to monopoly, therefore the use of the word "purpose."

When an action of a corporation is challenged by the sovereignty which gave it existence, or by whose favor it is permitted to pursue its business, it may be required to show a clear warrant for the acts so called in question.

Cent. Ohio Nat. Gas Co. v. Capital City Dairy Co., 60 O. S., 96

It would seem from the advertising pamphlet of said company that the principal inducement offered to the public by the company to secure such deposits is that 4 per cent. interest will be paid thereon, and be compounded semi-annually; and further, *that the money on deposit, or any part of it, may be withdrawn on demand by signing a receipt for the amount withdrawn.*"

A denial of the right to receive deposits in the manner above described and set out in said pamphlet would not embarrass the corporate business of

The Fair Company. This "Deposit Purchase Department" is not a choice of means for the prosecution of the *main purpose of the corporate enterprise*. In my judgment the receiving of such deposits by said company, under the conditions prescribed in the enclosed pamphlet, either in open account or by issuing certificates therefor, together with the right to withdraw the same on demand, is not a necessary or convenient incident to the main purpose of said company and not necessary to carry into effect the purpose of its creation. It is, in fact, to that extent, usurping the function of a bank without being authorized by or complying with the law of the state relating to banks and banking.

I am, therefore, of the opinion that The Fair Company is a misuser of its corporate rights and its acts in the respects herein set out are not authorized by law. Upon its refusal to discontinue the "Deposit Purchase Account Department," as described in the enclosed pamphlet and conducted by said company, proceeding should be instituted against it in *quo warranto* by the state.

Yours very truly,

U. G. DENMAN,
Attorney General.

BANKS AND BANKING—TRUST COMPANY—MANNER OF INVESTING FUNDS.

All trust companies may invest funds in steamship company's bonds as provided in section 3821aa.

March 29th, 1909.

HON. B. B. SEYMOUR, *Superintendent of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your letter is received in which you submit to this department, for an opinion thereon, the following inquiry:

> Will the act to supplement section 3821*a* R. S. (99 O. L. 395) apply to such banks and companies as are therein mentioned, organized prior to the passage of the Thomas act on May 5th, 1908? And further, will the fact that this act is supplementary to section 3821*a* R. S., which was enacted prior to the Thomas act, make it apply to corporations organized *after* the passage of the Thomas act?

Replying thereto, I beg to say that this supplementary act referred to in your inquiry, and being section 3821*aa* R. S., provides that

> "savings societies, savings and loan associations and safe deposit and trust companies heretofore or hereafter organized under or by act of the general assembly of this state, or organized or doing business under the laws of this state, in addition to the powers heretofore conferred upon such corporations, be and hereby are, authorized, in addition to the investments named in sections 3806, 3812, 3813 and 3821*a* of the Revised Statutes, to loan and invest the funds, moneys and properties owned or received by such companies, respectively,"

in accordance with the subsequent provision of said supplementary section.

The provisions in section 18 of the "Thomas law" relating to the organization of banks, that,

> "hereafter, all corporations * * * shall be incorporated and organized with a capital stock, and *under the provisions of this act*"

is a regulation of corporations organized subsequent to the enactment of such law, therefore does not affect this supplementary act or other enactments passed prior to or subsequent to the enactment of the "Thomas law," when the same are not in conflict with the provisions of said law. The "Thomas law" does not repeal this act nor section 3821*a* R. S., which it supplements.

Section 3821*aa* R. S. is an enlargement and not a restriction of the powers conferred in the above mentioned sections to trust companies, relative to their investment of funds coming in their possession, under favor of said sections of the Revised Statutes.

Very truly yours,

U. G. DENMAN,
Attorney General.

BANKS AND BANKING—TRUST COMPANIES ENGAGING IN REAL ESTATE BUSINESS ORGANIZED PRIOR TO THOMAS LAW.

A trust company organized prior to Thomas law may not engage in doing a real estate business.

May 5th, 1909.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this department thereon the following inquiry:

> "Will it be a violation of the law for a trust company incorporated under the general laws prior to the passage of the Thomas law, to engage in doing the business of a real estate agent, buying, selling, leasing, renting, collecting rents and advertising as such?"

A corporation has no existence only in a legal contemplation, and therefore being a mere creature of the law, possesses only those attributes which the law confers or such as may be implied as necessary to its existence; and it can exercise no powers but such as are expressly conferred upon it by law and charter and such incidental powers as are necessary to carry into effect the powers expressly conferred.

This rule of law is so well settled in this state as not to require discussion or analysis.

Your inquiry relates to the powers of a corporation, a trust company, incorporated prior to the enactment of the Thomas law, May 1, 1908. It is necessary then to inquire into the law of this state conferring corporate powers, to ascertain if such powers as those about which you inquire are conferred directly or by inference upon such trust companies. Section 3235 R. S. provides:

> "Corporations may be formed in the manner prescribed in this chapter for any *purpose* for which individuals may lawfully associate themselves, etc."

In section 3236 Revised Statutes the legislature provides that the form of the articles of incorporation which shall be prescribed by the secretary of state must contain the *purpose* for which it is formed. It will be noted that in

both of these sections the legislature has used the word "purpose." The word "purpose" is therefore evidently used designedly in the singular number. To have used the word "purpose" in the plural would be to clothe corporations with capacity to unite all classes of business under one organization, which would tend to monopoly.

It therefore appears that if a trust company may engage in doing the business of a real estate agency, either express provision must be found authorizing the same or a conclusion reached that such business is necessarily incident to the main purpose for which the trust company was incorporated.

Looking now to sections 3821*a* and 3821*b* R. S., otherwise known as the safe deposit and trust company statutes, we find there expressly defined the business in which a trust company may engage, and in neither of which is found expressed the rights and privileges inquired about. The remaining question is, then, are they such necessary and convenient and incidental powers as the law applicable to trust companies authorizes by implication? On this question the following authorities are regarded as conclusive in this state:

Bank v. Flour Co., 41 O. S. 552, 553.
Central Ohio Nat. Gas Co. v. Capital City Dairy Co., 60 O. S. 96.
State ex rel v. Taylor, 55 O. S. 61.
State v. Railroad Co., 68 O. S. 40.

Without attempting to particularize as to the various distinctions which could be made as tending to show that the performance of a trust as provided for and defined under the sections of the Revised Statutes relating to trusts, and the conducting of a real estate agency are not of kindred purpose, it is sufficient to state that by no parity of reasoning can the conclusion be reached, under the definition given and applied in the case of State v. Taylor, 55 O. S. 61, that the business of a real estate agent, towit, buying, selling, leasing, renting, collecting rents and advertising as such, is a necessary incident to the proper function of a duly incorporated trust company. Such rights are therefore denied.

Yours very truly,

U. G. DENMAN,
Attorney General.

BANKS AND BANKING—COMMON PLEAS JUDGE MAY BE DIRECTOR.

February 11, 1909.

HON. B. B. SEYMOUR, *Supt., Department of Banks and Banking, Columbus, Ohio.*

DEAR SIR:—Your communication has been received in which you submit the following inquiry:

> "Whether a common pleas judge may be a director of a banking institution incorporated under the laws of Ohio?"

Replying thereto, I beg to say that I know of no law that would disqualify a common pleas judge from being a director of a banking institution incorporated under the laws of Ohio. Cases may arise in which such judge would be disqualified to hear an action pending in his court, when the bank of which he is a director would be a party in interest.

Very truly yours,

U. G. DENMAN,
Attorney General.

BANKS AND BANKING—DIRECTORS OF, MUST BE OWNERS OF AT LEAST FIVE SHARES OF STOCK.

November 9, 1909.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you inquire if a director of a bank doing business in this state prior to the passage of an act "relating to the organization of banks and the inspection thereof," (99 O. L. 269) which bank, under the law, has been authorized to do business with one-half of the authorized and subscribed capital stock paid in, may be legally qualified to remain as director of said bank under the act above referred to.

Section 25 of the act "relating to the organization of banks and the inspection thereof" provides that:

> "Every director must be the owner and holder of at least five shares of stock in his own name and right, unpledged and unincumbered in any way, * * *."

The provision of this section is applicable to the banks incorporated under the provisions of this act.

Sections 39 and 91 of said act have been construed by the common pleas court of Franklin county, under date of June 26, 1909, as exempting the banks existing prior to the enactment of this law from conforming to its provisions as to capital stock. Under this opinion a director of a bank having but one-half the authorized capital stock thereof paid in will be eligible to continue as director under the Thomas law. The decision does not, and neither is this opinion intended to convey the idea that such banks shall be exempt from the inspection, examination and supervision of the superintendent of banks as provided in the act under consideration.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Codifying Commission)

SPECIAL COUNTY OFFICERS' FEE LAWS ARE UNCONSTITUTIONAL—SPECIAL LEGISLATION.

September 2, 1909.

HON. LEWIS C. LAYLIN, *Chairman Codifying Commission, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as to the validity of sections 556, 1157, 1230-1, 1230*a*, 1230*b*, 1260 and 1260*a* Bates' Revised Statutes, which said sections prescribe the fees receivable by the probate judge, the county recorder, the sheriff and the clerk of courts.

The following portions of the above mentioned sections are in point:

Section 546:

"Each probate court, *in counties which at the last preceding federal census had a population less than twenty-two thousand five hundred*, shall receive for services rendered, the following prescribed fees * *.

"Each probate judge *in counties, which at the last federal census, had a population of twenty-two thousand five hundred or more*, shall received for services rendered, the following prescribed fees."

Section 1157:

"The recorder *in counties which, by the last preceding federal census had a population less than thirty-five thousand, shall receive the following* fees.

"The recorder *in counties which, by the last preceding federal census had a population of thirty-five thousand or more*, shall receive the following fees."

Section 1230:

"In all counties in which there is a city of the second grade of the first class, the fees of the sheriff, upon all land sales other than sales under execution, shall not exceed forty per cent. of that now provided by law * * *."

Section 1230*a*:

"The sheriff *of any county containing a city of the first grade of the first class*, shall, for services rendered hereinafter specified, when rendered receive the fees hereinafter provided."

Section 1230*b*:

"*In all counties which at the last preceding federal census had a population of twenty-two thousand five hundred or more, and for which there is no provision made by law for the payment of the sheriff*, he shall receive the following fees and compensation."

Section 1260.

"The clerk *in counties which by the last preceding federal census had a population less than twenty-two thousand five hundred*, shall, for services hereinafter specified, when rendered, receive the fees hereinafter provided.

"The clerk *in counties which, by the last preceding federal census had a population of twenty-two thousand five hundred or more*, shall, for services hereinafter specified, when rendered, receive the fees hereinafter provided."

Section 1260*a*:

"The clerks of the several courts of common pleas, district courts, and superior courts of *Hamilton county* shall, for services hereinafter specified, when rendered, receive the fees herein provided."

Section 26 of article 2 of the constitution of this state provides in part that "all laws, of a general nature, shall have a uniform operation throughout the state"

It is now well settled in this state that laws prescribing the fees receivable by county officers are of a general nature, and that such laws prescribing different fees for the same officers in different counties of the state fail to have a uniform operation throughout the state, and are, therefore, unconstitutional.

In State ex rel. Knisely v. Jones, 66 O. S. 453, it was held that an act providing a form of government for all municipalities having a certain population was a special act conferring corporate powers, and, therefore, invalid under section 1 of article 13 of the constitution. In the opinion of the court at page 489 the following language appears:

"In this connection it is interesting to observe the relation of this section of the constitution (section 1 of article 13) to section 26 of article 2, which provides that: 'all laws of a general nature shall have uniform operation throughout the state * * *.' Every consideration suggested for regarding the act under consideration as being without the first section of article 13, tends to the conclusion that it is within the 26th section of article 2."

This decision, therefore, together with State ex rel. v. Beacon, 66 O. S. 491, decided at the same time, establishes the rule that laws conceded to be of a general nature have not a uniform operation throughout the state when they are made applicable in different ways in different localities, classified upon a basis of population. This infirmity is present in all of the statutes enumerated in your question, and it follows, therefore, that said sections do not have the uniformity of operation throughout the state required by the constitution of general laws.

In State ex rel. Guilbert v. Yates, 66 O. S. 546, and State ex rel. Guilbert v. Lewis, 69 O. S. 202, the supreme court overruling a long line of prior decisions committed itself unequivocally to the view that the compensation of county officers is not a matter of local concern, and that, therefore, laws prescribing rates of such compensation are of a general nature within the meaning of the constitutional provision above quoted.

While both of the special acts condemned in these decisions were salary laws, and did not affect the fees receivable by the officers from the public, the reasoning of these decisions is applicable to the questions presented by you.

> "It must be borne in mind that the uniformity and compensation which is required, is not uniformity in total amount received, but uniformity in the rate of compensation; that is, that the same compensation shall be paid for the same service." State ex rel. Guilbert v. Yates, Supra, page 572.

The foregoing statement of the court is emphasized by its decision in the case of Theobald v. State ex rel. Hall, 78 O. S. 426, unreported, affirming Theobald v. State ex rel. 10 C. C.-N. S. 175, in which it was held that a law prescribing salaries for all county officers, payable out of the public treasuries in amounts different in the various counties classified upon a basis of population, has a uniform operation throughout the state. As stated in the opinion of Smith, J., of the circuit court,

> "This article in the constitution (article 2, section 26) does not mean that each officer in the county should receive the same amount of money as salary, but simply that the rules of compensation shall be uniform; and the legislature having seen fit to base this rule upon population, the exercise of that rule through the various counties of the state must of itself in its action be uniform." Page 178.

From the last three decisions above cited the conclusion follows that the matter of compensation of county officers is one of general nature which must be regulated by laws having a uniform operation throughout the state, and the classification of counties upon a basis of population for the purpose of providing adequate *salaries* for such officers, payable out of the county treasuries, affords a uniform operation to such a general law.

Because *salaries* may be classified upon a basis of population, however, it does not follow that different fees may be provided for the same officers in different counties under a classification according to population. On the contrary, the language above quoted from the decisions of the supreme court supports the opposite conclusion. At the foundation of the rule last above stated is the assumption that a classification of salaries according to population is uniform because it is reasonable, and affords to the officers affected thereby an adequate and proportionate compensation for services actually rendered. In other words, local conditions may and should be considered in fixing the amount which the officer is to receive for his personal reward when the same is to be paid out of the treasury. Where, however, as in the inquiry submitted by you, the subject of legislation is the fees receivable by the officer from the public generally, no such considerations exist. On the contrary, there is every reason for denying the constitutional propriety of making any classification whatsoever with respect to the amount of such fees. All citizens of the state—indeed all persons whatsoever—are prospective litigants in proceedings before every court in the state, and prospective applicants for the performance of the services, for which the several officers mentioned in your question are entitled to receive fees. The amount of such fees, therefore, is not a matter of local concern, in which the citizens of a single county or a group of counties are interested, but it is a matter of universal concern, and under the rule laid down in all the cases heretofore cited, the law fixing such fees is uniform only when the fees of each

officer are the same in all counties of the state. It follows, therefore, that all of the statutes now under consideration are of a general nature and fail to have a uniform operation throughout the state.

A decision directly in point is that in the case of Childs v. Perry, 5th C. C.-N. S. 33, in which section 1230*b* above quoted is held unconstitutional upon the authorities and for the reasons above set forth.

The sections enumerated by you are all of the same essential character, and all possess the same infirmity.

I am, therefore, of the opinion that they are all unconstitutional and void, and that the fees receivable by the various county officers affected thereby should be measured by the statutes last enacted, and fixing schedules of fees applicable to such officers in all counties of the state, if such there are.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Superintendent of Insurance.)

APPLICATION TO REVOKE LICENSE OF HOME LIFE INSURANCE COMPANY OF NEW YORK.

If an officer of insurance company make application for change of venue, or to remove any suit or action, to which it is a party, which has been commenced in any court of this state, to any federal court, it is duty of superintendent of insurance under R. S. 3620, to revoke license of such company, but such removal must be ordered or directed by an officer of company. General counsel of Home Life Insurance Company has not such authority as to bind company within the meaning of above statute.

April 2nd, 1909.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Answering your request made in the above matter for my construction of section 3620 of the Revised Statutes of Ohio, in connection with the facts hereinafter stated, I submit the following:

The facts upon which the request is based are that the Home Life Insurance Company is a New York corporation, and has been engaged in the business of life insurance in Ohio for upwards of forty years in conformity with the laws of Ohio. Some years since Mr. Jones purchased a life insurance policy of this company and continued the same in force, paying certain premiums thereon, and in June, 1908, some controversy having arisen between the company and Mr. Jones, the latter brought a suit against the former in the court of common pleas in Trumbull county, at the city of Warren, and service of summons in the action was made on the agent of the company in this state. On June 8th, 1908, this summons and a copy of the petition filed in the cause were handed to the general counsel of the company with a letter from Mr. William A. Marshall, the vice-president and actuary of the company, containing a request for advice regarding these papers and the suit. The general counsel, a practicing lawyer in the city of New York, where the home office of the company is located, did not at that time reply to the letter either in writing or orally, but upon his own initiative and responsibility, and without express authority from the company or any officer thereof, at once referred the case to a firm of attorneys in the city of Youngstown, Ohio, and requested them to appear in the suit as attorneys for the company, and suggested the removal of the cause to the federal court in Ohio at the city of Cleveland. This suggestion of removal was made for the reason that the New York general counsel was not acquainted with the practice in the courts of Ohio and for no other reason, as appears by the letter to the Youngstown attorneys suggesting the removal. Upon receipt by the Youngstown attorneys of this communication from the New York attorney, the former prepared and filed in the court of common pleas at Warren, Ohio, a petition in the usual form, under the practice, praying the removal of the cause to the federal court, according to the suggestion of the general counsel.

On July 10, 1908, the general counsel, in response to the company's request for advice, for the first time reported to the vice-president, Mr. Marshall, that he, the general counsel, had asked the Youngstown attorneys to represent the company in the suit and had suggested the removal of the cause. Mr. Marshall, for the company, at once repudiated this action of attempting to remove the cause from the state court, directed the attention of the New York attorney to

section 3620 of the Revised Statutes of Ohio, and instructed him that the suggestion for the removal of the suit should be forthwith countermanded and withdrawn and that the application or petition which had been filed should be withdrawn at once, and that the company desired to comply with the laws of Ohio in every respect, and try the cause in the state court at Warren, Ohio. Vice-President Marshall was aware of and acquainted with section 3620 of the Revised Statutes of Ohio, but the existence thereof was not known to the general counsel at New York until Mr. Marshall directed his attention to it as above stated.

Upon getting these instructions from the company, the general counsel communicated immediately with the Youngstown attorneys, advising them of the desires of the company and of the existence of this statute, and directed that they at once have the cause remanded from the federal court to the state court at Warren, and this was done immediately by the Youngstown attorneys. Prior to this direction from the general counsel the attorneys at Youngstown were not aware of the existence of the statute.

The New York attorney was elected general counsel for the company in February of 1908 under a by-law of the company, which provides that it should have a "counsel" and that "it shall be the duty of counsel to give such legal advice and assistance as may at any time be solicited by the board, or committees or the officers of the company."

About six months after the suit had been remanded to the state court and while pending there awaiting trial, Mr. Jones made this application before the superintendent of insurance, requesting him to revoke the company's license to do business in the state of Ohio, on the ground that in making the application to remove, the Ohio statutes had been violated and the penalty imposed by that statute had been incurred.

The company answers that the removal of the case was not in fact or in law the act of the company, and that upon that and upon other grounds the application for a revocation of the company's license should be denied.

The facts as stated above clearly appear from the affidavits of the general counsel, the Youngstown attorneys and Vice-President Marshall, and they are in fact admitted by all parties concerned.

Section 3620 R. S., in question, reads as follows:

> "If any company, partnership, or association organized without the limits of this state, and doing business within this state, make an application for a change of venue, or to remove any suit or action to which it is a party, heretofore or hereafter commenced in any court of this state, to the United States district or circuit court, or to any federal court, the superintendent of insurance shall forthwith revoke and recall the license or authority to such company, partnership, or association to do or transact business within this state; and no renewal or authority shall be granted to such company, partnership, or association for three years after such revocation, and it shall thereafter be prohibited from transacting any business in this state until again duly licensed and authorized."

The question on which you ask my opinion is as to whether, under the facts as above stated it is mandatory upon you, under the statute just quoted, to revoke the license of this company.

Had the board of directors, the president and vice-president, the secretary or any other officer or officers having general management of all or a depart-

ment of the business of the company, ordered and directed that this suit be removed from the state to the federal court with knowledge of the existence of this statute, then there would seem to be no question but that it would clearly be your duy, under the law, to revoke the license of the company and that it could not again be relicensed for a period of three years thereafter.

It seems very clear, however, from the facts of the case that no one of the officers of the company knew anything about the action of the attorneys in making the application to remove the cause until after the attorneys had made such application and reported it to Mr. Marshall, the vice-president and actuary of the company, and who seems to be in general management of the affairs of the company, and he immediately upon obtaining such information from the general counsel repudiated the action in that regard and directed him to at once withdraw the application and to try the case in the state court where it was originally begun. Under the by-laws of the company as quoted above and the authorities which I have examined, I am of the opinion that it was not within the authority of the attorney to remove this cause without first consulting the proper officers of the company in response to their request for advice upon the subject. Under this view of the law as to the authority of the attorney to bind the company in this respect, the question then is, did the company in fact or in law make an application to remove the cause? As a general rule, of course, a lawyer may bind his client with respect to the course of procedure in conducting litigation if the authority given him by the client is a general one; in other words, he may do this if he is made without limitation the general manager of the litigation without any requirement that he consult the client before he proceeds in any particular instance. As appears by this by-law, above quoted, however, there was no such authority given to the general counsel by this company. That by-law provides that he shall give advice to the company on its request for the same with reference to any particular matter.

The facts in this case are that the vice-president, Mr. Marshall, sent the summons in this action to the general counsel and requested his advice with respect to the same, but the general counsel, without answering the letter and without consulting the vice-president, at once suggested to the Youngstown attorneys that the cause be removed to the federal court at Cleveland because he, the general counsel, was not acquainted with the court procedure in the courts of Ohio. The general counsel was wholly unaware, as were the Youngstown attorneys also, of the existence of this statute, and when he did proceeed to advise the vice-president, Mr. Marshall, on the case, he was told by Mr. Marshall of the existence of this statute, and his conduct in directing the removal of the cause was at once repudiated, the vice-president stating that this company desired to comply with the laws of Ohio in every respect. The authority under which the general counsel was acting not being broad enough to allow him to bind the company without first consulting some person in authority, and he having acted without such consultation, and entirely upon his own initiative and without advising the company in any respect thereto before the action was taken by him, I am of the opinion that the company, as a matter of fact, never made the application and that this statute, under such circumstances, does not require the revocation of this license, and I am further of the opinion that under the facts as above set forth it does not even authorize you to revoke the license. Further than this, I am of the opinion that if the directors or general managing officers of the company had directed the general counsel to remove the cause and these directors or general managing officers had been ignorant of the existence of this statute and had then immediately countermanded their direction and directed that the cause be returned to the state court upon learn-

ing of the existence of the statute, thereby waiving all right to prosecute the cause in the federal court and continuing the same in the state court, showing their desire to fully comply with the laws of Ohio in every respect, then in that event also this statute would not authorize the revocation of the license. And this view, it seems to me, is enirely sustained by the case of the *State of Ohio* v. *Blair, et al*, decided by our supreme court and reported in the 71 Ohio State, page 410. The syllabus of this case reads as follows:

> "A county commissioner who, without wilfulness or a corrupt motive, but through ignorance, disregards the provisions of a statute regulating the exercise of his official duties, is not thereby guilty of misconduct in office within the meaning of section 6915 of the Revised Statutes which prescribes a fine and the forfeiture of office for such misconduct."

The question under consideration here and the case just cited are not exactly parallel in every particular, but I am clearly of the opinion that the object of section 3620 R. S. is to prevent insurance companies from wilfully endeavoring to evade the laws of Ohio, and it seems to me there is no authority in it for punishing a company which has complied with the laws of the state of Ohio in all respects for forty years and which in no way ever authorized any of its agents or attorneys to violate them in any wise, but on the other hand repudiates any attempted action in that regard, when one of its attorneys under limited authority proceeds to do something in violation of the laws of Ohio, but in ignorance of the existence of those laws.

I am, therefore, of the opinion that as a matter of fact this company did not make an application for the removal of the cause to the federal court within the provisions of section 3620 of the Revised Statutes of Ohio and that its license should not be revoked.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO BURIAL INSURANCE COMPANY—ASSIGNMENT OF POLICIES TO UNDERTAKERS.

Where policies are assigned by assured to undertakers on form approved by insurance company, and such undertakers are officers or representatives of insurance company, such contract is an attempt to evade section 289.

July 2, 1909.

HON. CHAS. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of June 18th, requesting an opinion of this department upon the following facts as shown by a report of examination of the Ohio Burial Insurance Company of Cincinnati, Ohio, dated June 15, 1909, a copy of which you enclosed in your letter, received:

> Between January 1, 1909, and June 15, 1909, the Ohio Burial Insurance Company of Cincinnati paid forty death claims and in all but eight cases checks in payment of these claims were issued to the same undertaker under an assignment of the policies by the assured

to the undertaker. Over half of the policies written by this company have been upon lives of persons who were formerly members of burial associations, and in all such cases the policies so issued have been assigned to one of the following undertakers: E. S. Robbins, Troy, Ohio, representing Miami County Benefit Association, Troy, Ohio; J. J. Radel Company, Cincinnati, Ohio, representing the Cincinnati Benevolent Burial Association; William C. Siefke & Sons, Cincinnati, Ohio, representing the Queen City Benevolent Burial Association; Witt & Cook, Cincinnati, Ohio, representing the Metropolitan Funeral & Burial Association; Toledo Undertaking Company, Toledo, Ohio, representing the Toledo & Lucas County Burial Association. The above named undertakers are either officers or representatives of the Ohio Burial Association Company, and in all cases where a former member of one of the above burial associations has been insured in the Ohio Burial Insurance Company, the undertaker has secured an assignment of the policy to himself. The company claims that the blank forms of undertakers' contracts were prepared and are printed by the undertakers themselves.

The section of the statute which covers the question involved in the above statement of facts is section 289 of the Revised Statutes, which was amended in 99 O. L. 131 to read in part as follows:

> "* * * And it is unlawful for any company, corporation or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, * * * or for any company, corporation or association, engaged in the business of providing for the payment of funeral, burial or other expenses of deceased members, or certificate holders therein, *or engaged in the business of providing any other kind of insurance*, to contract to pay or to pay the same, or its benefits or any part of either, to any official undertaker, or to any designated undertaker or undertaking concern, or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them, in the procuring and purchasing said supplies and services in the open market with the advantage of competition, unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating the same have been complied with, * * *."

The above statement of facts, in my opinion, indicates that the Ohio Burial Insurance Company is violating section 289 of the Revised Statutes as above set forth. The apparent intention of the legislature in enacting section 289, as evidenced by a reading thereof, was to prevent insurance companies from "depriving representative or family of the deceased from, or in any way controlling them, in procuring and purchasing undertakers' supplies and services in the open market with the advantage of competition." This is clearly shown by the absolute prohibition forbidding such companies "engaged in the business of providing for the payment of funeral, burial or other expenses of deceased members or certificate-holders from contracting to pay or to pay the same or its benefits or any part of either, to any official undertaker, or to any designated undertaker or undertaking concern, or to any particular tradesman or business man, so as to deprive, etc."

In my opinion it seems clear that the prohibition contained in section 289 is broad enough to include such a situation as is shown by the above quoted.

statement of facts and the case is made all the stronger by the consideration of the additional fact that the insurance company has approved and accepted the form of assignment or contract used in these cases by the undertaker and that they have done so is shown by the fact that their policies contain the following provision:

> "No assignment to this policy will be binding upon the company unless made upon forms made by the company and unless notice is given to the company of such assignment at its home office."

All of the assignments of policies which have been made to the above named undertakers have been filed with the company and accepted and approved by it in accordance with the above quoted provision in their policies. By the acceptance and approval of such assignments, the company has bound itself to pay to the undertaker, designated in such assignment, the amount of the policy conveyed by it, for, by such acceptance and approval it has, in my opinion, impliedly promised to so pay to the designated undertaker, the amount of such policy.

The above statement of facts evidences a plan on the part of the insurance company and the undertakers to evade section 289, but I am of the opinion that such plan is within the scope of said section and that the Ohio Burial Insurance Company, in carrying out such plan, is "contracting to pay" the policies or benefits to a designated undertaker or particular tradesman so as to deprive the representative or family of the deceased from or to control them in procuring and purchasing undertakers' supplies and services in the open market with the advantage of competition, and as there is no express authorization in the statutes of this state for such a procedure on the part of this insurance company, it is directly violating the law.

It also seems clear to me that, in the thirty odd cases where payment was made on policies to "the same undertaker under an assignment of the policies by the assured to the undertaker," as stated in the report, the company has violated the provisions of section 289 of the Revised Statutes, for said section absolutely prohibits such company from "paying the policies or other benefits or any part of either to any official undertaker or to any designated undertaker or undertaking concern or to any particular tradesman or business man, etc."

Yours very truly,

U. G. DENMAN,
Attorney General.

FRATERNAL BENEFICIARY ASSOCIATION—POWERS OF.

Fraternal beneficiary association may not issue certificates to its members for any benefits other than in case of death or physical disability.

In re The Grand Fraternity.

February 13, 1909.

HON. CHAS. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your communication, together with copies of charter, constitution, by-laws, forms of 20 annual payment life death benefit and combination benefit certificates of the Grand Fraternity, a fraternal beneficiary association of Philadelphia, Pa., is received.

You inquire if authority is granted under the fraternal beneficiary act, passed April 26, 1904, whereby said fraternal beneficiary association may pro-

vide in its benefit certificates for payment to members, regardless of disability, of cash surrender values, loans, payments of dividends and tables of estimated credits, etc.?

In reply, I beg to say under date of June 29, 1904, your predecessor in office, Mr. Vorys, submitted to this department in substance this same inquiry, and under date of August 3, 1904, an opinion was rendered by the attorney general in which it was held that fraternal associations doing business in Ohio could only provide for the payment of such benefits as are expressly authorized in section 5 of the act passed April 26, 1904. Said section is as follows:

> "Every association transacting business under this act shall provide for the payment of death benefits and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age, provided the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years."

Thereafter, on November 2, 1904, the vice-president of the Grand Fraternity submitted a brief to the insurance department, which brief was transmitted to this department, and after a careful examination of the same a second opinion was furnished your department by the attorney general, in which opinion the conclusions contained in the opinion of August 3, 1904, were affirmed.

After a careful consideration of these two opinions, and the enclosures submitted by you, it is my judgment that the ruling of the attorney general as contained in these former opinions is correct and that the act regulating fraternal beneficiary associations, as passed April 26, 1904, will not permit the issuance of membership certificates providing for other benefits than those authorized in section 5 of said act.

Yours very truly,

U. G. DENMAN,
Attorney General.

INSURANCE COMPANY—"UNINCUMBERED REAL ESTATE" DEFINED.

Insurance companies may not invest funds in real estate where deed contains reservations, conditions and restrictions, as such real estate is not unincumbered within the meaning of section 3591.

October 19, 1909.

HON. CHAS. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of September 21st, in which you request my opinion upon the following question is received:

> May an insurance company, the investments of whose assets are regulated by sections 3591 and 3598 of the Revised Statutes of Ohio, invest its assets in a first mortgage upon real estate when the deed conveying title to such real estate to the mortgagor contains the following reservations, conditions and restrictions, to-wit:
>
> "That said premises shall be used for residence purposes only by the grantee, heirs and assigns; that no intoxicating liquors of any kind shall ever be manufactured or sold on said premises; that no

dwelling shall be erected or placed on said premises which shall cost and be of the value less than $3,000, and not nearer than 30 feet from the front and street line to the front line of the porch, nor nearer than 8 feet from the east line of said premises; that no double or two-family house, barn, or shop shall be erected or placed on said premises; that or terrace or apartment house shall be erected or placed on said premises; that no fence or enclosure of any kind shall be erected or placed within 60 feet from the front street line of said premises; that the general grade shall not be over 14 inches higher than the top of the curb; that no dwelling shall be erected or placed on said premises nearer than 20 feet from the east line of East 105th street (formerly Doan street)."

Section 3591 R. S. O. reads in part as follows:

"No joint stock company shall be organized under this chapter with a less capital than one hundred thousand dollars, and the whole capital shall, before proceeding to business, be paid in and invested in treasury notes, in stocks or bonds of the United States, in stocks or bonds of the state of Ohio, or of any municipality or county thereof, *or in mortgages on unincumbered real estate within the state of Ohio worth double the amount loaned thereon.* * * *."

Section 3598 R. S. O. reads in part as follows:

"A company organized under the laws of this state may invest its accumulations as follows, * * *. 2. *In bonds and mortgages upon unincumbered real estate,* the market value of which real estate is at least double the amount loaned thereon, at the date of investment * * *."

The question involved in your inquiry resolves itself down, under the above quoted sections of the statutes, to what is the meaning of "unincumbered real estate" as used in said sections. In considering this question it is advisable to bear in mind the fact that these sections were passed for the benefit of and the greater security of the funds of an insurance company in which the policyholders and stockholders of such company have an equitable interest, that the relation of the officers of such insurance company in making investments of such funds is, to a certain extent, the same as that of a trustee to the fund of which he has charge, and that, therefore, the powers of such company in making such investments as given by the above quoted sections of the statutes, must be strictly construed with a view to furthering the element of security in such investments.

Granger C. J., in National Bank of Washington v. Insurance Co., 41 O S. 10, in construing the charter of an insurance company in regard to the powers of investment of assets given to such company, thereby uses the following language:

"The first section of its charter granted to the insurance company power to possess and invest effects of every kind, and to sue and be sued in all courts of justice. This grant of power clothed the company with capacity to make the loan and take the mortgage and note from Roberts. Did section twelve take away this capacity? The object of that section is plain. The safety of policyholders required safe investments by the company. This section was intended primarily for the

> protection of policyholders and stockholders. * * * * Well-settled rules require that the courts shall construe its provisions so as to promote the legislative intent, if this can reasonably be done. * * * * Legislation has labored to secure policyholders and stockholders from losses by the frauds and misconduct of company officers and agents."

The above quoted language of Granger, C. J., shows that the policy of our courts has been to construe laws regulating investment of assets by insurance companies with a view to promote the greatest security of such investments.

In McComb v. Feidler, 24 O. S. 466, the court adopts the definition of "incumbrance" used by Justice Parsons in Prescott v. Trueman, 4 Mass. 627, as follows:

> "An incumbrance is a paramount right which may wholly defeat the title of the grantee; it is a weight upon the land which may lessen its value."

The following definition of "incumbrance" is found in Bouvier's Law Dictionary (Rawles Revision) page 1008, and in 4 Words & Phrases Judicially Defined, page 3519:

> "An incumbrance is any right to or interest in land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee."

That such a restriction in a conveyance of title as that set forth in your inquiry "is a weight upon the land which may lessen its value," and which diminishes "the value of the estate of the tenant" scarcely affords ground for argument, for it is unquestionably a limitation upon the right of the grantee of such a conveyance to freely use the land so conveyed, and it is a matter of common knowledge that residence districts, upon parcels of which such restrictions are most often placed, may within a comparatively short space of time, and within the life of a mortgage which might be taken on such property by an insurance company, so change that the burden of such a restriction would lessen its then market value, though at the time of the making of such mortgage such restriction might, as a matter of fact, actually increase its market value.

It has been held in New York, Massachusetts, Rhode Island and Pennsylvania that a building restriction constitutes an incumbrance upon the title of land such as would give rise to a breach of a covenant against the incumbrance contained in a subsequent deed conveying title to the same land. Roberts v. Levy, 3 Abb. Prac. (N. S.) (N. Y.) 316; Irving v. Campbell, 121 N. Y. 353; Kramer v. Carter, 136 Mass. 504; Jeffries v. Jeffries, 117 Mass. 184; Greene v. Creighton 7 R. I. 1; Bartley v. Foerderer, 12 Pa. 460.

I am, therefore, of the opinion that an insurance company, the investment of whose assets is regulated by sections 3591 and 3598 of the Revised Statutes may not invest its assets in a first mortgage upon real estate, the deed conveying the title of which to the mortgagor, contains reservations, conditions and restrictions such as are set forth in your inquiry.

Yours very truly,

U. G. DENMAN,
Attorney General.

INSURANCE—TAX ON PREMIUMS SENT THROUGH MAILS—79TH O. S. 305 CONSTRUED.

Premiums remitted by policyholders to insurance company's home office out of state through mails are considered received by company in state of Ohio within meaning of section 2745.

October 30, 1909.

HON. CHAS. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of October 21st, in which you ask my opinion upon the following statement of facts is received:

> "The Pittsburg Life and Trust Company in its annual statement to this department showing its condition as of December 31, 1908, reported in its exhibit of premiums for taxation purposes $141,397.62.
>
> "On August 12, 1909, it filed an amended report of premiums collected in Ohio for the year 1908 for taxation purposes of $26,959.27 (a copy of which is herewith enclosed).
>
> "On September 10th, the department forwarded to this company a letter, of which the enclosed is a copy, and received a reply under date of September 13th, a copy of which is also enclosed.
>
> "If, as stated by the company, the amended report was 'intended to cover the fact that $114,438.53 was remitted in 1908 direct to the home office of this company at Pittsburg, Pa., by policyholders of Ohio, through the mails in cash, checks, drafts, postoffice orders or other forms of remittance,' is it the duty of this department to collect 2½% tax thereon?"

In reply thereto I beg leave to submit the following opinion:

The Pittsburg Life & Trust Company in its note to the amended report which it filed with you, a copy of which note is included in your letter, stated that such amended report was submitted after reading, and upon the authority of, the case of the Mutual Life Insurance Company v. State of Ohio, 79 O. S. 305, and the question which you ask resolves itself down to the proposition, whether in that case the supreme court held that premiums sent by residents of this state to the home office of a foreign insurance company through the mails in cash, checks, drafts, postoffice orders or other forms of remittance were "received by it in the state" within the meaning of section 2745 of the Revised Statutes of Ohio as such section stood prior to its amendment of March 23, 1909.

The determination of this question involves an analysis of the pleadings upon which the decision of the supreme court in 79 O. S. 305 was rendered. The original petition in this case made the following averment:

> "Plaintiff says, that in the annual statements to the superintendent of insurance of the state of Ohio, filed by the defendant in pursuance of the provisions of said section 2745 for the years hereinafter set forth, *the defendant did not include therein the premiums received at the home office of the defendant in the city of New York directly from policyholders who, at the times of such payment were residents in the state of Ohio and not paid by such policyholders through any agent of the defendant in the state of Ohio, the place of such payments being at such home office in the city of New York.*"

It will be seen from the above quoted allegation in the original petition, which the supreme court passed on in 79 O. S. 305, that the averment was directly and positively made that the place of payment was "at such home office in the city of New York," and in such original petition it was nowhere averred that the payments alleged to have been made at the home office were sent through the mails. In view of the condition of the pleadings in the 79 O. S. case, as above set forth, it is clear that the supreme court could not properly have passed upon the question presented in your inquiry, and indeed had that court considered that it was passing on such question adversely to the state it would have reversed the judgment of the lower courts which had been in favor of the state, and would have dismissed the petition. As it was, however, it reversed the judgment and remanded the cause for further proceedings. This the supreme court would not have done had it considered the case as being disposed of finally upon its merits. When the above case was remanded for further proceedings to the common pleas court of Franklin county, the state filed its amended petition which contained the following averment:

> "The plaintiff further says that in its annual statements to the superintendent of insurance of the state of Ohio, filed by the defendant pursuant to the provisions of section 2745 of the Revised Statutes of Ohio for the years hereinafter set forth, *the defendant failed to include therein in the premiums which were paid to it in the state of Ohio by policyholders, by depositing the same in the mails within the state of Ohio, at its request, and addressed to it at its home office in the city of New York, and which said premiums were carried by the mails to said home office of said company. Said premiums so remitted to it through the mails as aforesaid, were paid by policyholders who were residents of the state of Ohio at the times such payments were made, and at the times the policies upon which said premiums became payable were issued.*"

To this petition the defendant demurred on the ground that the petition did not state a good cause of action. Argument was had thereon and the case now awaits the decision of the common pleas court of Franklin county on such demurrer.

In the 79 O. S. case it was held by the supreme court, and indeed it is conceded by counsel for the defendant in this case, that any premiums paid to an agent of the company in Ohio are premiums "received by it in the state," and hence are subject to the excise tax of 2½% under the provisions of section 2745 R. S. O.

In view of the present status of the above case, and of the fact, there has so far been no direct decision on this question in Ohio, it follows, therefore, that if in contemplation of law premiums sent by mail to the home office of the Pittsburg Life & Trust Company by Ohio policyholders are premiums "received by it in the state," it is your duty to collect such tax on the $114,438.53 which was so remitted to said company in 1908.

In 22 Am. & Eng. Dic. of Law, p. 1057, the following rule upon the above question is laid down and is, I think, the clearly established law of this country:

> "The United States government through its postoffice department undertakes, upon receiving the required amount of postage, to forward any letter received at any postoffice in the United States to the party

whose address is placed thereon. After the letter is placed in the postoffice it passes out of the control of the sender and into that of the person to whom it is directed, and the postmaster or postoffice department is his agent to forward the letter to him. The right of the addressee being a property right, he cannot be deprived of it except by due process of law."

Illustrations of this principle are found in the following cases:

Johnson v. Sharp, 31 O. S. 611.
U. S. v. Jackson, 29 Fed. 503.
U. S. v. Johnson, 31 Fed. 725.
Commonwealth v. Taylor, 105 Mass. 172.
McDonald v. Chemical National Bank, 174 U. S. 610.
Tayloe v. Insurance Co., 9 How. 390, and many others.

In this connection the case of Tayloe v. Insurance Co. *Supra*, is very instructive. The question involved in this case was whether the premium on a fire insurance policy was paid when a letter containing the amount due was deposited in the mail. The facts were that a contract for insurance was made by correspondence between plaintiff and defendant. The terms upon which the company would carry the risk were sent to the insured by letter with instructions to send check for amount of premium if the terms were satisfactory. The terms were accepted and the plaintiff mailed a check to the defendant for the premium. Before the letter reached its destination the building insured was burned. One of the conditions of the policy of insurance was that no insurance was binding on the company until the premium was actually paid, and that credit should not be given by an agent for a premium under any circumstances. It was claimed by the insurance company that the premium was not actually paid and that consequently it was not liable. The court, however, held that the premium was actually paid when the letter containing the check for the amount was deposited in the postoffice.

In view of the above authorities, therefore, I am of the opinion that the premiums remitted by policyholders of the Pittsburg Life & Trust Company in the year 1908 direct to the home office of said company at Pittsburg, Pa., through the mails in cash, checks, drafts, postoffice orders or other forms of remittance, which premiums were reported by said company to amount to $114,438.53, were "received by it in the state" of Ohio during the year 1908, within the meaning of section 2745 Revised Statutes of Ohio prior to its amendment, March 23, 1909, and that, therefore, it is your duty to collect the 2½% tax thereon, provided for by said section 2745 of the Revised Statutes of Ohio.

Yours very truly,

U. G. DENMAN,
Attorney General.

INSURANCE — FRATERNAL BENEFICIARY ASSOCIATION — NATIONAL COUNCIL DAUGHTERS OF AMERICA BENEFICIARY DEPARTMENT.

Fraternal beneficiary associations incorporating in Ohio must do so under section 3631-21. *Such associations must adopt national fraternal congress rates.*

Fraternal beneficiary associations existing prior to April 26, 1904, *may continue business and exercise all powers not inconsistent with fraternal beneficiary association act.*

September 9, 1909.

HON. CHAS. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of September 4th, requesting my opinion whether the National Council Daughters of America Benefit Department, a fraternal beneficial association which was organized and doing business in Ohio, with its home office in Ohio, on April 26, 1904, the date of the passage of the present fraternal act, and which pays maximum death benefits of $250, may be incorporated or reincorporated under the present fraternal act, received.

In reply, I beg leave to state that I have carefully examined the papers and data submitted with your letter, and also the brief submitted on the question of said company. From these papers the facts appear to be that the National Council Daughters of America Benefit Department is conducted by the National Council of the Daughters of America for the purpose of reinsuring such local councils or lodges of that order as may choose to avail themselves of the benefits granted under the laws of the benefit department of that order. This is done by such local council making application to the national council, which application contains a list of all members of such local council in good standing therein between certain ages, such application being accompanied by a fee of twenty-five cents per name, said fee covering first month's premium. Thereupon, said council becomes a member of said benefit department, and upon the death of any member of said local council, and the proper proof of such death to said national council, said national council pays to said local council the amount of death or funeral benefit to which said member may—under the laws of said benefit department in no case to exceed $250—be entitled; said local council thereupon pays amount of said death benefit to the beneficiary of said deceased member.

The provisions applying to the facts in this case are those of section 3631-23*p* R. S. O., which reads in part as follows:

> "Nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance branch of the supreme lodge Knights of Pythias), or to similar orders which do not issue insurance certificates, nor to local lodges of an association now doing business in this state, that provide death benefits not exceeding three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both; *nor to any contracts of reinsurance of or between such local lodges of such association* now doing business on such plan in this state, * * *."

The certificate issued by the National Council Daughters of America Benefit Department, a copy of which is included among the papers submitted by you, is one of reinsurance, inasmuch as the National Council Benefit Department in no way obligates itself to pay the amount of such certificate to the member named therein, but merely agrees to reimburse the local council of which such person is a member, for the amount of death benefit not exceeding $250, which shall be paid by such local council to such member. The following definition of reinsurance is found in Vance on Insurance, page 61:

> "Reinsurance is a contract whereby the reinsurer agrees to assume the whole, or a part, of a risk undertaken by the original insurer. In its nature it is not different from the contract of original insurance,

but it possesses some peculiarities. The contract is personal between the insurer and the reinsurer, and the original insured is no party to it."

Bouvier defines reinsurance as follows:

"Insurance effected by an underwriter upon a subject against certain risks, with another underwriter, on the same subject, against all or a part of the same risks, not exceeding the same amount. * * * There is no privity of contract between the original assured and the reinsuer, and the reinsurer is under no liability to such original assured."

2 Bouvier's Law Dict. 864.

It is clear that in this case the beneficiary of the member of a local council insured as aforesaid, would have no right of action against the National Council D. of A. Benefit Department, and that there is no privity of contract between such member and the National Council of D. of A. Benefit Department. Indeed, the claim is specifically made in the brief submitted by the company that this is a contract of reinsurance.

I am, therefore, of the opinion that the underlined portion of the above quoted section 3631-23*p* R. S. O. is exactly applicable to this case, and was intended by the framers of this act to apply to just this class of insurance. Such being the case, I am of the opinion that the National Council D. of A. Benefit Department is totally exempt from *all* of the provisions of the fraternal beneficiary association act, for stronger language to so exempt them could scarcely have been used than the following, found in the first part of the above quoted section:

"Nothing contained in this act shall be construed to effect or apply to, etc."

Therefore, as the provisions and regulations of the fraternal beneficiary association act do not in any way affect or apply to the National Council D. of A. Benefit Department, such association cannot avail itself or be governed by any of the provisions of such act, and, therefore, cannot incorporate under such act. I use the term "incorporate" rather than that of "reincorporate" as used in 3631-23 of said act, for the reason that there is no general or special provision in the Revised Statutes of Ohio for "reincorporation" of such an association, and, therefore, the word "reincorporate" as used in section 13 must be held to mean "incorporate."

I am further of the opinion that even should such association aforesaid so alter its plan of insurance as to come within the meaning of and be governed by the provisions of the fraternal beneficiary association act, it would, should it desire to incorporate under such act, be compelled to accept and be governed by all of the provisions of such act.

Section 3631-23 of said act reads as follows:

"Any association now engaged in transacting business in this state, may exercise, after the passage of this act, all of the rights conferred thereby, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of association not inconsistent with this act, or it may be reincorporated hereunder. But no association already organized shall be required to reincorporate here-

under, nor shall it be required to adopt the rates prescribed herein for new associations, in order to avail itself of the privileges of this act, and any such association may amend its articles of association from time to time in the manner provided therein, or in its constitution or 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 association, constitution or laws."

It is evident from a careful reading of this section that the framers thereof had two plans in mind, the first being that any association engaged in transacting insurance business in Ohio at the time of the passage of the act, might continue to exercise all of the rights, powers and privileges which it was exercising at the time of the passage of the act under its charter or articles of association, which powers and privileges were not inconsistent with the act, and also might exercise all of the rights conferred by the act, or it might incorporate under the act. Should it adopt the first plan, the section further provides that it should not be required to incorporate under the act nor to adopt the rates prescribed in the act for new associations, but I am of the opinion that should it decide to adopt the second plan, as outlined by this section, namely, that of an incorporation under the fraternal beneficiary association act, it must do so under the provisions of section 3631-21 of said act, which governs and prescribes the manner in which associations shall incorporate under such act. Among the provisions of section 3631-22 is that which prescribes that such association so incorporating must have a "rate of regular payments or assessments which shall not be lower for death benefits than those required by the National Fraternal Congress Table of Mortality, with interest at four per cent. per annum."

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State Inspector of Oils)

OIL MUST BE INSPECTED IN THE BARREL.

January 8th, 1909.

HON. W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your communication with reference to the inspection of single barrel shipments of oil. You inquire whether or not it is a sufficient compliance with the statute for an inspector to have samples of oil sent to him for inspection purposes, and thus avoid going to the point where the oil has been shipped.

In reply thereto permit me to say that in my opinion this will not be a compliance with the statute. The purpose of the act providing for the inspection of oils is to protect the general public. It is the duty of the inspector and his deputies to make inspections of the shipments of oil for the purpose of determining whether or not the oil is up to the standard. The provisions of the act cannot be effectually carried out by a deputy who seeks to avoid making inspections by having a sample of oil sent to him. While there may be no fraud in sending a fair sample, it is the duty of the inspector to inspect and brand the package itself.

Very truly yours,

U. G. DENMAN,
Attorney General.

OILS—DEPUTY INSPECTORS OF, ENTITLED TO ALL FEES EARNED DURING YEAR, NOT EXCEEDING $1,200.

February 3rd, 1909.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your communication of February 2nd is received in which you submit in substance the following inquiry:

From June 1st to December 31st, 1908, Mr. Albert Bauer, deputy oil inspector of Franklin county, has earned $841.86 fees for the inspection of oils. Out of said fees he has been paid at the rate of $100 per month for seven months, beginning June 1st, 1908. This leaves a balance of $141.86 to his credit. The total fees earned by said inspector during the month of January, 1909, is $38.46. Query: Is Mr. Bauer entitled to have the deficiency in his compensation for the month of January, 1909, made up out of said balance of $141.86?

In reply I beg to say section 6 of the law regulating the inspection of oils, gasoline and naphtha provides that

> "each deputy inspector shall receive for such inspections as he may be called upon to make under the provisions of this act a fee of three cents for each and every barrel of oil of fifty gallons which he shall so inspect, payable out of the fees as provided in section 7 hereof, and not otherwise; provided that no deputy inspector shall receive more than $1,200 in any year."

Under this section a deputy inspector is clearly entitled to all the fees earned not in excess of $1,200 in any one year.

Section 1 of said law provides that the term of the state inspector of oils shall begin on the 15th day of May of each even numbered year. I am, therefore, of the opinion that in enforcing the provision in section 6, "that no deputy inspector shall receive more than $1,200 in any one year," the compensation should be based upon the total amount of inspection fees earned during each inspection year, and that such inspection year shoud be held to begin on the 15th day of May annually. It follows, therefore, that Mr. Bauer is not only entitled to the balance of $141.86, but to all other inspection fees earned by him during the year ending May 15th, 1909, not in excess of $1,200.

Yours very truly,

U. G. DENMAN,
Attorney General.

PETROLEUM SHIPPED FROM OTHER STATES—INSPECTION OF.

February 23rd, 1909.

HON. W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit substantially the following inquiry:

Any petroleum products shipped directly from refineries in Pennsylvania or other states to the consumers thereof in Ohio, and also when such consumers in Ohio receive the same as result of an order for said petroleum products made by a third party to said foreign refineries in behalf of said consumers, subject to the state inspection laws of Ohio pertaining thereto as found in chapter 15 of the Revised Statutes?

Replying thereto, I beg to say that section 394 of said chapter 15 provides:

> Are petroleum products shipped directly from refineries in Pennsylvania a product of petroleum, or into which petroleum or any product of petroleum enters or is found as a constituent element, *whether manufactured within this state or not, shall be inspected, as provided in this chapter, before being offered for sale or sold for consumption for illuminating purposes within the state,* and such inspection shall be conducted as herein provided, in the following manner: * * *."

Section 395 of said chapter of the Revised Statutes provides:

> "The inspectors and their deputies are required to test the quality of *all mineral or petroleum oils, or any oil, fluid or substance,* which (is) a product of petroleum, or into which petroleum or any product of petroleum enters, or is found a constituent element, *which is offered or is intended to be offered for sale for illuminating purposes in this state,* * * *"

Section 397 of said chapter 15 provides a penalty for violations thereof as follows:

> *"If any person for or as agent for any other person shall sell, or attempt to sell, to any person in this state any such oils to be consumed*

*within this state for illuminating purposes, whether manufactured in this state or not, before having the same inspected as provided in this chapter, he shall be fined in any sum not less than one hundred and not exceeding three hundred dollars; * * *"*

I am of the opinion that these sections make mandatory the inspection of petroleum products which are shipped into Ohio, the object being for the protection of the general public, including the consumer. The above statutes seem to be clear in thus providing, and to hold otherwise would render null and void our inspection laws as to petroleum products shipped directly from refineries in other states to consumers in Ohio.

Yours very truly,

U. G. DENMAN,
Attorney General.

OIL—INSPECTION OF BOOKS OF OIL COMPANY—EMPLOYING BOOKKEEPER FOR SAME—SALARY OF INSPECTOR FOR SAME.

Inspector of oil may not pay deputy a salary for examining books of oil company, but such deputies are to receive compensation in fees as provided by statute; nor can a bookkeeper be employed for inspecting books, as such inspection is part of duty of deputy oil inspectors.

April 30th, 1909.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Department of Oil Inspection, Columbus, Ohio.*

DEAR SIR:—Your letter of April 20th received, in which you ask the following questions:

1. Whether you may legally pay a salary to your deputy inspector of oils, at Lima, for examination of the books of the Solar Refining Company, in regard to the shipments of oils from that point, and
2. Whether you may legally employ a bookkeeper in Cleveland to examine the books of the refineries in that city in regard to the shipments of oils from that point, and may lawfully pay him a salary therefor.

The answer to both of these questions in my opinion is in the negative.

House bill No, 1275, passed May 9th, 1908, 99 Ohio Laws, 513, which repeals sections 394, 395 and 396 of the Revised Statutes provides in section 3 of said act as follows:

"The state inspector of oils shall appoint a suitable number of deputy inspectors of oils who shall have the same qualifications as the inspector, and who shall be empowered to perform *the duties of inspection*, and be *liable* to the same penalties as the state inspector of oils."

Section 6 of said act provides as follows:

"Each deputy inspector shall receive for such inspections as he may be called upon to make under the provisions of this act, a fee of three cents for each and every barrel of oil of fifty (50) gallons *which*

he shall so inspect, payable out of the fees collected as provided in section 7 hereof, *and not otherwise;* provided, that no deputy inspector shall receive more than $1,200.00 in any year."

Section 3 is the authority under and by virtue of which you may appoint deputy inspectors of oil, and section 6 provides the manner in which such deputy inspectors shall be paid. In both of these sections the duties of such deputy inspectors are stated to be those of the "inspection of oils," and section 6 provides that they shall be compensated in the manner there set forth "for such inspections as he may be called upon to make under the provisions of this act." Section 10 provides the manner in which the actual inspection or test of such oils shall be made.

Section 11 reads in part as follows:

"The inspector shall prepare the forms of all stencils and brands provided for in this chapter, *and also all general regulations and rules for inspection not inconsistent with the terms and provisions of this chapter.*"

And it would appear from this that you would have, under this section, the power to require your deputies to make such inspections of the books of the various refineries throughout the state as you may, in your discretion, deem necessary for a complete and adequate inspection of all such oils produced by such refineries, such inspection of books being, in my opinion, "not inconsistent with the terms and provisions of this chapter," and it is my opinion that your deputies would under the provisions of this act be required to perform such duties without any other or further compensation than that provided in section 6 of said act. Should you find that this would work a hardship on your force of deputies, as it is now constituted, you would in my opinion, under section 3 of this act, be empowered to increase their number to such an extent that you could so divide up among them the duties of inspecting such books as not to unduly burden any particular deputy or deputies, inasmuch as said section 3 empowers you to appoint a "suitable number of deputy inspectors of oils." This mode of procedure would, I think, enable you to legally attain the end you desire without unduly burdening your deputies, until such time as you can apply to the legislature for relief.

Yours very truly,

U. G. DENMAN,
Attorney General.

OIL—INSPECTION OF BY STATE OIL INSPECTOR AT COLUMBUS BARRACKS.

State Oil Inspector has not authority to inspect oil in territory ceded by state to federal government as military reservation.

June 25th, 1909.

HON. W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter in which you state that the oil used for illuminating purposes at the Columbus Barracks, Ohio, has been procured in the state of Indiana, shipped to Ohio and so used without being inspected, and that the officer in charge refuses to have said oil inspected.

You inquire if, under the law of the state of Ohio, as state inspector of oils, you are not authorized and required to make inspection of this oil.

The Columbus Barracks being a federal military reservation, your inquiry presents the interesting question as to whether the state of Ohio has jurisdiction over the same. It is true that section 12 of "An act to provide for the inspection of oils, gasoline and naphtha," 99 O. L. 513, provides that "any oil intended for sale for illuminating purposes within the state, as defined herein, shall be inspected within this state, etc."

Section 398 of the Revised Statutes of Ohio provides that:

> "Whoever knowingly uses for illuminating purposes any oil or product of petroleum, except such oil known as crude petroleum, before the same has been inspected and branded by a chief inspector or his deputy, as hereinbefore provided, shall be fined in any sum not exceeding one hundred dollars nor less than twenty dollars."

These general statutes make it mandatory that the oil used at the Columbus Barracks for illuminating purposes shall be inspected by authority of the state of Ohio, unless the state is precluded from exercising jurisdiction in the premises by reason of federal inhibition.

The 17th paragraph of section 8 of Article I of the constitution of the United States provides that congress shall have power

> "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

It is a fact that the territory in question has been ceded by the state of Ohio to the federal government as a military reservation and authority for the state so doing is found in section 23-7*a* Revised Statutes, towit:

> "That the consent of the state of Ohio is hereby given, in accordance with the seventeenth clause, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, court houses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government."

Section 23-7*b* of the Revised Statutes of Ohio provides that:

> "Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

I therefore conclude that because of these constitutional and statutory provisions your authority does not extend to the military reservation of the federal government situated within the state of Ohio. This conclusion is fully sus-

tained by the court's opinion in the case of *State of Ohio v. Thomas*, 173 U. S. 277, wherein the court held that:

> "A governor of a soldiers' home which is under the sole jurisdiction of congress is not subject to the state law concerning the use of oleomargarine, when he furnishes that article to the inmates of the home as part of the rations furnished for them under appropriations made by congress therefor."

The fact that in the case under consideration the military reservation has been ceded to the United States and that the oil furnished therefor was under appropriations made by congress, makes the above case directly in point and clearly decisive of the question raised in your letter. This conclusion is further sustained by the cases of *Tenn v. Davis*, 100 U. S. 257, and *Ex parte Siebold*, 100 U. S. 371. These cases concur in upholding the paramount authority of the federal government, under circumstances similar in effect to those set forth in your letter.

The supreme court of Ohio in 19 O. S.. at page 306 in the case of *Sinks* v. *Reece* in determining a cause of action wherein the same issue was raised, reached the following conclusion as stated in the second paragraph of the syllabus thereof, towit:

> "When territory for such purpose is so purchased by 'the consent of the legislature of the state in which the same shall be,' the government of the United States is invested, under the provisions of the same section, with exclusive jurisdiction over the same and its appurtenances, in all cases whatsoever."

Without the recital of further authority it is sufficient for me to state that in my opinion you are without jurisdiction to make the inspection inquired about.

Yours very truly,

U. G. DENMAN,
Attorney General.

OIL—STATE INSPECTOR OF—COMPENSATION OF DEPUTIES.

Deputy inspectors may not receive sum greater than aggregate of his fees even though fees be less than $100 *per month or less than* $1,200 *per year.*
Deputy inspector only entitled to $100 *a month for time served as such.*

June 29th, 1909.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of June 25th, in which you state that as state inspector of oil you are authorized to appoint a suitable number of deputy inspectors of oil, and that said deputy inspectors shall receive a fee of three cents for each and every barrel of oil of fifty gallons which he shall inspect, provided that no such deputy inspector shall receive more than $1,200.00 in any year. You then inquire what amount of compensation such deputy inspector would be entitled to when serving less than a year, and when the fees so earned by such deputy inspector would not amount to $100.00 per month. You also inquire what would be the proper compensation to be received by such deputy inspector in case the fees so earned would aggregate to exceed $100.00 a month for the number of months less than a year so served

by such deputy inspector. The authority conferred upon you as state inspector of oil, and the compensation to be received by such deputy inspector of oil, as may be appointed by you, is found in an act "to provide for the inspection of oils, gasoline and naphtha," 99 O. L. 513. Section 1 of the said law provides that the term of the state inspector of oils shall begin on the 15th day of May of each even numbered year.

It therefore follows that such inspection year should be held to begin on the 15th day of May annually.

Section 6 of said act provides that

> "each deputy inspector shall receive for such inspections as he may be called upon to make under the provisions of this act a fee of three cents for each and every barrel of oil of fifty gallons which he shall so inspect, payable out of the fees collected as provided in section seven hereof, and not otherwise; provided, that no deputy inspector shall receive more than twelve hundred dollars ($1,200.00) in any year."

From the provisions of this section it is seen that the deputy inspector is authorized to receive a maximum salary in fees of $1,200.00 per year. This would be at the rate of $100.00 per month. Under the provision as found in sections 1, 3 and 6, an appointment by you as inspector of oils of a deputy inspector at such time that his period of service would be less than a year, would be proper and legal.

By the terms of said section 6, such deputy inspector is to receive a fee of three cents for each barrel of oil of fifty gallons which he shall inspect, and that no deputy inspector shall receive more than $1,200.00 in any year.

An analysis of this and other sections of the act leads me to the conclusion that such deputy inspector cannot receive for his services a greater sum of money than the aggregate of his fees, even though such aggregate be less than $100.00 per month, or less than $1,200.00 per year.

Your second inquiry presents a more interesting, and perhaps more difficult, question. If a deputy inspector is appointed at a time, or should be dismissed at such time, his period of service would be less than a year, and his fees as such inspector during said period would aggregate to exceed $100.00 per month, and yet not exceed the sum of $1,200.00, the question is then fairly presented, to what amount of compensation is he entitled? If such deputy inspector has made inspections for one year, and his fees under section 6 of said act should aggregate $2,000.00, it is clear that he would be entitled to but $1,200.00, that sum being the maximum allowed him by law.

Suppose a deputy inspector in one of our large cities, say Cincinnati or Cleveland, would serve as deputy inspector for a period of five months, and during the five months his fees would aggregate $1,200.00, and a successor to him would be appointed, and during the five months immediately following, the successor should earn $1,200.00 in fees, can it be said that the first inspector would be entitled to $1,200.00, and a second inspector, in case he, too, should sever his relationship as such inspector, would be entitled to $1,200.00 also? I think this is a practical illustration of your inquiry, and must be answered in the negative.

I am, therefore, of the opinion that no deputy inspector under you is entitled to receive for any year, or fraction thereof, a sum of money as compensation in excess of $100.00 per month for the time so served as such deputy inspector. To conclude otherwise would, in my opinion, be in direct contravention of the terms of the act, and the clear legislative intent in the enactment thereof.

Yours very truly, U. G. DENMAN,
Attorney General.

SIGNAL OIL OF RAILROADS SUBJECT TO INSPECTION.

December 15, 1909.

HON. W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—In compliance with your request of December 10th for an opinion upon the question whether it is your duty to inspect signal oil used by railroads in this state, such oil having a higher flash test than that prescribed by the statute, and being in part a petroleum product, I beg leave to submit the following opinion:

Section 398 of the Revised Statutes of Ohio reads as follows:

> "Whoever knowingly uses for illuminating purposes any oil or product of petroleum, except such oil known as crude petroleum, before the same has been inspected and branded by a chief inspector or his deputy, as hereinbefore provided, shall be fined in any sum not exceeding one hundred dollars nor less than twenty dollars."

Section 12 of an act "To provide for the inspection of oils, gasoline and naptha," passed May 9, 1908, 99 O. L. 513, reads in part as follows:

> "* * Nothing contained in this chapter shall be so construed as to require the inspection of miner's lamp oil; nor the inspection of fuel oil for fuel purposes under boilers for generating steam, furnaces, or retorts, in lieu of other fuel in manufacturing plants; nor the inspection of gas making material when sold to gas works for the manufacture of gas."

The above quoted section 398 makes it unlawful for anyone to use oil required to be inspected under the provisions of law regulating the same, and, therefore, if signal oil is such as is required to be inspected under the law, it is your duty so to inspect it before it is used by railroads in this state.

The above quoted paragraph of section 12 of the act of May 9, 1908, and section 398 R. S. O. except certain kinds of petroleum oils from inspection, and I am of the opinion that, under the well-known rule of statutory construction, to-wit, the "rule of enumeration and exclusion," the intention of the legislature, as evinced by said sections above quoted, was that all petroleum oils other than those specifically excepted therein, should be inspected by you before use. I am therefore, of the opinion that it is your duty to inspect or cause to be inspected all signal oil before the same is used by railroads within this state.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State Highway Commissioner)

ROADS AND HIGHWAYS — STATE AID FOR IMPROVEMENT — UNEXPENDED BALANCE MAY BE TURNED INTO PIKE REPAIR FUND OF COUNTY.

February 2, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your letter of January 25, you state that Huron county prior to January 1, 1908, filed the usual application with the state highway department for state aid for pike repairs, and aso applied for state aid for construction work. You state that after paying the state's part for the construction work performed during 1908 there is left a balance of about $1,700 out of the amount set aside for Huron county. You ask whether this balance may be forwarded to the treasurer of Huron county to become a part of the pike repair fund of said county.

Section 31 of the act approved May 9, 1908, 99 O. L. 318, provides that

> "the county commissioners of any county that have filed or may hereafter file petitions for the apportionment of the aid to such county for repair may, with the consent of the state highway commissioner, use part of such apportionment for construction and any residue remaining for repair, in any case to be under the provisions of this act."

I believe, therefore, that you may forward this balance upon receiving a properly certified statement setting out that during 1908 the county commissioners have levied on the total tax duplicate of such county a tax sufficient to equal the amount to be apportioned to such county by the state for its repair fund.

Very truly yours,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—CONTRACT FOR IMPROVEMENT—EMERGENCY WORK.

No responsibility on part of state for contracts let or work performed in an emergency unless highway commissioner approves contract from beginning.

March 25th, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your communication relative to the Akron & Medina road, in Summit county, you state that the bills approved by your department for construction work under contracts and in strict conformity with the act of 99 O. L. 308, amounted to $13,746.78. That subsequent to the performance of this work and by reason of an emergency due to a subterranean lake under such road, the county commissioners had additional work performed to the amount

of $1,004 without the letting of contracts and without complying with the provisions of the act of 99 O. L. 308.

You ask whether, under section 15 of this act, you should make your apportionment upon the basis of $13,746.78, or whether you should include in your apportionment the additional sum of $1,004 certified to you by the county auditor of Summit county.

Section 15 of the act of 99 O. L. 308 provides:

> "Upon the completion of any highways rebuilt or improved under the provisions of this act, the state highway commissioner shall immediately ascertain the total cost and expense of the same and apportionment of the total cost and expenses between the state, the county and the township or townships and abutting property, and the state highway commissioner shall certify the total expense of said improvement to the county commissioners and to the trustees of the township or townships and abutting property owners respectively, signifying the amounts contracted to be borne by the state, the county and the township or townships and the abutting property as provided by this act."

Section 14 of the same act sets out the requirements as to advertising for bids, letting of contracts, etc. It is clear from this and other sections of this act that there is no responsibility on the part of the state or its officers for contracts let or work performed unless the state highway commissioner has directed and approved such contracts and work from the beginning.

I am of the opinion, therefore, that you should make your apportionment upon the basis of $13,746.78, since this was the amount expended in conformity with the provisions of the act which sets out your power and authority. The provision for the payment of the additional $1,004 should be made by the county commissioners.

Very truly yours,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—APPLICATION FOR IMPROVEMENT—AMENDMENT OF SAME.

An application for improvement for three different strips of roads at least one-third of mile in length is not to be construed a mile or more of road on any one of such three strips.

An amended application of April 15 cannot be considered in making apportionment of appropriation for this year.

April 28th, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your letter of April 20th you state that the county commissioners of Meigs county have filed an application for the improvement of three different strips of road, each at least one-third of a mile in length, under the provisions of the state highway law, 99 O. L. 308. You ask whether such application is valid and also whether your department may, under the state highway law, construct a mile of one of such three roads instead of one-third of a mile of each.

Sections 8 and 9 of 99 O. L. 308 do not give the state highway commissioner power to consider and act upon an application unless such application is for the construction of a road or section of road

"at least one mile in length, or being less than one mile in length, in an extension or connection with some permanently improved or paved street or permanently improved highway of approved construction, etc."

Since this provision of the law was not complied with and since it was evidently the intention of the county commissioners to have about one-third of a mile of each of the three roads mentioned in their application improved, I am of the opinion that such application is not in compliance with the law and should not be considered. In my opinion, therefore, such application does not warrant your construction of a mile or more of road on any one of such three sections.

You also present an amended application of the county commissioners of Wayne county, dated April 15, 1909, asking that the length of road to be improved under their application of December 26th, 1907, be extended from one mile to a mile and a half.

Section 6 of 99 O. L. 308 provides that:

"The highway commisisoner shall only consider petitions for apportionment of the appropriation of any year that have been filed before January 1st preceding the date when such appropriation is available."

Since the amended application of April 15, 1909, is, in effect, a new application for the construction of a half mile of road, and since the state highway law makes no provisions for the filing of such amended application, subsequent to January 1st of each year, I am of the opinion that the amended application of April 15th cannot be considered by you in making your apportionment of the appropriation for this year.

Yours very truly,

U. G. DENMAN,
Attorney General

PAVING OF COUNTRY ROAD OCCUPIED BY ELECTRIC RAILWAY—AMOUNT OF EXPENSE TO BE PAID BY RAILWAY COMPANY.

In absence of any provisions in grant to electric railway company such company can only be made to keep up paving after such paving is completed.

April 30th, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your letter of April 22nd you state that "it is desired to pave with brick a country road that is occupied along the center by an electric railroad," and ask whether the railroad company can be compelled to pave over the place occupied by its track and ties.

Section 3443-9, Bates' Revised Statutes, provides, as to street railroads outside of municipalities, that:

"All such companies shall have power to occupy and use for their tracks, cars and necessary fixtures and appliances, the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such highways, etc."

Section 3443-13, Bates' Revised Statutes, provides that:

> "Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers in so far as they are applicable, that other street railroad companies have."

Section 1536-183, Btaes' Revised Statutes, provides that:

> "The right to construct such railway within or beyond the limits of an unincorporated village, can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made."

County commissioners clearly have the power to provide, in any grant to an electric railroad, that such railroad may be compelled to pave or otherwise repair the part of the public highway covered by its tracks, just as a city council has this power. The county commissioners not only have the power, but it is their duty to enforce such provisions of a grant to such railroad company. The City of Columbus v. Street Railroad Company, 45 O. S. 98.

Where, however, no such specific provision for a new paving has been set out in the grant of the county commissioners, the company cannot be compelled to pave, but may be compelled to keep the paving in repair after such paving is completed. In other words, the company is required to repair but not bound to improve the road.

Elliott on Roads and Streets says in section 777 :

> "We suppose that it is safe to affirm that the assumption should be, where there is nothing evidencing the contrary, that the local authorities did not intend to relieve the private corporations from the duty of repairing, for, in the absence of a provision relieving it from that duty, the law would imply that it exists. * * It is probably true that, under the rule as now declared, in the majority of cases, as much as can be safely said is, that the railway company is under a general and continuous duty to repair, but is not bound to improve. This conclusion, it is, perhaps, hardly necessary to add, is relevant and valid only in cases where the form of the contract is such as to exonerate the company from the general duty, for, as we have repeatedly said, the contract is controlling and by it the rights and duties of the parties are to be measured and determined."

I am of the opinion, therefore, that a railroad company in the above case can be compelled to pave only when provision for such paving has been made in the grant of the county commissioners for the use of the public highway.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—STATE AID—MANNER OF COMPLETING ENTIRE ROAD.

After one section of road applied for under state highway law is completed it is not compulsory to complete remaining sections of such road.

July 1st, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—In your letter of June 15th you state that a certain county prior to January 1st, 1908, made proper application under the state highway law for the construction of a certain road, that because of lack of money it was impossible to complete the entire road last year and for that reason a contract was let for section No. 1 of such road, leaving section No. 2 to be completed later. You state, also, that section No. 1 has now been completed fully as provided in such contract, but that the county commissioners have filed no resolution, as provided in section 12 of the state highway law, for the construction of section No. 2, but have filed a resolution, as provided for in such section 12, for the construction of another road for which application has been properly made. You ask whether you may let a contract this year for such other road instead of completing section No. 2 above described. You also ask whether, under section 15 of the state highway law, you shall make the apportionment therein provided for immediately upon the completion of section No. 1 above described.

Section 20 of the state highway law, 99 O. L. 308, provides as follows:

> "In each county the construction and improvement of highways and sections thereof under the provisions of this act, shall be taken up and carried forward in the order in which they are finally designated, as determined by the date of the receipt in each case of the certified copy of the resolution provided in section 12, by the highway commissioners as hereinbefore provided, unless by mutual consent of the state highway commissioner and county commissioners another road or section of road be substituted. Provided however, that the state highway commissioner, where heavy grading is required, may contract for such grading and defer contracting for surfacing the road to such time as the grade has become stable and solid, and may, with the approval of the county commissioners contract for part of a road or section of road covered by a petition, such section to be not less than one-half mile in length unless connecting with an improved road or street, and continue construction in the same manner from year to year."

While section 20 above quoted seems to contemplate and encourage the continuation of the work upon a road section by section, from year to year, until such road is completed, I am of the opinion that the words "continue construction in the same manner from year to year" are directory and not mandatory, and that neither the state highway commissioner nor the county commissioners can be compelled to continue the construction of such a road until its completion.

Section 17 R. S. provides that:

> "An officer or agent of the state, or of any county, township, or municipal corporation, who is charged or entrusted with the construction, improvement, or keeping in repair of any building, or work of

> any kind, * * * shall not make any contract binding or purporting to bind the state, or such county, township, or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable to such purpose, unless such officer or agent has been authorized to make such contract."

In the case of State v. Medberry, et al., 7 O. S., 522, para. 2 of the syllabus reads as follows:

> "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 discretion, intact, to make appropriations, in general, devolving on each biennial general assembly, and for the period of two years."

In addition to the above it seems to me contrary to public policy to permit either the state highway commissioner or a board of county commissioners to control the action of a later state highway commissioner, or board of county commissioners, in the construction of such highways for a period of years. It seems to me a much better policy to permit such officers to decide each year as to what construction work will be of the greatest value to the state and county.

Since, in the case presented, no final resolution as provided for in section 12 has been presented to the state highway commissioner, he is without power to proceed with the further construction of the road, section 1 of which has been completed.

Section 15 of the above act provides as follows:

> "Upon the completion of any highways rebuilt or improved under the provisions of this act, the state highway commissioner shall immediately ascertain the total cost and expense of the same and apportionment of the total cost and expense between the state, the county, and the township or townships and abutting property, and the state highway commissioner shall certify the total expense of said improvement to the county commissioners and to the trustees of the township or townships and abutting property owners respectively, signifying the amounts contracted to be borne by the state, the county and the township or townships and the abutting property as provided by this act."

I am of the opinion that the language "upon the completion of any highways rebuilt or improved under the provisions of this act" applies to any road or section thereof for the construction or improvement of which a contract is let, and that the state highway commissioner should make the apportionment upon the completion of any road or section thereof as soon as he is able to compute the total cost and expenses of constructing or improving such road or section of road.

Where a road has been divided into sections and an apportionment is being made for one section thereof, I am of the opinion that such apportionment should be made in the same manner in which it would be made in the case of a road completed under a single contract.

Yours very truly,

U. G. DENMAN,
Attorney General.

HIGHWAY COMMISSIONER — APPROPRIATION FOR LABORATORY— EMPLOYMENT OF PERSON TO INSTALL.

July 14th, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 12th, in which you ask to be advised if house bill No. 129, passed March 12, 1909, which contains the following appropriation for the state highway department, "for new laboratory in Ohio State University for investigating materials for road building, $5,000," will permit you to employ labor for the purpose of installing the apparatus which you desire to purchase for this new laboratory, and if it would be proper for you to employ a competent person to take charge of the installation of said apparatus, including the drawing of plans and arranging for the construction of certain tables and other fixtures that may be necessary, such person to have general supervision over the work and to employ whatever assistants may be required, consisting of carpenters, electricians and other mechanics and laborers, all of said labor to be paid for on the per diem basis.

I beg to advise that the above appropriation only authorizes the expenditure of $5,000 for the purpose of installing a new laboratory in the Ohio State University for investigating materials for road building, and no part or the above appropriation is to be used for the maintaining of said laboratory after the same has been installed. As I understand your letter of above date, the person or persons you desire to employ are only to render services in the selecting of the apparatus to be used in the new laboratory and to assist in the installing of such apparatus.

I am, therefore, of the opinion that the labor which you desire to employ may be paid for out of the appropriation, as such labor is incident to the installing of the new laboratory.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—STATE AID—COUNTY COMMISSIONERS MAY PAY MORE THAN ONE-HALF OF COST.

July 19th, 1909.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of July 16th, in which you submit the following for my opinion: "The commissioners of Harrison county desire to construct a roed under the state aid law, the cost of which will be in excess of the amount upon which the state can pay one-half out of the appropriation for 1909, and the commissioners desire to assume the excess cost under section 16 of the highway act, and you desire to know if they may do so. I beg to advise that section 16 of the act providing for state aid in the construction of highways, 99 O. L. 308, provides the manner by which such road improvement shall be paid, and the conclusion of said section is as follows:

> "Provided, further, that nothing contained in this act shall prevent any board of county commissioners or township trustees from agreeing to appropriate a larger amount for any road improvement than the amount specified in this act, up to the full cost and expense of the same."

I am of the opinion that the above proviso in section 16 specifically gives county commissioners of any county authority to pay a larger amount for any road improvement than that paid by the state up to the full cost and expense of same.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

(To the Inspector of Mines)

MINES AND MINING—AIRWAYS—NUMBER TO BE MADE IN MINES.

September 20, 1909.

HON. GEORGE HARRISON, *Chief Inspector of Mines, Columbus, Ohio.*

DEAR SIR:—Section 298 Revised Statutes is in part as follows:

> "The owner or agent of every coal mine, * * * shall provide and maintain for every such mine, an amount of ventilation of not less than one hundred cubic feet, per minute, per person, employed in such mine, * * *, and no working place shall be driven more than sixty feet in advance of a breakthrough, or airway;"

There having been some controversy as to whether the New York Coal Company at its mine No. 31 were violating the above provision, a hearing was had in this office with Mr. McManigal and Mr. Morris representing the coal company, Mr. Green and Judge Wright representing the miners, and Hon. George Harrison, chief inspector of the mine department, all the parties interested in the above controversy being present. From the facts submitted to this department at the above hearing, I am of the opinion that the New York Coal Company, at its mine No. 31, did and at the present does provide and maintain an amount of ventilation of not less than one hundred cubic feet, per minute, per person, employed in such mine and also that they do not violate the latter part of the above-quoted section, to-wit:

> "No working place shall be driven more than sixty feet in advance of a breakthrough, or airway"

by having their breakthroughs, or airways, one hundred and twenty feet apart, alternating on each side of a room or working place.

I beg to remain,

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Railroad Commission.)

DEFECTIVE BRAKES—DISTANCE TRAIN MAY BE RUN—SECTION 3365-27*a* CONSTRUED.

Railroad companies may not run a train where air-brakes are inoperative within meaning of section 3365-27a beyond first reasonable adequate switching tracks of the company.

October 15, 1909.

Railroad Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The communication of your Mr. Strong, safety appliance inspector, is received, asking this department for a construction of section 3365-27*a* Revised Statutes as applied to the moving of common carriers engaged in moving traffic by railroad between points within this state when the airbrakes thereof become defective and inoperative, and particularly as to the right of the railroad company to run a train moving traffic to a terminal after the airbrakes used and operated by the engineer of the locomotive hauling such train have become defective, thereby rendering the engineer unable to control the train by the use of such airbrakes.

In reply thereto I beg to say that the part of section 3365-27*a* Revised Statutes applicable to your inquiry is as follows:

> "That it shall be unlawful for any common carrier engaged in moving traffic by railroad between points within this state to use on its line any locomotive in moving such traffic not equipped with power driving wheel brakes and appliances for operating the train brake system, or to run any train in such traffic that has not seventy-five per centum of its cars in such train having their brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in such train shall be associated together and have their brakes used and operated."

Two specific provisions are found in the part of the section quoted pertaining to brakes. First, that it shall be unlawful for the carrier moving traffic within this state to use any locomotive in moving such traffic not equipped with power driving wheel brakes and appliances for *operating* the train brake system. This evidently means that when the power driving wheel brakes and appliances for operating the train brake system become out of repair, or become so defective as to make it impossible for the engineer to operate the train brake system from the engine, then in that event it is unlawful to use such locomotive for moving the train.

The second provision relates to the cars hauled by the locomotive and the provision is clear that it is unlawful to run such train when the airbrake system cannot be "*used and operated by the engineer of the locomotive drawing such train, and all power brake cars in such train shall be associated together and have their brakes used and operated.*"

I am of the opinion that this section should not be construed as preventing a railroad company moving a train, the airbrake system of which is so impaired, to the nearest convenient and adequate sidetrack or switch. If such sidetrack or switch is at the nearest terminal to be reached after the impairment of the airbrake system, then the right to run the train by the use of handbrakes to the terminal would be a reasonable construction of the statute. But the nearest terminal on the road beyond the place where the impairment of the airbrake system of the train occurs may be a great many miles beyond a convenient and

fully adequate switch. In this case it would, in my opinion, be a violation of the provisions of this section to run such train beyond such switching facilities through villages and cities, perhaps, to a terminal.

This section was construed by George H. Jones, assistant attorney general, in an official opinion to Hon. J. C. Morris, commissioner of railroads and telegraphs, under date of April 1, 1904, in which opinion a somewhat more liberal construction than the above was placed upon the section. But the section has been amended since that opinion was given, and while the language of the section directly applying to the airbrakes is not materially changed, yet it is proper to read the entire section in order to get at the true legislative intent.

I am, therefore, of the opinion that this section, as amended, and in effect April 4, 1906, 98 O. L. 75, cannot be construed so as to give a railroad company the right to run such common carrier as therein defined with the aid of handbrakes, when the airbrakes are inoperative beyond the first reasonably adequate switching tracks of the company. The former opinion of this department, above referred to, does not go so far as to hold that a train with such impaired equipment may be run through to a "terminal."

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Supervisor of Public Printing.)

PAPER CONTRACTS—TRADE CUSTOMS.

Paper trade customs in state contracts have been abrogated by statute. Paper furnished state under contract must be identical with sample.

April 6th, 1909.

HON. JOHN L. SULLIVAN, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 5th, in which you submit the following statement of facts for my opinion:

> The Central Ohio Paper Company, at the last letting of the annual contracts for paper, was awarded the contract for the book paper. According to said contract this book paper was to weigh one hundred and fifty pounds to the ream and to conform in quality to the sample. A recent shipment by this company has failed to come up to the sample in weight, and because of your refusal to O. K. said shipment, on the ground that the contract was being violated, said company has taken issue with you and you desire to know how much leeway you must allow the company in determining whether the paper is up to the required standard and if the state is to consider alleged trade customs in enforcing the terms of its paper contracts.

Section 134 of the Revised Statutes is as follows:

> "Each proposal shall be accompanied with two sample sheets of each kind of paper bid on, of the approximate size required, with the character of each designated in printing or writing thereon; said samples to conform in quality to those furnished by the secretary of state and to form part of said proposal; *and the successful bidders must furnish papers identical with the samples which accompany their bids* * * *."

The above section prescribes the manner of letting contracts for state paper and also requires the successful bidders to furnish paper identical with the samples which accompany their bids. This statutory provision is a part of all state paper contracts and the meaning of the same is quite clear. The intention, no doubt, of such a provision was to protect the state after a contract was made from accepting any paper which borders on the line of a substitute for the samples which accompany the bids.

If a trade custom exists which permits paper companies, who have a contract to furnish paper according to a certain sample, to furnish paper under such a contract which is not identical with the sample, such a trade custom is abrogated by statute in this state relative to state paper contracts, as all paper furnished under contract to the state must be as section 134 requires, that "successful bidders must furnish papers *identical* with the samples which accompany their bids."

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Department of Workshops and Factories.)

WORKSHOPS AND FACTORIES—FIRE ESCAPES ON PUBLIC HALLS, ETC.

Inspector has discretionary power to order necessary fire escapes to be erected on second floor of public hall, but may not dispense with same above second floor.

August 9th, 1909.

HON. THOMAS P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 5th enclosing a letter of R. W. McCaughey, Esq., of Massillon, Ohio, with respect to the interpretation of the law relating to fire escapes. You request my opinion also concerning a certain feature of the statute relating to high explosives. As to this latter inquiry I beg to refer you to my opinion of August 6th, in which I think you will find a negative answer to the question presented in your letter, together with my reasons for making such answer.

Mr. McCaughey's question in short is as follows:

> May the chief inspector of workshops and factories order a fire escape to be erected for a public hall on the second floor of a building?

Prior to the enactment of the act of April 28, 1908, 99 O. L. 232, the law relating to public halls and places of assemblage was embodied in section 4238-1, etc., Bates' Revised Statutes. Section 4238-2 of said act sets forth at great length the specifications which all buildings containing such halls must satisfy. Among other provisions the following is found:

> "Every such building, place or room, *when above the second floor*, shall be provided with at least one fire escape."

Under the law above cited the chief inspector of workshops and factories possessed no discretionary power. He could not, therefore, enforce an order requiring a fire escape communicating with a room on the second floor, nor could he compel the erection of a fire escape according to specifications different from those set forth in section 4238-2. Whether or not the specifications of section 4238-2 still define the limits of the power of the chief inspector, depends upon a construction of the act in 99 O. L. 232. This is an act, as announced in the title thereof,

> "to enlarge the powers of the chief inspector of workshops and factories in the matter of public schools and other buildings."

Section 1 thereof provides in part that

> "in addition to the powers now vested in the chief inspector of workshops and factories, it shall be his further duty to cause his district inspectors to inspect all * * * halls * * * and other buildings

used for the assemblage or betterment of people * * * in the state of Ohio, with special regard to * * * the provision of fire escapes."

Section 2 provides in part that

"the district inspectors shall file with the chief inspector of workshops and factories, a written report of every inspection made of any of aforesaid structures, stating the condition in which such building was found, and if it is found that * * * means (are not) provided for the safe and speedy egress of the persons who might be assembled therein, said report shall specify such appliances, additions or alterations as are necessary to provide such * * * protection."

The professed object of the law being to enlarge the powers of the chief inspector of workshops and factories with respect to public buildings and places of public assemblage, I am of the opinion that with respect to public halls on the second floor, the inspector has discretionary power to order necessary fire escapes to be erected. The inspector may not, in the exercise of his powers, under the act of 1908, dispense with the erection of a fire escape communicating with a public hall on any floor above the second floor, and this, in my opinion, is the extent of the restraint upon his discretion imposed by section 4238-2. In a word, the law is, that all public halls located in a floor above the second floor must be supplied with a fire escape as set forth by section 4238-2, while all public halls situated on the second floor must be provided with such fire escapes as, in the judgment of the chief inspector of workshops and factories, may be necessary.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

WORKSHOPS AND FACTORIES—HIGH EXPLOSIVES—LOCATION OF MAGAZINE—BOND OF MANUFACTURERS—BAKE-SHOP LAW.

Inspector of Workshops and Factories may not, under any circumstances, issue certificate for high explosives of one hundred pounds or more to be kept at a distance less than sixty rods from nearest occupied dwelling, but may use discretion in issuing certificate for location for storing less than one hundred pounds of high explosives.

Inspector may issue certificate for storing high explosives when manufacturers have not filed bond as required by law. If manufacturers fail to file bond they are subject to prosecution.

The use and occupation of cellar or basement of building erected since enactment of bake-shop inspection law by bakery is unlawful, regardless of the fact that on site of such building there formerly stood a building, the cellar or basement of which was occupied by the same bakery.

August 6, 1909.

HON. THOMAS P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 4th, requesting the opinion of this department upon the following questions, which I have taken the liberty to restate for my own convenience, viz:

1. May the inspector of high explosives approve the plans and location of a magazine in which is stored more than one hundred pounds of high explosives and which is situated less than sixty rods from a factory, occupied building, etc., in case the topography of the adjacent country renders the location of such magazine practically safe?

2. May the chief inspector of workshops and factories grant a certificate approving the plans and location of a magazine such as that described in the previous question?

3. What is the discretion, if any, of the inspector of high explosives and the chief inspector of workshops and factories, regarding the approval of the location of a magazine situated more than sixty rods from the nearest establishment, when the topography of the adjacent country and the amount of high explosives stored in such magazine render the location thereof unsafe to such nearby establishment?

4. May the chief inspector of workshops and factories refuse to grant a certificate approving the plans and location of a magazine or factory before receiving notice that the bond required by section 4 of the high explosives act, 99 O. L. 211, has been approved and filed?

5. In case of the expiration of the term of a bond filed under section 4, or a change of surety, should the chief inspector of workshops and factories avoid the certificate of approval under section 3 of the act referred to, or should the chief inspector adopt any other means to enforce the execution of another bond?

The foregoing questions relate to the construction and application of an act to regulate the manufacture, handling and storage of explosives, 99 O. L. 211.

6. Does the bake-shop law, section 4364-71 et seq. Bates' Revised Statutes, prohibit the use and occupation by a bake-shop of a cellar or basement, except that in cases where a bake-shop, located in a cellar or basement at the time the law was enacted, is closed, the same may be reopened upon compliance with the provisions of said law? Under the provisions above described, could a cellar or basement of a building erected on the site of a building, the cellar or basement of which had been previously used as bake-shop be so used upon compliance with said law?

In consideration of the first three questions above stated, I deem it proper to make the following quotations from the act found in 99 O. L. 211:

"Section 1. Each person, partnership or corporation * * engaged * * in storing * * any * * explosive substance, shall file with the chief inspector of workshops and factories * * a complete statement of the location of such * * magazine * * together with the kind and character of the explosive * * substance * * stored * * thereat, the quantity stored * * and the distance which such * * magazine is located * * from the nearest factory, workshop, mercantile or other establishment, occupied dwelling, etc. * *.

"Section 2. Such statement * * shall be submitted by the chief inspector of workshops and factories for * * investigation, to the district inspector of explosives, who shall make a personal examination of each * * magazine, and if such * * magazine is found to be located at a safe distance from the nearest factory, workshop etc. * *

and to be so planned and managed as to insure as great safety as is consistent with the nature of the business, and the facts required in such statement are fully set out therein, and found to be true, then the chief inspector of workshops and factories shall grant a certificate approving the plans and location of such * * magazine as set forth in such statement.

"Section 4. No person, partnership or corporation shall * * store a quantity of (explosive substance) exceeding one hundred (100) pounds, * * within sixty (60) rods of any factory, workshop, etc. * *.

"Section 6. Whoever * * violates any provisions of this act, or * * stores any of such explosives, at any time, * * without having, at such time, a valid certificate from the chief inspector of workshops and factories, * * shall be fined, etc. * *.

"Section 8. It shall be the duty of the chief inspector of workshpos and factories and the district inspector of explosives to enforce the provisions of this act."

In answer to your first question, I beg to state that, in my opinion, the general assembly has, by this act, in the exercise of its unquestioned powers, undertaken to fix an arbitrary standard of safety respecting the relative location of magazines for the storage of explosives and of inhabited or occupied buildings. That standard, as set forth in section 4 above quoted, is for magazines in which a quantity of explosives exceeding one hundred pounds is stored, a distance of sixty rods between such buildings. For this reason, and also because the duty to enforce the provisions of the law in question is specifically enjoined upon the district inspector of explosives by section 8 above quoted, I am of the opinion that, as to magazines containing more than one hundred pounds of explosives and situated less than sixty rods from the nearest occupied building, the inspector of explosives may not give his approval; but that in all such cases, he should report the facts, including those which tend to establish the safety of the location of the magazine, to the chief inspector without his approval.

For similar reasons the chief inspector of workshops and factories must refuse to issue a certificate of approval of the location of a magazine in which more than one hundred pounds of explosives are stored and which is situated less than sixty rods from the nearest occupied building.

The third question above stated suggests the exact nature of the discretion vested in the inspector of explosives and the chief inspector of workshops and factories by the provisions above quoted. With respect to magazines located more than sixty rods from the nearest occupied building and in which more than one hundred pounds of explosives are stored, the district inspector of explosives should take cognizance of the topography of the region and the amount and nature of the explosives stored, and if, in his judgment, the conditions render the location of the magazine unsafe with respect to nearby establishments, he should so report to the chief inspector, who, in turn, should refuse to issue a certificate of approval. In this connection also it may be remarked that, with respect to magazines in which less than one hundred pounds of explosives are stored, the district inspector of explosives and the chief inspector of workshops and factories, in the exercise of their respective powers, have unlimited discretion, regardless of the distance from the nearest occupied building. Thus the location of a magazine in which seventy-five pounds of explosives are stored and which is situated less than sixty rods from the nearest occupied

building may be approved, while that of a magazine in which the same quantity of explosives are stored and which is situated more than sixty rods from the nearest occupied building, may be disapproved, both because the topography of the region and the nature of the explosives so stored render such locations respectively safe and unsafe. However, the act does not apply to the storage of gunpowder or blasting powder in quantities less than twenty-five pounds. (Section 7.) In a word, the absolute standard of safety created by the general assembly applies only to amounts of explosives exceeding one hundred pounds and, with respect to amounts of less than one hundred pounds, the inspector of explosives and the chief inspector of workshops and factories have discretion.

The fourth and fifth questions above stated may be answered together. In my opinion, the provision of section 4, with respect to the execution and filing of bonds by manufacturers of explosives and those who store more than one hundred pounds, is independent of the other provisions of the act relating to the approval by the inspector of the location and plans of plants and magazines. Accordingly, the chief inspector may and should issue his certificate of approval of plans and location of a given factory or magazine regardless of whether or not the proprietors thereof have given bond. However, it is unlawful for those required to give bond to engage in business without doing so, and if any such manufacturer or proprietor of a magazine should engage in business without filing bond, the chief inspector, in the exercise of his duty under section 8, should cause an affidavit to be filed under section 6, which provides in part that:

> "Whoever * * manufactures, handles or stores any of such explosives at any time without having first filed such bonds and statement * * shall be fined * *."

The success of such a prosecution would not be impaired by reason of the fact that the chief inspector had approved the plans and location of the factory or magazine in question; the offenses of failing to procure a certificate of approval and of failing to give bond are separate and distinct. By reason of the foregoing, the chief inspector should not feel called upon to avoid the certificate of approval under section 3 of the act in case the term of the bond expires or the surety becomes insufficient.

With respect to the sixth question above stated, I beg to quote a portion of section 1 of the bake-shop law, section 4364-71 Bates' Revised Statutes:

> "* * No cellar or basement not now used as a bakery shall be hereafter used and occupied as a bakery, and a cellar heretofore occupied shall, when once closed, not be reopened, unless the proprietor shall have previously complied with the provisions of this act."

This provision constitutes an effort on the part of the general assembly to save rights of property vested at the time the bake-shop inspection law was enacted. In my opinion it clearly and unequivocally prohibits basements and cellars being used as bakeries, except such basements and cellars as were being so used at the time the act was passed. In my opinion, also, the provision that "a cellar heretofore occupied shall, when once closed, not be reopened, unless the proprietor shall have previously complied with the provisions of this act, has reference to certain rooms and apartments and does not contemplate the construction of a different building upon a site whereon a cellar bakery had been previously conducted. Therefore, the use and occupation of a cellar or basement of a building, erected since the enactment of the bake-shop inspection

law, by a bakery is unlawful, regardless of the fact that on the site of such building there formerly stood a building, the cellar or basement of which was occupied by the same bakery.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

WORKSHOPS AND FACTORIES—INSPECTOR'S AUTHORITY TO ORDER FIRE ESCAPES.

Inspector has authority to order fire escapes on two-story buildings used for assemblage or betterment of people, where necessary to provide safe and ready egress in case of fire.

December 10, 1909.

HON. T. P. KEARNS, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 10th, in which you request my opinion upon the following questions:

> "1. Has the inspector of workshops and factories the authority to order a fire escape on any two-story building, such as those mentioned in the act of April 28, 1908, section 1?
>
> "2. Has the chief inspector of workshops and factories the power to order fire escapes and other necessary means of egress on buildings used as boarding houses, and houses occupied by a number of roomers, commonly called rooming houses?"

In connection with your first inquiry, you direct my attention to section 2573 as amended 99 O. L. 83. This section is similar to other sections in the state building code and provides generally that, regardless of any order or inspection on the part of the chief inspector or district inspector of workshops and factories,

> "It shall be the duty of any owner, or agent for owner of any factory, etc., * * * if such factory, etc., * * * be more than two stories high, to provide convenient exits from the different upper stories of said building which shall be easily accessible in case of fire * *."

The act of April 28, 1909, 99 O. L. 232 is, as disclosed by its title, "An act to enlarge the powers of the chief inspector of workshops and factories in the matter of public schools and other buildings."

Section 1 thereof specifically confers upon the inspector the duty to inspect certain classes of buildings used for the assemblage or betterment of people, with special regard to the provisions of fire escapes, etc., while section 2 confers upon the district inspectors the power to pass upon the existence of "necessary precautions for the prevention of fire" and "means provided for the safe and speedy egress of the persons who may be assembled" in such building.

The two laws do not conflict in any particular. The later one simply confers broader powers upon the inspectors with respect to certain classes of buildings, while the earlier act makes it the duty of the owners of such buildings and *other buildings* of certain classes to provide certain safety appliances.

As to the buildings of over two stories, it is the duty of the owner to provide the fire escapes, regardless of any order of the inspector, and the inspector has no power to waive this duty on behalf of the state; as to two-story buildings, the inspector has the power to order fire escapes where necessary to provide means for the safe and speedy egress of people assembled therein, and without the inspector's order no duty rests upon the owner to provide such fire escapes.

I therefore reiterate my former opinion to the effect that the chief inspector of workshops and factories has power to order fire escapes, where necessary, on buildings of less than three stories and which are used for the assemblage or betterment of people. This power, of course, is subject to review by the courts in all proper cases.

Answering your second question, I beg to state that the class of buildings described by you therein does not seem to come within the catalogue set forth in section 1 of the act of April 28, 1908. I do not believe that boarding houses or rooming houses would be regarded as "buildings used for the assemblage or betterment of people," and they certainly are dissimilar in many respects to all the classes of buildings enumerated in the section. However, under the general building act of the state, being section 4238*a*, etc., Bates' Revised Statues, the district inspectors may order sufficient means of egress in case of fire to be placed upon "shops or factories" (sec. 4238*f*), and the term "shops and factories" as used in said section is defined by section 4238*k* so as to include, among other buildings, "tenement and apartment houses."

Whether a given boarding house or rooming house would be a "tenement or apartment house" within the meaning of this section might be a question of fact to be determined by the evidence in each individual case. I do not feel that I can do more than to point out the above quoted provision, and to state that I know of no other law from which authority to order fire escapes in boarding or rooming houses could be derived.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Department of Soldiers' Claims.)

SQUIRREL HUNTERS' RESOLUTION—APPLIES ONLY TO SURVIVING MEMBERS.

May 13th, 1909.

HON. W. L. CURRY, *Commissioner Department of Soldiers' Claims, Columbus, Ohio.*

DEAR SIR:—Your letter of May 10th is received, in which you submit the following inquiry:

> George W. Duvinger, of Dayton, Ohio, filed a claim under the "Squirrel Hunters' resolution," which was found correct and was approved for payment. When the application was forwarded to his address for signature to receipt, the said Duvinger had died.
>
> Query: Is said claim now a charge against the state, and should payment thereof be made to the administrator of Duvinger's estate?

In reply I beg to say that joint senate resolution No. 76 passed May 9th, 1908, contains the following provision:

> "That an amount equal to one month's pay of militia at the time of their service, being the sum of thirteen dollars, be set apart and apportioned to each *surviving member*, who responded to this call, and whose names are so recorded in the files of the adjutant general's office of the state."

Under this provision, payment is only to be made to "surviving members."

I am, therefore, of the opinion that by reason of the death of George W. Duvinger, no obligation now exists for the payment of the proportionate sum as set out in the above quoted provision, to the legal representative of his estate.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State Fire Marshal)

CONSTITUTIONAL LAW—ONCE IN JEOPARDY.

Acquittal under prosecution for arson for setting fire to one building a bar to subsequent conviction on same charge for setting fire to adjoining building ignited from the first, without additional cause.

February 11th, 1909.

HON. W. S. ROGERS, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—You ask an opinion of this office upon the following questions:

> If A should set fire to B's house and the fire should spread and burn the property of C, and if A were put on trial for burning B's house and acquitted, could he then be put on trial for burning C's house? If not, what redress would C have?

Section 10, article I of the constitution provides that no person shall "be twice put in jeopardy for the same offense."

Bishop on Criminal Law, volume 1, section 1051, takes the view that

> "the offenses are the same whenever evidence adequate to the one indictment will equally sustain the other."

It has been decided in Ohio in the case of Price v. The State, 19 Ohio 423, and Mitchell v. The State, 42 O. S. 383, that on a plea of *autrefois acquit*, the true test to determine whether the accused has been put in jeopardy for the same offense, is whether the facts alleged in the second, if proven to be true, would have warranted a conviction on the first indictment. It is held, however, in Bainbridge v. The State, 30 O. S. 264, that a second indictment may be brought where the state in the first case elected what transaction it would rely upon for a conviction in that case and where such transaction was different from that elected and solely relied upon for a conviction in the second case.

I am of the opinion, therefore, that A cannot be convicted of setting fire to C's house if the facts necessary to sustain the indictment as to C's house would be sufficient and adequate to sustain a conviction under the indictment for setting fire to B's house.

While proof beyond reasonable doubt is required in criminal cases, only proof by preponderance of evidence is required in civil cases, and both B and C may have redress by civil suit against A, whether A has been convicted or acquitted for the burning of their houses.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Chief Examiner of Stationary Engineers)

STATIONARY ENGINEER—RENEWAL OF CERTAIN LICENSES.

Licenses obtained under section 10 *of act in* 94 *O. L.* 33, 36 *are not subject to renewal.*

March 26th, 1902.

HON. W. E. KENNEDY, *Chief Examiner Steam Engineers, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 25th, enclosing copy of opinion rendered by the circuit court of the 8th district, in the case of Theobald et al v. State of Ohio, and you desire to know if, in my opinion, the opinion rendered by the circuit court in the above case holds that it will be necessary for persons holding licenses issued to them under the act of the general assembly, passed March 1st, 1900 (94 O. L. 33, 36), to submit to a further examination after the expiration of the period therein designated by such licenses or may a renewal of such license be issued.

I beg to advise that the opinion of the above court, on this point, after quoting the last part of section 10 and all of section 7 of the act construed, is as follows:

> "Now as to section 10 (4364-89*u*), it may be said, first, that even though this section were held to be unconstitutional, the persons provided for in this section are simply those who at the time the present statute went into effect were holding licenses issued under the former act, and since no such license could extend beyond one year from the time of its issuing, it cannot be supposed that this small period of time for which some were permitted to operate engines after the examination, was an inducing clause for the enactment of the provisions in respect to the examination of those who desired to become engineers. Further than that this act extending the privilege to those who were already licensed under the former act for the short time they would be permitted to operate, is of too small consequence for the courts to say that it is in contravention of the constitution. In any event this has long ceased to be a practical question, for the present statute went into operation on the first of May, 1902, and all those permitted under the provisions of section 10, to operate engines have long since lost that privilege. It will be noticed by section 7, hereinbefore quoted, that it is only those who have obtained a license under the present act, who are entitled to a renewal, after examination. Those spoken of in section 10 of the former act, are not entitled to such renewal without examination. It is those who have obtained a license under the present act who may have a renewal."

From the above quoted portion of the court's opinion it is clear that only persons who have obtained their licenses under section 7 of the act construed, are entitled to a renewal of their licenses; and that the persons who, under section 10, were permitted to operate engines for the period covered by the licenses issued to them under the act of the general assembly passed March 1st, 1900 (94 O. L. 33, 36), without further examination, must, at the expiration of that period take another examination, as such license mentioned in section 10 of the act construed cannot be renewed. Very truly yours,

U. G. DENMAN,
Attorney General.

STATIONARY STEAM ENGINEERS—ENGINES AND BOILERS OF WHARF BOATS ON OHIO RIVER.

Persons operating steam engines and boilers on wharf boats in connection of Ohio shore of Ohio river must comply with Ohio laws.

September 9, 1909.

HON. WILLIAM E. KENNEDY, *Chief Examiner Steam Engineers, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 1st, in which you request my opinion as to the application of the statutes respecting the licensing of stationary engineers to persons operating engines and boilers of more than thirty horsepower upon wharf boats and coal diggers, so called, on the Ohio river at Cincinnati.

By letter of the district examiner, enclosed with your letter, and by statements verbally made to me by you, I am informed that the wharf boats referred to are craft moored to the Ohio bank of the Ohio river in such a manner as to be always opposite a given point thereof and so as to be afforded liberty of motion across the current of the stream, permitting the boat to float continuously at the exact edge of the water regardless of the state of the river. Such wharf boats constitute landings for the use of boats engaged in the navigation of the river and themselves have no motive power.

The coal diggers are described by you as floating platforms or barges upon which are erected steam cranes equipped with devices for transferring coal from other barges used in the commercial navigation of the river to railroad cars and wharfs situated on the Ohio bank of the river. Like the wharf boats these boats are designed to float continuously at a certain distance from a fixed point on the shore, but possess no means of self propulsion, and are not, in their ordinary use, towed from place to place. In short, they are in a sense appurtenant to particular coal yards or places of business along the bank.

A full statement of the exact use to which these boats or floating platforms are customarily put has been deemed necessary in view of the peculiar principles of law applicable to the Ohio river.

Under the terms of the cession by the state of Virgina to the federal government of the Northwest territory, the territorial boundary between the states of Ohio and Kentucky is low watermark on the Ohio side of the Ohio river. (Handley's Lessee v. Anthony, 5 Wheat. 385.)

By the articles of compact between Virginia and Kentucky at the time the former state ceded jurisdiction over the territory embraced within the latter in order that the new state might be created, it was provided that the respective jurisdictions of the commonwealth of Kentucky and of the proposed state to be formed on the other side of the Ohio river (now the state of Ohio) should be concurrent. This concurrence of jurisdiction in criminal matters, and particularly in matters of police regulation, has been recognized and asserted by the courts of the states on both sides of the Ohio river. The concurrent jurisdiction thus created and recognized embraces the whole of the waters of the river and extends, generally speaking, to the objects floating thereon. (Garner's Case, 3 Gratt. 674; State v. Plants, 25 W. Va. 119; Sherlock v. Alling, 44 Ind. 184.)

Some doubt might exist as to the extent of this concurrent jurisdiction with respect to provisions like the steam engineer's license law in view of the holding of the Kentucky court in the case of McFall v. Commonwealth, 2 Met-

calf 394, and the seemingly conflicting decisions of Re Mattson, 69 Federal, 525; State v. Stevens, 1 Ohio Decisions, 82; State v. Plants, *Supra;* State v. Mullen, 35 Iowa, 99, and State v. Faudre, 54 W. Va. 122.

Upon the facts above submitted, however, I do not deem it necessary to apply the rules pertaining to concurrent jurisdiction to this case, even if such rules might be ascertained with any degree of definiteness. In my opinion, both the wharf boats and the coal diggers above described are in a sense fixtures with respect to the Ohio bank of the river. Although they float upon the water, and thus are apparently included within the subjects of concurrent jurisdiction, and although at times they may project partially or entirely beyond low water mark and thus be situated over that portion of the bottom which is within the jurisdiction of Kentucky, yet they are for the purposes at hand to be regarded as portions of the Ohio bank and not as boats of commerce nor as fixtures with relation to the bed of the stream immediately beneath them. Upon such assumption the boats in question become subject not to the concurrent jurisdiction of Kentucky and Ohio, but to the exclusive jurisdiction of the state of Ohio. (Roberts v. Fullerton, 117 Wisconsin 222; Eckert v. Calvin, 1st Ohio Dec., reprint, 11; The Cheeseman v. 2 Ferry boats, Fed. cases, 2633; J. S. Keator Lumber Co. v. St. Croix Broom Corp., 72 Wis. 62; State v. Stevens, *Supra;* Phillips v. People, 55 Ill., 429.)

By the exercise of exclusive jurisdiction is meant that all of the laws of the state, both written and unwritten, apply to the territory in question. It follows, therefore, that persons operating steam engines and boilers upon the wharf boats and coal diggers operated in connection with the Ohio shore of the Ohio river at Cincinnati, as aforesaid, must comply with the law of the state of Ohio relating to the examination and licensing of stationary engineers and that for failure so to comply upon being notified as provided in said act, they may be prosecuted in this state.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATIONARY ENGINEER—FIREMEN'S LICENSES.

Stationary engineering department is without authority to issue firemen's licenses and those issued are void.

November 8, 1909.

HON. WILLIAM E. KENNEDY, *Chief Examiner Steam Engineers, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 4th, in which you submit the following for my opinion thereon:

> The department of steam stationary engineers issues two classes of licenses, one called fireman's license and the other called engineer's license. To be eligible for examination applicants for either of the licenses are required to file the same application. The examination, however, is different. The engineer's examination is more difficult than the fireman's and a different list of questions is presented to each class. The engineers are examined upon the following subjects: Construction and operation of steam boilers, steam engines and steam pumps, and also hydraulics, while the firemen are not examined upon the construction and operation of steam engines, but are examined upon

the other subjects. The engineer's license permits the holder to have charge of and operate any stationary steam boiler or engine in the state. The fireman's license permits the holder only to operate stationary steam boilers not connected with an engine.

You desire to know, first, if your department has authority to grant the class of licenses described as fireman's license, and, second, what is the status of one who has been granted such license?

I desire, first, to call your attention to an act relating to the licensing and examination of steam engineers, 95 O. L. 48, as amended in 97 O. L. 28. Section 1 of said act is as follows:

"That it shall be unlawful for any person to operate a stationary steam boiler or engine in the state of Ohio, of more than thirty (30) horsepower, except boilers and engines under the jurisdiction of the United States, and locomotive boilers and engines, without having been duly licensed so to do as herein provided. And it shall be unlawful for any owner or user of any steam boiler or engine, other than those excepted, to operate or cause to be operated such steam boiler or engine without a duly licensed engineer in charge."

You will note the above section makes it unlawful for any person to either operate a *steam boiler* or *engine* of certain horsepower without first being a duly licensed engineer within the meaning of this act.

At this point I desire particularly to call your attention to the fact that the act under consideration nowhere makes any distinction between persons who desire to operate a *steam boiler* and persons who desire to operate a *steam engine* of a horsepower mentioned in the act. To operate either one must be licensed engineer, and if one may operate a *steam boiler* he may operate a *steam engine;* therefore, their qualifications must be the same. It is necessary to look to section 6 of the act, which is the only section which provides the method of obtaining an engineer's license. Section 6 is in part as follows:

"Any person who desires to act as a steam engineer shall make application to the district examiner of steam engineers for a license so to act, upon a blank furnished by the examiner, and shall successfully pass an examination upon the following subjects; the construction and operation of steam boilers, steam engines, and steam pumps, and also hydraulics, under such rules and regulations as may be adopted by the chief examiner, which rules and regulations, and standard of examination shall be uniform throughout the state. If, upon such examination, the applicant is found proficient in said subjects a license shall be granted him to have charge of and operate stationary steam boilers and engines of the horsepower named in this act."

You will note this section requires that all applicants for steam engineer's license shall pass an examination in certain enumerated subjects under such rules and regulations as may be adopted by the chief examiner, but in all cases the standard of examination shall be uniform throughout the state, and then if such applicant is found proficient he shall be granted a license "to have charge of and operate stationary steam boilers and engines of the horsepower named in this act." The above provisions are mandatory, and condensing the same we have:

1st, an examination in *certain enumerated subjects.*

2nd, uniform standard of examination.

3rd, if found proficient in the above two provisions to be given a license to have *charge and operate stationary steam boilers and engines.*

Answering your first question, I beg to advise that I am of the opinion that your department is without authority to grant the class of license known as "fireman's license" for the following reasons:

First, you are without authority to grant any license except to have *charge and operate stationary steam boilers and engines*, and you cannot limit such license to only steam boilers. Any person entitled to a license is entitled to a license to have charge and operate both steam boilers and engines.

Second, the examination which you have been giving to firemen does not cover all of the enumerated subjects mentioned in section 6, to-wit, firemen are not examined in the construction and operation of steam engines.

Third, the examinations which have been given by your department are not of *uniform standard* as required within the meaning of this act.

Answering your second question, I am of the opinion that a person holding a fireman's license is without authority to operate a steam boiler, as he has not passed the examination required in section 6 to obtain an engineer's license, and also that your department was without authority to issue a fireman's license to them; and as all the authority which your department has is given to it by statute, and such authority has not been given to you, the same cannot be exercised.

In conclusion, I desire to advise that the present stationary engineer's law was held to be constitutional by the circuit court in the cases of E. R. Theobald v. State, W. S. Judd v. State and Frank Stupens v. State, reported in 10 Ohio circuit court (n. s.), page 536, and affirmed by the supreme court without report.

Whether it was wise or unwise that this law was so drafted as to require the above holdings, this office cannot change the law as it reads. It is only for us to declare the law as we find it.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATIONARY ENGINEERS—FRAUDULENT APPLICATION FILED BY APPLICANT FOR LICENSE.

An applicant for engineer's license making false statement as to experience is guilty of fraud in passing examination.

October 2, 1909.

HON. WILLIAM E. KENNEDY, *Chief Examiner Steam Engineers, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 30th, in which you enclose a letter and affidavit filed with you stating that one who has taken the stationary steam engineer's examination has never had the one year's experience required by your department to be eligible for examination, and that the person who took the examination was required at that time to make an affidavit that he did have the required one year's experience, and that this affidavit is now on file in your office, and you desire my opinion as to your duty in a case of this kind and what action, if any, you should take.

I beg to call your attention to section 6 of the act in 97 O. L. 28, relating

to the licensing and examining of steam engineers. The latter part of this section is as follows:

> "Such license shall continue in force for one year from the date the same is issued, provided, however, the district examiner may, upon *written charges*, after notice and hearing, revoke the license of any person guilty of fraud in passing the examination."

The first part of section 6 authorizes you, as chief examiner, to make certain rules and regulations governing the examinations, and in pursuance of this authority you have made a rule requiring all applicants for license to file an affidavit stating that he has had at least one year's practical experience as an engineer, fireman or oiler of steam boilers or engines. It may be well here to add that the department of steam stationary engineers by the above rule did not mean that an applicant, before being eligible for examination must have had any experience or performed any work which would have been unlawful for any person to have performed without having been a duly licensed engineer. Your having authority to adopt the rule that an applicant must make affidavit that he has had certain experience, makes it necessary for an applicant to file such affidavit before being eligible for examination, and in case a false affidavit is filed there is no doubt in my mind that such applicant filing the same would, within the meaning of the part of section 6 quoted in this opinion, be guilty of fraud in passing the examination.

You also ask my opinion as to your duty in a case of this kind. You will note section 6 requires that written charges must be preferred against a person before a hearing may be had before the district examiner to revoke the license of a person accused of fraud in passing the examination and notice must be given of such hearing. This section places the discretion in the district examiner after written charges have been preferred to determine whether there is reasonable ground to believe the accused has been guilty of fraud in passing the examination. If such district examiner should decide in the affirmative he should then give notice of a hearing to the parties interested, and at such hearing proceed to determine if the accused has been guilty of such fraud. If, after such hearing, he then determines that the accused has been guilty of such fraud he should revoke his license as provided in the above quoted portion of section 6. However, if the district examiner should, in determining whether there is reasonable ground to believe the accused has been guilty of fraud, determine in the negative no hearing should be had at all.

I herewith enclose the letter and affidavit attached to your letter of September 30th.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATIONARY ENGINEERS—FIREMEN'S LICENSES—DISPOSITION OF FEES COLLECTED FOR.

Fees received for stationary firemen's licenses and turned into state treasury may not be returned in absence of appropriation.

Fees received for firemen's licenses which are in hands of district examiners should be returned after licenses have been revoked because of lack of authority to issue.

Fees received from applicants for firemen's licenses which are no longer issued should be returned to such applicants.

November 23, 1909.

HON. W. E. HASWELL, *Chief Examiner Stationary Engineers, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 20th, in which you submit the following for my opinion:

> "1. What shall be done with fees which have been received for stationary firemen's licenses where such licenses have been issued or removed up to the present date and the fees received for the same have been turned into the state treasury?
>
> "2. What shall be done with fees which have been received for original stationary firemen's licenses and renewals, which have been collected by the district examiners, but have not been turned into the state treasury?
>
> "3. What shall be done with fees received hereafter from applicants for stationary firemen's licenses or renewals of such licenses where no renewals are given."

Answering your first question, I beg to call your attention to section 22 of article 2 of the constitution of Ohio, which is in part as follows:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; * * *."

By the above provision the sole power of setting apart money in the treasury for the payment of the liabilities which may accrue or have accrued against the state is vested in the general assembly, and no claim against the state may be paid unless there has been a specific appropriation by law to meet it. By virtue of this power the general assembly exercises their discretion in determining what claim shall be paid.

I am, therefore, of the opinion that stationary firemen who have paid money to your department for licenses and renewals of licenses, and the money has, according to law, been turned over to the state treasury, it may not be paid back to such persons in the absence of an appropriation made by the general assembly for that purpose.

Answering your second question: The money which is now in the hands of your district examiners for firemen's licenses and renewals, and which has not been paid into the state treasury, should be returned to the persons who paid the same. The people who have paid this money have received nothing in return, and morally are entitled to have the same returned to them. It would be against good conscience for the state to retain this money. I would, therefore, suggest that your department return all money which has been received by your district examiners for firemen's licenses and renewals, and which has not been turned into the state treasury.

Answering your third question: I suggest that all money which in future is tendered to your department for a fireman's license or for a renewal of the same be refused, and such money returned to such applicant.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Various Appointive State Boards)

(To the State Board of Health.)

BOARD OF HEALTH, STATE—ORDERS OF.

Police officer may arrest without warrant person whom he finds violating order of state board of health.

January 16, 1909.

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

DEAR SIR:—Your communication of the 13th inst. has been received. You submit the following inquiry:

> "I wish you would inform me if a constable or other person having power to arrest can arrest a person he finds violating the provisions of a rule of the state board of health and bring such person before a justice of the peace, mayor, etc., as provided in section 2121 Revised Statutes."

In reply thereto permit me to say that section 2119 of the Revised Statutes provides:

> "Whoever violates any provisions of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of any such order, or wilfully or illegally omits to obey any such order, shall be fined in any sum not exceeding one hundred dollars or imprisoned for any time not exceeding ninety days, or both; but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted contains the allegation that the offense is a second or repeated offense."

While the above section applies to local boards of health, yet section 17 of the act of the general assembly creating the state board of health, as amended May 9, 1908 (O. L. 99, p. 493), provides:

> "All prosecutions and proceedings by the state board of heath for the violation of any provision herein relating to such board or other laws which the board is required to enforce, or for the violation of any of the orders or regulations of the board, shall be instituted by its secretary on the order of the president of the board. The laws prescribing the modes of procedure, courts, practice, penalties or judgments applicable to local boards of health, shall apply to the state board of health and the violation of its laws and orders. All fines or judgments collected by the board shall be paid into the state treasury."

Section 7 of the last named act provides:

> "Local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables and other officers

and employes of the state or any county, city or township, shall enforce the quarantine and sanitary rules and regulations adopted by the state board of health."

Section 7129 of the Revised Statutes provides:

"A sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, or police officer, shall arrest and detain any person found violating any law of this state, or any legal ordinance of a city or village, until a legal warrant can be obtained."

The above provisions of the statute, in my opinion, authorize the officers named in section 7129 to arrest a person whom they find violating an order of the state board of health and file an affidavit before any justice of the peace or mayor within the jurisdiction where the offense was committed, as provided by section 2121 R. S.

They are not authorized on mere suspicion and without a warrant therefor to arrest a person whom they believe has committed an offense, but only where they find a person in the act of committing the offense.

Yours very truly,

U. G. DENMAN,
Attorney General.

TRUSTEES COUNTY HOSPITAL—BUILDING FOR TREATMENT OF TUBERCULOSIS.

Trustees of county hospital may construct separate hospital or building for care and treatment of tuberculosis, but may not condemn land as site for same.

February 5th, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

"Will you please inform me if a board of trustees appointed for the purpose of constructing a county hospital under the provisons of an act 'To provide for county hospitals,' passed May 9, 1908 (O. L. 99, p. 486), can construct in connection with such hospital a separate hospital to be used in the care and treatment of cases of tuberculosis. Also, if, under the provisions of the act above mentioned, such board of trustees have the power to condemn land as a site for a county hospital?"

Replying thereto, I beg to say that section 4 of said act provides that

"in case a majority of the electors of said county voting at such election are in favor of said issue of bonds, then the commissioners of such county, shall provide, for the purchase of such site, *and the erection of necessary buildings thereon*, and shall proceed to issue the

bonds of said county according to law and provide means by taxation for the said purchase and support of such hospital."

Section 5 of said act provides that

"said commissioners shall within thirty days after such election in the event of a majority of the votes favoring the issue of bonds for such hospital appoint six suitable trustees * * * * * and said trustees shall have charge of the purchasing of site, *erection of buildings thereon* for such hospital and the management and control of the same and all its said property, etc."

It will be seen from these sections of said law that the character of *buildings* erected shall be discretionary with said trustees, and in my opinion it is within the power of said trustees, under said act, to construct a separate hospital or building to be used in the care or treatment of cases of tuberculosis, should they in their judgment and discretion deem the same *necessary*.

You also inquire if, under the provisions of this act, such board of trustees have the power to condemn land as a site for a county hospital.

Section 19, article I, and section 5, article XIII, of the constitution of Ohio provide the conditions under which, and the manner in which private property may be appropriated for public use and benefit. No valid appropriation of private property for public uses can be made without a law providing compensation to the owner to be assessed in the mode prescribed in the constitution. The constitution, in this particular, does not execute itself. There is no provision in this act for the appropriation of property as required by the constitution. There is no general law or special act conferring this right upon the board of trustees created by this act. I am, therefore, of the opinion that said board of trustees have not the power to condemn land as a site for a county hospital.

Yours very truly,

U. G. DENMAN,
Attorney General.

JURISDICTION OF MUNICIPALITY TO PREVENT POLLUTION OF ITS WATER SUPPLY.

March 5th, 1909.

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

DEAR SIR:—I desire to acknowledge the receipt of your letter in which you submit the following inquiry:

"Please inform me whether the jurisdiction of a municipality to prevent the pollution of its water supply applies to a municipality having a water supply furnished by a private company, corporation or owner."

In reply thereto permit me to say section 2433 of the Revised Statutes provides:

"The jurisdiction of any municipal corporation to prevent the pollution of its water supply and to provide penalty therefor, shall extend twenty miles beyond the corporation limits. Whoever pollutes any running stream, the water of which is used for domestic purposes by any municipality by putting therein any putrid or offensive substance, (other than fresh or salt water), injurious to health shall be guilty of a misdemeanor, which shall be punishable by a fine of not less than five or more than five hundred dollars. It shall be the duty of the board of public service or board of trustees of public affairs of any municipal corporation to enforce the provisions of this section."

It is my opinion that under the provisions of the above section it is an offense for any one to pollute any running stream, the water of which is used for domestic purposes by any municipality, whether said municipality owns the waterworks plant or whether said plant is owned by a private company or corporation.

Yours very truly,

U. G. DENMAN,
Attorney General.

PHYSICIAN—FAILURE TO REPORT CONTAGIOUS DISEASE—FACTS IN EACH PARTICULAR CASE GOVERN.

March 5th, 1909.

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

DEAR SIR:—I desire to acknowledge the receipt of your letter in which you submit the following inquiry:

"Can a physician be excused for failure to report a contagious or infectious disease by giving as a reason that he was not sure of the diagnosis, when it appears that he had sent other children in the family away from home several days before?"

In reply thereto permit me to say that section 2125 Revised Statutes provides:

"Every physician or other person called to attend any person who is suffering from smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever, or typhoid fever, or any other disease dangerous to the public health, or required by the state board of health, to be reported, shall report the same to the health officer within whose jurisdiction such person is found, giving in such report the name, age, sex and color of the patient, and the house or place in which such person may be found; and in like manner it shall be the duty of the owner or agent of the owner of a building in which a person resides who has any of the diseases herein named or provided against, or in which are the remains of a person having died of any such disease, and the head of the family, immediately after becoming aware of the fact, to give notice thereof to the health officer; and when compaint is made or a reasonable belief exists that an infectious

> or contagious disease prevails in any house or other locality which has not been reported as hereinbefore required, the board shall cause such house or locality to be inspected by its health officer, and on discovering that such infectious or contagious disease exists, the board may, as it deems best, send such person so diseased to a quarantine hospital or other place provided for such persons, or may restrain them and others exposed within said house or locality from intercourse with other persons, and prohibit ingress and egress to or from such premises"

It is my opinion that under the provisions of the above section it is the duty of every physician to report a contagious or infectious disease to the health officer immediately upon discovering the same. Whether a physician will be excused for failure to report a case of a contagious or infectious disease depends upon the facts in every case. This section requires the utmost good faith upon the part of the physician, and before he can successfully plead as a defense lack of knowledge of the character of the disease he must satisfactorily explain all of his acts which show guilty knowledge. He cannot be excused if his acts and the circumstances surrounding his visits are such as show that he had knowledge of the character of the disease.

Yours very truly,

U. G. DENMAN,
Attorney General.

HEALTH OFFICER MAY POST QUARANTINE CARDS WITHOUT ORDER OF BOARD OF HEALTH.

March 5th, 1909.

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

DEAR SIR:—I desire to acknowledge the receipt of your letter in which you submit the following inquiry:

> "Is a health officer authorized to enforce the quarantine measures provided in section 2126 R. S., when a contagious or infectious disease is reported without calling the board of health together and having a formal order issued?"

In reply thereto permit me to say that section 2126 R. S. provides:

> "It shall be the duty of the board of health when a case of smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, or scarlet fever is reported within its jurisdiction, to at once cause to be placed in a conspicuous position on the house wherein any of the aforesaid diseases occur a quarantine card having printed on it in large letters the name of the disease within, and to prohibit entrance to or exit from such house without written permission from the board of health."

By the provisions of section 2115 the health officer appointed by the board of health is the executive officer of the board and acts for the board in the discharge of his duties. In my opinion he is authorized to post quarantine cards,

as provided in section 2126, as soon as the contagious or infectious disease is reported to him, and without waiting for the board to be called together to pass a resolution or order to that effect. This authority is implied by virtue of his office and appointment as executive officer of the board.

Yours very truly,

U. G. DENMAN,
Attorney General.

QUARANTINED HOUSE—PARENTS PERMITTING CHILDREN TO ATTEND SCHOOL.

Parents who send children from quarantined house to school cannot be punished.

March 6th, 1909.

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

DEAR SIR:—I desire to acknowledge receipt of your letter in which you submit the following inquiry:

> "Where a house is quarantined on account of scarlet fever, can the parents, who send their children from such house to a public school, be punished for violation of either section 2126 or 2129 R. S.?"

In reply thereto permit me to say that section 2126 R. S. provides as follows:

> "It shall be the duty of the board of health when a case of smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, or scarlet fever is reported within its jurisdiction, to at once cause to be placed in a conspicuous position on the house wherein any of the aforesaid diseases occur a quarantine card having printed on it in large letters the name of the disease within, and to prohibit entrance to or exit from such house without written permission from the board of health; that 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 every physician attending a person affected with any of the aforementioned diseases shall use such precautionary measures to prevent the spread of the disease as may be required by the board of health. No person shall remove, mar, deface or destroy such quarantine card, which shall remain in place until after the patient has been removed from such house, or has recovered and is no longer capable of communicating the disease, and the said house and contents thereof have been properly purified and disinfected by the board of health, and where other inmates of said house have been exposed to and are liable to become ill of any of said diseases, for a period thereafter counting from the completion of the disinfection, as follows, to-wit: in diphtheria and membranous croup, 14 days; in smallpox, 17 days; in scarlet fever, 10 days; in cholera or yellow fever, 7 days; in typhus fever, 21 days, and 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 preventive measures as are provided for in this chapter in cases of scarlet fever or diphtheria. The board of health may employ as many persons as it deems necessary to execute its orders and properly guard any house or place containing any person or persons affected with any of the diseases named herein, or who have been exposed thereto, and such persons shall be sworn in as quarantine guards, shall have police powers, and may use all necessary means to enforce the provisions of this chapter for the prevention of contagious or infectious disease, or the orders of any board of health made in pursuance thereof."

Section 2129 R. S. provides as follows:

"No person residing in or occupying any house in which there is a person suffering from smallpox, cholera, plague, typhus fever, diphtheria, membranous croup, or scarlet fever, shall be permitted to attend any public, private, or parochial school, or college or Sunday school, or any other public gathering, until the quarantine provided for in such diseases in section 2126 has been removed by the board of health, and all school principals, Sunday school superintendents, or other persons in charge of such schools, are hereby required to exclude any and all such persons until such time as they may present a written permit of the board of health to attend or re-enter such schools."

These sections should be strictly construed. They do not specifically cover the offense mentioned in your inquiry, and for that reason I am of the opinion that parents who send their children from infected houses to the public schools cannot be punished. The school officials are required to exclude such children until a written permit of the board of health is presented.

Yours very truly,

U. G. DENMAN,
Attorney General.

SEWAGE DISPOSAL PLANT—EMPLOYMENT OF ENGINEER—DUTY OF COUNCIL AND BOARD OF PUBLIC SERVICE.

The employment of engineer for making plans for sewage disposal plant, is within duties of board of public service and not council.

May 17, 1909.

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

DEAR SIR:—I have your letter in which you state that the state board of health has, after hearing, ordered the city of Greenville, Ohio, to construct a sewage disposal plant and to have the same in operation by December 1, 1909. You further state that the council of said city is willing and ready to provide the necessary funds for the construction of said plant. You also state that both the council of said city and the board of public service of said city are claiming the right to appoint an engineer to prepare the plans for such plant. You then inquire whether the council or the board of public service of said city has the legal right to make such appointment.

The provisions of our Ohio Municipal Code were intended to make separate and distinct the function of a city council and the "board of public service"

as is provided for in section 138 of said code. In enumerating the general powers of the board of public service section 139 of the Municipal Code provides:

> "The directors of public service shall be the chief administrative authority of the city and shall manage and supervise all public works and all public institutions except where otherwise provided in this act."

Section 140 of said code provides that:

> "The directors of public service shall supervise the improvement and repair of streets and alleys * * * sewers, drains, ditches * * * streams and water courses * * * and the construction of all public improvements and public works except as otherwise provided in this act."

Section 141 of the Municipal Code provides that:

> "The directors of public service shall have the management of all municipal water * * * sewage disposal plants * * * as well as all public buildings and other property of the corporation not otherwise provided for herein."

These sections specifically provide that the directors of public service, known as the "board of public service," shall constitute and be the chief administrative authority of the city, and their duties and powers are specifically enumerated in the above quoted and other sections of the Municipal Code.

Looking now to the powers conferred upon city councils by legislative enactment we find in section 123 of the code the following provision:

> "The power of council shall be legislative only, and it shall perform no administratve 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 may be otherwise provided in this act. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contract has been given and the necessary appropriation made, council shall take no further action thereon."

From the language used in this section it is apparent that the legislature intended to limit the powers of council and that such powers be "legislative only." The courts have construed this section in substantially the same form as it now is.

> Bellows v. Cincinnati, 11 O. S. 544, 547,
> Lillard v. Ampt, 4 N. P. 305.

It seems to be agreed, and rightly, that council is the proper body to provide the funds for the construction of this proposed plant. The code provides, as above recited, that the board of public service shall "manage and supervise all public works including public buildings and other property of the corporation unless otherwise provided for."

We fail to find in the code an exception to the powers of the board of public service in this particular case. We also fail to find a provision in the code authorizing council to make this appointment or a similar one. It must be conceded that if the board of public service is to supervise the construction of this plant, and this right seems not to be challenged by council, that board should have the right and should approve the engineer's plans therefor. It therefore seems logical that if the plans to be drawn by the engineer are to be approved and applied by the board of public service, said board should have the appointing power. The city council would be outside of its statutory authority if it should attempt to superintendent or direct, or advise and consult with the engineer in the preparation of said plans.

I am, therefore, of the opinion that when the council has made provision for the funds necessary to the construction of said sewage disposal plant it has performed its legal duty; that the employment of an engineer and the making of plans for said plant is properly included in the construction thereof, and by statute, made the duty of the board of public service.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE BOARD OF HEALTH—MUNICIPAL WATER SUPPLY.

State board of health is limited in passing on plans for municipal water supply to the consideration of purely sanitary matters.

July 20, 1909.

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

DEAR SIR:—I beg to acknowledge receipt of your communication in which you request the written opinion of this department as to the extent and scope of the power of the state board of health in passing upon proposed public water supplies for municipalities and as to whether the board in considering plans for such supply is limited to the consideration of purely sanitary matters.

In reply to your inquiry, I beg to say that the state board of health of the state of Ohio is created by legislative authority as found in Title 3, Chapter 21, Revised Statutes of Ohio. Its powers, therefore, are such as are expressly authorized and reasonably implied from legislative enactment. The recognized right of the state board of health to order the abatement of a nuisance is not inquired about here. So that the question is, may the state board of health be the deciding authority for a municipality within the state of Ohio, which of two or more available sources for public water supply it must avail itself of when chemical and bacteriological examinations show that, considered strictly from a sanitary standpoint, any one of the two or more sources would afford pure water? In other words, when the municipal authorities propose to furnish the inhabitants thereof with a public water supply from a source of pure water as above defined, has the state board of health authority, when said water is hard or is found to contain, say, for instance, iron, lime or other such properties not considered injurious to health but objectionable for other reasons, to compel said municipality to abandon such proposed plan and procure such water supply from an available water supply not possessed of lime or iron and which would not be objectionable in consideration of health under a bacteriological and chemical examination?

Section 9 of "An Act to revise and consolidate the laws relating to the appointment, powers and duties of the state board of health," passed May 9, 1908, as found in 99 O. L. at page 494, provides:

> "No city, village, public institution, corporation or person shall provide or install for public use, a water supply * * * or make a change in the water supply, water works intake, water purification works of a municipal corporation or public institution, until the plans therefor have been submitted to and approved by the state board of health * * *."

This language, when considered by itself, seems to give to the board of health such power as will justify an affirmative answer to the above inquiry, but when read in connection with the entire act, and especially section 8 thereof, and it is a well recognized rule of construction that the entire act should be considered together so as to give effect to all parts thereof, the meaning is much restricted, so that the correct conclusion would seem to be that this right to approve is given the board of health so as to prevent such proposed plan for a water supply from embracing a polluted source that would cause disease or any unsanitary construction thereof. I therefore do not believe that the section quoted gives to the board of health the plenary power to dictate the location of the source of water supply, when such supply of water is not objectionable for public use when considered from a standpoint of health.

Section 2 of "An Act to authorize the state board of health to require the purification of sewage and public water supplies, and to protect streams against pollution," 99 O. L. 74, provides in part as follows:

> "Whenever the board of health or health officer of any city or village or ten per cent. of the electors thereof file with the state board of health a complaint in writing setting forth that it is believed that the public water supply of such city or village is *impure and dangerous to health* it shall be the duty of the state board of health to forthwith inquire into and investigate the conditions complained of."

The legislature here uses the language "impure and dangerous to health" and provides that when a condition is found that is dangerous to the health of the community the state board of health may interfere. Our courts have held in an unbroken line of decisions that the titles to legislative enactments are to be considered in arriving at the intent of the legislature. Looking then to the titles of the various legislative enactments conferring authority on the state board of health, we do not find language used therein which would indicate that in questions like that which is herein inquired about, the board of health may go beyond the question of whether the water supply is safely free from germs and properties which would produce injury to the health of the public using the same.

In section 3 of the last mentioned act the board of health is authorized to act when "the water supply has become dangerous to health." From a consideration of all the statutes creating and conferring powers upon the state board of health I am led to the conclusion that the scope of the board's powers has reached its limitation when the water used or to be used by the municipality will stand a chemical and bacteriological analysis that will be approved by the board of health from the standpoint of health. The legislature evidently proceeded on the theory that a local municipality would exercise good judgment and should be permitted to exercise its good judgment as to the question of lime and iron being in the water or when the water is of that degree of hardness

that would render it objectionable. For instance, lime water used in a steam boiler would cause the same to scale. A municipal authority knowing this fact would have every natural reason to procure the municipal water supply for public use from a source free from these objectionable qualities, as to not do so would be lessening the chances of a municipality for procuring manufactories and other industries because of the injurious properties of the municipal water supply, for steam and other manufacturing purposes.

Illustrations might be multiplied as tending to show that the natural desire of municipal authorities would be to procure a water supply not only healthful from a strictly sanitary standpoint, but from an industrial and commercial standpoint as well. I therefore conclude that it has not been the legislative expression or intent that the state board of health should have jurisdiction over these matters, and I may say in conclusion that they may be properly left to the good judgment and local pride of the municipalities of our state.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY HOSPITAL FOR TUBERCULOSIS—TIME BOARD OF STATE CHARITIES AND BOARD OF HEALTH MUST APPROVE PLANS.

Board of state charities and board of health must approve plans for county hospitals for tuberculosis before any obligations for erection are incurred.

August 17, 1909.

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

DEAR SIR:—I have your request for an opinion as to the time when the state board of health, acting with the board of state charities, shall approve the location and plans for a county hospital for tuberculosis.

The act authorizing the board of county commissioners to construct such a hospital is found on pages 62 and 63 of 99 Ohio Laws, and the last sentence of section 5 of tht act, defining in part the duties of the state board of health with respect to such hospitals, reads as follows:

> "And said board, acting with the board of state charities, shall approve the location and plans for all county hospitals for tuberculosis."

This provision just quoted does not specify any particular time when the location and plans must be approved by these two boards, but, in my opinion, this approval must be had before a contract is let if the work is to be done by contract and if the work is to be done by the county commissioners, hiring their own labor and purchasing their own material, then the approval must be had before any obligations are incurred by the board toward the construction.

I have heretofore, on June 8, 1909, given to Harry Garn, city solicitor for the city of Fremont, Ohio, an opinion on this same question with respect to the heating and ventilating system and apparatus for a public school building in the city of Fremont, Ohio, and pertaining to the time when the plans for such apparatus shall be approved by the Department of Workshops and Factories, and I enclose you herewith a copy of that opinion. Plans for tuberculosis hospitals must be approved by the Department of Workshops and Factories as well as by the State Board of Health and the Board of State Charities. It is held in that

opinion that all preliminary matters looking to the construction and installation of the heating and ventilating system—such as advertising for bids, opening of the bids, etc.—may be had prior to the approval by the Chief Inspector of the Department of Workshops and Factories, of the plans for such construction, but that such plans must be so approved before a contract is let for the construction of the work.

That opinion is adhered to in this case, and my judgment is that if the location and plans for the county hospital for tuberculosis are approved by the State Board of Health, the Board of State Charities and the Chief Inspector of the Department of Workshops and Factories, at any time before a contract is let for the construction of the work, the approval will be valid and within the requirements of the law. Very truly yours,

U. G. DENMAN,
Attorney General.

CITY HOSPITAL—PHYSICIANS MAY ONLY PERFORM POST-MORTEM EXAMINATIONS IN PURSUANCE OF SECTION 3763.

December 9, 1909.

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

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> "Will you please inform me if, under the provisions of section 3763 of the Revised Statutes, physicians connected with city hospitals would be prevented from performing post-mortem examinations of persons dying within the hospital until after the lapse of the number of hours specified for the claiming of a body by someone with a legal right to make such claim and where the consent of the proper person has not been secured by such physician or hospital authorities for such post-mortem examination."

The section referred to is of too great length and only part of it will be necessary to quote for the purpose of reply to your inquiry. The section divides bodies of deceased inmates in city hospitals, county infirmaries, workshops, asylums, hospitals, or other charitable institutions founded and supported in whole or in part at public expense, also of the penitentiary, and bodies in the possession of township trustees, sheriffs, or coroners into two classes:

First, those bodies "not claimed or identified" or which must be buried at the expense of the state, county or township, and

Second, those bodies in the possession of the aforesaid authorities which are claimed in writing by any relative or other person for private interment at his own expense. If no proper claim is made for a body of the first mentioned class within thirty-six hours after death, then, and in that event, the authority having charge of the same may deliver it to the medical authority mentioned in the section for medical or surgical study or dissection. But even after such delivery the body is yet subject to be claimed by any relative or person as provided in the statute.

As to the second class, and more directly in reply to your inquiry, no body of a deceased person, dying in a hospital, shall be subjected to medical or sur-

gical study or dissection until not less than twenty-four hours after death, and until notice of the death is given to relatives and friends of the deceased, if they are known. There is no authority of law in this section or elsewhere for the appropriation of a body for the purpose of medical or surgical study or dissection in disregard of the demand for the body by relatives or friends who seek to inter the same at private expense. The statute does expressly provide that upon such demand the body shall be given up to such claimant. In other words, the medical authority mentioned in the section have a right to the bodies of paupers and persons not claimed for private interment at private expense, and after the limitation of time mentioned in the section has expired, and for these purposes only; and at no time is such medical authority justified in withholding the body for the purposes mentioned in the statute after a demand has been made on such authority for the body as provided in the statute.

Very truly yours,

U. G. DENMAN,
Attorney General.

STATE SANITORIUM—MANNER OF ADMITTING PATIENTS FULLY DISCUSSED.

December 20, 1909.

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

DEAR SIR:—You have asked my opinion on the following questions:

> "1. Under the act of April 21, 1904, providing for a state sanitorium for the treatment of persons afflicted with incipient pulmonary tuberculosis, etc., and as amended April 29, 1908, may more than one patient be admitted to said institution from any one county in the state when it can accommodate less patients than the number of counties in the state, and when there is a less number of counties represented in the applications than the institution can provide for at the present time.
>
> "2. What is the scope of authority of the state board of health as authorized in section 1 of the original act?"

Replying to your first inquiry as to the apportionment of patients among the several counties in the state, I call your attention to the provision contained in section 1 of the act of 1904, as follows:

> "Said patients shall be apportioned among the several counties of the state in proportion to the population as shown by the next preceding federal census, it being further provided that each county shall be entitled, at all times, to, at least, one patient in said hospital."

This provision is evidently intended to prevent discrimination in receiving patients from the various counties in the state. It is not repealed or modified in the amendment of 1908. The provision that each county shall be entitled at all times to, at least, one patient in said hospital shall govern the receiving of patients thereto until the patients shall number eighty-eight. Patients received in excess of eighty-eight shall be on the basis of population, as provided for in this section. No one county is entitled to have two or more patients in the institution to the exclusion of one eligible applicant from any other county in the state. If an application is not made by an eligible patient from as many

counties in the state as the institution can receive and care for, then until such time as such application is made by a patient from a county without a patient in the institution, I am of the opinion that two or more patients may be received from one county. But until each county has one patient in the institution any number of patients greater than one from any one county would have to withdraw from the institution in favor of the eligible applicant from the county without a patient in the institution.

In answer to your second inquiry: The two acts referred to are not clear in distinguishing the duties of the superintendent, the state board of health, and the board of trustees of the institution.

Section 1 of the act of 1904 provides that:

> "The state board of health shall prescribe how the several patients may be selected and admitted from the several counties."

Section 5 of the act of 1908 provides that:

> "Any citizen of this state of more than seven years of age who is suffering from pulmonary tuberculosis, as determined by the superintendent, may be admitted to the sanitorium, etc."

This provision, however, does not repeal the power conferred upon the state board of health in the original act. The two provisions are reconcilable in that the duty of the superintendent is to define the test or stage of the disease that shall divide applicants into the two classes of eligible and ineligible; that is, upon the superintendent is conferred the power to reject an applicant because, in his discretion, the applicant is in a stage of the disease advanced beyond that which, in his opinion, should be admitted. The state board of health is authorized to prescribe the manner in which those persons seeking admission to the institution as patients may proceed to such examination by the superintendent, and their subsequent admission if approved.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the State Board of Embalming Examiners)

BOARD OF EMBALMING EXAMINERS — MANNER OF ISSUING LICENSE.

March 31st, 1909.

CAPTAIN GEORGE BILLOW, *Secretary-Treasurer Ohio State Board Embalming Examiners, Akron, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 29th, in which you submit the following question for my opinion:

> Shall the Ohio state board of embalming examiners continue to grant and issue embalmers' license to applicants making affidavit of having been actively engaged in this state in the practice of embalming for a period of five years immediately preceding the passage of the act?

You no doubt have the old embalmers' act in the 95 O. L. 333 in mind in asking the above question, which provides that if a person "actively engaged in this state in the practice of embalming for a period of five years immediately preceding the passage of this act an affidavit shall be executed in lieu of an examination as to his or her qualifications under the provisions of this act."

I beg to advise that in the 99 O. L., page 508, the original embalmers' act was repealed and another act substituted which is, with a few slight changes, the same as the original act. However, one of the changes made was the doing away with issuing a license to persons who had been actively engaged in the practice of embalming for a period of five years upon an affidavit, as was provided for in the old act. The new act in 99 O. L. 508 only provides for one method by which a person may obtain a license, and that is by examination. I am, therefore, of the opinion that your board must not issue and grant licenses except to persons who have passed a satisfactory examination as provided in 99 O. L. 508.

Yours very truly,

U. G. DENMAN,
Attorney General.

MATTERS RELATING TO LICENSED EMBALMERS.

A licensed embalmer may have men who are not licensed embalmers prepare the dead under his actual direction irrespective of cause of death, and may report to health officer that such body was prepared by him.

A licensed embalmer may not certify to health officer that he has prepared the dead for purpose of obtaining burial and transportation permits for other undertakers who have no license when in fact bodies certified to were never seen by such licensed embalmer.

Ohio state board of embalming examiners may not prescribe period of grace for payment of renewals or forfeiture of license on failure of payment and restoration of same.

Failure to register license and annual renewal card prohibits licensed embalmer from practicing until same is registered, and renewal cards must be registered as prescribed in chapter 15a Revised Statutes.

March 4th, 1909.

CAPTAIN GEORGE BILLOW, *Secretary-Treasurer Ohio State Board of Embalming Examiners, Akron, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 27th, in which you submit the following inquiries to this department for an opinion thereon:

1. May a licensed embalmer have in his employ men who are not licensed embalmers and by his directions embalm and prepare the dead irrespective of the cause of death, contagious, infectious and communicable diseases, for burial or transportation, and he (the licensed embalmer) make the report to the health officer, certifying that such dead body was prepared by him in conformity with the law?

2. May a licensed embalmer certify to the health officer that he has prepared the dead as required by law for the purpose of obtaining burial and transportation permits for other undertakers who have no license, when in fact the body certified to by such licensed undertaker never has been seen by him?

3. May the Ohio state board of embalming examiners under the last clause of section 3, chapter 15*a*, Revised Statutes of Ohio, prescribe a period of grace for the payment of renewals, or a forfeiture of license on failure of payment and restoration of same afterwards should mitigating circumstances, in the opinion of the board, warrant?

4. What effect has the failure to register a license and annual renewal cards of licensed embalmers; and may such license and renewal cards be registered at the office of the local registrar of each established district as provided by the act creating the bureau of vital statistics?

Answering your first inquiry, I beg to say section 8 of chapter 15*a* of the Revised Statutes of Ohio is as follows:

"Any person who shall practice or hold himself or herself as practicing, in this state, the science of embalming, either by arterial or cavity treatment, upon the body of any person dead of an infectious or contagious disease, or prepare for burial, cremation or transportation, the bodies of persons dead of an infectious or contagious disease, without having complied with the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof before any court of competent jurisdiction, shall be sentenced to pay a fine of not less than twenty-five dollars nor more than fifty dollars for the first offense, and for the second and each repeated offense, a fine of not less than fifty nor more than one hundred dollars; or imprisonment for six months, or both, at the discretion of the court."

I am of the opinion that the above section does not apply to one who is not a licensed embalmer who prepares the dead under the actual directions of a licensed embalmer, as such persons are not practicing or pretending to practice embalming within the meaning of this act, and that such embalming will be considered as done by such licensed embalmer. However, the facts in

each particular case would govern what is really the actual directions of a licensed embalmer. I am also of the opinion that such licensed embalmer under whose direction the body was prepared may certify to the health officer that he prepared the body for the purpose of obtaining a permit for burial or transportation without violating section 1536-758 R. S.

In answer to your second question I beg to advise that section 1536-758 R. S., relative to the removal or conveyance of a corpse, is in part as follows:

> "No corpse shall be buried or cremated within the state of Ohio, or taken out of the state without a permit from the board of health where the death occurred, and before granting such permit the board of health, if the corpse is to be transported beyond its jurisdiction, shall receive from the undertaker or person in charge of the corpse a written certificate certifying that it has been prepared in accordance with the rules of the state board of health, and *any person wilfully making a false statement relative to the preparation of a corpse shall be punished as provided in section* 2119 *of this chapter.*"

I am of the opinion that a licensed embalmer who certifies to a health officer that he has prepared a body himself, when in fact he has never seen the body, is making a wilful false statement relative to the preparation of a corpse within the meaning of this section.

Answering your third question, I beg to advise that section 3 of chapter 15*a*, Revised Statutes of Ohio, does not give the Ohio state board of embalming examiners the power to prescribe a period of grace for the payment of renewals or forfeiture of licenses on failure of payment and restoration of same afterwards should mitigating circumstances in the opinion of the board warrant. The power of the state board of embalming examiners in relation to renewals of licenses to practice embalming is found in the last clause of section 6 of said act, which is as follows:

> "All persons receiving a license under the provisions of this act, shall register the same at the office of the board of health, and where there is no board of health, with the clerk of the court of common pleas of the county, in the jurisdiction of which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such licentiate, and annually thereafter, on or before a date to be fixed by the said state board of embalming examiners, pay to the secretary-treasurer the sum of one dollar, for the renewal of said license."

The above is mandatory, and if one who has received a license fails to pay to the secretary-treasurer the sum of $1.00 annually for the renewal of said license on or before the date fixed by the state board of embalming examiners, the license will end on the date fixed by the board for renewing the same, and it is not within the power of the board of embalming examiners to restore the license after such failure to renew except by an examination, as is provided for obtaining a license in the first instance.

Answering your fourth question, I beg to say that the latter part of section 6, quoted in answer to your third question, requires that a licensed embalmer shall register his license at the office of the board of health, and where there is no board of health, with the clerk of the court of common pleas of the county, in the jurisdiction which it is proposed to carry on said practice. This

section makes it necessary for one who has received a license to register the license, and when renewed the renewal cards as prescribed, before he will have the right to practice as a licensed embalmer. I am further of the opinion that it is not within the power of the state board of embalming examiners to designate any other place for licensed embalmers to register their license than the offices designated in this act.

Your question relative to the sect known as Amish burying their dead is not entirely clear to me, but if you will furnish additional facts as to what the sect known as the Amish do in the way of preparing their dead for burial and the manner of receiving certificates for burial and transportation, I will be glad to answer the same.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EMBALMING EXAMINERS—EXPENSES OF MEMBERS—COMPENSATION OF PRESIDENT FOR CERTAIN DUTIES.

President of Board of Embalming Examiners not entited to any compensation for merely signing licenses.

Hotel expenses of wife of member while at board meeting may not be paid out of funds of board.

Member not entitled to any expense in excess of three cents per mile to and from meetings.

July 27, 1909.

CAPT. GEORGE BILLOW, *Secretary The Ohio State Board of Embalming Examiners, Akron, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of July 21st, in which you submit the following for my opinion:

> 1. The president of the board of embalming examiners signs, during the interim of the meetings of the board, anywhere from 23 to 60 licenses, as the law requires of him. Such licenses are prepared and expressed to him by the secretary. Is ten dollars a proper charge for so signing?
>
> 2. If the wife of a member of the board accompanies him to a meeting of the board, are her hotel expenses permitted to be paid from the funds of the board?
>
> 3. Is a member of the board entited to extras to cover expense of cab hire and the use of chair car in addition to the mileage of three cents per mile allowed him by section 87 of the embalming act?

Answering your first question, I beg to call your attention to section 87 of the state board of embalming examiners' act, 99 O. L. 509, which is as follows:

> "Each appointed member of the state board of embalming examiners, except the secretary, shall receive ten dollars for each day of actual service during the meetings of the board, and mileage at the rate of three cents for each mile of travel in attendance upon such meetings. The secretary shall receive such salary as the board directs, and his necessary traveling expenses incurred in the discharge of his

official duties. Salaries, mileage and other expenses of the board, shall be paid from fees received under the provisions of this act relating to the state board of embalming examiners."

You will note the only provision made for compensation for appointed members of the state board of embalming examiners is that they shall receive ten dollars for each day of actual service during the meetings of the board, and I am clearly of the opinion that the president of the board, who is an appointed member of the board, is not entitled to any compensation whatever for signing licenses, regardless of number, during the interim of the meetings of the board.

Answering your second question, there is nothing in the Ohio embalming act which permits the paying of the expenses of a member's wife, who accompanies him to a meeting, out of the funds of the board.

Answering your third question, I call your attention to section 87 of the embalmers' act quoted above. You will note that the statute limits appointed members of the embalming board to mileage at the rate of three cents for each mile of travel for attendance on meetings, while the same statute specifically provides that the secretary shall receive his necessary traveling expenses incurred in the discharge of his official duties, and it seems very clear to me that, since the statute permits the secretary of the board to be reimbursed for *all necessary expenses*, and only permits the appointed members, except the secretary, mileage at the rate of three cents per mile, that the appointed members, other than the secretary, are not entitled to be reimbursed for money expended for chair car or cab hire.

I beg to remain,

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

(To the State Medical Board)

STATE MEDICAL BOARD—ALL FINES COLLECTED IN PROSECUTIONS UNDER MEDICAL PRACTICE ACT, 99 O. L. 492, MUST BE PAID TO.

Columbus, Ohio, February 9, 1909.

DR. GEORGE H. MATSON, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—You have handed me the letter of Dr. C. Ludwig Mueller, addressed to yourself, in which it is stated that a person has been convicted and sentenced for practicing medicine without having procured a certificate from the state medical board as defined by section 43 of the act reating to the duties of the state medical board, 99 O. L. 492; that the fine assessed against said person is in the hands of the clerk of courts of the county in which the prosecution was had, viz, Auglaize county, and that the prosecuting attorney of that county has advised that said fine may not be paid to the state medical board under section 56 of the act above cited. You request my opinion as to whether, upon the above statement of facts, the fine can be collected from the clerk or whether the prosecuting attorney's advice in the matter should be followed.

In my opinion the state medical board is entitled to this fine. Section 56 provides that

> "all fines collected under the last four preceding sections shall be paid to the state medical board."

Section 52, being one of the "four preceding sections," provides that

"whoever practices medicine or surgery * * * shall be fined * * *."

Section 43 provides:

> "A person shall be regarded as practicing medicine, surgery or midwifery within the meaning of this act who uses the words or letters 'Dr.' * * * etc."

Section 43 does not impose any penalty or provide for the collection of any fine. It simply defines the practice of medicine and surgery which is inhibited by section 52. There are but four sections in the entire medical law under which fines can be collected, viz.: sections 52 to 55, inclusive, and these are the four sections preceding section 56, to which that section refers.

I am at a loss to understand how the prosecuting attorney could have reached the conclusion at which he arrived in this matter. I advise, therefore, on behalf of the medical board, that you make demand again upon the clerk of courts of Auglaize county for this fine.

I herewith return the letter of Dr. Mueller.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State Board of Charities)

INSTITUTION FOR FEEBLE MINDED YOUTHS—PETITION TO COMMIT TO BE FILED WHERE CHILD RESIDES.

March 26th, 1909.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 26th, requesting an opinion on the following state of facts:

> Three boys, inmates of a certain sectarian orphange, are fit subjects to be committed to the institution for feeble minded youth at Columbus. These boys are not former residents of the county wherein the orphanage is located, but were received from other counties in Ohio. It is not stated whether they have been legally surrendered to the full custody and guardianship of the orphanage or are inmates thereof under what is commonly called "temporary care."
>
> Query: From what county is the application for admission of these boys to be signed by the probate judge?

I beg to advise that the last part of section 674*e* of the Revised Statutes of Ohio, which governs such cases, is as follows:

> "Such printed instructions and forms shall be furnished to all applicants for the admission of any person or patient in whole or in part as a state beneficiary, and shall be indorsed by the probate judge of the county in which he or she *resides* at the time of the making of the application."

The word "resides" must be taken to mean the legal residence and not the mere temporary residence. If the boys in question were in the full custody and guardianship of the orphanage, then they must be committed from the county wherein the orphanage is located, but if the orphanage has mere temporary charge of the boys, then they must be committed from the county wherein they have a legal residence.

I believe this fully answers your inquiry. I beg to remain,

Yours very truly,

U. G. DENMAN,
Attorney General.

PETITION TO ADOPT CHILD MUST BE FILED IN COUNTY WHERE CHILD RESIDES.

March 26th, 1909.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 25th in which you ask for an opinion as to the meaning of the word "resides," as found in the third

line of section 3137 of the Revised Statutes, as amended in 99 O. L. 190.

In reply I beg to say said section is in part as follows:

> "Any suitable person not married, or husband and wife jointly, may petition the probate court of the county in which a minor child not theirs by birth *resides*, for leave to adopt and for a change of the name of such child."

In reply thereto I beg to say that I am of the opinion that the word "resides" should be construed to mean the legal residence of such child and not mean temporary residence in a county.

I note in your letter that you advise that the purpose of this amendment was to make it possible for a non-resident of the state to adopt a child from any of the public or private children's homes of the state. The construction which I have placed upon the word "resides" does not in any way apply to the person or persons who may adopt such child, but merely applies to the county where the petition must be filed for the purpose of adoption.

I beg to remain, Yours very truly,

U. G. DENMAN,
Attorney General.

CHILDREN'S HOME—ADOPTION OF CHILD WITHOUT APPEARING IN COURT.

A child awarded by court in accordance with 99 *O. L.* 190 *may be adopted without the person desiring to adopt the child, or the child, personally appearing in court.*

April 26, 1909.

HON. H. H. SHIRER, *Secretary State Board of Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 26th, in which you advise that a children's home incorporated under the laws of this state has placed a child, which was awarded to it by a court in accordance with "An Act to regulate the treatment and control of dependent, neglected and delinquent children," with a family located in a different county from that of the children's home. The family desire to adopt the child, but refuse to come to the county where the children's home is located to file their petition with the probate court as required by section 3137 Revised Statutes, as amended in 99 O. L. 190, and you desire to know if it is possible to secure this adoption without the family who have the child or the child personally appearing in the probate court of the county in which the children's home is located.

I beg to advise that section 31 of senate bill No. 412, 99 O. L. 199, is as follows:

> "In any case where the court shall award a child to the care of any association or individual in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward, and be subject to the guardianship of the association or individual to whose care it is committed. Such association or individual shall have authority to place such child in a family home, with or without indenture, and shall be made a party to any proceedings for the legal adoption of the child, and may appear in any court where such proceedings are pending, and assent to such adoption. And such assent shall be sufficient to authorize

the judge to enter the proper order or decree of adoption. Such guardianship shall not include the guardianship of any estate of the child."

It appears from the language of the section above quoted that where the papers required by section 3137 R. S., as amended 99 O. L. 190 have been filed in the probate court of the county where the child resides, to-wit, the petition of the persons desiring to adopt, the written consent of the child if of the age of 14 years, and the written consent of the children's home signed by the proper officer, the probate judge shall enter the proper order or decree of adoption. I am of the opinion that it was the intention of the general assembly to place the responsibility with children's homes in the placing of children, and their assent to an adoption should be sufficient for a judge to enter the proper order or decree of adoption, and that such a proceeding is merely for the purpose of making the adoption a matter of record, and the issuing of an order or decree of adoption is a purely ministerial one on the part of the judge, and I do not believe any judge would require either the person desiring to adopt a child or the child to personally appear in court.

It is also to be borne in mind that the "Act to regulate the treatment and control of dependent, neglected and delinquent children" is to be liberally construed to the end that its purposes may be carried out, one of which is that the proper guardianship may be provided for in order that the child may be educated and cared for as far as practicable in such manner as best subserves its moral and physical welfare. It seems very clear by section 31 of the above act that the general assemby intended placing such a discretion upon the children's homes which have been awarded a child in accordance with this act, and I am of the opinion that a judge before whom proceedings to adopt a child are pending would be justified in issuing an order or decree of adoption after the proper papers, as required by section 3137 Revised Statutes, are filed with said court without anyone whatever appearing before the court.

I beg to remain,

Yours very truly,

U. G. DENMAN,
Attorney General.

LEGAL RESIDENCE OF UNNATURALIZED PERSON WITHIN MEANING OF 99 O. L. 323.

An unnaturalized person who has resided in a county of this state since April 1, 1905, has gained a legal residence for admittance into any benevolent institution of state, within meaning of 99 O. L. 323.

April 26, 1909.

HON. H. H. SHIRER, *Secretary State Board of Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 23rd in which you advise that an unnaturalized resident of Tuscarawas County, who has resided in said county continuously since April 1, 1905, is insane, and you desire to know if the continued residence of this person has satisfied the limitations imposed by the general assembly in the 99 O. L. 323 and if he has gained a legal residence in this state and may be committed to the asylum for the insane.

I beg to advise that section 632*a* of the Revised Statutes as amended in 99 O. L. p. 323 is as follows:

"No person who has not gained a legal residence in the state of Ohio shall be admitted to any benevolent institution of this state."

And that section 700 of the Revised Statutes, as amended in 99 O. L. 325 places the additional limitation on persons being committed to insane asylums, that such persons must be an inhabitant of Ohio for one year next preceding the date of their application to be admitted into either of the hospitals for the insane. Therefore, a person to be admitted into a hospital for the insane must be a legal resident of Ohio and also an inhabitant of Ohio for one year next preceding the date of his application.

A legal residence has been defined to be a continuous residence at one place for twelve months (4 O. N. P. 403). And one may have a residence in the state without a domicile and without citizenship. The essential distinction between residence and domicile is that the first involves the intent to leave when the purpose for which one has taken up his abode ceases, and the other has no such intent. (2nd Bouvier, 904.)

I am, therefore, of the opinion that this person who has resided in Tuscarawas County since April 1, 1905, has gained a legal residence in said county, and that he was an inhabitant of the state for one year preceding the date of his application and is entitled to be admitted to the hospital for the insane. I may add, however, that by section 632*a* R. S., the board of state charities may authorize the reception of a non-resident person into an institution in cases where the legal residence cannot be ascertained or where the peculiar circumstances of the case constitute, in their judgment, a sufficient reason for the suspension of the rule as to legal residence and of being an inhabitant of the state for one year preceding the date of their application.

I beg to remain,

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—CHILDREN'S HOME—AMOUNT THAT MAY BE EXPENDED FOR.

County commissioners may expend $15,000 *for new children's home building, to be erected on part of premises occupied by old building, without submitting question to vote.*

May 12, 1909.

HON. H. H. SHIRER, *Secretary State Board of Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 11th in which you submit the following for my opinion:

"The commissioners of Union County desire to erect a new building at the children's home and said building is to be erected on part of the premises where the present children's home is now standing. The new structure is in no way to be connected with the existing structure, which will later be torn down,"

and you desire to know if the commissioners may use $10,000.00 or $15,000.00 for the building of the home without submitting the question to the voters of the county.

I beg to advise that section 2825 of the Revised Statutes is in part as follows.

> "The county commissioners shall not levy any 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, and except as hereinafter provided, the expenses of which will exceed fifteen thousand dollars, without first submitting to the voters of the county, the question as to the policy of building any public county building or buildings, or for the purchasing sites therefor, or for the purchase of lands for infirmary purposes by general tax."

and section 2825*a* is as follows:

> "Whenever the county commissioners of any county, shall determine to *enlarge, repair, improve, or rebuild* any public county building except in a city of the first class, or first or second grade of the second class, the entire cost of which expenditure shall exceed ten thousand dollars, before levying any tax or appropriating any money for such expenditure, the question as to the policy of such expenditure shall be first submitted to the voters of the county as provided in section 2825."

The above two quoted sections must be taken together. Section 2825 clearly applies to the building of *new buildings*, while section 2825*a* applies to changes made in or on old buildings, which is shown by the use of the terms "enlarge, repair, improve or rebuild." The building which the commissioners in this case contemplate building is without a question a new building, as the same is not in any manner related to the present building, as is the case where a building is enlarged, repaired, improved or rebuilt.

I am, therefore, of the opinion that the county commissioners of Union County may expend the sum not to exceed fifteen thousand dollars for the above building without first submitting the question to the voters of the county.

I am,

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF STATE CHARITIES—STATE CONFERENCE OF—AUTHORITY TO INVITE AND PAY EXPENSES OF BLIND RELIEF COMMISSION.

Board of state charities may invite one member of each county blind relief commission to attend state conference provided for in section 656a R. S., and expenses of such member to be paid out of fund available for various blind relief commissions.

September 15, 1909.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 11th, in which you submit the following for my opinion:

> "May the board of state charities, under section 656*a*, invite one member of each county blind relief commission to attend the next state

conference provided for in the above section, and from what fund shall the expenses of each invited member of the county blind relief commission be paid?"

I call your attention to section 656*a* Revised Statutes, which is 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 or 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 economical and efficient conduct of such institutions, the most effective plans for granting public relief to the poor, and similar subjects. All officials duly invited to such conferences 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."

You will note that the county blind relief commission is not specifically mentioned in the above section, and to come within the same they must be "officials responsible for the administration of public funds used for the relief or maintenance of the poor."

Section 2 of "an act to provide for the relief of needy blind," 99 Ohio Law, page 256, is as follows:

> "A needy blind person shall be construed to mean any person of either sex who, by reason of loss of eyesight, is unable to provide himself with the necessities of life; who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by this act, would become a charge upon the public or upon those not required by law to support him."

It is the duty of the blind commission to give relief to the class of persons mentioned in the above quoted section, and I am of the opinion that such duties devolving upon the blind relief commission would constitute them "officials responsible for the administration of public funds used for the relief or maintenance of the poor," and the board of state charities may, therefore, lawfully invite a member of each county blind relief commission to the next state conference provided for in section 656*a*.

Section 656*a* provides that the officials invited by the board of state charities to the state conference shall be entitled to their actual necessary expenses, payable from any funds available for their respective boards and institutions.

Section 1 of "an act to provide for the relief of needy blind," 99 Ohio Laws, page 56, is as follows:

> "The boards of county commissioners of the several counties in this state are hereby authorized and required to levy, in addition to the taxes now levied by law for other purposes than those herein provided, a tax not exceeding two-tenths of one mill per dollar on the assessed value of the property of their respective counties, to be levied and collected as now provided by law for the assessment and collection of

taxes, for the purpose of creating a fund for the relief of the needy blind of their respective counties."

The above section provides the fund available for the various blind relief commissions, and it will be necessary for each member of the various county blind relief commissions to be reimbursed from that fund.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Board of Pharmacy.)

DEPOSITORY LAW—APPLICATION OF TO STATE BOARD OF PHARMACY.

Section 1 of State Depository Law, in so far as it provides that fees collected by various state officers and boards shall be paid into state treasury weekly does not apply to state board of pharmacy.

June 23, 1909.

DR. FRANK H. FROST, *Secretary State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—The following letter addressed to me under date of June 21st has been received from you:

> "Will you please inform me if the depository law, requiring all departments of the state to deposit their receipts with the state treasurer weekly, applies to the state board of pharmacy? Our receipts come to us mostly in amounts of one and two dollars by draft, check, postal money order and express order. It has been our custom to deposit these with the bank for collection, then checking into the state treasury about once a month."

Section 1 of the state depository law, sec. (200-2) Bates' Revised Statutes, provides as follows:

> "Every state officer, employe, board, department or commission, receiving money, checks, or drafts, for or on behalf of the state, from fees, rentals, penalties, costs, fines, sales of property or otherwise shall on or before Monday of each week, pay to the treasurer of state, all such money checks or drafts received during the preceding week and on the same day, file a detailed, verified statement of such receipts with the auditor of state."

This act was approved May 3, 1904, (97 O. L. 535).

Section 4411 R. S., as amended 93 O. L. 181-184, embodied the law, with respect to the disposition of moneys collected by the state board of pharmacy as it existed at the time of the enactment of the state depository law. It provided that:

> "All fees shall be paid in advance to the treasurer of the board and by him covered into the state treasury monthly, to the credit of a fund, which is hereby appropriated for the use of the Ohio board of pharmacy. * * All expenses * * of the board * * shall be paid out of said fund * *."

The state depository law contains no repealing clause, and its enactment affected existing laws such as section 4412 only by way of implied amendment and repeal, which are not favored.

Art. II sec. 1, Const. of Ohio;
Lewis' Sutherland on Statutory Construction, sec. 247.

In my opinion, the fact that under section 4411, as it existed at the time of the enactment of the state depository law, the fees collected by the state board of pharmacy were regarded as a fund for the use of the board exclusively and out of which the board should support itself, does away with any necessary repugnancy between the provisions of that statute and those of section 1 of the depository act which applies in terms to "money, checks and drafts received for or on behalf *of the state.*" There being no necessary repugnancy, the two laws were at the time to be regarded as in force.

But, even if an opposite conclusion be reached with respect to the effect of the enactment of the state depository law upon section 4411, there can be no question as to the present state of the law for the reason that that section was amended April 16, 1906, (98 O. L. 209), and repealed and supplanted by section 76 of the revision of 1906, (99 O. L. 402-500). Both of these acts provide that the fees collected by the state board of pharmacy shall be paid into the state treasury monthly, and both of them are subsequent in date to the state depository law.

In my opinion, therefore, section 1 of the state depository law, insofar as it provides that fees collected by various state officers and boards shall be paid into the state treasury weekly, does not now apply and never has applied to the state board of pharmacy, and it is the duty of the treasurer of the state board of pharmacy to pay over monthly the moneys collected by him as fees, etc.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Board of Agriculture.)

BOARD OF LIVE STOCK COMMISSIONERS—COMPENSATION OF MEMBERS —OHIO STATE FAIR—METHOD OF HANDLING FUNDS.

Members of board of live stock commissioners may not receive compensation for attending meetings and performing duties while not engaged in investigating and eradicating diseases of domestic animals.

Receipts of Ohio State Fair may be kept by board as separate fund from which expenses of fair shall be paid on voucher of secretary; balance remaining at close of state fair to be certified into state treasury.

April 2, 1909.

HON. A. P. SANDLES, *Secretary The Ohio State Board of Agriculture, Columbus, O.*

DEAR SIR:—In your letter of April 1st you inquire whether, under section 4211-13 of Bates' Revised Statutes, members of the board of live stock commissioners may receive the compensation provided in that section for attending meetings and performing duties imposed upon such board.

Section 4211-13 provides that:

> "Each member of said board shall receive for his services the sum of three dollars per day and necessary traveling expenses for each day he is actually engaged in the investigation and eradication of diseases of domestic animals by the direction of the board."

It is to be noted that the compensation provided in this section is to be paid to the particular members of the board who are "actually engaged in the investigation and eradication of diseases of domestic animals," and that they are to be paid only when working "by the direction of the board."

I am of the opinion, therefore, that members of such board may not receive the compensation provided in the above quoted section for attending meetings and performing duties while not engaged in the investigation and eradication of diseases of domestic animals.

You also ask for an interpretation of the act of 99 O. L. 529*a* relating to the handling of funds and the rendering of statements as to the Ohio State Fair.

Section 2 of this act provides that:

> "The board shall file a verified, itemized, quarterly statement of all its receipts and expenses from every source on the first day of January, April, July and October with the auditor of state. All disbursements made shall be by itemized vouchers upon the auditor of state, and all receipts shall be deposited with the treasurer of state in the same manner as is now required of all other officers, boards and commissions of the state."

Section 3691-25, as amended by this act, provides that:

> "Whenever it becomes necessary to pay out premiums and the expenses of conducting a state agricultural exhibition, the board may retain from its receipts a sufficient sum therefor, and pay such premiums and such expenses therefrom on vouchers of the secretary and shall

thereafter immediately certify the balances in its hands into the state treasury, rendering an account of such premium payments, and the expenses of conducting such agricultural exhibition, as provided in section 2 hereof."

From a reading of the above provisions it is evidently the intention of the general assembly that receipts of the board in connection with the Ohio State Fair need not be turned into the treasury, but may be kept by the board as a separate fund from which the expenses of such fair shall be paid on vouchers of the secretary of the board, the balance remaining at the close of the state fair to be certified into the state treasury.

I am further of the opinion that the verified, itemized statement to be made in regard to the receipts and expenses of the state fair is not to be made quarterly but is to be made as a part of the first quarterly statement following the close of the state fair. The use of the word "thereafter" in the above quoted provisions of section 3891-25 leads me to this conclusion.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD LIVE STOCK COMMISSIONERS—CATTLE AFFECTED WITH TUBERCULOSIS.

Board of live stock commissioners may order cattle affected with tuberculosis killed, and same applies to cattle affected with tuberculosis shipped into Ohio for breeding purposes contrary to governor's proclamation.

July 2, 1909.

HON. A. P. SANDLES, *Secretary The Ohio State Board of Live Stock Commissioners, Columbus, Ohio.*

DEAR SIR:—In your letter of June 23rd you ask what authority the board of live stock commissioners has, under the statutes, to inspect, test, or destroy cattle which suppy milk to a city when evidence has been presented to the board that such cattle are infected with tuberculosis, which I understand to be a contagious and infectious disease.

You also inquire as to the authority of the board in dealing with cattle shipped into Ohio for breeding purposes contrary to the proclamation of the governor under section 4211-15 R. S., when such cattle are infected with tuberculosis.

In cases of cattle which are believed to be infected with tuberculosis, I believe that the following provision of section 4211-16*b* applies:

"The board of live stock commissioners, or any of them, or their authorized officers, agents or employes, shall have authority to enter upon any public or private premises, or within any building where live stock is housed, or to enter any railway car or any boat or other conveyance used in the transportation of live stock, for the purpose of inspection and for the purpose of protection of the live stock of the state."

In case such inspection shows the presence of tuberculosis among any cattle, the board of live stock commissioners may, under section 4211-16, order the

destruction of such animals and arrange for their appraisement. The board may also, under section 4211-10, quarantine such diseased animals.

As to cattle which are shipped into Ohio contrary to the proclamation issued by the governor, for breeding purposes within this state, the board may exercise the same powers as in the case of animals within this state. Section 4211-17, however, provides that:

> "No compensation shall be made to any person who may have brought animals into the state infected with such contagious disease or from a district in which such contagious disease existed, etc."

Section 4211-16*e* provides for co-operation between the state and the United States Bureau of Industry in extirpating such diseases and section 4211 R. S. provides as to the duties of common carriers and owners of stock yards when a contagious disease is discovered among live stock.

Since your questions are very general and the language of the statutes sometimes indefinite, I shall be pleased to advise you further and more specifically at any time upon particular questions relating to this subject which may arise in your department.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE BOARD OF AGRICULTURE—FIRE INSURANCE ON STATE FAIR BUILDINGS—MAY NOT EXPEND MONEY FOR.

October 12, 1909.

HON. A. P. SANDLES, *Secretary The Ohio State Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—You ask whether the Ohio state board of agriculture is authorized by law to expend money for fire insurance premiums upon state fair ground buildings.

I find no specific provision of law authorizing expenditures for such purposes. Section 6969 R. S., as contained in the Revised Statutes of 1880, and in 73 O. L. 86, mentioned "fire insurance for the use of the state," but neither this section nor any other provision of the statutes now contains any reference to fire insurance in connection with buildings owned by the state. While section 3705*a* specifically authorizes the insurance of buildings owned by a county agricultural society or by a county for the benefit of a county agricultural society, there is no such authority specifically given for state fair buildings.

A thorough investigation of the subject of insurance of state buildings shows that it has been the policy of the state of Ohio for many years to make no expenditures of money for the insurance of state buildings. In this policy the state has been in the position of a mutual insurance company, saving the expense incident to insuring so great a number of buildings, accepting such losses as occur and providing an emergency board to authorize the incurring of liability in case of fires occurring during the adjournment of the general assembly.

While the board of agriculture, prior to the act approved May 9, 1908, (99 O. L. 592*a*), was a quasi official board of the state of Ohio, expending money from both private and public sources, and of uncertain powers and duties, owing to the doubtful standing of its members as officers of the state under the pro-

visions of our constitution, the present board is distinctly an official board of the state of Ohio and its members are officers of the state of Ohio, endowed with such powers and duties as are conferred upon them by law. Therefore, in construing the powers and duties of such board and its members, we must follow the rules which have been laid down for the government of other officers and boards of the state. The board of agriculture, like other state boards and officers, has only those powers which have been specifically conferred upon it by law and those implied powers which are necessary and incident thereto. In view of the absence of specific authority to expend money for fire insurance and the policy of the state in not insuring other state buildings, I am unable to say that an expenditure of money for fire insurance is necessary or incident to the specific powers granted to the board of agriculture.

An expenditure, therefore, for fire insurance for state fair ground buildings, is not authorized by law. Should the board of agriculture desire to insure such buildings against fire their recourse is to the general assembly, which can, by statute, grant the necessary authority.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Board of Accountancy.)

BOARD OF ACCOUNTANCY—POWER TO RECONSIDER BEFORE CHANGING PERSONNEL.

The state board of accountancy has not power to reconsider and again pass on matters before a change in personnel thereof.

June 21, 1909.

The Ohio State Board of Accountancy, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> "Under the act of May 9, 1908, entitled, 'An Act to establish an Ohio state board of accountancy for the regulation of the profession of public accounting,' such board was regularly organized, and before the first day of July, 1908, assumed the duties imposed upon it by said act. During the year 1908, and early in the year 1909, the board acted upon several applications for certificates as 'certified public accountants,' and approved some of the applicants for examination, but none of them have presented themselves for the examination. Recently a vacancy occurred in the board, and exercising the authority conferred upon him by the act, the governor of the state filled the vacancy by the appointment of Leroy Parker. Has the board, at this time, power to reconsider its action in certifying such applicants for examination, and in cases where, in its opinion, the applicant has the necessary qualifications to certify him without examination, under the waiver clause contained in section 5 of the act?"

Briefly stated, your inquiry raises the question as to whether the board, as now constituted, may reconsider and again pass on all matters considered by your board before the change in personnel thereof. Section 2 of the act provides that "the board shall keep a complete record of all its proceedings." If your inquiry is to be answered in the affirmative, it will be proper and legal for the board, as now constituted, to take up and reconsider an application that the board, a year ago, sought to finally determine, and make final record thereof. I am not advised as to the nature of any rules or by-laws which your board may have promulgated as supplemental to the provisions of the act to govern its proceedings, and if there are such rules or by-laws expressly providing for the procedure of the board, they would have much to do with the answer to this inquiry. However, to say that the board, in the month of June, 1909, with a change in its personnel, can take up and reconsider, and thereby render null and void the action of the board as to an application one year ago, is to conclude that your board is without power to take any action in regard to application filed with it that will be final, or that would be binding upon a board of the same membership, or of a different membership, at a subsequent date. This conclusion does not impress me as being the correct rule. If the board, as it is now constituted, may treat as a nullity, all former acts and records since the organization thereof, then the record as provided for in section 2 of said act has no substantial force, and is subject to alteration and change by any subsequent board that may agree to make change therein. I do not believe that this is

the intent of the act, and I feel safe in saying that no such rule or regulation has been promulgated under the board to be governed thereby. If the literary qualification of an applicant has been approved for examination, I do not believe a subsequent board of different personnel should reconsider and change that approval to a rejection. The applicant so approved should still have his right to take the examination. And further, if the literary qualification of an applicant has been approved within the six months waiver clause provision, as found in section 5 of the act, and the applicant did not possess such further qualifications as, in the judgment of the board, to entitle him to a certificate without further examination, then I believe it will be necessary for such applicant to take the further examination. This conclusion is reached on the theory that the record as made up of the board should mean something. The remedy of a rejected applicant would be to refile his evidences of literary qualification rather than to ask this board to declare null and void its own record made a year ago.

To the statement that many of those applicants whose literary qualifications have been approved have as yet failed to take the examination, I can but say that it must be their own fault, as nowhere in your inquiry is the suggestion that the board has refused to hold an examination as provided for in the act.

Suppose, for instance, some applicant has been rejected, and one member of the board, in the month of June, 1908, made a motion to reconsider the vote whereby that certain applicant was rejected, and the vote to reconsider was lost, can the board at this time get back through this record and again consider that applicant? I think not.

If your inquiry is to be answered in the affirmative, no applicant will know when such application is finally acted upon by your board. There will be no such thing as a final record, and I am not of the opinion that this is the intention of the act, nor do I believe that this is in accord with a good procedure.

Section 3 of the act provides that

> "An examination * * * for applicants for such certificates shall be held annually, but, if not less than five months after the annual examination, three or more persons, apply to the board for certificates, the board shall hold an examination for such applicants * * *."

If, then, this board is to consider its record as having a valued and binding effect, the proper proceeding for applicant, if rejected, is to again file with the board evidences of literary qualifications, and if the applicant has been approved for examination for a certificate, then the law is plain in its provision that an examination must be taken in order to procure such, either at the annual examination or at the special examination occasioned by the application of not less than three applicants for such special examination.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Armory Board.)

STATE ARMORY BOARD—POWER TO LEASE, ACCEPT DONATIONS AND SECURE SITES FOR ARMORIES.

State armory board may not make leases for armories until general assembly appropriates the state armory fund. Leases may begin to run at any date after appropriation becomes available, but not for over two years from date of said appropriation.

Authority of board to prescribe rules, etc., for government of armories is limited to armories erected and provided for under armory act.

Board may at any time receive donations, and, after receiving donations, may expend same.

June 10, 1909.

HON. BYRON L. BARGAR, *Secretary The State Armory Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 8th, in which you submit for my opinion the following questions:

"1. One trouble, experienced by commanding officers in the past, has arisen from their lack of authority to make long leases for armories. This disability in the lessees has prevented property owners from making the investments necessary to provide proper quarters. The board wish, therefore, to be advised:

"(a) How soon may the board legally make armory leases?

"(b) On what date shall these lease terms begin to run?

"(c) For what terms may such leases be made?

"(d) When shall the board adopt and prescribe rules and regulations for the guidance of organizations occupying armories, as directed in the last sentence of sec. two?

"2. Several communities have signified their desire to donate centrally located armory sites to the state. In order to secure to the state these desirable tracts the board asks opinions:

"(a) When may it enter into negotiations with those proposed donors?

"(b) When is said board authorized to receive gifts or donations of land for armory sites as provided in sec. two?

"(c) How far may the board go, in securing sites offered, before it has authority to advertise for bids under the second paragraph of section three?

"(d) How soon may it make the decisions required by the first paragraph of section three, and prepare plans thereunder?"

For convenience I shall consider the first three subdivisions of your first question together.

Section 4 of the act in 100 O. L. 25 provides in part as follows:

"* * * It shall be the duty of the auditor of state, from and after January 1, 1910, to credit to the 'state military fund' from the general revenue of the state, a sum equal to ten cents for each person who, it shall appear from the last preceding federal census, was a resident of this state. The fund herein provided * * * shall be a continuing

fund and available only for that purpose * * * and the general assembly shall annually appropriate and divide into two funds the amount authorized by the provisions of this act, to be known as the 'state armory fund' and 'maintenance Ohio National Guard' * *.

"From the amount allotted and appropriated as 'state armory fund,' the state armory board shall provide armories by *lease*, purchase or construction as provided in sections 2 and 3 of this act."

The provision above quoted does not, of itself, create the state armory fund. The amount of the state *military* fund, as therein directed to set aside from the general revenue fund, is fixed and may be computed at any time. The two constituent funds, however, are not available for expenditure, are not determinable as to amount, and, in short, cannot be said to have any existence whatever until the general assembly, by appropriation, has made the division directed by section 4 as above quoted. This the general assembly might see fit not to do; it cannot, certainly, be compelled to act.

The authority to lease buildings suitable for armory purposes is seemingly limited to the making of such leases as involve the expenditure of the state armory fund. No authority thus to expend moneys donated for armory purposes is to be found in any of the express provisions of the act. Indeed, section 2 seems to limit the authority to receive donations to those made "for the purpose of aiding in the purchase, building, furnishing or maintaining of any armory building." However, in this respect the law should, in my opinon, receive a liberal construction, and I do not hold that donations of money may not be expended for leasing buildings for armory purposes; you have not submitted this question and I mention it only for the purpose of indicating that my opinion is limited to the question with respect to the expenditure of the "state armory fund."

Inasmuch, then, as the "state armory fund" has no present existence, I am of the opinion that no contracts may be now entered into which involve its expenditure.

Art. VIII sec. 3 and art. II sec. 22, Const. of Ohio;
State v. Medbery, 7 O. S. 522.

State ex rel. v. Board of Public Works, 36 O. S. 409, is to be distinguished as the decision in that case held a contract entered into in pursuance of a statute to be valid and permitted it to be discharged by the expenditure of a subsequent appropriation; in the present instance the statute does not, of itself, authorize the execution of leases, except by way of expending funds already available. Furthermore, the fund involved in the decision of the case last cited was that derived from receipts and balances of collections by the board of public works and not a direct appropriation such as that required to be made by the state armory act. Again, the case of the state armory board is to be distinguished from that in which an executive department finds itself when a fund has been appropriated by the general assembly but is not available until a subsequent date; in such case, of course, contracts may be entered into in anticipation of such fund.

Applying the principles above stated to the first three subdivisions of your first question, I am of the opinion that:

(a) The board may not legally make armory leases until the general assembly has set aside and appropriated the "state armory fund." This statement is made subject to qualification in case of the receipt of money donated for the purpose of leasing buildings for armory purposes.

(b) The lease terms may begin to run at any date after the appropriation above mentioned becomes available.

(c) The terms of such leases may not run beyond two years from the date of the appropriation. Art. II, sec. 22 of the Constitution; State v. Medbery, supra. While sec. 4, as above quoted, provides that the general assembly shall annually appropriate and divide "the state armory fund," it seems clear that each of such annual appropriations would be available during the period of two years after it is made.

Answering the fourth subdivision of your first question, I beg to state that I am of the opinion that the authority of the board "to adopt and prescribe rules and regulations for the management and government, for the guidance of the organizations occupying the same" is limited to armories erected and provided under the provisions of the armory act. While I am satisfied that, in view of the first sentence of sec. 1, defining the purpose of the act, all provisions thereof should receive a liberal construction, I am unable to find therein any language which, by construction, might be deemed to confer on the state armory board any authority over armories provided for the use of any of the military organizations of the state under laws, other than the act now in question. Doubtless the board may acquire control of all armories in the state by appropriate proceedings under the act, but until such proceedings are taken, existing armories will continue to be administered as in the past; in other words, the state armory law does not *ipso facto* vest in the state armory board control of existing armories.

Answering the first subdivision of your second question, I may say that I am of the opinion that the state armory board may, at any time, enter into negotiations with prospective donors of lands, money, or other property, for armory purposes. I find in the act no provision limiting the authority of the board in this respect, either expressly or by implication. On the same principle the board may, at any time, receive such gifts or donations of land as those concerning which you inquire in subdivision B of your question.

With respect to the last two subdivisions of your second question, I find myself obliged to return a conditional answer. If the board should receive, prior to the next session of the general assembly, donations of money available for armory purposes, the board might proceed under sec. 3 to cause plans, specifications and estimates to be prepared and to let contract upon such plans, etc. As the proceedings under sec. 3 involve the expenditure of money, however, I am of the opinion that, upon the principles above set forth as governing my answer to your first question, the board may not proceed under said section until by donation or appropriation it has funds to expend.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Officers of the Various State Institutions)

(To the Athens State Hospital)

ABSTRACT OF TITLE TO LAND PURCHASED FOR ATHENS STATE HOSPITAL.

January 21st, 1909.

HON. WALTER L. REMLEY, *Financial Officer, Athens State Hospital, Athens, Ohio.*

DEAR SIR:—I have examined the abstract of title to certain tracts of real property situated in the village of Athens, Athens county, Ohio, being all of out-lot No. 104 in said village, together with all of out-lots Nos. 102 and 103 in said village lying south of the following described line, to-wit: Beginning 109.8 feet south 4¾ degress west from the southeast corner of in-lot No. 1575 in Wilkes' addition to said village; thence running north 66½ degrees east 330 feet, to the Hocking river.

I have also examined the deed of Julia S. Moore and her husband, David H. Moore, to the state of Ohio, by which it is proposed to convey to the state an unencumbered title in said premises.

There are certain defects and encumbrances in the early history of this title, of which it will be unnecessary to take account, as they fall into two classes, viz:

1. Those in the case of which the state of Ohio or the Ohio University have the adverse interest.
2. Those barred beyond the shadow of a doubt by lapse of time.

Reference is made in the deed of Abner Cooley and wife to Eliakiam H. Moore, shown on page 24 of the abstract, to a "right to mine coal under the said laws heretofore granted to the Athens Mining Company." No further reference is made thereto in the abstract, but some disposition of this apparent defect should be made. If, as a matter of fact, the Athens Mining Company has not used this right since the date of the deed in which it is mentioned, this matter is, of course, of no importance.

No examination has been made in the courts of the United States for pending suits or judgments.

Having found no serious defect in the title under consideration I hereby approve the same and advise that the deed referred to will convey a good and perfect title to the state of Ohio.

The papers submitted to me are returned under separate cover.

Very truly yours,

U. G. DENMAN,
Attorney General.

ATHENS STATE HOSPITAL—OPINION ON ABSTRACT OF TITLE TO CERTAIN LANDS.

May 6, 1909.

HON. WALTER L. REMLEY, *Financial Officer Athens State Hospital, Athens, Ohio.*

DEAR SIR:—I have examined the abstract of title to a certain tract of land purchased by the state of Ohio for the use of the Athens State Hospital, together with the deed of Susan C. Beckler and husband to the state of Ohio therefor. The real estate in question is situated in the village of Athens, Athens County, Ohio, and is described as follows:

> "Beginning nineteen (19) feet north of the northeast corner of outlot number one hundred and five (105) in said village, and thence running south sixty-six (66) degrees and forty-five (45) minutes west, three hundred and eighty (380) feet, more or less, to the middle of the Hocking River; thence southeastwardly down the middle of said river to the east side of said in-lot number one hundred and five (105); thence north, five hundred and ten (510) feet more or less to the place of beginning, containing two acres more or less."

The original lease of the Ohio University to Isaac Taylor abstracted at pages 2 to 4, inclusive, of the abstract described said outlot No. 105 by metes and bounds and does not employ the Hocking River as the southwest boundary thereof. In all the intermediate deeds between the original lease and that from Maggie E. Wilkes and husband to Susan C. Beckler, abstracted on pages 35 and 36, the description in the lease is adhered to. This discrepancy is of no importance, however, since the courses and distances in the original deed conform substantially to the thread of the Hocking River, and since also that portion of said lot No. 105 now sought to be conveyed is smaller in area than a like portion of the same lot would be, if the original courses and distances were employed in the description thereof.

The failure of description in the deed abstracted on page 13, being that from Joseph H. Morton and wife to J. Ballard & Sons, has been cured by adverse possession.

There is an error in the description of the property conveyed by the deed of Maggie E Wilkes and husband to Susan C. Beckler, the error being in the location of the place of beginning. However, this does not appear to be a material defect.

No examination has been made for municipal assessments, nor of the federal records.

Subject to the foregoing exceptions I am of the opinion that the abstract shows a good and perfect title in the state of Ohio to the property above described through the conveyance of Susan C. Beckler.

Yours very truly,

U. G. DENMAN,
Attorney General.

ADVERSE POSSESSION OF LAND AS AGAINST OHIO UNIVERSITY.

May 7, 1909.

HON. WALTER L. REMLEY, *Financial Officer Athens State Hospital, Athens, Ohio.*

DEAR SIR:—In my letter of yesterday I neglected to call attention to the fact

that the tract of real estate sought to be purchased for the Athens State Hospital from Susan C. Beckler extends 19 feet north of the north line of lot No. 105. From the abstract and plat it appears that there is a strip of land 66 feet in width between lots 101 and 102 on the north and lot No. 105 on the south, as originally platted by the Ohio University, which strip was evidently intended to be used as a street. The abstractor certifies, however, that to his own knowledge this strip has been farmed by adjoining owners for 50 years. I am accordingly of the opinion that such adjoining owners have acquired title by adverse possession as against the Ohio University, and that therefore no question could be made concerning the small plot north of the original north line of lot No. 105.

You will please attach this letter to that already written to you and consider it a part of the same.

Yours very truly,

U. G. DENMAN,
Attorney General.

ATHENS STATE HOSPITAL—TRUSTEES MAY MAKE RULES RELATIVE TO DISPOSITION OF INMATES' MONEY.

August 30, 1909.

DR. O. O. FORDYCE, *Superintendent Athens State Hospital, Athens, Ohio.*

DEAR SIR:—Your communication of August 27th is received, in which you ask to be referred to the statutes fixing the duties of the superintendent and financial officer of the state institutions relative to moneys belonging to inmates.

In reply, I beg to say the legislature has made no specific provision whereby the superintendent or financial officer of any state institution is required to accept or account for moneys belonging to inmates.

Section 639 Revised Statutes provides, however, that:

> "The board shall establish such *rules* and *regulations* as may be deemed expedient for the government and management of their several institutions and for securing *economy and accountability in all their affairs and all officers and employes shall strictly observe such rules and regulations*, which may be changed at the pleasure of the board."

In the case of Rutter v. State, 38 Ohio State, the court in passing upon this section of the statute used this language:

> "It was obviously impossible to provide in detail for the management of such institutions and hence it is provided that the board of trustees shall establish such rules and regulations as may be deemed expedient for their government."

I am therefore of the opinion that it is within the power of the board of trustees of your institution to make such rules and regulations relative to the moneys belonging to the inmates of the institution as they may deem proper, and such rules and regulations when made will be binding upon the officers of the institution.

Yours very truly,

U. G. DENMAN,
Attorney General.

ATHENS STATE HOSPITAL—PURCHASE OF HORSE BY PATIENT—AUTHORITY OF SUPERINTENDENT TO CONTROL PROPERTY OF PATIENT.

A sale of a horse to patient of Athens state hospital is voidable.

Superintendent of institution has such control over property of patient as is necessary to properly manage institution, and may bank money of patient for patient's benefit.

October 5, 1909.

HON. O. O. FORDYCE, *Superintendent Athens State Hospital, Athens, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 30th, in which you submit the following for my opinion:

> "A patient in the Athens state hospital, who is a trusty, was given permission by one of your assistants to go to Athens to purchase certain supplies for himself. While in Athens he purchased a two-year-old colt and paid $115 in cash for the same. The person from whom he purchased the colt refuses to receive the colt and return the money, and you desire to know,
>
> (1) If the sale is legal;
>
> (2) If it is advisable to allow the patient to carry such a large amount of money.
>
> (3) In case a patient has no guardian, what relationship do you assume.

I beg to advise:

(1) The rule is now established in this country that the contracts of persons *non compos mentis* are invalid and not binding on them either in law or equity, and that rule rests upon the elementary principle that the making of a valid contract the consent of the contracting parties is essential. Their minds must meet and agree upon the terms and considerations of the contract, and where there is not capacity to understand or agree there can be no contract. In the case you have submitted the parties both can be placed in *statu quo*, and undoubtedly the sale of the horse can be set aside.

(2) I do not believe it to be a good policy to permit an inmate under your charge to remain in control of such a large amount of money, if for no other reason than to avoid such complications as are presented in this case.

(3) Section 699*b* of the Revised Statutes of Ohio prescribes the powers and duties of a superintendent of an asylum for the insane, which is in part as follows:

> "Said superintendent shall also *have charge* of said buildings when occupied, and *of the patients kept therein*, employing the necessary officers and employes under the direction of the board, and as required for the purposes mentioned."

This section gives you such control over a patient and his property as is necessary for the proper management of the institution of which you have charge, regardless of the fact that a guardian has or has not been appointed for the patient. I suggest that where a patient is in possession of money, as in this case, that you take such money from the patient and deposit it in a bank, obtaining the best interest possible on the money, in your name for the benefit

of the patient, and the interest earned on the money to accumulate for the benefit of the patient. I do not believe it will be necessary in a case such as the above, where no guardian has been appointed for the patient, to have one appointed merely to take charge of the little money which he may have in possession while confined as a patient, as the method which I have suggested would be as beneficial to the patient as if a guardian was appointed, but at the same time relieves the patient of the expense of the guardian.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Hospital for Epileptics)

EPILEPTICS—HOSPITAL FOR—FUND DERIVED FROM PAY-PATIENTS MAY NOT BE DEVOTED TO CURRENT EXPENSES.

February 1st, 1909.

DR. WILLIAM H. PRITCHARD, *Superintendent The Ohio Hospital for Epileptics, Gallipolis, Ohio.*

DEAR SIR:—Your communication of January 23rd is received in which you request an opinion relative to the disposal of money received for the care and treatment of patients under section 751-4 of the Revised Statutes.

In reply thereto I beg to say said section 751-4 is as follows:

> "Nothing herein contained shall be construed to prohibit the admission as inmates of persons not residents of Ohio, or pay-patients from Ohio, if there be accommodation for them, upon the payment of such sums and upon such terms as the trustees may determine; and the money so received shall be paid over to the steward, receipted for by him, and *by him certified into the state treasury to the credit of the general revenue fund;* and the steward shall make a correct record of all such moneys received by him in a book which shall be open for public inspection."

This section expressly provides that the money received for the care and treatment of non-resident and other pay-patients shall be by the steward certified into the state treasury to the credit of the general revenue fund. Your steward is not, therefore, permitted to use such funds to the credit of the current expense fund of the institution in like manner as other money received from outside sources.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO HOSPITAL FOR EPILEPTICS—ORDER FOR DISCHARGE OF PATIENT BY COMMON PLEAS COURT—HOMICIDAL PROPENSITIES.

Common pleas court is without jurisdiction to order discharge of patient who has homicidal propensities from hospital for epileptics.

April 7, 1909.

HON. DANIEL H. SOWERS, *Member Board of Trustees Ohio Hospital for Epileptics, Gallipolis, Ohio.*

DEAR SIR:—You have transmitted to this department the papers and correspondence in the matter of the application for the discharge of Agnes Massing, an inmate of your hospital. It appears therefrom that the judges of the court of common pleas of Hamilton County, in joint session, have authorized the entry of an order granting the application of Barney Massing for the discharge of the said patient and have directed the superintendent of the Ohio Hospital for Epileptics to discharge her "under such arrangement as will insure the proper care

and safety of said inmate until delivered to said Barney Massing and in accordance with the law and regulations of state hospitals."

You inquire what, if any, jurisdiction the court of common pleas of Hamilton County has to enter such an order.

Replying to your inquiry, I beg to state that the discharge of patients from the Ohio Hospital for Epileptics is regulated by section 751-9 R. S., which provides:

> "The board of trustees are empowered to make such rules and regulations respecting the care, custody, discipline and discharge of patients, as they may deem best for the interests of the patients and the state."

And by section 751-7 R. S., which provides:

> "In the case of epileptic insane or epileptics whose being at large is dangerous to the community, like proceedings shall be had, and like powers by officers charged with duties in the premises exercised, with respect to * * * their discharge therefrom, as is provided in chapter 9, title 5, part I, of the Revised Statutes, regulating the care of the insane."

From the papers submitted it appears that the said Agnes Massing is an epileptic insane person, and accordingly section 751-7 R. S., governs this particular case. The reference in said section is to section 709 R. S., which provides in part:

> "On consent and advice of the trustees, the superintendent may discharge any patient from any state hospital for the insane, when he deems such discharge proper and necessary; provided, no patient who in the judgment of the superintendent has homicidal or suicidal propensities, shall be discharged."

I have examined carefully all of the provisions of the Revised Statutes relating to the commitment to the hospitals for the insane and epileptics of persons charged with crime both before and after indictment as well as the statutes relating to the general powers and jurisdiction of the court of common pleas, and find therein nothing which confers upon the common pleas court jurisdiction to order the discharge from any institution of any insane or epileptic person. On the contrary, all such statutes, as well as those above quoted, confer upon the trustees or the superintendents of the institutions affected full discretionary power in the matter of such discharge, subject always, of course, to the determination of the facts relating to the actual condition of patients by proper proceedings in habeas corpus.

The correspondence transmitted to this department seems to indicate the possibility of classifying the said Agnes Massing as a patient having "homicidal propensities," and if the superintendent is satisfied that such is the case, not only is the court of common pleas without jurisdiction to discharge her, except after proceedings in habeas corpus duly had, which proceedings cannot properly be instituted in the common pleas court of Hamilton County, but even the board of trustees of the institution is without authority, and the power to discharge rests solely in the discretion of the superintendent.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO HOSPITAL FOR EPILEPTICS—FORM FOR ADVERTISING FOR BIDS FOR BOILER.

Plans and specifications to meet requirements of building statutes should give equal opportunity to all builders of boilers and not be limited to some particular kind.

October 2, 1909.

HON. DANIEL H. SOWERS, *President Board of Trustees, Ohio Hospital for Epileptics, Gallipolis, Columbus, Ohio.*

DEAR SIR:—Your board has submitted to this department the plans and specifications for the installation of two water tube boilers at the state hospital at Gallipolis, with the request that we advise you as to whether or not the same conform to the building statutes of Ohio.

The first paragraph of said plans and specifications is as follows:

> "This contract will include the furnishing, delivering and erecting complete upon foundations at Gallipolis, Ohio, of two (2) B. & W. type water tube boilers, together with the necessary setting for same; also the tearing down and removing of the two present boilers now in place; all in accordance with the following specifications."

And further on in said specifications, under the subhead "Size," the following provision is found:

> "Each boiler to be of the Babcock & Wilcox type, with inclined headers, 10 tubes wide and 9 tubes high. Tubes to be 18′ 0″ long, with two 36″ diameter steam drums approximately 23 feet long. Tubes to be 4″ in diameter by 18′ 0″ long, of the best grade of charcoal iron, as is commonly used on this type of boiler."

Under these two provisions of the specifications bidders are required to bid on "B. & W. type" boilers alone.

In the enactment of sections 782 to 803, inclusive, of the Revised Statutes (known as the building statutes), the legislature evidently intended to provide a method whereby the state, in contracting for the construction of its public buildings and improvements thereto, should have the benefit of open and free competition and section 785 expressly provides that all contracts awarded thereunder shall be let "to the lowest bidder."

Said building statutes provide that before any contract is entered into for the erection, alteration, addition to or improvement of any state institution, asylum or other improvement, the cost of which will exceed the sum of $3,000, "full, complete, and accurate plan or plans of such institution, asylum, or other improvement, or of any addition to, or alteration or improvement thereof," shall be made.

Said statutes further provide that when such plans and specifications are so made they shall be approved by the governor, auditor of state and secretary of state, and further provide for the publication of a notice of the time and place when and where sealed proposals will be received for performing labor and furnishing the materials called for in said plans and specifications. It is further provided that this notice shall be published "in one or more daily papers having the largest circulation and published in the cities of Cincinnati, Cleveland, Columbus and Toledo, and also in the paper having the largest circulation in the county where the work is to be let."

These provisions, I understand, in this case have all been complied with and seven bids were submitted, as follows:

Bid No. 1, Babcock & Wilcox Co.....	$7,000 00
Bid No. 2, Tudor Boiler Mfg. Co.	6,372 00
Bid No. 3, Tudor Boiler Mfg. Co.	5,922 00
Bid No. 4, Miller Supply Co.....	6,105 00
Bid No. 5, Toledo Flanner Boiler Co.....	5,593 34
Bid No. 6, Samuel A. Esswein Heating & Ventilating Co.	5,550 00
Bid No. 7, E. Keeler Co.....	4,899 00

Of these bids, however, only three conform to the specifications; that is, there are but three bids upon "B. & W. type" boilers, and two of these bids were submitted by one company, and I am informed that the variation in the bids submitted by the Babcock & Wilcox Company and the Tudor Boiler Manufacturing Company is approximately the difference in the cost of the three different headers used on the B. & W. type of boilers.

By reason of the fact that the remaining four bids proposed a different type of boilers than the "B. & W. type," they do not conform to the specifications and cannot, therefore, be considered. The result is that, by reason of the requirement in the specifications that the bids must be for the "B. & W. type" of boiler, the competition is limited to two bidders. This, in my opinion, is not in compliance with the statutes. The plans and specifications should be so drawn as to admit bids of all builders of water tube boilers.

It is suggested in this instance that the board of trustees should have the right to limit the specifications to the "B. & W. type" of boilers, for the reason that all the boilers now in use at said institution are of that type and that they should not be compelled to take some other boiler not so satisfactory solely because it can be purchased for a less price. The fact, however, that the board of trustees desires a particular boiler will not warrant the drawing of plans and specifications whereby competition is restricted.

Section 785 of the building statutes contains a provision whereby the board of trustees, if they deem it to the best interests of the state and secure the written consent of the governor, auditor of state and secretary of state, may accept any bid other than the lowest.

I am, therefore, of the opinion that the plans and specifications as drawn do not meet the requirements of the building statutes and that the same should be redrafted whereby equal opportunity will be given all builders of water tube boilers to submit proposals. The state will then have the benefit of the competition contemplated in the law and by the exercise of the discretion vested in the governor, auditor of state and secretary of state such boilers as will best meet the needs of your institution can be secured.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the State School for Deaf)

OHIO STATE SCHOOL FOR THE DEAF—TRUSTEES RECEIVE ONLY NECESSARY EXPENSES.

March 9th, 1909.

HON. LEE J. EVANS, *Member Board of Trustees, Ohio State School for the Deaf, Ripley, Ohio.*

DEAR SIR:—Your communication of March 6th is received in which you submit the following inquiry:

> Are members of the board of trustees of the Ohio State School for the Deaf entitled to receive mileage at the rate of 10 cents per mile when attending the meetings of said board?

In reply I beg to say section 606 of the Revised Statutes is in part as follows:

> "The trustees of said institutions (of which the Ohio State School for the Deaf is one), shall be appointed by the governor, by and with the advice and consent of the senate; and, except as otherwise provided by law, shall receive no compensation, but shall be entitled to receive *their necessary expenses* in attending the meetings of their respective boards or in going to and from their respective institutions on official business necessarily connected therewith, which shall be paid by the disbursing officer of their respective institutions upon presentation of an *itemized voucher* therefor which shall be filed with the other vouchers of the institution?"

The above quoted section expressly forbids the receiving of any compensation by the trustees of said institution, but provides that they shall receive their "necessary expenses," and further provides that such expenses shall be paid on presentation of "itemized vouchers."

I am, therefore, of the opinion that said trustees are not entitled to receive a flat mileage of ten cents per mile and are only to be reimbursed for necessary expenses actually incurred, the same to be paid upon itemized vouchers presented to the disbursing officer of the institution.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Institution for Feeble Minded)

INSTITUTION FOR FEEBLE MINDED—EFFECT OF DIVORCE PROCEEDINGS AWARDING CHILD TO A PARENT ON AUTHORITY OF INSTITUTION TO CONTROL INMATE.

Where child committed to institution of feeble-minded right to custody not changed by prior award to mother in divorce proceedings.

November 2, 1909.

DR. E. J. EMERICK, *Superintendent Institution for Feeble-Minded, Columbus, O.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 30th, enclosing a letter from Charles E. Chadman, Esq., referring to the case of Lucille Knill, a pupil in your institution admitted thereto by the probate court.

The facts as disclosed by your letter, and the communication with Mr. Chadman, are as follows:

> The parents of the pupil, Lucille Knill, had been divorced previously to her admission to the institution. The decree of divorce awarded the custody of the child to the mother. Subsequently the child being on a visit to her father, he applied to the probate court of the county in which he resided under section 674*g* Revised Statutes, and upon his application the child was admitted to the institution, the father paying a part of the expense of her support. The mother now desires to withdraw the child from the institution and asserts her legal right to her custody, and the invalidity of the proceedings by which she was admitted.

You request my opinion as to your duty in the premises. Section 674*g* Revised Statutes, provides in part that:

> "The probate court of a county, in approving an application for admission of a person to said institution shall state whether or not such person has * * * a parent * * * of sufficient financial ability, to defray the expense, in whole or in part, of supporting such person in said institution * * *."

Section 671 Revised Statutes provides that:

> "The trustees of the institution for feeble minded youth are authorized to admit into the institution all youth of this class * * * who are incapable of receiving instruction in the common schools."

While the statute relating to the institution for feeble minded youth does not specifically so provide, it has been the ruling of this department that the proceeding outlined in section 674*g*, above quoted, is essentially similar to an inquest of lunacy, and that the probate court has jurisdiction to hear and determine the principal question involved therein, viz., the capability of the subject of the inquest, of receiving instruction in common schools, upon the application of any person, regardless of the legal right of the applicant to the custody of the child. This ruling is based upon the well established policy of our

school laws which guarantees and makes compulsory a common school education in the cases of all children of school age who are capable of receiving any instruction.

In this view of the case, the fact that the father, the original applicant, was not entitled to the legal custody of the child becomes immaterial so far as the power of the authorities of the institution to retain the child at the institution for the purpose of instructing her, is concerned. She has in effect been committed by legal process to their care, and she must remain therein until the conclusion of the term of her instruction. At such time as she would be entitled or required to return to her parents, under the rules of the institution, for a vacation period, or otherwise, and not until then would the authorities of the school be called upon to recognize either the father or the mother as the legal custodian of the child. At such time, on the facts stated, the mother should be recognized.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Boys' Industrial School.)

JUVENILE DELINQUENCY ACT—DEPENDENT CHILDREN—BOYS' INDUSTRIAL SCHOOL.

A boy may not be committed to boys' industrial school under juvenile delinquency act on charge of being neglected or dependent child; a commitment must show on its face whether child has been apprehended for delinquency or dependency.

April 13, 1909.

COL. C. B. ADAMS, *Superintendent The Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 2nd, in which you submit to this office the following questions:

> Can a boy be committed to the boys' industrial school under the provisions of the juvenile *delinquency* act on a charge that he is being neglected in that he is not receiving the proper parental care? Can a dependent who is not a delinquent be committed? If a delinquent, is it not necessary that the commitment papers state specifically that he is a delinquent, and in what manner he has violated the juvenile delinquency act?

An examination of the various provisions of the juvenile act of 1908 (99 O. L. 192) discloses that a sharp distinction is therein made between "delinquent children" as defined in section 5 thereof and "dependent children" as defined in section 6.

The procedure provided by the act in the case of a "delinquent child" is separate and distinct from that provided in the case of a "dependent" or neglected child. As to delinquent children it is provided in section 12, that the judge exercising the juvenile jurisdiction may commit "to the boys' industrial school at Lancaster." Section 13, which relates exclusively to the disposition of dependent or neglected children, provides as follows:

> "The judge may make an order committing such child to the care of some *suitable state or county institution*, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school as provided by law, or to the care of some association, etc."

The sole question presented, therefore, under this language, by your first inquiry, is as follows: Is the boys' industrial school a "suitable state institution" or "an industrial school," within the meaning of section 13?

In my opinion, the boys' industrial school is not a suitable state institution, or an industrial school within the meaning of the juvenile act. That act is to be "liberally construed to the end that its purpose may be carried out, to-wit: that proper guardianship may be provided for in order that the child may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare." (Section 40.) Nothing therein may be construed to repeal "any portion of the act relating to the boys' industrial school." (Section 38.)

The boys' industrial school is a reformatory institution. All the provisions of the act creating the institution and providing for its administration contemplate the care and reformation of juvenile offenders against the criminal laws of the state. (Section 752, et seq. R. S.) This function of the institution has been enlarged in only two instances: in case of juvenile disorderly persons under the compulsory education act (section 4022-8 Revised Statutes), and in the case of delinquent children under the juvenile act now under consideration. No provision of the law, aside from section 13 of the juvenile act now under consideration, authorizes the admission to the boys' industrial school of any class of youths excepting the vicious, the incorrigible and the morally depraved. Considerations of public policy together with the manifest purpose of the juvenile act, militate against such a construction of section 13 as would constitute the boys' industrial school a *suitable* state institution or an industrial school within the meaning of said section.

I conclude, therefore, that judges exercising juvenile jurisdiction have no authority to commit dependent or neglected children to the boys' industrial school.

Your second question is sufficiently answered by the foregoing.

With regard to your third question, I beg to state that this department has already held that the nature of a proceeding in court exercising the juvenile jurisdiction as to its being one for delinquency or dependency must be specifically set forth in the process of the court.

I am of the opinion that no commitment, under the juvenile act, is valid unless it shows on its face that the child has been apprehended for delinquency, or for dependency, as the case may be. I find, however, no provision of law requiring the commitment to set forth specifically the manner in which the child has been found delinquent. Yours very truly,

U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—PAROLE OFFICERS—NUMBER DISCRETIONARY WITH BOARD OF MANAGERS.

June 17, 1909.

HON. F. C. GERLACH, *Superintendent Boys' Industrial Schools, Lancaster, Ohio.*

DEAR SIR:—In reply to your communication of June 14th I beg to say that I find no statutory provision expressly authorizing the employment of parole officers for the boys' industrial school. Provision is made, however, for paying the salaries and expenses of parole officers of the boys' industrial school in section 9 of an act entitled "An Act to provide for probation of persons convicted of felonies and misdemeanors," passed by the legislature May 9, 1908, 99 O. L. 339.

The legislature in enacting the provision in section 9 of the probationary act above referred to seems to have taken cognizance of the fact that the boys' industrial school did employ parole officers and therein made provision for their compensation. I assume, therefore, that inasmuch as the legislature has expressly provided for the payment of the salaries and expenses of parole officers for your institution that your board of managers will be authorized to employ as many parole officers as are deemed by them necessary to the proper conduct of the school.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—EFFECT OF JUDICIAL DECREE IN DIVORCE EFFECTING CUSTODY OF INMATE.

November 2, 1909.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 30th, in which you request my opinion as to the authority of the board of trustees of the boys' industrial school to exercise control over a boy who has been paroled, in case custody of the boy has been awarded to a parent by judicial decree in divorce proceedings entered prior to the commitment of the boy to the institution.

Section 757*b* Revised Statutes, which sets forth the authority of the trustees to parole inmates, is in part as follows:

> "The trustees shall have authority to establish rules and regulations under which inmates may be allowed to go upon parole, *in legal custody, and under the control of the trustees*, and subject at any time to be taken to said school."

It is clear from the foregoing provision that a parole inmate remains within the legal custody and control of the board of trustees of the boys' industrial school. If there were any doubt as to the power of the board of trustees to place a boy in an environment considered by them to be best suited to his welfare until he reaches the age of twenty-one, the same would be resolved by consideration of the provisions of section 757 Revised Statutes, which is in part as follows:

> "The trustees, through the superintendent, have the same power to apprentice inmates as the directors of houses of refuge have, and in case of such apprenticeship the indentures shall be filed at the institution * * *."

In any event, the parent to whom the custody of the child has been granted by decree of court loses his right to such custody upon commitment to the boys' industrial school, and until final discharge therefrom; the legal custody during the period of commitment is in the authorities of the institution, and is not terminated as to such authorities by parole, indenture or any proceeding short of final discharge.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—PAROLE OFFICERS—EMPLOYMENT OF.

June 17, 1909.

HON. F. C. GERLACH, *Superintendent Boys' Industrial School, Lancaster, Ohio.*

DEAR SIR:—In reply to your communication of June 14th, I beg to say that I find no statutory provision expressly authorizing the employment of parole officers for the boys' industrial school. Provision is made, however, for paying the salaries and expenses of parole officers of the boys' industrial school in sec-

tion 9 of an act entitled "an act to provide for probation of persons convicted of felonies and misdemeanors," passed by the legislature May 9, 1908, 99 O. L. 339.

The legislature in enacting the provision in section 9 of the probationary act above referred to seems to have taken cognizance of the fact that the boys' industrial school did employ parole officers and therein made provision for their compensation. I assume, therefore, that inasmuch as the legislature has expressly provided for the payment of the salaries and expenses of parole officers for your institution that your board of managers will be authorized to employ as many parole officers as are deemed by them necessary to the proper conduct of the school.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Girls' Industrial School.)

GIRLS' INDUSTRIAL HOME—FINANCIAL OFFICER—RESIDENCE OF.

July 21, 1909.

HON. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "A resident of Delaware County has filed an application for appointment as treasurer of the girls' industrial home. Query: May such officer be a resident of the county in which the institution is located?"

In reply, I beg to call your attention to section 640 Revised Statutes, which requires the steward of the girls' industrial home to be a resident, at the time of his appointment, of a county other than that in which the institution is located.

Section 648, R. S., requires that:

> "The steward or other financial officer of each institution, before entering upon the discharge of his duties, shall give bond to the state of Ohio in the sum of $10,000, etc."

From the language used in the above quoted part of this section it is clearly the legislative intent that the qualifications of a steward shall apply to all financial officers of benevolent institutions. It is not, in my judgment, material whether the officer be designated as steward or treasurer, the fact remains that he is the financial officer of the institution and the statutes governing stewards control all such officers.

I am, therefore, of the opinion that the financial officer of the girls' industrial home, whether he be designated steward or treasurer, must be a resident of a county other than that in which the institution is located.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

GIRLS' INDUSTRIAL HOME—FINANCIAL OFFICER MAY NOT BE WOMAN.

August 13, 1909.

HON. S. D. WEBB, *Superintendent The Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—In your letter of August 11th you ask whether a woman is eligible to the position of financial officer of the girls' industrial home.

The financial officer of such a state institution, whose position is identical with that of steward, is designated as an officer by title in various sections of the Revised Statutes, such as sections 643, 648, 649, 650, etc., and his position is called an "office" in section 648 R. S. In addition to this, such steward or financial officer, in many ways, exercises a part of the sovereign power of the state of Ohio. For example: In section 643 R. S., 99 O. L. 382, it is made his

duty to "open all sealed proposals at a place open to the public, etc.;" section 649 R. S., 99 O. L. 383, provides that:

> "Under the authority and advice of the superintendent and in accordance with the regulations of the board of trustees or managers, the steward or financial officer of such institution shall purchase all its supplies, etc.,"

that the monthly estimate of expenditures shall be signed by the superintendent of the institution and by "the steward or financial officer thereof," and also that he "shall see that the grounds, buildings and all other property belonging to the state are properly preserved and kept in order, etc.;" other sections provide for additional statutory duties of such officer; and section 648 R. S. requires him to

> "give bond to the state of Ohio in the sum of $10,000, * * conditioned that he will faithfully and honestly perform the duties of his *office*."

For these reasons I believe that the steward or financial officer of your institution is an officer of the state of Ohio. The fact that he is appointed by your board of trustees does not change the situation, for an officer of the state may, under article II, section 27 of the Constitution, be appointed "in such manner as may be directed by law."

Article XV, section 4 of the Constitution provides that:

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

Article V, section 1 of the Constitution defines these qualifications as follows:

> "Every 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, * *."

I am, therefore, of the opinion that, under our Constitution and laws, as well as the ruling of our supreme court in the cases of State ex rel. v. McKinley, 57 O. S. 627, and State ex rel. v. Adams, 58 O. S. 612, a woman cannot hold the position of steward or financial officer of the girls' industrial home.

Yours very truly,

U. G. DENMAN,
Attorney General.

GIRLS' INDUSTRIAL HOME—AUTHORITY OF SUPERINTENDENT TO COMPEL BANK TO GIVE INFORMATION OF INMATES' DEPOSIT.

November 2, 1909.

HON. S. D. WEBB, *Superintendent Girls' Industrial Home, Delaware, Ohio.*

DEAR SIR:—In your letter of October 26th, receipt whereof is acknowledged, you request my advice concerning your right to demand from a bank in which an inmate of the girls' industrial home has funds on deposit, a statement of her account.

Section 779 R. S. defines the authority of the superintendent over the inmates of the home as follows:

> "The superintendent * * * shall have the general charge, and custody of the girls; he shall * * * discipline, govern, instruct, and employ and use his best endeavors to reform the girls in such manner as shall * * * secure the formation * * * of moral and industrious habits, and regulate thorough progress and improvement in their studies, trades and employments."

I find in the chapter relating to the institution of which you are superintendent no specific provision authorizing you or any of the officers of the institution to assume charge or control of the personal estate of any inmate, and in my judgment section 779 above quoted does not have this effect. While by analogy the provisions of said section might be said to impose upon the superintendent the rights and duties of a guardian of the persons of all of the inmates, I do not think that the guardianship could be said to extend to the estate of any of them.

It follows, therefore, that you cannot compel the bank in question to give you the information desired.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Ohio Penitentiary.)

OHIO PENITENTIARY—AUTHORITY OF BOARD OF MANAGERS TO BUY LAND UNDER GENERAL APPROPRIATION.

A general appropriation made to Ohio penitentiary for improving and modernizing same, but which makes no express or specific provisions for purchase of land may not be used for that purpose.

May 27, 1909.

The Board of Managers of the Ohio Penitentiary, Columbus, Ohio.

GENTLEMEN:—Your communication is received in which you submit the following inquiry:

Section 1 of House Bill No. 26 as passed by the last general assembly provides:

> "That the board of managers of the Ohio penitentiary is hereby authorized and directed to remodel, rebuild, alter and repair the penitentiary as follows:
>
> "(a) To tear out the three oldest cell blocks, containing about one thousand cells, and to erect new steel cell blocks, the cells to be equipped with sanitary conveniences, and to be built with regard to light, air and ventilation.
>
> "(b) To tear out the present dining room, kitchen, bakery, laundry, and bath house, and to erect and to equip new buildings for said purposes, to build and equip a cold storage plant for the needs of the institutions.
>
> "(c) To erect a central power plant to supply power, heat, and light.
>
> "(d) To tear out the present women's department, and to erect a new building or buildings for a women's department..
>
> "To make all such alterations and improvements as are necessary for modernizing the penitentiary, and for making it healthful and sanitary."

The general appropriation bill for the Ohio penitentiary for the year ending February 15, 1910, contains an item of two hundred thousand dollars ($200,000.00), for modernizing and improving the penitentiary, and to carry out provisions of Substitute House Bill No. 26.

Query: May the board of managers under section 1 of House Bill No. 26 as above set out, purchase additional lands upon which to erect a women's building and pay for the same out of said two hundred thousand dollars ($200,000.00) appropriated by the legislature.

In reply, I beg to say, section 22 of article 2 of the Constitution is as follows:

> "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 section of the Constitution requires a specific appropriation before money can be drawn from the state treasury.

Section 1 of House Bill No. 26, as above set out, after specifically enumerating in paragraphs a, b, c and d, the things to be done in remodeling, rebuilding, altering and repairing the penitentiary, contains a general provision "to make all such alterations and improvements as are necessary for modernizing the penitentiary, and for making it healthful and sanitary."

The appropriation is for improving and modernizing the penitentiary so as to carry out provisions of House Bill No. 26, and House Bill No. 26 makes no express or specific provision for the purchase of land.

I am, therefore, of the opinion that the two hundred thousand dollars ($200,000.00) appropriated is not available for the purchase of additional lands.

Very truly yours,

U. G. DENMAN,
Attorney General.

PENITENTIARY—SUSPENSION OF SENTENCE OF A PRISONER BY COURT.

Court cannot suspend sentence of prisoner in penitentiary after sentence has been started in execution.

June 17, 1909.

HON. T. H. B. JONES, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication is received with which you enclose two certified journal entries in the common pleas court of Scioto County, ordering the release of Smith Price and Washington Russell from the Ohio penitentiary. You inquire whether or not you should release said prisoners in accordance with said journal entries. Said journal entries are as follows:

> "Court of Common Pleas, Scioto County, Ohio.
>
> "State of Ohio, Plaintiff, versus Smith Price, Defendant. April Term A. D. 1909, June 10th, No. 4225. Charge—Counterfeiting.
>
> "On application of the defendant herein, Smith Price, and good cause being shown therefor, execution of the sentence heretofore given said defendant is now suspended during the good behavior of said defendant and during the pleasure of the court.
>
> "And the clerk of this court is hereby ordered and directed to certify a copy of this suspension to the warden of the Ohio penitentiary that the said Smith Price may be released from said institution."

> "Court of Common Pleas, Scioto County, Ohio.
>
> "State of Ohio, Plaintiff, versus Washington Russell, Defendant. April Term A. D., 1909, to-wit, June 10th. No. 4337. Charge—Horse-stealing.
>
> "On application of the defendant herein, Washington Russell, and good cause being shown therefor, execution of the sentence heretofore given said defendant is now suspended during the good behavior of said defendant and during the pleasure of the court.
>
> "And the clerk of this court is hereby ordered and directed to certify a copy of this suspension to the warden of the Ohio penitentiary that the said Washington Russell may be released from said institution."

The commitment papers in these two cases show that at the April term of said court in Scioto County, 1908, Smith Price plead guilty to the crime of counterfeiting and was sentenced to the Ohio penitentiary for the term of two years, and that said Price was received into the penitentiary on February 5, 1908.

That at the September term of said court in Scioto County, 1908, Washington Russell plead guilty to the crime of horse-stealing and was sentenced to the Ohio penitentiary for the term of three years. Said Russell was received into the Ohio penitentiary September 18, 1908.

By the terms of the journal entries above set out the court now orders the warden of the Ohio penitentiary to release said prisoners from said institution.

The supreme court has held in the case of Webber v. State 58 O. S., "that in a criminal case the court has the power to suspend the execution of the sentence in whole or in part unless otherwise provided by statute." The facts, however, in that case were that the order of suspension was a part of the sentence of the court. In other words, the court sentenced the defendant to pay a fine of $400 and to be confined in the county jail for a period of ten days, but added to said sentence the following words, "but execution of the sentence to jail is hereby suspended." The court afterward, on its own motion, set aside the suspension of the execution of the sentence of imprisonment and ordered the sheriff to carry said sentence into execution.

The decision of Judge Dillon of the common pleas court of Franklin County in the "Lee" case reported in the 3rd Nisi Prius (new series) at page 533, is based upon similar facts. That is, the defendant was convicted in the police court and at the time of sentence the judge suspended execution thereof during good behavior and at a subsequent term of said court revoked the suspension and sentenced the accused to be taken to the workhouse. The case came before Judge Dillon on application for a writ of habeas corpus and the court held, "in the absence of a statutory enactment to the contrary, the power of the court 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."

It will be observed, however, that in both of the cases above cited, the power of suspension was exercised by the court at the time of passing sentence and while the defendants were within the jurisdiction of the court. While in the cases under consideration the defendants were regulary sentenced and the sentence put into execution by the order of the trial court, and are therefore, by virtue of section 7330 Revised Statutes, no longer within the jurisdiction of the court.

Said section 7330 is as follows:

> "A person sentenced to the penitentiary shall within thirty days after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary by the sheriff of the county in which the conviction was had, and delivered into the custody of the warden of the penitentiary, together with a copy of the sentence of the court, there to be safely kept *until the term of his confinement expires or he is pardoned;* and if the execution of the sentence be suspended and the judgment be afterwards affirmed, the defendant shall be conveyed to the penitentiary within thirty days after the court directs the execution of the sentence."

The supreme court has held in State ex rel. v. Peters, 43 O. S. 629, that the

provisions of this statute operate upon and are a necessary part of every sentence.

Furthermore, the legislature has by the enactment of sections 7388-9 and 7388-10 vested the power to parole prisoners confined in the penitentiary in the board of managers of said institution, and the power to pardon, under the constitution, rests alone with the governor. It follows, therefore, that the decisions in the "Webber" and "Lee" cases afford no precedent for the action of the trial court in making the above orders for the reason:

First, the power of suspension in both cases was exercised before the execution of the sentence had commenced.

Second, the jurisdiction of trial courts over defendants in felony cases ceases by statutory enactment after execution of sentence has commenced.

I am, therefore, of the opinion that the trial court was without authority of law to make the orders contained in the above entries, and that you, as warden of the penitentiary, are not warranted in releasing said prisoners in accordance therewith.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OHIO PENITENTIARY—FEDERAL PRISONER—PAROLE OF BY BOARD OF MANAGERS.

A federal prisoner confined in Ohio penitentiary may be paroled by board of managers.

July 7, 1909.

Board of Managers of the Ohio State Penitentiary, Columbus, Ohio.

GENTLEMEN:—Your communication of June 27th, in which you ask my opinion on the following question received:

> "Can the board of managers of the Ohio penitentiary parole a federal prisoner confined therein."

In reply thereto, I beg leave to submit the following opinion:
Section 5539 United States Compiled Statutes (1901) reads as follows:

> "Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory."

Section 7388-9 Revised Statutes of Ohio reads in part as follows:

> "That said board of managers shall have power to establish rules and regulations under which any prisoner who is now, or hereafter may be, imprisoned under a sentence other than for murder in the first or second degree, who may have served a minimum term provided by

law for the crime for which he was convicted (and who has not previously been convicted of felony), and served a term in a penal institution, and any prisoner who is now, or hereafter may be, imprisoned under a sentence for murder in the first or second degree, and who has now, or hereafter (shall have served under said sentence twenty-five years), may be allowed to go upon parole outside of the buildings and inclosures, but to remain, while on parole, in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of said institution; * * *"

Johnson J., delivering the decision of the court in State ex rel. v. Peters, 43 O. S. 650, in discussing the question of what a parole is under section 7388-9 R. S. O., uses the following language:

"Section 8 (of the act in question, 82 O. L. 236) does not purport to discharge the prisoner or shorten his term of service. It simply authorizes the board of managers to allow the prisoner to go outside the buildings and inclosures of the penitentiary, but he is to remain in their legal custody, and under their control. Neither is it a commutation of the sentence; commutation is the 'change of a punishment to which a person has been condemned into a less severe one.' Bouvier Law Dict. It is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit. Ex parte Victor, 31 O. S. 206."

From a consideration of the above quoted sections and of the definition of "parole" as given in the above citation from State v. Peters, it would appear that a prisoner paroled from the penitentiary is still "confined therein," and "under the control of the officers having charge of the same, under the laws of such state" within the meaning of section 5539 United States Compiled Statutes (1901).

It appears to have been the intention of congress in enacting section 5539 supra to give to the officers placed in control of state penitentiaries, the same authority over federal prisoners as is given such officers over state prisoners by the statutes of the state, and this is shown by the use of the terms "such criminal shall in all respects be subject to the same discipline and *treatment* as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated."

I am, therefore, of the opinion that your board has the power to parole a federal prisoner confined in the penitentiary in the same manner as such power would be exercised in the case of a state prisoner.

I am further strengthened in this opinion by the decision of Taylor J. in re Joseph Naples, where he held that a federal prisoner confined in the workhouse of the city of Cleveland could be paroled by the board of public service of that city. This decision was rendered in the district court of the United States for the Northern District of Ohio, Eastern Division.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OHIO PENITENTIARY—INSANE PRISONER REMOVED TO STATE HOSPITAL—CREDIT ON TERM.

Insane prisoner receives credit for that part of sentence confined in state hospital for insane.

October 1, 1909.

HON. T. H. B. JONES, *Warden, The Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts:

> On May 23, 1907, one Bertha Harris was received at the Ohio Penitentiary to serve a term of two years. While confined here she became insane and, in the absence of accommodations in the penitentiary for insane female prisoners, she was transferred, in accordance with section 7428 of the Revised Statutes, to the Columbus State Hospital. She remained in said hospital until September 27, 1909, upon which day she was returned to the penitentiary as is provided in section 7429 of the Revised Statutes. In the meantime, on December 28, 1908, the short time of her two-year sentence expired. Query: Is said prisoner entitled to credit for the time she was confined in the Columbus State Hospital?

In reply I beg to say that sections 7428 and 7429 of the Revised Statutes are as follows:

> "When a convict becomes insane, the warden shall give notice to the physician for the penitentiary who, upon the receipt of such notice, shall forthwith examine such convict, and if upon such examination he is of the opinion that the convict is insane, he shall certify the same to the warden, who shall forthwith confine such lunatic or insane convict in the insane department of the penitentiary. Should it be deemed necessary after such convict is put in such department, evidenced by the certificate of the superintendent of the Columbus state hospital and such physician, the board of managers of the penitentiary may direct and order, and thereupon it shall be the duty of such warden to remove such lunatic or insane convict to the Columbus state hospital, and it shall be the duty of such superintendent to set apart a portion of such asylum wherein such lunatic or insane convict shall be confined as may be necessary.
>
> "The physician for the penitentiary shall give such medical and surgical treatment to all lunatic or insane convicts while confined in the penitentiary as the nature of their case requires; and all lunatics or insane convicts while confined in the Columbus state hospital, shall receive such care, attention and medical treatment, and be subject to such rules as may be provided for other inmates therein; and whenever a certificate is issued to the warden by the physician of the penitentiary that any lunatic or insane convict confined in the insane department of the pentitentiary, or whenever a certificate is issued to the warden by the superintendent of said state hospital that any lunatic or insane convict removed and confined in said state hospital, as provided in the next preceding section, is restored to his proper mind, or so far restored that it is considered safe to put him at labor under his sentence, the warden shall again put him at hard labor according to his sentence."

I understand that all of the provisions of these two sections were complied with in the commitment to and return from the Columbus state hospital.

Section 7429 provides that when any lunatic or insane convict confined in the insane department of the penitentiary or has been removed and is confined in the Columbus state hospital "is restored to his proper mind, or so far restored that it is considered safe to put him at labor under his sentence, the warden shall again put him at hard labor according to his sentence." In other words, it is assumed that, while the convict is insane and confined in the insane department of the penitentiary or in the said state hospital, that such convict shall be relieved from the performance of the hard labor imposed by his sentence but the statute contains no provision that a reduction shall be made from his time by reason of his insanity. In my judgment a prisoner is entitled to credit on his sentence for the time he is confined in the insane department of the penitentiary or in said state hospital, and I understand that this has always been the rule in cases where insane convicts have been confined in the insane department of the penitentiary.

The provision in section 7429 that "when a convict is restored to his proper mind, or so far restored that it is considered safe to put him at labor under his sentence, the warden shall again put him at hard labor according to his sentence" applies alike to insane convicts confined in the insane department of the penitentiary and insane convicts confined in the Columbus state hospital.

I am, therefore, of the opinion that the prisoner Bertha Harris is entitled to credit on her sentence for the time that she was confined in the Columbus state hospital.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Dayton State Hospital.)

VITAL STATISTICS—COMPLIANCE WITH LAW BY STATE INSTITUTIONS.

An act to establish bureau of vital statistics and to provide for registration of births and deaths within state must be complied with by state institutions.

April 1, 1909.

DR. A. F. SHEPHERD, *Superintendent Dayton State Hospital, Dayton, Ohio.*

DEAR SIR:—I am in receipt of your letter in which you inquire if institutions conducted by the state of Ohio and burying bodies in their own cemetery on the institution grounds are subject to the regulations of "an act to establish a bureau of vital statistics and to provide for the prompt and permanent registration of all births and deaths occurring within the state of Ohio," as found in 99 O. L. 296.

Replying thereto, I beg to say that section 1 of this act provides that the secretary of state shall have "charge of the state system of registration of births and deaths * * * and shall be charged with the thorough and uniform enforcement of this act throughout the state." The section further states that "no system for the registration of births and deaths shall be continued or maintained in any of the several municipalities of this state in conflict with any of the provisions of this act."

Section 5 of the act provides that:

> "The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of, or removed from or into any registration district, until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in which the death occurs."

Section 18 provides that:

> "It shall be the duty of the local registrar to supply blank forms of certificates to such persons as require them and he shall carefully examine each certificate of birth or death, when presented for record, to see that it has been made out in accordance with the provisions of this act and the instructions of the state registrar * *."

Section 21 of said act provides:

> "Any registrar, deputy registrar, or subregistrar who shall neglect or fail to enforce the provisions of this act in his district * * * shall be deemed guilty of a misdemeanor, * * *."

Section 22 of said act provides:

> "Local registrars are hereby charged with the strict and thorough enforcement of this act in their districts under the supervision and direction of the state registrar."

There is no section in this act wherein it exempts state institutions from complying with its provisions. From the above quoted and other sections, I am of the opinion that in event of births and deaths at the Dayton state hospital the provisions of this act should be complied with.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROBATE COURT—TIME OF ISSUING WARRANTS TO CONVEY INSANE PERSON TO STATE INSTITUTION.

Probate court may not issue "warrant to convey" an insane person until after application to superintendent of asylum for admission of patient.

October 20, 1909.

DR. A. F. SHEPHERD, *Superintendent Dayton State Hospital, Dayton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Has a probate court, under section 705 R. S., the authority to send a patient to the state hospital of the district in which the court is situated without first making application to the superintendent of the state hospital and transmitting to him a copy of the medical certificate and receiving from him advisement as to whether the patient can be received, and the time at which he will be received?

In reply I beg to say section 705 of the Revised Statutes is in part as follows:

> "The probate judge, upon receiving the certificate of the medical witness, made out according to the provisions of the preceding section, shall forthwith apply to the superintendent of the asylum for the insane, situated in the district in which such patient resides; he shall, at the same time, transmit copies under his official seal of the certificate of the medical witness, and of his findings in the case; 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; the probate judge, when advised that the patient will be received, shall forthwith issue his warrant to the sheriff commanding him to forthwith take charge of and convey such insane person to the asylum."

Under the provisions of this section, as quoted, the probate judge is without authority to issue a "warrant to convey" until after he has made application to the superintendent of the district asylum for the admission of the patient. In other words, the probate judge must first learn whether or not the asylum has accommodations for the patient before issuing the warrant to the sheriff.

I assume from your letter there has been some conflict in the report of the newspapers relative to an opinion recently furnished the superintendent of the Massillon state hospital. That opinion involved the question as to the

authority of the superintendent of the asylum to refuse to accept a patient regularly adjudged insane solely upon the ground that said superintendent believed the patient not to be insane but imbecilic, and in no wise related to the provisions of section 705.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Massillion State Hospital)

MASSILLON STATE HOSPITAL—FINDING OF PROBATE COURT AUTHORITY TO RECEIVE PATIENT.

October 13, 1909.

DR. HENRY C. EYMAN, *Superintendent Massillon State Hospital, Massillon, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "On the 30th day of August, application was made for the admission of one Herbert Koch, of Mahoning county, alleged to be insane. From the history of the case, and the medical papers, I was convinced that Koch was an imbecile and rejected the application. Koch had been an inmate of the institution for the feeble minded at Columbus, and his history is one of imbecility and incorrigibility. The probate judge and physicians who were called in to examine Koch claim that he is now insane and not imbecilic.
>
> "Query: Are imbeciles eligible to state hospitals for the insane?"

In reply I beg to say section 674*f*, which is found in chapter 7, title 5, of the Revised Statutes, which section provides for the admission of feeble minded adults into the institution for feeble minded youth, is as follows:

> "Adults who may be determined to be feeble minded, and who are of such inoffensive habits as to make them proper subjects for classification and discipline for admission in an institution for the feeble minded, can be admitted, on pursuing the same course of legal commitment as govern admission to the state hospitals for the insane."

This section expressly authorizes the admission of adult imbeciles into the institution for feeble minded youth, provided their habits are such "as to make them proper subjects for classification and discipline." I assume, however, that from your statement of fact that Herbert Koch has been adjudged to be insane by a proper proceedings in the probate court of Mahoning county.

If this be true, I am of the opinion that it is your duty to receive him, provided that Mahoning county's "quota" is not already taken up. I do not believe you can go back of the finding of the probate court. If there be a question, and I assume there is, as to whether or not the said Koch is insane or imbecilic, proper proceedings should be had in a court of competent jurisdiction to determine that question, but until it is determined that he is imbecilic and not insane, it is, in my judgment, your duty to permit him to remain under the order of commitment in your institution.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Ohio State Reformatory.)

OHIO STATE REFORMATORY—ARREST WHILE ON PAROLE FOR OFFENSE COMMITTED PRIOR TO COMMITMENT AND AGAIN SENT TO REFORMATORY—AUTHORITY OF BOARD OF MANAGERS TO AGAIN PAROLE.

May 4, 1909.

HON. FRED S. MARQUIS, *Secretary Board Managers Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—A few days ago you submitted to me in person the following statement of facts, together with a request for an opinion thereon:

> "James Taylor, a legally committed inmate of the Ohio state reformatory was paroled to employment at Somerset, Ohio. While out under parole certain officers arrested him and took him to Cincinnati to answer for an offense alleged to have been committed before his commitment to the reformatory and for which no indictment had been secured up to the time of his release on parole. The court finally decided that under the law Taylor should be surrendered to the custody of the Ohio state reformatory, but coupled with this the condition that he must be kept therein for the maximum time.
>
> Mr. Williams, representing the attorney general's office, thought best not to accept him under these conditions and advised to take the case to the circuit court. In the meantime, however, Taylor plead guilty to the charge against him, but claimed that it was a part of the same offense for which he was originally committed. On this plea of guilty Judge O'Connell sentenced him to the Ohio state reformatory, stating to the field officer, Mr. Thomas, that he had no wish in the matter as to the length of time that he should stay, that that matter was with the board of managers. Under this sentence Taylor was returned to the state reformatory.
>
> Query: Is Taylor, under the law, now subject to parole?

In reply, I beg to say section 7388-29 of the Revised Statutes contains the following provision:

> "The said board of managers shall also have the authority to establish rules and regulations under which prisoners within said Ohio state reformatory may be allowed to go upon parole in *legal custody* and under the control of the board of managers and subject at any time to be taken into the enclosure of said reformatory:"

Under this provision I am of the opinion that the arrest, arraignment and sentence of the said Taylor while on parole was without authority of law and that the legal status of the prisoner has not been effected thereby. It follows, therefore, that the prisoner is subject to an immediate parole, if the same is deemed advisable by the board of managers of said reformatory.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO STATE REFORMATORY—TRANSFER OF CONVICT FROM PENITENTIARY BY GOVERNOR—AUTHORITY TO PAROLE.

Governor not authorized to transfer convict from penitentiary to state reformatory. If such convict transferred to be governed by laws applicable to convicts in penitentiary so far as they relate to commutation of imprisonment.

December 15, 1909.

HON. F. S. MARQUIS, *Secretary Board of Managers, Ohio State Reformatory, Mansfield, Ohio.*

DEAR SIR:—You have submitted to this office an order of the governor whereby it is ordered that one Daniel Rosenbecker, convicted of the crime of manslaughter and sentenced to imprisonment in the penitentiary for a period of twenty years be transferred to the Ohio state reformatory. Said order contains this provision:

> "Therefore I, Andrew L. Harris, governor of the state of Ohio, by virtue of the authority in me vested, do hereby direct you to receive the said Daniel Rosenbecker into the Ohio state reformatory, there to be detained *during the remainder of the term of his said sentence to the Ohio penitentiary.*"

You inquire whether or not under the above underscored language the said Rosenbecker is eligible to parole in your institution.

In reply I beg to say the only provision for the transfer of prisoners from the Ohio penitentiary to the Ohio state reformatory is contained in section 7388-31 Revised Statutes, and it is evident from the language used in the order that the transfer was based upon the authority granted in this section. Said section is as follows:

> "Whenever the board of managers shall have so far completed the construction of any buildings and cells of the Ohio state reformatory (so) as to properly accommodate and safely keep any desired number of convicts *whose labor may be profitably employed in and upon the grounds and buildings of said reformatory*, they shall have authority to make requisitions upon the managers of the Ohio penitentiary, who shall select the number required, from the youthful, well behaved and most trusty class of convicts, whose record shall be subject to the approval of said board making such requisition, and transfer them to said reformatory for such purpose of labor, education and treatment, under the rules and regulations thereof; and the board of managers are hereby authorized to receive and detain during the term of their sentence to the Ohio penitentiary, such prisoners so transferred; and the laws applicable to convicts in the Ohio penitentiary so far as they relate to the commutation of imprisonment for good conduct, shall be applicable to said convicts when transferred under this section; said managers also, upon the order of the governor, shall receive from the Ohio industrial school for boys such of its inmates as he may deem advisable to transfer to the Ohio state reformatory, and hereafter no prisoner shall be transferred from the Ohio penitentiary to the boys' industrial school."

It will be observed that this section authorizes the board of managers of the Ohio state reformatory to make requisitions upon the managers of the

Ohio penitentiary for any desired number of convicts whose labor may be profitably employed in and upon the grounds and buildings of said reformatory. This section also enjoins upon the managers of the Ohio penitentiary when such requisitions are made to select the number required "from the youthful, well behaved and most trusty class of convicts whose record shall be subject to the approval of said board making such requisition, and transfer them to said reformatory for such purpose of *labor, education and treatment,* under the rules and regulations thereof;"

This section also provides that the board of managers of the Ohio state reformatory "are hereby authorized to receive and detain during the term of their sentence to the Ohio penitentiary such prisoners so transferred; and the laws applicable to convicts in the Ohio penitentiary so far as they relate to the commutation of imprisonment for good conduct, shall be applicable to said convicts when transferred under this section;"

Nothing in this section contained authorizes the governor to transfer prisoners from the Ohio penitentiary to the Ohio state reformatory, and from a careful reading of the entire section I am led to believe that the legislature contemplated in its enactment that the transfer of convicts from the penitentiary to the reformatory, as therein provided, should only be exercised by the board of managers of the Ohio state reformatory during the construction, erection and completion of said reformatory, and that it was not intended that the board of managers of the Ohio state reformatory should, or could, make requisitions upon the board of managers of the Ohio penitentiary for the transfer of convicts after the Ohio state reformatory was completed. The language of the section is that the requisition may be made for the transfer of convicts "whose labor may be profitably employed in and upon the grounds and buildings of said reformatory," thereby clearly indicating that the transfer was not for the purpose of reformation, but on the ground of financial economy in the construction of the reformatory. That this order is based upon this section is apparent, not only from the language therefrom above quoted, but also from the following language, which is a repetition verbatim of one of the provisions in said section, to-wit: The convict is to be transferred to the Ohio state reformatory "for labor, education and treatment under the rules and regulations thereof." It is clear to me that a convict transferred under this section is not subject to parole under the rules and regulations of your institution, but that "the laws applicable to convicts in the Ohio penitentiary so far as they relate to the commutation of imprisonment for good conduct shall be applicable to said convicts when transferred under this action."

The trouble with the whole matter, in my judgment, is that the governor was not authorized under this section to order the transfer of said convict from the Ohio penitentiary to the Ohio state reformatory. However, if said prisoner is permitted to remain in your institution he will not be entitled to the privilege of parole, but will be governed by the rules of the Ohio penitentiary relative to the commutation of imprisonment for good conduct, and must be detained during the remainder of the term of his sentence to the Ohio penitentiary as set out in the order of transfer.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Ohio University.)

OHIO UNIVERSITY—CONDEMNATION OF LAND.

April 13, 1909.

HON. J. M. WELCH, *Trustee Ohio University, Athens, Ohio.*

DEAR SIR:—Replying to your letter of April 2nd I beg to state that I find no authority of law whereby the board of trustees of the Ohio University, or any state authority in behalf of such university, may appropriate private property for the use of the institution, and, in my opinion, such authority does not exist.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Ohio State University.)

OHIO STATE UNIVERSITY—TREASURER OF BOARD OF TRUSTEES—AMOUNT OF BOND REQUIRED.

August 9, 1909.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Replying to your letter of August 3d, in which you request my opinion respecting the amount of the bond which the treasurer of the board of trustees of the Ohio state university must furnish before entering upon the duties of his office, I beg to state that section 4105-14 R. S., clearly provides that the amount of such bond must be determined by the board of trustees, but that it shall, in no event, be for a less sum than will probably be under the control of the treasurer "in any one year." While it might be more reasonable to require that the bond should equal the probable maximum amount in the hands of the treasurer at any one time, still this is not the clear purport of the section, and I am of the opinion that the total amount passing through the hands of the treasurer in any one year, as estimated by the board, should determine the amount of the bond. If, as a matter of fact, such an amount is approximately three hundred thousand dollars, as suggested in your letter, that, in my judgment, should be the penal sum of the bond. Very truly yours,

W. H. MILLER,
Assistant Attorney General.

(To the Ohio Co-operative Topographic Survey.)

GEOLOGICAL SURVEY—AMOUNT GOVERNOR MAY AUTHORIZE TO EXPEND.

Governor may not authorize out of appropriation for co-operation with United States Geological Survey an amount greater than apportioned to Ohio by Department of Interior of Federal Government.

May 21, 1909.

PROF. C. E. SHERMAN, *Inspector, Ohio Co-operative Topographic Survey, Columbus, Ohio.*

DEAR SIR:—You submit to this department the question as to whether the governor may authorize the expenditure, out of the appropriation for co-opera-

tion with the United States Geological Survey, etc., of an amount greater than that apportioned to the state of Ohio by the department of the interior of the federal government.

My attention is directed to the provision of the appropriation act, passed by the last general assembly, viz:

> "For co-operation with the U. S. geological survey, in the preparation and completion of a contour topographic survey and map of this state balances and.....$20,000.00. To be paid upon vouchers approved by the governor, and the governor is hereby authorized to see that such work is carried on as heretofore arranged * * *."

You have handed me a proposed agreement between the governor of Ohio and the director of the U. S. geological survey, in furtherance of the above quoted provision, and which I understand to be substantially identical with the agreements that have heretofore been made annually between these two contracting parties for the same purpose. This agreement specifies that the amounts expended by the state and the federal government respectively shall be equal and shall not exceed $15,000, the amount allowed on the work in the state of Ohio by the department of the interior. I am informed that the equality between the amount expended by the two governments has existed customarily from year to year since the year 1900, the date of the first appropriation by the general assembly of this state for the purpose in question. The appropriation then made was in the following terms:

> "For co-operation with the U. S. geological survey in the preparation and completion of a contour topographic survey and map of this state * * * and the governor is hereby authorized to arrange with the director * * of the U. S. geological survey concerning this survey and map * * * the sum of $25,000, provided * * * that the state shall pay not to exceed one-half of the cost of survey *as completed.*" 94 O. L. 266.

It may have been the intention of the general assembly in making this initial appropriation to limit the total amount to be expended under this and all succeeding appropriations for this purpose to an amount equal to that expended by the federal government. Inasmuch, however, as the appropriation of 1900 was for the succeeding fiscal year only, and the above quoted limitation applied specifically to the expenditure of that appropriation only, I do not believe that such limitation governs the expenditure of subsequent appropriations.

The provision above quoted from the appropriation act of 1908, to the effect that the governor is authorized to see that the work is carried on "as heretofore arranged with the representatives of the U. S. geological survey" evidently refers to the customary division of expenditures between the state and the federal government and to the equality thereof. In view of the intention of the general assembly as evinced in this provision I would advise that the governor should not enter into a contract whereby a sum greater than that allowed by the federal government for conducting the work of the topographic survey within the state of Ohio during the current year would have to be expended.

In my judgment, therefore, the governor may not authorize the expenditure of the full appropriation of $20,000 unless the director of the U. S. geological survey agrees to expend an equal sum on behalf of the federal government.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Ohio Soldiers' and Sailors' Orphans' Home)

OHIO SOLDIERS' AND SAILORS' HOME—MECHANICS' LIEN LAW NOT APPLICABLE TO STATE CONTRACTS.

March 16, 1909.

To the Board of Trustees, Ohio Soldiers' and Sailors' Home, Sandusky, Ohio.

GENTLEMEN:—Your communication is received in which you submit, in substance, the following statement of fact, and several inquiries relative thereto, together with a request for an official opinion thereon:

> On the ..... day of ....., 1908, the trustees of the Ohio Soldiers' and Sailors' Home, acting for the state of Ohio, entered into a contract in writing with the William H. Seddon Plumbing & Heating Company, for the erection of a new steam heating plant, to be used at the home, a copy of which contract is herewith submitted. The contractor entered upon the performance of his contract and, in furtherance of the same, employed the Pittsburg Gage & Supply Company to furnish part of the material and perform part of the labor. Before any liens were filed the said contractor made an arrangement with F. L. Packard, architect for the home, and the Pittsburg Gage & Supply Company, that when the work of said last named company was completed, an estimate would be made for it, and when such estimate was approved by the trustees it would be turned over to said Pittsburg Gage & Supply Company, who would draw the money on the same, the amount to be charged to the contractor. The trustees of said home took no official action on this agreement.
>
> Before the Pittsburg Gage & Supply Company completed its work other subcontractors filed claims against the board, under the provisions of the mechanics' lien laws of Ohio. The contractor has about completed his work and there is about $6,000 still due him, provided no deduction is made for delay. The contract required the work to be completed by November 1, 1908, and provides a forfeiture of $15.00 per day for all delay after said date. The work was not completed prior to March 1, 1909. Query:
>
> 1. Do the mechanics' lien laws of Ohio apply to public contracts, such as is herewith submitted?
>
> 2. If said lien laws do apply to this contract, was the arrangement made with the contractor, architect and Pittsburg Gage & Supply Company, such as to work, an equitable assignment in favor of said last named company and take precedence of the liens filed after it was made?
>
> 3. In what manner shall the trustees make settlement with the contractor?
>
> 4. Is that part of the contract providing for the forfeiture of $15.00 per day for all delay after the first of November, 1908, valid and binding; or have the trustees the right to use their discretion in the matter?
>
> 5. If the trustees exact the forfeiture, or any part of it, does the money go into the home fund or should it be turned into the state treasury?

In reply I beg to say that inasmuch as the first three questions submitted involve the application of the mechanics' lien laws of Ohio to contracts made under the public building statutes, they will be regarded as one inquiry and so answered.

The contract entered into between the board of trustees of the Ohio Soldiers' and Sailors' Home and the W. H. Seddon Plumbing & Heating Company, as evidenced by the copy enclosed, conforms in form and substance to the provisions of sections 782 to 793 R. S., inclusive. Sections 788, 789 and 790 provide the method by which the contractor or contractors are to receive payment on estimates of material furnished and labor performed, which is in substance as follows:

> A detailed estimate of the various kinds of labor and materials performed and furnished under such contract or contracts with the amount due for each kind of labor and material, and the amount due in the aggregate, which estimate shall be based upon an actual measurement of the labor and material so performed and furnished, and shall, in all cases, give the amount of the preceding estimate or estimates and the amount of labor performed and material furnished since the last estimate, *which shall be delivered to the contractor or contractors entitled thereto.* The auditor of state on the receipt of such estimate, so certified and approved *shall give to the person or persons entitled thereto* a warrant on the treasurer of state for an amount shown by such estimate or estimates to be due; and the treasurer of state shall pay the warrant issued by the auditor of state under and by virtue of the provisions of this chapter.

Under the contract entered into, the William H. Seddon Plumbing & Heating Company, of Columbus, Ohio, is the "contractor," and the board of trustees of the Ohio Soldiers' and Sailors' Home is the "owner," and under the terms of said contract the contractor agrees to provide:

> "all material and perform all work mentioned in the specifications or shown on the drawings as prepared by said architect for the completion of the mechanical equipment for the Ohio Soldiers' and Sailors' Home, Sandusky, Ohio."

In other words, the William H. Seddon Plumbing & Heating Company is to furnish all the material and perform all the work and are to receive therefor the sum of $13,280.

From the above statement of fact no subcontracts were entered into by the said board of trustees. The mechanics' lien laws of Ohio do not apply to contracts of this nature for the reason that suits could not be maintained against the state for their enforcement.

I am, therefore, of the opinion that the board of trustees are not authorized to furnish estimates, nor is the auditor warranted in issuing vouchers thereon to any person or persons other than contractor or contractors named in said contract.

The contract in question, however, contains this provision:

> "If at any time there should be any evidence of any lien or claim for which, if established, the owner of the said premises might become liable and which is chargeable to the contractor, the owner shall

have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify him against such claim or lien."

Under this provision of the contract I am of the opinion that the board of trustees may deduct from the estimate yet due the contractor an amount sufficient to cover all claims made by subcontractors that are yet unpaid. Such sums of money so deducted from the estimate may not, however, be paid to subcontractors or lien holders until after an appropriation has been made by the legislature for the payment of their claims.

The clause in the contract providing for the forfeiture of $15.00 may, or may not be, enforced, in the discretion of the board of trustees. All money received on account of such forfeiture, however, may not be placed into the home fund of the institution, but must be turned into the state treasury.

Very truly yours,

U. G. DENMAN,
Attorney General.

OHIO SOLDIERS' AND SAILORS' HOME—MAY NOT RELEASE CONTRACTORS.

One who contracts with the state sailors' and soldiers' home may not be released because such contract is not to his advantage.

October 15, 1909.

The Board of Trustees, Ohio Soldiers' and Sailors' Home, Sandusky, Ohio.

GENTLEMEN:—In your communication to this department you state that your board of trustees last spring, after competitive bidding, awarded a contract to the Kenton Creamery Company, the lowest bidder, under which it agreed to furnish butter for a certain period at twenty-five cents a pound, and that this company gave bond for the performance of such contract. You state that the company, after complying with such contract to date, now desires to be released from it for the reason that the market price of butter is now in excess of twenty-five cents per pound, and that the company will suffer loss if compelled to comply with the terms of such contract. You ask what power, if any, your board of trustees has to release the Kenton Creamery Company from its obligation under this contract.

Sections 674-1 et seq., provide certain powers and duties for the government of the board of trustees of the Ohio Soldiers' and Sailors' Home, and section 674-4 provides that:

> "Such trustees * * * shall be governed by the provisions of the general laws relating to the state benevolent institutions, except as otherwise provided in this act."

Sction 643 R. S., relating to the duties of trustees of state benevolent institutions, provides that:

> "Whenever, in the opinion of any board of trustees, the interest of the state, and of the institution under their charge, will be subserved thereby, said board shall advertise for sealed bids to furnish at the in-

stitution any article or articles needed for its use, at such times and in such quantities as the superintendent may, from time to time, direct, each bid to be accompanied with a bond in such amount as the board shall direct, with good and sufficient surety that the bidder, if the contract is awarded to him, will faithfully fulfill and perform the contract on his part. All such contracts shall be awarded to the lowest bidder, and all provisions and supplies thus furnished shall be of good and wholesome quality, or the same may be rejected by the superintendent."

When a contract has been entered into under these provisions of law, the first duty of the board of trustees is to secure its faithful performance. The board has only those powers and duties which are specifically granted to it by law, or which are necessary or incident thereto, and has no power to modify or change a contract once let, or to release the contractor from his obligations. Should the contractor refuse to fulfill his contract, the board of trustees then has the right to purchase butter either with or without contract at such price as they may be able to purchase it, and may bring suit as provided in section 630 R. S., against the contractor and his bondsmen for the difference between the contract price and the price which the board of trustees were compelled to pay during the remainder of the term of such contract. The contractor who enters into a contract for the purpose of gain to himself cannot be heard to complain in case the contract turns out to be to the advantage of the party from which he hoped to gain profit.

Yours very truly,

U. G. DENMAN,
Attorney General.

OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—APPROPRIATION TO.

September 30, 1909.

HON. E. D. SAWYER, *Superintendent Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR:—I have received an inquiry from your engineer, Mr. Wingard, relative to the remodeling of your old power plant and converting the same into cooling rooms for storage and rooms for ice machinery, etc. Mr. Wingard states that it is your purpose to do all the work of remodeling the building yourselves without the letting of any contracts, and submits the inquiry as to whether or not the appropriation of $4,000 made by the last legislature for an ice plant is available for this purpose, and also whether or not your board would be required to comply with the building statutes in the performance of this work.

In reply I beg to say that a compliance of the building statutes is only required where the cost of the improvement is in excess of $3,000. Inasmuch as you propose to perform all the work yourselves, I assume the only contracts to be let will be for materials, and these contracts need not comply with the provisions of the building statutes if, as stated above, they do not exceed $3,000.

By reference to the general appropriation bill I find this item in the appropriation for the Ohio Soldiers' and Sailors' Orphans' Home, "Ice plant, $4.000." From the language used in this item it might be inferred that the legislature

intended that the $4,000 should cover the cost of the entire plant and not to be used entirely for the purpose of constructing the building, and then asking an additional appropriation for the machinery. However, that is a question for the finance committee. There is no question, however, but that this appropriation is available for the remodeling of the building under the plan proposed, and that the public building statutes do not apply thereto.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

(To the House and Members of the General Assembly)

(To the Senate)

MUNICIPAL CORPORATION OFFICERS—EFFECT OF ACT IN 99 O. L. 568.

Committee to appoint civil service commissioners under 99 *O L.* 568 *may not meet until January* 1, 1910.

Civil service examination prescribed by commissioners under said act may not be exacted of employes in police and fire departments, serving prior to January 1, 1910*; persons employed to fill vacancies and newly created positions as well as positions in the classified service as defined by said act may be required to take such examination after said date; in other departments all employes subject to removal until January* 1, 1910, *after which date classified service as to such other departments, provided in said act, will become effective.*

Members of boards of public service continue to serve until January 1, 1910, *at which time director of public service provided by* 99 *O. L.* 568 *must be appointed.*

Ordinance fixing salary of municipal officers in accordance with provisions in act of 99 *O. L.* 568 *may be passed at any time.*

February 13th, 1909.

HON. GEORGE K. CETON, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 9th in which you ask my opinion on the following questions:

1. If the bill is not amended, at what times does the committee consisting of the president of council, the president of the sinking fund trustees, and the president of the board of education meet to name the civil service commission?

2. The bill provides that the commission shall begin operations on August 1st. Do the employes who are now serving retain their present positions or are they required to take the examinations provided for by the civil service commission? If they retain their positions does the civil service commission only fill vacancies?

3. When is the director of public safety and the director of public service to be appointed under the bill, and when do the present board of public service and public safety go out of office?

4. When should the council pass an ordinance fixing the salaries of the various officials, and provide for the other matters under the law?

5. If the present board of public service and the board of public safety are affected by the provisions of the Paine bill that the same goes into effect August 1st; for what period of time is the director of public service and the director of public safety provided for in the Paine bill to be appointed, and when do their terms of office expire?

To answer these questions involves a construction of H. B. No. 914, commonly known as the "Paine bill," passed at the last session of the general assembly, and amending sections 129, 131, 138, 139, 140, 141, 144, 145, 146, 147, 153, 154, 157, 158, 159, 160, 161, 162, 163, 164, 165 and 227 of the municipal code of 1902, and found in volume 99 O. L. 562 to 568, inclusive.

Section 3 of this act, page 568 (99 O. L.), provides as follows:

"This act shall take effect and be in full force on and after August 1, 1909, provided that all elected officers shall serve out the terms for which they have been elected, except that the provisions of sections 157, 158, 159, 160, 161, 162, 163, 164 and 165 shall be in full force and effect from and after January 1, 1910."

From the above section 3, as quoted, it will be seen that sections 157 to 165, inclusive, as amended by the Paine bill, do not take effect until January 1st, 1910. These sections, as so amended, constitute the president of the board of education of city school districts in which the city is located; the president of the board of sinking fund commissioners, and the president of council, a commission which shall appoint three resident electors of the city to be known as civil service commissioners and prescribe the rules under which such civil service commission shall work.

1. The answer to your first question, therefore, is that the committee, consisting of the president of council, the president of the sinking fund trustees and the president of the board of education, will come into existence on January 1st, 1910, and it will thereupon be their duty to, at that time, appoint the civil service commissioners.

2. In your second question you state that the Paine bill provides that the commission shall begin operations on August 1, 1909. From what has been said above you will see that this is not correct, because of the fact that section 157, as amended in the Paine bill, and which creates the commission which shall appoint the civil service commissioners, does not take effect until January 1, 1910. Answering your second question, therefore, I am clearly of the opinion that the employes in the police and fire departments of any city, who are now serving, will retain their present positions and cannot be required to take the examinations provided for by these civil service commissioners; and that these civil service commissioners will only hold examinations to fill vacancies which may occur from any cause, or to fill newly created positions and positions within the classified service, as fixed by the Paine bill, aside from the police and fire departments.

Section 166, as amended in the Paine bill, prevents the removal of any person serving in the police or fire department, except in accordance with section 152 of the municipal code, as it now stands, this section not being amended by the Paine bill. The only departments now under civil service in cities are the police and fire departments. In all other departments of the city the head of each department respectively is permitted, under the present law, to remove any employe at any time, and this will continue to be the case with respect to these employes in such other departments, until their places shall be thereafter filled from the classified service, as extended by the Paine bill.

Section 158, as amended in this bill, seems to extend the classified service beyond what it now is, so that after January 1, 1910, certain employes in departments, other than the police and fire departments, will also be in the classified service.

Section 3, of the Paine bill, provides that all elected officers, now in office, shall serve out the terms for which they have been elected, and this will continue those officers in their present positions until January 1, 1910. In the meantime, section 162 of the Paine bill recognizes the rights of these officers and boards, aside from the police and fire departments, to remove appointees under them.

3. Coming to your third question, I may say that it is somewhat difficult to determine just why the general assembly provided that the Paine bill should

take effect on August 1, 1909, and then in the same section (section 3) provides that sections 157 to 165, inclusive, should take effect from and after January 1, 1910. It is very clear, however, from section 3 of the bill, that the present members of boards of public service and public safety shall serve until the expiration of their terms for which they have been elected; and section 136, as amended in the bill, provides that in every city there shall be a department of public service administered by a director appointed by the mayor. and who shall serve until his successor is appointed and qualified.

Section 146 of the bill makes like provision for a department of public safety and a director thereof. These officers, therefore, will serve at the will of the mayor appointing them. And I am therefore of the opinion, and it seems very clear, that the director of public safety and the director of public service will not be appointed until January 1, 1910.

4. In answer to your fourth question, I am of the opinion that under section 149 of the code, which is not amended by the Paine bill, and under section 227, which is amended by that bill, the present councils might provide for any increases or decreases in salaries of persons in the various departments, and, of course, they might provide for new offices or positions and fix the compensations of the same. And it is equally clear that subsequent councils might create new positions within the limits of the law, and provide for other matters, except to increase or decrease the compensation of officers during the term of such officers.

5. The present boards of public service and public safety are not affected by the Paine bill, as suggested in your fifth question; and the director of public service or of public safety, provided for in the Paine bill, will be appointed by and will serve at the will of the mayors taking office on or after January 1, 1910.

The above, I believe, answers your questions, but if there is anything further you desire to ask relative to these matters I shall be glad to give it attention.

Very truly yours,

U. G. DENMAN,
Attorney General.

Note:—See supplementary opinion of February 15, 1909.

MUNICIPAL CORPORATIONS—OFFICERS—SUPPLEMENTARY TO OPINION OF FEBRUARY 13TH, 1909.

Members of board of public safety in office must retire on August 1, 1909, *at which date director of public safety provided for in act* 99 *O. L.* 568 *must be appointed.*

February 15th, 1909.

HON. GEORGE K. CETONE, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—On Saturday, February 13th, I sent you an opinion answering several questions asked by you with reference to the Payne bill, and shortly after this opinion left the office I discovered that I was in error with reference to one question propounded in your letter, viz: qustion three, which is as follows:

> "3. When is the director of public safety and the director of public service to be appointed under the bill, and when does the present board of public service and public safety go out of office?"

My error was with reference to the appointment of the director of public safety, and occurred because of an oversight in reading section 3 of the Payne bill, which provides that all elected officers shall serve out the term for which they have been elected. As this proviso affects only elected officers it does not, of course, control the boards of public safety, because the members of that board are appointed, which I well knew, but which, as stated above, was, at the time of the writing of the opinion, overlooked. The provision for the appointment of a director of public safety is found in section 146, as amended, in the Payne bill, and under the terms of this bill, as set forth in section 3 thereof, this provision takes effect on and after August 1, 1909.

Correcting my error spoken of above in the opinion given you on Saturday, I hold that the directors of public safety in the various cities of the state should be appointed on or immediately following August 1st of this year, 1909. The board of public safety will then no longer exist and the directors so appointed will exercise the powers and perform the duties which would otherwise have been performed by the boards of public safety.

This does not affect the other holdings of the opinion given you on Saturday, and those holdings will stand as therein set out. Regretting this oversight, I am, Yours very truly,

U. G. DENMAN,
Attorney General.

(To the House of Representatives)

GENERAL ASSEMBLY—MEMBERS MAY DRAW MILEAGE AT END OF SESSION ONLY.

January 25th, 1909.

HON. GRANVILLE W. MOONEY, *Speaker House of Representatives, Columbus, Ohio.*

DEAR SIR:—Your communication of January 22nd is received in which you submit the following inquiry:

> Is a member of the general assembly entitled to mileage at the rate of twelve cents per mile from his place of residence to the seat of government and return twice a month during any special or regular session of the general assembly?

In reply I beg to say section 40 of the Revised Statutes is in part as follows:

> "Each member of the general assembly shall receive a salary of $1,000 a year, * * * and also twelve cents per mile each way for traveling, not exceeding twice per month from and to his place of residence by the most direct route of public travel to and from the seat of government, to be paid but once in any regular or special session;"

The above provisions of said section expressly authorize the payment of mileage at the rate of twelve cents per mile each way to and from his home by the most direct route of public travel to each member of the general assembly twice per month, but further provides that such mileage is to be paid but once in any regular or special session.

It is my opinion, therefore, that members of the general assembly are entitled to mileage at the rate of twelve cents per mile for two trips a month to and from their place of residence to the seat of government, if actually made, and the total mileage of the trips so made is to be paid at the end of each special or regular session. Yours very truly,

U. G. DENMAN,
Attorney General.

GENERAL ASSEMBLY—INCREASE OF SALARY OF MEMBERS—UNEXPIRED TERMS.

Members of general assembly elected to fill unexpired terms entitled to receive salary at increased rate fixed at former session of same general assembly for time actually served.

February 5th, 1909.

HON. GRANVILLE W. MOONEY, *Speaker of the House of Representatives, Columbus, Ohio.*

DEAR SIR:—The communication signed by Messrs. Lowry, Howard, Smith and yourself is received, in which you submit the following inquiry, with a request for an opinion thereon:

You, and each of you, were elected members of the general assembly at the November election, 1907, for the unexpired terms of Messrs. Thompson, Ashbrook, Criswell and Baldwin.

The 77th general assembly, at its regular session in 1906, amended section 40 of the Revised Statutes whereby the salary of its members was increased from $600 to $1,000 per year. Query: What is the measure of compensation for the unexpired terms to which each of you were elected?

In reply I beg to say section 40 of the Revised Statutes, as amended April 2nd, 1906, contains all the law relative to the compensation of members of the general assembly, and it provides that "each member of the general assembly shall receive a salary of one thousand dollars a year, to be paid in monthly installments of not exceeding two hundred dollars during the year," with an additional provision for mileage.

No rule is fixed by which compensation is to be governed in case of death or resignation of members or the election of new members to fill unexpired terms.

The rules governing the congress of the United States in the instances above cited give no precedent, for the reason that such rules are based upon specific legislation. It follows, therefore, that the measure of compensation for the unexpired terms to which each of you were elected must be determined upon the common law rule of *quantum meruit*. That is, you are entitled to that proportion of the compensation for the entire term as the unexpired term bears to the whole term.

While it is true that the annual compensation was changed during the term for which your predecessors were elected, and while the constitution provides that no change in such compensation shall take effect during the term of office of any member, yet the rule obtains in this state that notwithstanding such constitutional inhibitions, a person appointed or elected to fill an unexpired term is entitled to the increased compensation. It follows, therefore, that each of you are entitled to such proportion of the annual salary of $1,000 as the duration of the time served in the year 1907 bears to the whole year.

Yours very truly,

U. G. DENMAN,
Attorney General.

GENERAL ASSEMBLY—MILEAGE OF MEMBER.

Mileage is part of compensation of members of general assembly within meaning of section 31, article III of constitution, and no change shall take effect during term of office.

March 31st, 1909.

HON. G. W. MOONEY, *Speaker House of Representatives, Austinburg, Ohio.*

DEAR SIR:—I have your letter of March 22nd in which you submit, for my opinion thereon, the following facts and questions:

> "During the last session of the legislature a law was passed reducing the mileage of members * * Question: Should mileage vouchers drawn prior to the date of this law becoming effective be drawn at the old rate?"

"The law above referred to also made provision that the balance of salary due members for the year might be paid in full at the end of any regular or special session. Question: Would the speaker of the house be justified in drawing vouchers for balance due members for the present year at any date subsequent to the date the new law became effective?"

To answer these questions involves a construction of section 31 of article III of the constitution; section 40 of the Revised Statutes, as that section stood prior to the special session of the general assembly, just adjourned, and of that same section 40 as amended at that special session of the legislature. The section of the constitution just referred to, and section 40 of the Revised Statutes prior to and since the amendment thereof at the last session of the general assembly, are as follows:

"Section 31. The members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage, or otherwise; and no change in their compensation shall take effect during their term of office."

Section 31, article 3 of the constitution.
Section 40, prior to the amendment of last session:

"Each member of the general assembly shall receive a salary of one thousand dollars a year, to be paid in monthly installments of not exceeding two hundred dollars during the year; and also twelve cents per mile each way for traveling, not exceeding twice per month, from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid but once in any regular or special session; but if any member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

Section 40, after amendment of last session:

"Each member of the general assembly shall receive as compensation a salary of one thousand dollars a year and mileage hereinafter mentioned; said salary shall be paid in monthly installments of not exceeding two hundred dollars during the year, but in any year in which a session of the general assembly is held the balance of the salary for said year shall be paid at the end of said session; and each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of said regular or special session; but if any member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

If I understand your first question correctly, you inquire whether mileage vouchers which were drawn prior to the amendment of section 40 of the Revised Statutes, should have been drawn at the rate of mileage specified in section 40 before the amendment was enacted at the last session of the general

assembly, on March 3rd, 1909. As may be seen from the language of section 40, as it stood before that amendment, the section provided that each member of the general assembly should receive a salary of one thousand dollars per year, also twelve cents per mile, each way, for traveling not exceeding twice per month, from and to his place of residence, by the most direct route of public travel, to and from the seat of government, which mileage should be paid but once in any regular or special session.

That section as amended provides that each member of the general assembly shall receive as compensation a salary of one thousand dollars a year and mileage at two cents per mile, each way, once a week, during the session, said mileage to be paid at the end of said regular or special session. In other words, the *compensation* which had been fixed by law by the general assembly for each of its members, under section 40 of the Revised Statutes, prior to the amendment of this year, consisted of one thousand dollars a year, as salary, plus mileage for each member at the rate of twelve cents per mile, each way, from and to the member's place of residence, not exceeding twice per month; and under section 40, as amended at this last session, the *compensation* for each member is fixed at one thousand dollars a year, as salary, plus mileage for each member at the rate of two cents per mile, each way, from and to the member's place of residence, once a week during the session.

Under this section 40, as it stood prior to the amendment spoken of, and since the amendment, the *compensation* to each member is made up of the salary and mileage, in the respective amounts stated in the statute.

The last sentence in section 31 of article 2 of the constitution, as quoted above, provides as follows: "and no change in their compensation shall take effect during their term of office," and I am of opinion that under this provision the amending act of section 40 of the Revised Statutes, as passed March 3rd, 1909, insofar as the same changes the compensation of members of the general assembly, cannot take effect during the term of this present general assembly.

In your second question you inquire whether you would be justified in drawing vouchers for the balance due the members for this present year, at any date subsequent to the date the new law became effective.

I am of the opinion that the new law is now in effect in all respects, except as to the change in the amount of compensation, the constitution prohibiting such change during the present term of office of members of the legislature. The provision of the new law as to the time of payment of this compensation is that:

> "In any year in which a session of the general assembly is held the balance of the salary for said year shall be paid at the end of the session"

and the mileage is "to be paid at the end of said regular or special session."

This language provides that whatever balance of compensation, whether of salary or mileage, exists at the end of the session shall be paid at that time, and you would, therefore, now be justified in drawing vouchers for these balances.

Very truly yours,

U. G. DENMAN,
Attorney General.

POLICE COURTS—ESTABLISHMENT OF BY GENERAL ASSEMBLY.

General Assembly may establish municipal police courts in one or more cities without providing general law establishing such court in each city of state. One bill may establish such courts in two or any number of cities.

February 16th, 1909.

HON. EARL M. GIBBS, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—Answering your inquiry of yesterday as to whether, under the constitution, the general assembly has power to establish municipal police courts in one or more cities of the state without providing a general law establishing such a court in each city in the state and also inquiring whether two or more such courts may be established by the general assembly in one bill, and whether the general assembly must fix the term of the judges of said court or may leave that to some other agency, I beg to say that section 1, article IV of the constitution provides as follows:

> "The judicial power of the state is vested in a supreme court, circuit courts, courts of common pleas, courts of probate, justices of the peace and *such other courts inferior to the supreme court as the general assembly may from time to time establish.*"

Under this section of the constitution the supreme court of Ohio has decided, in the case of State v. Bloch, 65 O. S., 370, that it is within the power of the general assembly to establish such other courts inferior to the supreme court as it may see fit to establish.

I am, therefore, of the opinion that it is within the power of the legislature to establish a municipal police court for any city in the state by a special bill for that purpose. I am also of the opinion that it is within your power to, in one bill, establish such courts in two or any other number less than the whole number of cities in the state, or of course you could pass a law providing for a municipal court in each of the cities of the state.

The term of office of the judges, however, must be fixed by the general assembly. This is provided for by section 2 of article XVII of the constitution, being the amendment which was adopted thereto on November 7, 1905, providing for the times for holding elections for state, county and other elective officers and prescribing the terms of office, etc. This section requires that the term of office of all elective county, township, municipal and school officers shall be such even number of years, not exceeding four years, as may be prescribed by the general assembly.

I believe the above answers your questions, but if the same is not clear or you desire to talk further on the matter, I shall be very glad to give you attention.

Yours very truly,

U. G. DENMAN,
Attorney General.

CEMETERY SUPERINTENDENT—PAINE LAW.

Cemetery superintendent is in classified service and place must be filled from persons who take examination under civil service commission, unless service commission adopt rule requiring superintendent to have professional or technical skill.

March 11th, 1909.

HON. W. S. GREGG, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 6th asking my opinion as to whether the Paine law extends the classified service in cities so as to include cemetery superintendents.

This matter is governed by section 158 of the municipal code, as amended in the Paine law, and found in 99 O. L. pp. 565, 566. I am of the opinion that nobody will know exactly what this amended section means until it has gone through our courts, and, deplorable as this may be, until such decision is had there must necessarily be a lot of guessing done on this law.

I feel that a superintendent of cemeteries is not necessarily required to have professional or technical skill, although the civil service commissioners might require certain professional or technical skill of him in order that he would not be subjected to an examination, and, in that way, those commissioners and other parties interested might be able to secure such appointment without examination, simply on the grounds of friendship or some political consideration. Neither do I feel that a cemetery superintendent comes within any of the other classes mentioned in section 158, as being in the unclassified service, unless he is an unskilled laborer.

Without further speculation on the matter, and from the most careful reading I can give the section, I am of the opinion that this officer, superintendent of cemeteries, is in the classified service and that the place must be filled from persons who take the examination under the civil service commission, unless the civil service commission should adopt some rule requiring the superintendent of cemeteries to have some professional or technical skill. I do not wonder that you have had difficulty in construing this act.

Trusting that I have answered your question, and with best wishes for your success, I am, Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—GRADUATES OF HIGH SCHOOL OTHER THAN FIRST CLASS—TUITION OF.

Board of education must pay tuition of graduates from high school other than first grade to first grade high school.

May 17, 1909.

HON. OWEN J. EVANS, *New Berlin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 10th in which you submit the following for my opinion:

> Glenn Smith graduated and received a diploma under the Patterson law from New Berlin Special School District June 15, 1905. The village of New Berlin was incorporated in August, 1905, and the New Ber-

lin Special School District became the New Berlin Village District. Smith attended the New Berlin high school three years, it being a second-class high school. He is now attending the Canton high school, and you desire to know if, under House Bill No. 17, passed by the last general assembly, the New Berlin Village District can be held for the tuition of Smith at Canton for this year, or, at least, that part of the year since the passage of the House Bill No. 17.

I beg to advise that section 4029-3 R. S. as amended by House Bill No. 17 of the last general assembly applies to the payment of tuition of two classes of pupils:

1st. "Pupils holding diplomas (under Patterson law) and residing in township, special or joint subdistricts, not maintaining a high school."

2nd. Pupils graduating from schools other than first-grade high schools.

Glenn Smith does not come within the first class, as he is residing in a village district, but he does come within the second class, as he has graduated from a second grade high school, and is, therefore, entitled to tuition in a first-grade high school for one year from the date of the passage of the amendment of the last general assembly.

I am, therefore, of the opinion that the board of education of New Berlin Village District must pay the tuition of Glenn Smith in a first-grade high school for one year from the date of the passage of this amendment, March 23, 1909; provided, however, that the New Berlin village board of education shall not be required to pay any such tuition after the rate of taxation permitted by law for such district, shall have been reached, and all the funds so raised are required for the support of the schools of said district. The amendment referred to seems clearly to have in view the placing of a chance of a four-years' high school education within the reach of each pupil in the state.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES MAY RESIDE IN SAME PRECINCT.

October 15, 1909.

HON. OWEN J. EVANS, *Member General Assembly, Canton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 11th in which you ask for my opinion on the following:

> Two township trustees were nominated by one party on September 7, 1909, from the same precinct in a township which has four voting precincts. You desire to know, if elected, whether they will be eligible to serve, even though they both reside in the same voting precinct?

In the above case both persons nominated for township trustee are residents of the township, but both are residents of the same precinct. The only

qualification I have been able to find for township trustee as to residence is that he must be a resident of the township from which elected, and I am of the opinion that there is nothing to prohibit two township trustees being candidates and holding office at the same time from the same precinct.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To the Prosecuting Attorneys)

TAXES—DELINQUENT TAX COLLECTOR.

Delinquent tax collector may assist county auditor in collecting delinquent taxes already on duplicate, but may not assist in placing omitted taxes on duplicate.

February 13th, 1909.

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

DEAR SIR:—Your communication of February 10th is received in which you submit the following statement of fact, together with a request for an opinion thereon:

> The county auditor of Ross county recently, by virtue of sections 2781 and 2781*a*, placed upon a book called "Additions to Duplicate," the sum of $2,300 as taxes and penalty against a citizen of Ross county for omitted taxes. Said amount of tax was paid by the person against whom it was charged into the county treasury. There is also in our county a "delinquent tax collector" employed under section 2858 R. S., who receives as his compensation 20 per cent. of the amount collected by him. This tax collector rendered services in having the $2,300 placed upon the tax duplicate and also in its collection. He claims 20 per cent. of the amount collected as fees.
>
> Query: Is he entitled to said compensation?

In reply I beg to say, under the provisions of section 2781 and succeeding sections of the Revised Statutes, the duty devolves upon the county auditor to make the necessary investigations and place omitted taxes on the duplicate, and he is given authority to issue compulsory process and require the attendance of any person or persons and examine such person or persons on oath in relation to omitted taxes.

The duties of the delinquent tax collector, as provided in section 2858, apply only to the collection of personal taxes already on the duplicate and which are delinquent. The law authorizing the county commissioners to employ a tax inquisitor to assist the auditor in placing omitted taxes upon the duplicate has been declared unconstitutional, and the delinquent tax collector employed under the provisions of said section 2858 is without official authority to render any assistance to the county auditor in the performance of his duties under section 2781 and succeeding sections and is, therefore, not entitled to any compensation for any services so rendered.

Yours very truly,

U. G. DENMAN,
Attorney General.

INFIRMARY DIRECTOR ENTITLED TO TRAVELING EXPENSES.

January 30th, 1909.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Your communication of January 27th is received in which you submit the following inquiry:

"An infirmary director lives some ten miles from the county institution, and in attending the regular and called meetings of the board travels thereto and from via traction line. Will he be permitted to charge this traveling expense to the county?"

In reply I beg to say section 969 of the Revised Statutes is as follows:

"Each infirmary director shall be allowed in addition to his *actual traveling expenses*, $2.50 for each day he is employed in his official duties. He shall present an itemized account of his services and expenses in the discharge of his official duties to the board of directors at a *regular meeting;* said account, after being approved by said board, shall be submitted to the board of county commissioners *at a regular session of said board*, who upon their approval thereof, shall allow the same to be paid out of the county fund on the order of the county auditor."

Under the provisions of this section an infirmary director is entitled to $2.50 for each day he is employed in his official duties and also his actual traveling expenses. Certainly there can be no question but that the car fare on the traction car which carries the director to and from the infirmary to his home is money actually expended or "actual traveling expenses," and the infirmary director is entitled to include such expenses in his itemized account for allowance by the county commissioners.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL TEACHER—SUBSTITUTE—COMPENSATION FOR HOLIDAYS.

January 27th, 1909.

HON. WARREN W. COWEN, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Replying to your letter of January 22nd, I believe that a board of education, under its general powers, has the right to employ a so-called cadet teacher to teach during the sickness or disability of a regular teacher. It seems to me that the first duty of a board of education is to keep the schools open throughout the school year, and that they may provide in this way for such emergencies as would otherwise interfere with the accomplishment of this purpose. While it has been the practice in many districts of the state for teachers to employ their own substitutes in case of sickness, etc., I believe that the spirit, if not the letter of the law, makes that a matter which should be under the control of the board of education.

In your letter you state that a regular teacher was, by reason of sickness, unable to attend school for some days before Christmas, and his school was taught up to Christmas by a substitute, the regular teacher taking up his school work at the beginning of the term immediately ater the Christmas holidays. You ask who is entitled to pay for the holidays, the substitute or the regular teacher.

Section 4015 R. S. provides that:

"Teachers employed in the public schools may dismiss their schools without forfeiture of pay, on * * * the 25th day of December."

If the substitute teacher was employed by the board of education and dismissed her school over Christmas, I believe that the substitute is entitled to pay for such holiday. If, however, the substitute taught in pursuance of an agreement with the regular teacher, such substitute would not be "employed" within the meaning of section 4015, and the board of education should make payment to the regular teacher.

Very truly yours,

U. G. DENMAN,
Attorney General.

TOWNSHIP TREASURER BECOMING ELECTOR AND RESIDENT OF ANOTHER TOWNSHIP—SUCCESSOR MAY BE APPOINTED.

February 27th, 1909.

HON. WARREN W. COWEN, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts together with a request for an opinion thereon:

> At the November election, 1907, A. A. Wiley was elected treasurer of Colerain township, Belmont county, Ohio. Said Wiley duly qualified, gave bond and has since been performing the duties of treasurer of said township. On November 4, 1908, said Wiley removed with his family to Wheeling township, Belmont county (Wheeling township adjoins Colerain township), and became a resident of Wheeling township and, of course, an elector of Wheeling township. Some weeks after Mr. Wiley's removal to Wheeling township, the trustees of Colerain township declared the office of treasurer vacant and appointed F. W. Boggs as treasurer of Colerain township. In pursuance of his appointment Mr. Boggs gave bond and was duly qualified as treasurer of Colerain township.
>
> Query: To whom should the county treasurer turn over the township funds.

In reply I beg to say, from your statement of facts as above set out, Mr. Wiley, on his removal with his family to Wheeling township, became a resident and elector of said township. This I assume to be correct; that is, that Mr. Wiley's removal to Wheeling township was permanent. He could, however, *temporarily* reside in Wheeling township and retain his residence in Colerain township, and while a resident of Colerain township would be entitled to hold the office of township treasurer. He may not, however, retain the office if he has permanently removed from the township and taken up his residence elsewhere.

It follows, therefore, that the county treasurer should pay over the township funds to Mr. Boggs, who has been duly appointed by the township trustees to the vacancy occasioned by the permanent removal of Mr. Wiley from the township.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—POWER TO LEVY TAX FOR NATIONAL ROAD IMPROVEMENT.

Columbus, Ohio, March 3rd, 1909.

HON. WARREN W. COWEN, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter in which you submit the following inquiry:

> "Have the commissioners of Belmont county, Ohio, the right to levy a tax for the improvement of the national road within that county?"

In reply thereto permit me to say that, in my opinion, the commissioners of any county through which any part of the national road passes, are authorized to levy taxes for the repair and preservation of such part of said road. The national road should be considered as a state road, except that the county commissioners are authorized to collect tolls thereon and apply the proceeds to the keeping up of the same.

I am, therefore, of the opinion that the commissioners have authority to levy such taxes in accordance with the laws in force relating to state roads, but no special levy can be made.

Very truly yours,

U. G. DENMAN,
Attorney General.

APPOINTMENT OF ASSESSOR IN VILLAGE SITUATED IN TWO TOWNSHIPS—MUNICIPAL CORPORATION NOT HAVING TOWNSHIP ORGANIZATON.

In case of vacancy in office of assessor of village situated jointly in two townships, the trustees of the two townships may act jointly in appointing successor.

Municipal corporation not having a township organization, is one whose boundaries are identical with township.

March 18th, 1909.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Your communication is received in which you submit, for an opinion of this office, the following inquiry:

> "Burbank village, Wayne county, is situate jointly in Canaan and Congress townships. The officers of the village are elected by the voters in the village; also some of the residents in Congress township, by special act of the legislature, vote in Burbank village, so that the precinct in Burbank village includes one-half the village and part of the township outside the village. The same way in Canaan township. An assessor for the village is elected by the voters of the village. In case of vacancy in the office of assessor within the municipal limits, which is situated in both of said townships, how should the vacancy be filled; and in case

of a vacancy in the office of assessor in Burbank village precinct territory, which is the territory adjoining the village corporation and being situate in both Canaan and Congress townships.

"Also, what is meant, under section 1518 R. S., by the phrase 'municipal corporation not having a township organization?'"

Replying thereto I beg to say that our statutes relating to filling vacancies in the office of assessor do not expressly provide for the filling of vacancy in office of assessor in such territory as you describe. In the absence of such direct statutory authority we are left to a comparison of the statutes relating to the appointing of an assessor to fill vacancies to ascertain if authority is given, by plain inference, warranting such appointment. Section 1518 R. S. provides that:

"In the event that there should be a failure to elect an assessor in any ward or precinct of a *municipal corporation not having a township organization*, or if any person elected fails to give bond and take the oath of office for one week after his election; or in the event of removal from the precinct or ward of such assessor after his election, the office shall be considered vacant, or should there be at any time a vacancy in said office from any other cause, *the county auditor shall fill such vacancy by appointing an elector of such ward or precinct to the office of assessor.*"

This section is not authority for the appointment to fill a vacancy in the office of assessor by the trustees. The section is intended to apply to and authorize the appointment of an assessor in a "municipal corporation not having a township organization."

Section 1451 R. S. provides that:

"If, by reason of non-acceptance, death or removal of a person chosen to any office in any township, except trustees, at the regular election, or upon the removal of the assessor from the *precinct or township* for which he has been elected, or there is a vacancy from any other cause, *the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.*"

This section is authority for the filling of a vacancy in the office of assessor, where the municipal corporation or the territory attached thereto, form a part of the municipal precinct in which an assessor is elected by the people therein, by the trustees in any township.

The question now is, does this section authorize the appointment of an assessor to fill a vacancy when the precinct wherein there is a vacancy is jointly situated in two townships. If this territory adjacent to the corporate limits of Burbank village was all in Canaan township the trustees of said township are expressly authorized to fill the vacancy. The same would be true as to the trustees of Congress township. The statutes above set out should not be construed as failing to provide for such appointment unless their plain statement impel such construction. This the language of said sections does not do.

I am, therefore, of the opinion that the board of trustees in Canaan township and the board of trustees in Congress township will be warranted by said

section 1451 in acting jointly in the appointment of a person having the qualifications of an elector to fill such vacancy, either in the corporate limits of the village of Burbank or for the territory outside the corporate limits, but now including the village precinct, as created by said legislature enactment.

The phrase "municipal corporation not having a township organization," is such municipal corporation as the boundaries of which are identical with those of the township; for example, Cincinnati township, Hamilton county. In such case all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, excepting justices of the peace and constables. See section 3, Ellis's municipal code, page 6. Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY SURVEYOR—COMPENSATION FOR MAKING TAX MAPS.

County commissioners may contract with county surveyor for making tax maps, but may not limit his compensation as surveyor to that received under such contract; commissioners desiring to employ person other than county surveyor to make tax maps must award contract to lowest bidder after advertisement, etc.

January 25th, 1909.

HON. H. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following questions:

> "1. Can the county commissioners employ the county surveyor for a limited time, say one year, for a fixed sum as tax map draftsman in lieu of all county expenses?"
>
> "2. Have the county commissioners the right to appoint a draftsman to make the tax maps other than the county surveyor or one appointed by him?"

In reply I beg to say I assume the information desired in your first inquiry is, may the county commissioners employ the county surveyor as a tax map draftsman at a fixed salary, and further provide that such salary shall be in lieu of the compensation provided by law for services rendered as county surveyor?

Section 2789*a* of the Revised Statutes provides that the county commissioners *may* appoint the county surveyor as a tax map draftsman for the purpose of making, correcting and keeping up to date a complete set of tax maps of the county; and it also provides that assistants, not exceeding four, may be appointed, and fixes the maximum salary of the draftsman at $2,000 a year and the assistants at $1,500 per year.

Under the above provisions the county commissioners are only authorized to fix a compensation for services rendered as tax map draftsman. They may not, in such contract of employment, provide that the compensation received as tax map draftsman, shall be in lieu of all services rendered as county surveyor. The legislature has already fixed the compensation of county surveyors, and

for such services rendered they are entitled to such compensation and none other.

Second. While section 2789*a* provides that the board of county commissioners *may* appoint the county surveyor, thereby leaving it optional as to whether or not such appointment shall be made, yet if such appointment is to be made no authority is given to appoint any person other than the county surveyor. The county commissioners may, however, under section 2739, by proper advertisement for sealed proposals, award the contract for making the necessary maps for the decennial appraisement of land to the lowest and best bidder.

Yours very truly,

U. G. DENMAN,
Attorney General.

EXECUTIVE APPROVAL MAKES LAW EFFECTIVE—SECTION 3920 R. S. AS AMENDED APPLIES ONLY TO TOWNSHIP BOARDS OF EDUCATION.

January 13th, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication of January 8th is received, in which you submit two questions: First, whether or not H. B. No 678 (99 O. L. 105) took effect on its passage. Second, whether or not said law applies to special school districts?

In reply I beg to say: First, since the passage of the constitutional provision giving the veto power to the governor, all laws passed by the general assembly become effective upon their approval by the governor, unless the date upon which the law is to go into effect is expressly designated in the law. House bill No. 678, referred to in your inquiry, provides no date when the law shall take effect. It follows, therefore, that said law became effective upon its approval by the governor. Second, section 3920 R. S., as amended by said house bill is, in part, as follows:

> "Boards of education of *township school districts* shall organize on the first Monday in January after the election of the board, * * * each member of the board shall receive, as compensation, two dollars ($2.00) for each meeting actually attended for not more than ten meetings in any year."

It will be observed that this amendment only provides compensation for members of boards of education in township school districts.

Very truly yours,

U. G. DENMAN,
Attorney General.

JUVENILE DETENTION HOME—FUNERAL EXPENSES OF INMATE PAYABLE OUT OF COUNTY FUND.

January 30th, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication of January 27th is received in which you submit the following statement of facts with a request for an opinion thereon:

"In Wood county, under the juvenile court law passed April 23, 1908, the commissioners organized a detention home, and among the many inmates which have come under their care, one child was taken sick and died. Please state whether or not there is any provision to pay for the necessary funeral expenses and burial. Have the commissioners such authority under section 40 of the juvenile court act?"

Section 40 of the juvenile court act, passed by the last legislature, is in part as follows:

"This act shall be liberally construed to the end that its purposes may be carried out. * * * and all fees and costs in all cases coming within the provisions of this act, together with such sums as may be necessary for the incidental expenses of said court and its officers, and together with the cost of transportation of children to places to which they may be committed, shall be paid out of the county treasury of the county upon itemized vouchers and certified to by the judge of the court."

While this section contains no express provision authorizing the payment of such burial expenses out of the county fund, and while the deceased may have been, within the provisions of section 1500*a* R. S., a pauper, yet the death occurred while an inmate of a "reformatory, benevolent or charitable institution," and for that reason the township trustees would not be authorized to pay the expenses of the burial. My judgment is, that if the child was at the time of its death a pauper, within the meaning of the law, the proper burial expense should be a charge against the county, and the county commissioners are authorized to allow the payment of the same out of the general revenue fund of the county. Yours very truly,

U. G. DENMAN,
Attorney General.

INFIRMARY DIRECTORS—TRAVELING EXPENSES.

February 27th, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

"Does the 'actual traveling expenses' provided for in section 968 Revised Statutes include hotel bills of infirmary directors while engaged in traveling on official business?"

In reply I beg to say section 968 is in part as follows:

"Each infirmary director shall be allowed, in addition to his traveling expenses, $2.50 for each day he is employed in his official duties."

The above quoted provision of said section clearly answers your inquiry. "Actual traveling expenses" mean expenses actually incurred while traveling and unquestionably include hotel bills.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—DUTY TO EMPLOY COUNTY SURVEYOR—FEES.

County commissioners are not compelled to employ county surveyor to act as engineer for improving joint county and township roads.

County commissioners cannot draw $3 per day for only signing ditch contract.

March 6th, 1909.

HON. WM. DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication is received in which you request an opinion on inquiries substantially as follows:

> "1. Under section 13 of 'An act to authorize the improvement of public roads of townships and streets of villages therein,' as found in 99 O. L. 155, are the county commissioners compelled to employ the county surveyor to act as engineer on joint county and township roads, where the township has no regularly employed surveyor without being reimbursed in part by the township?"
>
> "2. Under section 4506 R. S., can the county commissioners draw $3.00 per day for no other services relating to county ditches during the day than the act of signing a ditch contract?"

Replying thereto I beg to say, first, that part of section 13 of the above mentioned act which relates to the subject matter of your inquiry is as follows:

> "and further provided that the county commissioners of any county and the township trustees of any township in the state of Ohio are hereby authorized and empowered to improve any county or township line road or public highway by jointly agreeing in regard thereto, and paying for said improving under any plan and specifications authorized by law for road improvement in any county and township in the state of Ohio."

This provision is authority for the joint action on the part of the county and township for the improvement of any county or township line road or public highway. The law authorizes the commissioners and trustees to agree as to the relative amount each should pay for such proposed improvement. The law does not say that in addition to this equitable division of the cost of improving a road or public highway of this character that the commissioners of the county should furnish at the expense of the county alone the surveyor. While it would be quite natural for the county surveyor to be employed in a case of the kind submitted, it does not follow that the hire of the surveyor should not be considered in the apportionment of the cost of improvement as between the county and the township.

Second. Replying to your second inquiry, the county commissioners in Ohio receive a fixed annual compensation. In addition thereto, in counties having county ditches, the commissioners are each allowed $3.00 "for services actually rendered under the provisions of this chapter" (meaning the chapter of the Revised Statutes on county ditches). From a careful reading of this chapter, and particularly of sections 4505 and 4506 thereof, I am of the opinion that if the county commissioners should each charge $3.00 per day for "the act of signing a ditch contract," they would be violating both the letter and spirit of this law.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL—LACK OF FUNDS TO CONTINUE FOR THIRTY-TWO WEEKS.

Where board of education has not sufficient funds to continue school 32 weeks, the county commissioners may take action under section 3969.

March 17th, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—In your letter you state that a certain board of education in your county has not a sufficient amount in its tuition fund to pay salaries for the entire eight months of school required by law. You ask whether section 3969 R. S. applies to such a case as this and how provision can be made for keeping the schools of this district open for the full eight months.

Section 3969 R. S. provides that:

> "If the board of education in any district fail in any year * * to provide for the continuance of any school in the district for at least thirty-two weeks in the year * *, the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall do and perform any or all of said duties and acts, in as full a manner as the board of education is by its title authorized to do and perform the same; and all salaries and other money so paid by the commissioners of the county, shall be paid out of the county treasury as other county expenses are paid, but the same shall be a charge against the school district for which said money was paid, and the amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

I am of the opinion that the county commissioners can take action in this case under section 3969, and that the amount of money necessary to continue such schools eight months may be paid out of the county treasury, but that such amount must be deducted from the funds due to such school district at the time of making the next semi-annual distribution of taxes.

Very truly yours,

U. G. DENMAN,
Attorney General.

INTOXICATING LIQUORS—SALE BY PRESCRIPTION—LIQUOR TO BE USED BY PHYSICIAN.

Person for whom liquor is prescribed may, by proper authority, have agent fill same, but prescription must contain name of person for whom prescribed and name of agent, and agent must enter name and residence of principal and himself on druggist's record. Physician may write prescription for intoxicating liquors to be used by himself for medicinal purposes.

March 20th, 1909.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this office thereon the following inquiries:

1. Under sections 4361-30*zb* and 4364-30*zc* of the Revised Statutes, when the person for whom the liquor is prescribed is unable, by reason of illness, to go to the drug store personally and too ill to authorize an agent in writing to have a prescription filled for them, what evidence of authority should such agent have in order to have prescription filled, and should the prescription state the name of both the agent and the person for whom prescribed?"

"2. May a physician write a prescription for himself for intoxicating liquor to be used by himself for medical purposes?"

Replying thereto I beg to say as to your first inquiry, that section 4361-30*zb* provides:

> "In every county, township, municipal corporation or district in which the sale of intoxicating liquor as a beverage is prohibited, a book shall be kept by every retail druggist and pharmacist, in which shall be entered at the time of every sale of intoxicating liquor, the date thereof, *the name of the purchaser who shall also sign his name in said book as part of said entry*, the kind, quantity and price of such liquor, the purpose for which it was sold and the residence by street and number, if there be such, of said purchaser. When the sale is for medicinal purposes the book shall also contain the name of the physician issuing the prescription and the prescription shall be cancelled by writing on it the word cancelled and the date on which it was presented and filled," etc.

I am of the opinion that an agent under proper authority might, under the terms of this section, legally have such prescription filled. But such prescription should contain the name of the person for whom prescribed and also the name of the agent. And further, I am of the opinion that in order to comply with this section, the agent should enter the name and residence of the person for whom the intoxicating liquor is prescribed and also his own name and residence on the druggist's record of such sales. When liquor is procured in this manner, and in good faith, it is my opinion that the provision of said section 4364-30*zb* relating thereto is complied with.

To answer your second inquiry it is necessary to construe section 4364-30*zc*, which reads in part as follows:

> "It shall be unlawful for any doctor or physician to issue a prescription for intoxicating liquors, except in writing, or knowing the same to be for use as a beverage. Every prescription for intoxicating liquor shall contain the name and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written and direction for the use of the liquor so prescribed."

To construe this section as precluding a physician, acting in good faith, to write a prescription for himself for intoxicating liquor to be used by himself for medicinal purposes, would be an unnecessary infringement on the practice of medicine by a reputable physician acting in good faith which the law does not seem to contemplate. It is true the prescription must be in writing and must not be for use as a beverage, but the statute does not say a physician

shall not prescribe intoxicating liquor for himself to be used for medicinal purposes, and I am of the opinion that he has such right.

Yours very truly,

U. G. DENMAN,
Attorney General.

POWER OF COUNTY COMMISSIONERS TO ADJUST CLAIM FOR DAMAGES GROWING OUT OF ROAD IMPROVEMENT.

March 3rd, 1909.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of March 1st with reference to the attorney general's opinion of December 29th, 1908, relative to the power of county commissioners to adjust claims for damags growing out of road improvements. My attention is called to the case of *Smith v. Commissioners* (50 O. S. 628).

In reply permit me to say that this case was considered in writing the opinion, together with those of Judge McIlvaine in 34 O. S. 334 and 21 O. S. 490, and other cases. It will be found as said by the court in the 34 O. S.:

> "The general rule to be that no liability on the part of a municipality for injury to abutting property, by reason of the improvement of a street exists where such improvement is properly made," etc.

yet in that case the exception is noted. The same exception appears apparently in your case. I cannot determine what the facts are and cannot say that the county is liable to respond in damages, but, as stated in my opinion,

> "The circumstances in each case will determine whether or not a valid claim for damages exists."

If the abutting owners have suffered a special injury peculiar to themselves, as distinct from the public, or have been deprived of free access to their premises, they will be entitled to compensation, and such claims may be adjusted. Mere inconvenience of travel is not sufficient.

In my opinion, the commissioners will act within their authority if, in good faith and without fraud, and with a full understanding of the facts, they adjust such claims.

Very truly yours,

U. G. DENMAN,
Attorney General.

DOW-AIKEN TAX—DELINQUENT—LEVY OF.

Percentage for collection fees and costs in levying Dow-Aiken tax against personal property should, in the event of failure to collect by means of such levy, be included in the levy against the real property.

January 25th, 1909.

HON. ROSS W. FUNCK, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

Where the county treasurer fails to make the collection for delinquent liquor tax, as provided in section 4364-12 Revised Statutes, for the reason that no goods are found upon which to levy, and the delinquent tax is then placed on the tax duplicate against the real property, shall the tax charged against the real property include the "4 per cent. collection fees and costs" as provided in said section?

In reply I beg to say that section 4364-12 R. S., is in part as follows:

> "That if any person, corporation or co-partnership shall refuse or neglect to pay the amount due from them under the provisions of this act within the time therein specified, the county treasurer shall thereupon forthwith make said amount with all penalties thereon, and 4 per cent. collection fees and costs, by distress and sale, as on execution of any goods and chattels of such person, corporation or co-partnership, he shall call at once at the place of business of each person, corporation or co-partnership; and in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation or co-partnership, wherever found in said county, or on the bar, fixtures or furniture, liquors, leasehold and other goods and chattels used in carrying on such business, * * *. In the event of the treasurer, *under the levy provided for under this act*, being unable to make the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on, and the same shall be collected as other taxes and assessments on said premises."

It will be observed that under the above provisions of said section the county treasurer is required to include in his "levy on the goods and chattels" all penalties and "4 per cent. collection fees and costs," and if he be unable to make "the amount due thereunder, or any part thereof, the county auditor shall place the amount due and unpaid on the tax duplicate against the real estate in which said traffic is carried on; and the same shall be collected as other taxes and assessments on said premises."

In other words, the treasurer is required to include the 4 per cent. collection fees and costs in the levy, and if he fail to make it, or any part thereof, out of the personal property, the county auditor is required to place all that is due under said levy against the real property in which the business is carried on.

I am, therefore, of the opinion that the 4 per cent. collection fees and costs which are included in the levy made by the treasurer should be included in the amount placed by the county auditor on the tax duplicate against the real property.

Yours very truly,

U. G. DENMAN,
Attorney General.

CORPORATIONS MUST BE ORGANIZED FOR A PURPOSE, NOT PURPOSES.

February 25th, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication is received with enclosed forms of purpose clause for the following proposed corporations: The Deforest Company, The

Basic Steel Company, The Deforest Sheet & Tin Plate Company and the T. & T. Metal Roofing Company, which purpose clauses are modified with view to compliance with the laws of this state governing the same and as construed by this office.

I note your statement that the purpose of each of these several corporations is to do one general business. Then why not begin the purpose clause of each by stating directly the "purpose" for which the company is incorporated? For instance, in the Deforest company the purpose clause might be substantially as follows:

> This company is formed for the purpose of buying, selling and dealing in real estate on which are to be erected manufacturing plants, and to do all things incident thereto.

It is unnecessary to enumerate in the purpose clause the incidental powers which a corporation may exercise.

The same may be said of the other three forms. Your addition to each of the purpose clauses properly recognizes the laws of this state applicable thereto, and I would suggest a purpose clause for each similar to the following:

> Said corporation is formed for the purpose of manufacturing, buying and selling iron and steel and the various products and forms thereof, and all things incident thereto.

The law is that a corporation shall be organized for a "purpose," not purposes.

I suggest a re-draft of each of the purpose clauses to comply with the above suggestions and I think you will have no trouble having the same filed.

Four enclosures.

Yours very truly,

U. G. DENMAN,
Attorney General.

CORONER'S INQUEST—WHEN JUSTICE OF PEACE TO HOLD—FEES OF CORONER'S STENOGRAPHER.

Coroner may not hold inquest over body of person accidentally killed when fully informed by eye witnesses as to circumstances of accident.

Stenographer of coroner must be paid out of coroner's fees for taking testimony at inquest, and not out county fund.

Justice of peace not entitled to fee when summoned by finders of dead body, unless coroner is absent from county or ill.

February 15th, 1909.

HON. CHARLES L. JUSTICE, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—You have submitted to me the following questions concerning the rights and duties of the coroner:

> 1. Has the coroner power to hold an inquest over the body of a person killed by a railway train in the presence of several eye witnesses?

2. May a bill of expense consisting of the charge of a stenographer for reducing the testimony, taken at the inquest, to writing, be presented by the coroner and allowed by the county commissioners?

3. Is a justice of the peace entitled to act as coroner when he is summoned by the finders of a dead body, because of apparent difficulty in locating the coroner, when in fact the coroner is neither ill nor absent from the county and does appear at the inquest before the same is concluded?

Your first question involves a construction of section 1221 Revised Statutes, the pertinent language whereof is as follows:

> "When information is given to any coroner that a body of a person whose death is supposed to have been caused by violence has been found within his county he shall appear forthwith at the place where such body is * * * and proceed to inquire how the deceased came to his death, if by violence from any other person or persons by whom, whether as principals or as accessories before or after the fact, together with all the circumstances relating thereto, * * * and he shall if he deem it necessary, cause the witnesses attending * * to enter into recognizance * * * for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter aforesaid * *."

Section 122z, being in *pari materia* with the foregoing section, provides in part as follows:

> " * * * If he finds that the deceased came to his or her death by force or violence, and by any other person or persons, if the person or persons so charged are there present, the coroner shall arrest such person or persons and convey him or them immediately before a proper officer for examination according to law; and if said persons, or any of them, are not present, the coroner forthwith shall inform one or more justices of the peace and the prosecuting attorney * * * of the facts so found, in order that the persons may be immediately dealt with according to law."

It seems to me that the solution of the question which you have submitted depends on the construction of the word "violence," as repeatedly used in the quoted portions of the above cited sections. This term is defined as "the abuse of force." That force which is employed against common right, against the laws and against public liberty." (Bouvier's law dictionary.) "Any wrongful act of one person whereby either he is, or his instrument of wrongdoing, is brought into contact with the limbs or body of another person * *" (Standard dictionary, quoting Prof. Robinson).

Substituting these definitions in the context of the sections under consideration it would appear that the power of the coroner to hold an inquest is limited to cases in which the information given him is to the effect that the death was caused by unknown means or by unlawful means, as distinguished from external and forcible means which are not unlawful. This view is strengthend by the other quoted provisions of the two sections, under which it is the duty of the coroner to transmit the evidence taken by him to those officers whose duty it is to proceed against criminals. It is apparent that the coro-

ner's office is intended to be an adjunct to the enforcement of the criminal law. It is my conclusion, therefore, that the coroner is without authority to hold an inquest over the body of a person accidentally killed when he is fully informed by eye witnesses as to the nature and circumstances of the accident. In the specific case you submit, the coroner should not attempt to hold an inquest unless the information at hand was to the effect that the railroad train was running at an unlawful rate of speed or was being unlawfully handled in some other way, so that the engineer thereof would be guilty of manslaughter or some other crime.

In the case of State ex rel v. Bellows, 62 O. S. 307, the deceased person came to his death as the result of a quarrel which was witnessed by a large number of persons, and the court there upheld the authority of the coroner to hold an inquest on the ground that although there could be no supposition, the manner of death being notorious, yet there was "violence" in that the manner of death was unlawful. The circuit court, the opinion of which is expressly approved by the supreme court, distinguished, however, mere accident or casualty from cases wherein the cause of death is unlawful. (15 C. C. 504-507.)

I am, therefore, of the opinion that upon the facts as you have stated them, the coroner has no authority to hold an inquest, and should not be allowed fees for an inquest which has been held.

Answering your second question, I beg to state that I find no provision of law authorizing a coroner to employ an official stenographer, the compensation of whom may be paid by the county as expenses of the coroner. *Section* 1221 does mention the official stenographer of the coroner, but it is apparently contemplated that this stenographer shall be paid out of the fees of the coroner allowed under section 1239, and that no allowance as for expenses shall be made to cover such services.

With regard to the third question you have submitted, I do not believe that a justice of the peace has authority to act as coroner unless the coroner is actually ill or absent from the county. In the case submitted the coroner, and not the justice of the peace, should receive the fees provided by law for holding the inquest. Yours very truly,

U. G. DENMAN,
Attorney General.

TESTAMENTARY TRUST FUNDS MUST BE LISTED FOR TAXATION IN COUNTY WHEREIN TRUSTEE OR EXECUTOR RESIDES.

February 8th, 1909.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your letter of February 5th is received in which you submit the following inquiry with a request for an opinion thereon:

> "A resident of Stark county by will leaves a trust, and by the will it was provided that the trust fund be deposited in a trust company in Cleveland, Ohio, and the fund is now so deposited by order of the probate court of Stark county. Query: Shall the return for taxation be made in Cuyahoga county or Stark county?"

In reply I beg to say section 2734 Revised Statutes is in part as follows:

"Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited subject to his order, check, or draft, and all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; * * * and all property of every *person for whose benefit property is held in trust by the trustees; of every estate of a deceased person by his executor or administrator.*"

Your letter gives no information as to the appointment of an executor or trustee, but I assume, however, that such appointment has been made by the probate court. If so, under the provisions above quoted, the property should be listed in Stark county. Yours very truly,

U. G. DENMAN,
Attorney General.

DOW-AIKIN TAX—REFUNDER OF.

Refunder of Dow-Aikin tax must be paid to persons discontinuing business of trafficking in intoxicating liquors out of general county fund.

February 5th, 1909.

HON. C. A. LEIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your recent communication is received in which you submit the following inquiry, together with a request for an opinion thereon:

"In October, 1908, the voters of Pickaway county, Ohio, voted upon the question of county local option, and gave a majority for the dry. After thirty days the persons engaged in the sale of intoxicating liquors surrendered their liquor license to the auditor of the county and received a refunder for the unexpired time for which the license was issued. This amounted to something like $51 to each, there being twenty-two such certificates issued. These refunders called for payment out of the liquor fund, and there being no such fund, or money in such fund at the time, the treasurer refused to pay said refunders, but stamped upon them 'Not paid for want of funds.' These refunders have not been paid, nor is there any money in the liquor fund to pay such sums. What is the proper procedure in the premises?"

In reply thereto I beg to say section 4364-11 R. S. provides that the county auditor, upon being satisfied that any person, corporation or co-partnership engaged in the business of trafficking in intoxicating liquors has discontinued such business, shall issue to such person, corporation or co-partnership a refunding order for a proportionate amount of said assessment, so paid, but in no case shall the amount of such assessment retained be less than $200.00.

It will be observed that this provision of said section does not direct that the refunding order shall be paid out of the "liquor fund." On the contrary, no fund is designated upon which the order shall be drawn. It follows, therefore, that the auditor should draw the refunding order against the general revenue fund of the county out of which it should be paid.

There is no question but that the draft upon the general fund of the county, through the enforcement of this provision of the law, works a hardship because the county, in the distribution of the liquor tax, only receives two-tenths of the assessment, and it is quite possible that by reason of the enforcement of the county local option law the refunding orders in many instances will be greatly in excess of the share of taxes received by the county. For instance, where the full amount of the liquor tax has been paid, and the business is discontinued by reason of the local option election at the expiration of sixty days thereafter, the refunding order would amount to $300, while the county received as its share of the assessment $100. It seems, therefore, that it would be just and equitable for the legislature, while in session, to provide an appropriation out of which the state auditor could pay the state's proportionate share of the refunder, and thereby relieve the various county treasuries of the state.

Very truly yours,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE MAY BE ASSESSOR.

January 18th, 1909.

HON. WILLIAM E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication of January 15th is received in which you submit the following inquiry:

> May the county auditor appoint a justice of the peace to fill a vacancy in the office of township assessor?

In reply I beg to say there are two well recognized rules which govern the right of a person to hold, at the same time, two or more elective or appointive offices, viz: statutory prohibition and incompatibility.

Upon an examination of the statutes I find no law preventing a justice of the peace from holding the office of township assessor. The question of incompatibility will be determined by the consideration of the official duties of a justice of the peace and a township assessor. If there is any duty enjoined by law upon a justice of the peace that affects or relates to any of the duties of a township assessor then the offices are incompatible. In other words, the performance of the duties of one office must not be hindered or prejudiced by the assumption of the duties of another and different office.

Upon an examination of the statutes prescribing the duties of a justice of the peace and township assessor I find nothing, in my judgment, that makes the two offices incompatible. I am, therefore, of the opinion that the auditor may rightfully appoint a justice of the peace to the office of township assessor to fill out an unexpired term.

Very truly yours,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES—BUILDING TURNPIKE—ISSUE OF BONDS.

March 4th, 1909.

HON. WILLIAM E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter in which you submit the following inquiry:

> Have township trustees, under section 2835 R. S., the power and authority, without submitting the proposition to the electors of the township, to issue bonds in the sum of $1,500 for the purpose of cutting down a hill and building an embankment, or must they proceed under section 4737 R. S.?

In reply thereto permit me to say that section 2835 R. S. provides that the trustees of any township shall have power to issue and sell bonds in the manner provided by law "for improving highways leading into the township * * * or for building or improving a turnpike or for purchasing one or more turnpike roads and making the same free."

In my opinion the trustees of the township, acting under the authority of this section, may issue the bonds, providing the highway comes within the terms of the above provision. The bonds cannot be issued if the total bonded indebtedness created in one fiscal year, under authority of the act for any or all purposes, will thereby exceed 1 per cent. of the total value of all the property listed for taxation, without submitting the question to a vote of the qualified electors. If the trustees proceed under section 4737 to levy an additional tax of not exceeding three mills, the question of making such levy must be submitted to a vote of the qualified electors if the amount to be raised in any one year exceeds $200. Yours very truly,

U. G. DENMAN,
Attorney General.

CEMETERY ON OR NEAR TOWNSHIP LINE—PURCHASE OF BY TOWNSHIPS IN DIFFERENT COUNTIES.

March 4th, 1909.

HON. W. E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter in which you state:

> "In Monroe township, Miami county, Ohio, and near Montgomery county line, which is also the line between Monroe township, Miami county, and Butler township, Montgomery county, lies a cemetery which is used by the people of both of said townships for burial purposes, and the title to which is vested in a board of trustees. The board of trustees desire to transfer this burial ground to the trustees of said townships. The trustees of Monroe township and the trustees of Butler township desire to purchase this cemetery."

You inquire whether or not said township trustees have the authority to purchase said cemetery?

In reply permit me to say that section 3773-1 R. S., provides:

"Whenever any public burying-ground is located on or near a township line, and is used by the people of two or more townships for burying purposes, the title of which is vested in any religious or benevolent society, such religious or benevolent society, or the trustees thereof, may convey the same to the trustees of such townships so using the same, and their successors in office, jointly; and the trustees of such townships shall accept the same and shall jointly take possession of the same, and take care and keep the same in repair, as required as to public burial grounds in and belonging to the respective townships, and each township shall bear an equal share of the expenses thereof; and the trustees of each township shall levy needful taxes in that behalf, not exceeding in any one year more than one-fourth of one per cent."

Assuming that the cemetery is now owned by a religious or benevolent society, it is my opinion that the above section gives authority to the trustees of the townships in both counties to purchase the cemetery and to provide for the care of the same by taxation as therein provided.

Yours very truly,

U. G. DENMAN,
Attorney General.

NATURAL GAS COMPANY—METER RENT.

Municipal council, prior to amendment of section 3556 R. S. 99 O. L. 471, might authorize natural gas company to charge meter rent and fix such rental within municipality; in the absence of such regulation, no meter rent may be exacted by such company.

February 2nd, 1909.

HON. WILLIAM MAFFET, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—You ask whether section 3556 R. S. applies to natural gas companies, and you also inquire whether section 2478 R. S., or section 3556 R. S. applies to the provision of a Carrollton natural gas ordinance that "the gas company shall have the right to adopt some standard make of gas meters to be used by the patrons in consumption of gas, and shall furnish the same to the consumers by said consumers paying a reasonable rental therefor or purchasing the same at a reasonable price to be fixed by the company and council."

Section 3556, as amended by the act approved May 9, 1908, (99 O. L. 471), provides that:

"The provisions in this section shall apply to all gas companies, supplying the public with either natural or artificial gas."

Although this section, as it stood prior to this amendment, was enacted (64 O. L. 39) at a time when natural gas was not used in Ohio for illumination and other purposes, yet the reasoning of the courts in such recent cases as Cline v. the city of Springfield, 7 N. P. 626, the city of Toledo v. Natural Gas company, 5 C. C. 557, and Chillicothe v. Logan Natural Gas & Fuel company, 8 N. P. 88, in construing secs. 2478 and 2479 R. S., would seem to extend the provisions of 3556 even prior to the above amendment so as to include natural gas companies.

I understand that the natural gas ordinance cited by you was passed by the council of Carrollton prior to the amendment of sec. 3556 (99 O. L. 471). Since sec. 2478, which gives councils the right to regulate and fix the price for rent of meters as contained in the acts of 98 O. L. 170, 97 O. L. 114, 86 O. L. 62, etc., is later in point of time than sec. 3556, as found in 64 O. L. 69, and since the provisions of sec. 2478, as to rent of meters, is special in its nature, such later special provision would prevail over the earlier general provision of 3556 that "no gas company shall have the right to charge rent for meters." The council, therefore, has the right, under the terms of the ordinance passed prior to May 9, 1908, to regulate and fix the rental price of meters. However, until council does so fix such price (the company having no authority either under the law or under its ordinance to act in this matter), the provision of sec. 3556 that "no company shall have the right to charge rent for meters" will prevail, and the company can charge no rental for meters.

Very truly yours,

U. G. DENMAN,
Attorney General.

COMMISSIONERS—LEGAL COUNSEL MAY NOT BE EMPLOYED BY, WITHOUT WRITTEN REQUEST OF PROSECUTING ATTORNEY.

February 16th, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your communication of February 11th is received, in which you inquire as to the authority of county commissioners, under section 845 R. S., as amended 99 O. L. 388, to employ legal counsel without the written request of a prosecuting attorney. In reply I beg to say section 845 as amended is in part, as follows:

> "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."

The above quoted section only authorizes the county commissioners to employ legal counsel upon the written request of the prosecuting attorney. It follows, therefore, that the county commissioners are without authority to employ legal counsel, as provided in said section, until a written request for such employment is first made by the prosecuting attorney.

Very truly yours,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEE—RESIDENCE IN TOWNSHIP OTHER THAN ONE FROM WHICH ELECTED.

March 29th, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this department thereon the following question:

A citizen of Brown township, Darke county, was duly elected and qualified trustee for said township. After entering upon the discharge of his duties as such trustee in said township he removed to a neighboring township, taking up his residence therein with intent to remain permanently in his new location. He asserts his right to continue in his official capacity as trustee in the township of Brown from which he moved. Can he legally do this?

In reply thereto I assume from your inquiry that the legal residence of this trustee is established in a township other than Brown. Section 1441 Revised Statutes provides that township officers shall be elected by the electors of such township. Section 1442 Revised Statutes provides that the term thereof, justices of the peace excepted, shall be for a term of two years. Section 1448*a* Revised Statutes provides:

"Before entering upon the discharge of his duties each township trustee elected * * * shall give to the state of Ohio, for the *use of the township* a bond with at least two sureties *who shall be residents of the same township with the trustee*, in the sum of $500, payable as above mentioned * * *."

From these sections it seems clear to me that the removal of the legal residence of this trustee to a township other than Brown township disqualifies such trustee from further performing the duties of his said office in Brown township, and creates a vacancy in said township in the office of trustee, which vacancy should be filled in accordance with the provisions of section 1452 Revised Statutes in such case made and provided.

Very truly yours,

U. G. DENMAN,
Attorney General.

BONDS—ISSUE OF BY COUNTY COMMISSIONER UNDER SECTION 2834*a* TO TAKE UP OUTSTANDING INDEBTEDNESS OF COUNTY.

County commissioners may not issue bonds twice under section 2834a R. S. to pay outstanding indebtedness which has been caused by maximum levy allowed by law being insufficient to meet necessary expenses.

April 1st, 1909.

HON. C. C. W. MAYLOR, *Prosecuting Attorney, Manchester, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter in which you state that the maximum county levy allowed by law has not produced sufficient revenue to meet the necessary expenses of your county from time to time; that various claims have been allowed and warrants drawn on the general account of the county and are now outstanding in the amount of thirteen to fourteen thousand dollars and not paid for lack of funds in "county account." You further state that a similar condition existed in your county in 1904 when, under favor of section 2834*a* Revised Statutes, your county commissioners issued bonds for the amount of the indebtedness at that time, to-wit: $13,500. You now inquire if your county commissioners may again avail themselves of said

section 2834*a* and issue bonds on which to realize the amount of the present deficit of approximately $14,000 which has been incurred in excess of the revenue derived from the maximum levy allowed by law for the county fund since 1904.

Your inquiry raises the question as to whether such act on the part of your commissioners will not be in effect increasing the indebtedness of the county within the meaning of the act?

Section 2834*a* Revised Statutes provides that:

> "The * * * commissioners of any county, for the purpose of extending the time of paying an indebtedness, which, from its limits of taxation such county is unable to pay at maturity, shall have power to borrow money or to issue bonds of such * * * county so as to change but not to increase the indebtedness, in such amounts and for such length of time and at such rate of interest as the commissioners may deem proper, not to exceed the rate of six per centum per annum payable annually or semi-annually. * * * * * And for the payment of the bonds issued under this section * * * the county commissioners shall levy a tax, in addition to the amount otherwise authorized every year during the period the bonds have to run sufficient in amount to pay the accruing interest and the bonds as they mature."

The purpose of the act seems to be to permit a county in such condition as your county was in 1904, having general outstanding and unpaid accounts on which it is paying interest, to fund the indebtedness. It is known as result of experience that by permitting the county to issue bonds for this purpose the rate of interest on the bonds would be sufficiently less than the rate of interest of the ordinary outstanding indebtedness of the county to make an appreciable difference; and it seems to be the intent of the act that the county may be the beneficiary of this as well as having its indebtedness funded. But your county did this in 1904. Your commissioners seem to have proceeded on the theory that they might repeat the issuing of such bonds as frequently as the accumulating excess of county liability might demand. The question then comes, is this not in fact and effect such increasing of the indebtedness of the county as the section itself expressly prohibits? The property owners and taxpayers of your county are safeguarded by the provisions of section 2823 R. S., which places a limitation upon the rate of levy for taxes for county purposes. If, from time to time, your county commissioners can avail themselves of section 2834*a* and issue new bonds, then all that will be necessary for them to do in order to annul the salutary provision of said section 2823 R. S., is to incur county obligations in excess of the money levied from the legal tax levy and issue bonds for such excess.

This power given to a board of commissioners, who may be unappreciative of the effect of an increasing bonded indebtedness, to be paid at a future date by the property owners of the county, would be hazardous to property rights, and, in my opinion, contrary to both the letter and spirit of the statute directly under consideration, and all other Ohio law relating to taxation.

To prevent abuse of discretion in the expenditure of county funds by county commissioners the legislature wisely placed a limitation on the tax levy to be imposed for that purpose in section 2823 R. S. That this section of the statutes was in the mind of the legislature when enacting section 2834*a* is evident because of the use of the phrase "*so as to change but not to increase the indebtedness.*"

A repetition of this character of bond issue with the power vested in the commissioners to "*levy a tax in addition to the amount otherwise authorized every year during the period the bonds have to run sufficient in amount to pay the accruing interest and the bonds as they mature,*" is "to increase the indebtedness" of the county.

I am therefore of the opinion that, under the statement of facts as set forth in your inquiry, your commissioners have no legal authority to issue such further bonds as your inquiry suggests.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES—COUNTY COMMISSIONERS—GRADE CROSSING.

Township trustees and commissioners need not be joined in petition to establish grade crossing at point where road established by commissioners and opened by trustees is to cross railroad track.

February 17th, 1909.

HON. F. M. PARSONS, *Prosecuting Attorney, McConnellsville, Ohio.*

DEAR SIR:—I have received your communication in which you submit the following inquiry:

> Should township trustees and county commissioners be joined as plaintiff in a petition to establish a grade crossing at a point where a road established by the county commissioners, and opened by the trustees, is to cross a railroad track?

In reply I beg to say section 3337-17*m* of the Revised Statutes is in part as follows:

> "A petition shall be presented by the board desiring such construction to the court of common pleas of the county within which said crossing is situated upon ten days' notice to the corporation owning said railroad, * * * and setting forth the reasons that are supposed to make the same necessary or desirable; and the court of common pleas shall thereupon have jurisdiction of the parties and the subject matter of the petition, and may proceed summarily or otherwise, and upon such notice as it shall deem sufficient to examine the matter, either by evidence, by reference to a master commissioner or otherwise, and if satisfied that such construction is reasonably required to accommodate the public * * * it shall make an order or orders permitting such crossing or grade to be established."

From your statement of facts I assume that the duty is enjoined upon the township trustees to open up the road. This being true, under the above quoted provisions of section 3337-17*m*, I am of the opinion that it is not necessary for the county commissioners to join in said petition.

I am further of the opinion that the expense of constructing said crossing and approaches thereto should be paid as provided in section 3337-3 R. S.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION IN SCHOOL DISTRICTS CONTAINING ONE BANK —COMPETITIVE BIDDING FOR FUNDS BY BANKS CONVENIENTLY LOCATED.

February 26th, 1909.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have received your communication under date of February 24th, in which you submit the following inquiry:

> Under the provisions of section 3968 R. S., may a board of education in a school district containing but one bank designate that bank as a depository for school funds without bringing other banks outside the school district into competitive bidding with it?

In reply I beg to say section 3968 R. S. is, in part, as follows:

> "In all school districts containing *less than two banks* the board of education may, after the adoption of the resolution providing for the deposit of its funds, enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall in no case be less than 2 per cent., for the full time the funds, or any part thereof, are on deposit, and said bank or banks shall give good and sufficient bond of some approved guaranty company in a sum at least equal to the amount deposited, etc."

The above quoted provision of section 3968 R. S. authorizes the board of education in school districts having but one bank to award contracts based upon competitive bids to one or more banks conveniently located, providing, however, that the contract shall be given to the bank or banks offering the highest rate of interest. While the language used in this provision is not mandatory in form, yet from a consideration of the entire section I am of the opinion that the word "may," as used therein, should be construed to mean "shall" for the reason that it is clearly the policy of the law in creating depositaries for school funds to base the contracts for the same upon competitive bids.

I am, therefore, of the opinion that in school districts containing but one bank the board of education is required to submit proposals for competitive bids to such banks as are conveniently located and designate as depositaries such bank or banks as offer the highest rate of interest.

Very truly yours,

U. G. DENMAN,
Attorney General.

BLIND—RELIEF FOR NEEDY.

Blind woman who has children required by law to support her and are able to do so, is not entitled to relief.

March 15th, 1909.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this office the following inquiry:

Is an indigent blind person living with her son entitled to an allowance under the act to provide relief for the needy blind, when the son is a motorman on the street car, earning from fifty to sixty dollars a month, is buying a home and paying for the same, and has two children living at home whom he is educating in music?

Replying thereto I beg to say that section 2 of "an act to provide for the relief of needy blind," as found on page 256, 99 O. L., provides that:

> "A needy blind person shall be construed to mean any person of either sex who, by reason of loss of eyesight, is unable to provide himself with the necessities of life; who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by this act, would become a charge upon the public *or upon those not required by law to support him.*"

The blind commission of your county should first determine whether this applicant for relief is such a "needy blind person" as described in this section. If the commission finds that such person applying for relief has living children not indigent themselves it should, before granting relief, ascertain if such child or children are not required under section 7017-3 to support the parent. Said section 7017-3 provides that:

> "Any adult person, a resident of this state, having a parent within this state, said parent being destitute of means of subsistence and unable either by reason of old age, infirmity or illness to support himself or herself, who is possessed of, or able to earn means sufficient to provide such parent with necessary shelter, food, care and clothing, and neglects or refuses so to do, shall, upon conviction, be imprisoned in a jail or in a workhouse at hard labor, for not more than one year nor less than three months."

It was not the legislative intent in the enactment of this act to provide for the relief of the needy blind nor of said section 7017-3 that any child of a destitute, infirm or aged parent should be buying a home and giving his children special educational advantages, leaving his indigent mother to become a county charge. The making of an allowance to this applicant will depend upon her not having a child required by law to support her. This is a question of fact to be determined in each instance by the commission.

Your inquiry leaves me to assume that this applicant is a resident of this state and has been a resident of your county for one year.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY—DUTIES OF.

Prosecuting attorney must, without additional compensation, prosecute and defend civil actions and act as legal adviser for county commissioners, township trustees and boards of education, excepting those of city school districts; he need not appear in probate court in inquests of lunacy.

February 13th, 1909.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiries:

"1. As prosecuting attorney am I compelled by law to prosecute or defend civil actions for township trustees or school boards without compensation?

"2. Am I required to defend county commissioners in civil actions at law in which they are made parties without compensation?

"3. Is it a part of my duty to prosecute proceedings in lunacy in the probate court, and if so am I entitled to charge the persons interested for so doing?"

In reply thereto I beg to refer you, in answer to your first two inquiries, to sections 1274 and 3977 of the Revised Statutes. Sec. 1274 makes the prosecuting attorney the legal adviser of the county commissioners and all other county officers, and also requires him to perform all the duties and services required to be performed by legal counsel under sec. 845 of the Revised Statutes. Said sections also require him to be the legal adviser for the township officers and further provide that 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.

Section 3977 of the Revised Statutes makes it the duty of the prosecuting attorney to give legal advice to all boards of education in the county in which he is serving, except in city school districts, and further provides that he shall be the legal counsel of said boards or the officers thereof in all civil actions brought by or against them and shall conduct the same in his official capacity.

It follows, therefore, that all of the services embraced in your first two inquiries are official duties to be performed by you without additional compensation to your regular salary provided by law.

In reply to your third inquiry I desire to say inquests of lunacy in the probate court are held under the provisions of section 702 and succeeding sections of the Revised Statutes, and in the procedure there provided no duty devolves upon the prosecuting attorney. I am, therefore, of the opinion that you are not required officially to attend upon the probate court in proceedings in lunacy.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOYS' INDUSTRIAL SCHOOL—ACCOUNT AGAINST GEAUGA COUNTY.

March 6th, 1909.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Your communication is received in which you request an opinion of this department as to whether the enclosed account of the Boys' Industrial School against Geauga county is in compliance with section 632 Revised Statutes.

Replying thereto I beg to say that section 632 of the Revised Statutes provides that:

"If there be a failure in any case to pay incidental expenses, or furnish the necessary clothing, the steward or other financial officer of the institution is hereby authorized to pay such expenses, and furnish

the requisite clothing, and pay for the same out of the appropriation for the current expenses of the institution, *keeping and reporting a separate account of the same. The account so drawn up*, signed by such officer, countersigned by the superintendent, and sealed with the seal of the institution, etc."

The copy of the form of account used by said institution, as enclosed, would be a reasonable compliance with the provisions of this section, but in case a county should feel that it was being overcharged for the incidental expenses and necessary clothing of an inmate in said school, I am of the opinion that under the language of said section, to-wit,"*keeping and reporting a separate account of the same,*" the county would be entitled to an itemized report of the expenditures in favor of such child.

Yours very truly,

U. G. DENMAN,
Attorney General.

CORONER—POWER OF TO HOLD INQUEST, UNDER FACTS OF CERTAIN CASE.

January 20th, 1909.

HON. FRANK J. ROCKWELL, *Prosecuting Attorney Akron, Ohio.*

DEAR SIR:—Your communication of January 14th is received in which you submit the following statement of facts, together with a request for an opinion thereon:

On December 16th, 1908, at nine o'clock P. M., Milo S. Williams, 30 years of age, a resident of the city of Akron, alighted from a north-bound street car at a regular crossing, on Howard street in the city of Akron, and proceeded around the rear end of said car, and was about to step upon and across an adjacent track, whereupon he was struck by a south-bound car, receiving injuries on the head and body; as a result of which injuries, he died at the Akron city hospital on Saturday, December 19th at ten o'clock A. M. The county coroner, Dr. H. S. Davidson, made an examination of the body on December 22nd, and afterwards, on December 28th, held an inquest, at which said inquest several witnesses were examined, and the coroner made a finding, in which finding it was held that the street car company was not liable for the death. The coroner has submitted his cost bill for holding such inquest to the county commissioners. Query: Under the above statement of facts, was the coroner authorized to hold the inquest, and should the county commissioners allow the cost bill?

In reply I beg to say the duties of a coroner, relative to the holding of inquests, are prescribed in section 1221 of the Revised Statutes. Said section is in part as follows:

"When information is given to any coroner that the body of a person whose death is supposed to have been caused by violence, has been found within his county, he shall appear forthwith at the place where such body is, shall issue subpoenas for such witnesses as he deems necessary, and administer to them the usual oath, and proceed to inquire how the deceased came to his death, if by violence from any other person or persons, by whom, whether as principals or accessories before or

after the fact, together with all the circumstances relating thereto; the testimony of the 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, shall be by the coroner returned to the clerk of the court of common pleas of the county, and he shall, if he deem it necessary, cause the witnesses attending as aforesaid, 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 aforesaid."

The supreme court in the case of State ex rel Brown v. Bellows, 62 O. S. 307, in passing upon the duties of the coroner under the above provisions of section 1221, held that it is the duty of the coroner to hold an inquest and perform the other duties enjoined upon him by said section whenever a dead body is found within his county, and he knows, or may reasonably believe, that death was caused by unlawful means, and that for the services rendered in holding such inquest he is entitled to the compensation provided by the statutes.

The court also say: "that a body 'is found' within the county when it is ascertained by any means that it is within the county."

Under the court's decision, in this case, the question to be determined is, did the coroner at the time he held the inquest know or have reasonable belief that the death was caused by unlawful means?

From the statement of facts it appears that the deceased, after alighting from a north-bound car, at a regular crossing on Howard street in the city of Akron, proceeded around the rear end of said car and was about to step upon and across an adjacent track when he was struck by a south-bound car receiving injuries, from which injuries he afterwards died. In addition to these facts the coroner also had information that the south-bound car which struck the deceased was moving at an undue rate of speed, and upon this information the inquest was held.

The question of criminal negligence on the part of the motorman operating the street car, and contributory negligence on the part of the deceased both enter into the determination of the question as to whether or not the death was caused by unlawful means, and certainly the coroner could not have known in advance of the inquest what the real facts were.

In my judgmnt, the information that the coroner had, as above set forth, was a reasonable ground for the belief that the deceased came by his death unlawfully and that he was warranted in holding the inquest.

I am therefore, of the opinion that the cost bill, if in accordance with the fees prescribed by law, should be allowed and paid.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL ATTENDED BY PUPILS LIVING IN ADJOINING DISTRICT—NOTICE TO ADJOINING DISTRICT.

Boards of education cannot collect tuition for attendance of pupils living in adjoining district until after notice of attendance of same is given to board of district where pupils reside.

March 23rd, 1909.

HON. E. C. SAYLES, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this department thereon the following inquiry:

> A school in one of our school districts in Scott township, this county, is being attended by scholars living in the adjoining district in Seneca county, more than one and one-half miles from the school in this district and less than that distance from the school which they are attending. They have attended this school for the past five years and no tuition has been paid for such attendance. One year ago the school board in the district where they are attending, notified the school board in the district in which they reside that they were indebted for tuition for the five years mentioned. The school board refused to pay the tuition accruing before the notification of attendance, on the ground that under section 4033*a* of the Revised Statutes they were not obliged to pay any tuition except that accruing after the notification of attendance. Does this statute exempt the school board from paying the tuition accruing before the notification of attendance?

Replying thereto, I beg to say that section 4022*a* Revised Statutes contains the law governing such cases as you present. It gives pupils living more than one and one-half miles from the school to which they are assigned in the district in which they live the right, without obtaining the consent of the board of education of the district where they reside, to attend a nearer school in the same district, or if there be no nearer school in said district they may attend the nearest school in another district, in all grades below the high school, and in such case the board of education of the district in which they reside shall be compelled to pay the tuition of such pupils without an agreement to that effect, *but the board of education shall not collect tuition for attendance as provided herein until after notice of such attendance shall have been given to the board of education of the district where the pupils reside.*

Applying well-established rules for the construction of statutory law to this section, the conclusion is reached that the board of education shall not collect tuition for attendance as provided in said section until after notice of such attendance is given to the board of education of the district where the pupils reside, and I so hold.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—CONTRACT WITH WORKHOUSE—MAYOR SENTENCING PRISONERS TO, AT COUNTY'S EXPENSE.

Where contract is made with workhouse by county commissioners for receipt of prisoners, mayor of city must not send prisoners to the same for violation of ordinances at county's expense.

March 19th, 1909.

HON. D. T. SIMPSON, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The board of county commissioners of Holmes county made a contract with the workhouse at Columbus for the receipt of prisoners sentenced thereto. The marshal arrested six men for being on a car of the Cleveland, Akron & Columbus Railway and took them before the mayor, where they were fined and sent to the workhouse at Columbus. A bill of costs for $106.40 was presented to the county commissioners. The commissioners were advised by the prosecuting attorney that the bill was not a proper claim against the county, but should be paid by the municipality.
>
> Query: Should said bill be paid by the county or municipality?

In reply I beg to say section 6801*a* Revised Statutes is in part as follows:

> "It shall be competent for the commissioners of any county or the council of any municipality, wherein there is no workhouse, to agree with the city council, or other authority having control of the workhouse of any city in any other county, or with the board of district workhouses having a workhouse, upon terms and conditions upon which persons convicted of misdemeanors or of the violation of any ordinances of such municipality * * * * may be received into such workhouse under sentence of such court or magistrate."

Under the provisions of said section as above quoted the county commissioners have authority to make a contract with a workhouse outside of their county wherein prisoners may be sentenced upon conviction for misdemeanors. The council of a municipality is also authorized to make such a contract for the receipt of prisoners convicted for violation of ordinances.

I am not informed from your letter whether or not the six men sentenced to the workhouse by the mayor were convicted under an ordinance or a state law. If the conviction was had under an ordinance the mayor was without authority to sentence them to the Columbus workhouse until after the council of the municipality had entered into a contract. If the conviction was had under a state law the mayor had the power to impose a sentence and the costs should be paid by the county.

Yours very truly,

U. G. DENMAN,

Attorney General.

COUNTY RECORDER—FEES—INDEXES.

County recorder may not retain for his own use compensation for making indexes under contract with county commissioners, payable after date when county salary law became effective; entitled to clerk hire for services made necessary by such contract.

January 8th, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

On August 4th, 1906, Frank Gmeiner, county recorder, entered into a contract with Putnam county, Ohio, through its board of commissioners, to make certain indexes as provided for by section 1154 of the Revised Statutes. The county officers' salary law became effective January 1st, 1907. Mr. Gmeiner has drawn money on this contract from time to time, both before and after said date. No part of said money drawn by him since the salary law went effect has been paid into the county treasury to the credit of the recorder's fee fund. Mr. Gmeiner has now presented another bill to the county commissioners for work done under this contract. Query: Is it the duty of the county commissioners to allow this bill for work done under said contract, notwithstanding the fact that Mr. Gmeiner intends to retain the money instead of covering it into the county treasury?

In reply I beg to say, under the provisions of the county officers' salary law the county recorder is entitled to receive for his personal use all money due for services rendered under said contract prior to January 1st, 1907, when the county officers' salary law became effective. He is also entitled to receive payment for all services rendered upon said contract since the enforcement of the salary law, but is required to turn the same into the county treasury to the credit of the recorder's fee fund. Mr. Gmeiner, however, is entitled to an allowance from the county commissioners, to be paid out of the recorder's fee fund, from which clerk hire may be paid for services rendered under said contract. Should the county recorder fail to turn the money received upon said contract since the salary law went into effect into the county treasury to the credit of the fee fund, suit may be brought against him by the prosecuting attorney for the recovery of the same. I do not believe that the county commissioners are authorized to refuse payments upon said contract solely upon the ground of the belief that the recorder will not perform his legal duty in turning the money, when received, into the county treasury. In my judgment, the thing to do is for the county commissioners to pay the bills and then instruct the prosecuting attorney to see that the money is covered into the treasury.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—TRAVELING EXPENSES OF.

March 9th, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

"May county commissioners rceceive expenses under section 897-5 Revised Statutes, in addition to the compensation fixed by section 897 Revised Statutes?"

In reply I beg to say section 897 R. S., as amended (97 O. L. 254), renders void the provision for traveling expenses, as provided in section 897 R. S., for the reason that said section 897-5 does not authorize the payment of expenses to county commissioners in counties where the compensation of said commissioners is fixed by a stated salary; and under section 987, as now amended, all county commissioners are compensated by a fixed salary.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—REWARD FOR ESCAPED INMATE OF ASYLUM.

County commissioners may not offer reward for capture of one indicted for murder and before trial found to be insane and committed to asylum from which place he escaped.

March 19th, 1909.

HON. PHIL B. SMYTHE, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Your communication is received in which you submit, for the opinion of this department thereon, the following inquiry:

> At the September term, 1908, of the common pleas court of this (Licking) county, a man named Terwilliger was indicted for murder. Afterwards, at the same term, under sections 7240-7243, a jury was empanneled to try the question of his sanity, and he was found to be insane and ordered committed to the hospital for the insane at Columbus. He remained in the asylum some time and then escaped. This man was never declared to be sane by the hospital authorities, and never returned to the jurisdiction of the Licking county officials. The question now is, have the commissioners of this county authority to offer a reward for his capture?

The answer to your inquiry depends upon the authority vested in the county commissioners by section 918 R. S., which provides that

> "the county commissioners may, when they deem the same expedient, offer such rewards as in their judgment the nature of the case requires, for the detection or apprehension of any person charged with or convicted of a felony, and pay the same on the conviction of such person, together with all other necessary expenses, not otherwise provided for by law, incurred in making such detection or apprehension, out of the county treasury."

It is true that the escaped inmate of the institution is still insane in contemplation of law, and is still a criminal, regardless of his mental condition.

as is clear under sections 7240-7243 R. S. above referred to. But before the commissioners would be authorized to pay such reward this insane person would have to be declared sane by the hospital authorities, which may never be, and later convicted in Licking county.

While the discretion given the commissioners by section 918 R. S. is wide in its scope, it should not be construed as warranting an expenditure of the county's money for the apprehension of a person who cannot be tried in his present condition, and which trial is contingent wholly upon his recovery and proper discharge from the hospital for the insane.

I am, therefore, of the opinion that the commissioners of Licking county have not legal authority to offer reward for the detection or apprehension of Terwilliger.

Very truly yours,

U. G. DENMAN,
Attorney General.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—EXAMINATION OF TOWNSHIP OFFICES — PROSECUTING ATTORNEY MUST ENFORCE FINDINGS.

February 13th, 1909.

HON. SCOTT STAHL, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The bureau of inspection and supervision of public offices has made an examination of the various offices of Salem township, Ottawa county, said examination disclosing that M. Herring and A. H. Suhrbier had drawn fees illegally from the township treasury in the following amounts respectively: $8.50 and $58.00. W. G. Franck, a taxpayer, has made a written demand upon me to bring suit against said trustees for said amounts. No report of the examination as made by the bureau of inspection and supervision of public offices has been filed with me, as provided in section 8 of the act creating said bureau.
>
> Query: Is it my duty as prosecuting attorney to institute the suits demanded by said taxpayer?

In reply I beg to say section 8 of the act creating the bureau of inspection and supervision of public offices requires "the proper legal authority of the taxing district" in which the examination is made "to take prompt and efficient legal action by civil process to carry into effect the findings of any such examination or to prosecute the same to a final conclusion."

In as much as the prosecuting attorney is by law the legal adviser of township officers, I am of the opinion that he is the "proper legal authority upon whom the duty devolves" to "carry into effect the findings" resulting from an examination of the offices of a civil township.

Under the law the bureau should have filed a copy of their report with you. Their failure to do so may have been an oversight. I suggest that you call their attention to the delinquency.

You also inquire as to the style of the action to be brought against said

trustees. The form usually adopted, and in my judgment the correct one, is to bring the action in the name of the state of Ohio for the benefit or on behalf of the taxing district entitled to recover. In this instance I would adopt this caption: "The State of Ohio on the Relation of Scott Stahl, Prosecuting Attorney of Ottawa County, for the Benefit of Salem Township, v. M. Herring and A. H. Suhrbier."

Yours very truly,

U. G. DENMAN,
Attorney General.

BLIND RELIEF—CITIZENSHIP—RESIDENCE.

February 17th, 1909.

HON. EDWARD S. STEPHENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I have received your communication in which you submit the following inquiry:

> Under the provisions of the law providing relief for worthy blind are blind persons who have been residents of the state and county during the time required in said law, but who are not citizens, entitled to the relief therein provided?

In reply I beg to say section 3 of said act is as follows:

> "The said blind persons must be *bona fide* residents of the state of Ohio for five years, and of their respective county one year. Under no condition or circumstances shall the said beneficiary lose his or her benefits or residents by or through removal to any home or institution for the blind not maintained by the state or county."

It will be observed that the above section provides that the applicant for relief must be a *bona fide* resident of the state for five years, and of the county one year, but contains no requirement that he shall be a citizen.

I am therefore of the opinion that unnaturalized persons, who come within the other requirements of the law are entitled to receive the benefits herein provided.

Very truly yours,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES AND VILLAGE COUNCIL POWER TO ERECT TOWN HALL—ISSUE OF BONDS—PROPERTY TO BE TAXED.

Township trustees and village council desiring to erect township hall must comply with provisions of section 1480a-1, 2, 3, *even if sufficient funds are in treasury available for purpose.*

Township trutees desiring to erect halls in two villages in said township, but in different election precincts, must submit question to voters severally, but may be on same ballot and at same election.

Township trustees may issue bonds for above purpose and tax must be levied on all property in township.

February 27th, 1909.

HON. J. R. STILLINGS, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiries:

1. May the trustees of a township contract with the council of a village for the erection of a town hall without complying with the provisions of sections 1480*a*-1, 2, 3, provided that sufficient funds are in the treasury and available for that purpose?

2. The board of trustees in a certain township desire to erect halls in each of two villages situated within said township, each village being in a different election precinct. In complying with the provisions of sections 1480*a*-1, 2, 3, should the question for the erection of the two halls be submitted as a whole or separately?

3. Do sections 1480*a* and 1480*a*-4 authorize an issue of bonds?

4. Under section 1479 may the question of the erection of two different town halls be voted on at the same time, and should the tax authorized to be levied by the trustees under said section be levied on the entire township or should the incorporated villages be excluded?

In reply I beg to say:

First: Section 1480*a* and section 1480*a*-1 to 1180*a*-4, inclusive, provide a method by which the *electors* of an incorporated village and the *electors* of the township may unite in the enlargement, improvement or erection of a public building. No authority is given the trustees of the township or the council of the village to take the initiative in such contemplated improvement.

Section 1480*a*-4 does provide, however, that the council of the village and the trustee of the township shall jointly take such action as is necessary to carry out the contemplated improvement in the event that two-thirds of the electors of said village and township voting shall vote in favor of said improvement. The fact that the money is already in the treasury, thereby making the levy of a tax unnecessary, does not, in my judgment, authorize the township trustees to expend the same for such joint building until after the electors have so decided as herein provided.

It follows therefore, that the provisions of the above cited sections must first be complied with before the township trustees will be authorized to contract with the village council for the erection of such public building.

Second: In my judgment the question for the erection of the two halls should be submitted severally. I do not mean, however, that there should be two separate and distinct ballots, but that the question should be so submitted that the electors may vote for or against one or both.

Third: Section 1480*a*-4 authorizes the village council and township trustees to take such *action as is necessary* to carry out the improvement contemplated. And section 2835 R. S. gives authority to both township trustees and village councils to issue and sell bonds for the erection of public halls and public offices.

Fourth: I see no reason why the question of the erection of two town halls may not be submitted at one election, provided that the same opportunity is given the electors as is suggested in my answer to your second inquiry.

As to the question of the levying of the tax, said section 1479 provides that the "trustees shall levy the necessary tax" and it necessarily follows that such tax must be levied upon all of the property in the township.

Yours very truly,

U. G. DENMAN,
Attorney General.

DELINQUENT PERSONAL TAXES.

Failure to pay December half-tax within time fixed by law and resolution of county commissioners renders personal tax for entire year delinquent, and penalty is computed on entire amount.

January 8th, 1909.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry: Under the provisions of H. B. No. 724 (99 Ohio Laws p. 435), where the payment of the December half of taxes on personal property has been extended by the county commissioners to January 20th, and the same has not been paid, and the whole amount of taxes for the current year thereby becomes due and delinquent, does the 5 per cent. penalty as provided in said bill, attach to the whole year's taxes?

In reply I beg to say section 1094, as amended by H. B. No. 724, as passed by the last general assembly, is as follows:

> "When one-half of the taxes, as aforesaid, charged against any entry, on a tax duplicate in the hands of a county treasurer, is not paid on or before the 20th day of December next after the same has been so charged, or when the remainder of such taxes is not paid on or before the 20th day of June next thereafter, the county treasurer shall proceed to collect the same by distress or otherwise, together with a penalty of five per centum on the amount of taxes *so delinquent*, which penalty shall be turned into the treasurer's fee fund, provided, however, that the county commissioners of any county in the state shall have the power, by resolution spread upon their journal, to extend the time of payment of taxes from June 20th to July 20th of the same year and from December 20th to January 20th of any following year; but in all cases where such half of any taxes, other than on real estate, has not been paid on the 20th day of December or on the 20th day of the following January, providing the time has been so extended, the whole amount of taxes, other than on real estate, for the current year, so charged, shall be *due and delinquent, and shall be collected in the manner and with the penalty provided in this section.*"

The above section designates all taxes delinquent that are due and not paid on the 20th day of December and on the 20th day of June, and provides a penalty of 5 per centum on taxes so delinquent. Said section, however, authorizes the county commissioners, by proper resolution, to extend the time of payment of June taxes to July 20th and December taxes to January 20th, but further provides that where the December taxes on personal property are

not paid on January 20th, when the time is so extended, the whole amount of personal taxees for the current year become due and delinquent and shall be collected in the manner and with the penalty provided in the section.

The penalty attaches when taxes become delinquent and the whole year's personal tax becomes delinquent when the December half is not paid within the period of extension. It follows, therefore, that in the collection of delinquent personal taxes caused by the failure to pay the December half within the period of the extension, the penalty of 5 per cent. will also be collected on the whole amount of personal taxes charged for the current year.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—SALE OF BONDS.

Board of education proceeding under section 3992 R. S., need not ask for appointment of sinking fund trustees; bonds issued under such section need not be sold by competitive bidding, but such sale must be advertised.

January 22nd, 1909.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication of January 20th has been received. You submit the following inquiries:

1. Should boards of education having no bonded indebtedness and proceeding under sections 3992 and 3993 of the Revised Statutes in selling bonds apply to the court for the appointment of a board of commissioners of the sinking fund, and after such appointment offer said bonds to such board?

2. May the board of education, proceeding under section 3992, sell the bonds at private sale without competitive bidding?

In reply thereto permit me to say that section 3992 provides:

"If a majority of the electors, voting on the proposition to issue bonds, shall vote in favor of said issue, the board shall be thereby authorized to issue bonds for the amount indicated by the vote provided for in section thirty-nine hundred and ninety-one, the issue and sale of said bonds to be provided for by a resolution fixing the amount of each bond, the length of time they shall run, the rate of interest they shall bear, and the time of sale which may be by competitive bidding at the discretion of the board; the bonds shall bear a rate of interest not to exceed six per cent. per annum payable semi-annually, shall be made payable within at least forty years from the date thereof, be numbered consecutively, made payable to the bearer, bear date of the day of sale and be signed by the president and clerk of the board of education; the clerk of the board shall keep a record of the number, date, amount, and the rate of interest of each bond sold, the amount received for the same, the name of the person to whom sold, and the time when payable, which record shall be open to the inspection of the public at

all reasonable times; and the bonds so issued shall in no case be sold for a less sum than their par value, nor bear interest until the purchase money for the same shall have been paid by the purchaser."

Section 3993 provides:

"When an issue of bonds has been provided for under sections thirty-nine hundred and ninety-one and thirty-nine hundred and ninety-two the board of education shall certify annually, to the county auditor or auditors as the case may require, a tax levy sufficient to pay said bonded indebtedness, as the same shall fall due together with accrued interest thereon; the county auditor or auditors shall place said levy on the tax duplicate and it shall be collected and paid to the board of education in the same manner as other taxes are collected and paid. The tax levy provided for herein shall be in addition to the tax levy provided for under section thirty-nine hundred and fifty-nine and shall be kept in a separate fund by the board of education and applied only to the payment of the bonds and interest for which it was levied."

The law relating to the appointing of sinking fund trustees and their powers and duties is found in section 3970-1 to 3970-4 of the Revised Statutes. Section 3970-1 provides:

"In any school district having a bonded indebtedness, for the payment of which together with interest, no provision has been made by a special tax levy for that particular purpose, it shall be the duty of the board of education of such district and such board shall annually, on or before the 31st day of August, set aside from its revenue a sum equal to not less than one-fortieth of said indebtedness together with a sum sufficient to pay the annual interest thereon.

"The board of education of every district shall provide a sinking fund for the extinguishment of all its bonded indebtedness, which sinking 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 who shall be appointed by the court of common pleas of the county in which such district is chiefly located, provided that in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of commissioners of the sinking fund of the school district; the commissioners of the sinking fund shall serve without compensation and shall give such bond as the board of education may require and approve, provided that any surety company authorized to sign such bonds may be accepted by such board of education as surety, and the cost thereof, together with all necessary expenses of the commissioners of the sinking fund shall be paid by said commissioners out of the funds under their control."

It is my opinion that the above provisions of law do not require boards of education to apply for the appointment of sinking fund trustees when they issue bonds under section 3992 R. S. since the making of an annual levy is mandatory under the provisions of section 3993. There will be no funds in the hands of such trustees to make investments and purchase bonds, and their sole function would be to receive the money arising from the levy and pay the bonds

and interest at maturity. I do not believe the law contemplates such action. The board of education may perform that duty.

Section 3992 gives to such boards the discretion to determine whether or not such bonds shall be sold by competitive bidding.

Section 22*b* of the Revised Statutes provides:

> "All bonds issued by boards of county commissioners, boards of education, commissioners of free turnpikes, shall be sold to the highest bidder after being advertised three times, weekly, in a newspaper having a general circulation in the county where the bonds are issued; and if the amount of bonds to be sold exceeds twenty thousand dollars, then in an additional newspaper having a general circulation in the state, three times, weekly. The advertisement shall state the total amount of bonds to be sold, the amount of each bond, how long they are to run, the rate of interest to be paid thereon, whether annually, or semi-annually, the law or section of law authorizing their issue, the day, hour and place in the county where they are to be sold. None of said bonds shall be sold for less than the face thereof, with any interest that may have accrued thereon; and the privilege shall be reserved of rejecting all or any bonds, and if said bids are rejected said bonds shall again be advertised; all moneys arising from premiums on the sale of said bonds, as well as the principal, shall be credited to the fund on account of which the bonds are issued and sold."

It appears that section 3992 R. S. contains a special provision which supplants section 22*b* as to the sale of such bonds by competitive bidding, but the provision as to the advertisement is not superseded.

The supreme court of Ohio, in Cinti. v. Guckenberger (60 O. S. 353), used this language:

> "True, it is not uncommon to find in legislation special provisions intended to supplant or supersede, for the special subject matter, some general provision on the same general subject, but such instances are expected to be so marked, either by the force of the language itself, or by necessary implication as to the purpose to be accomplished, as that the meaning shall be plain."

It seems proper that the attention of the board of education should be called to the general provisions of section 22*b*, together with the language above quoted, for their consideration, in exercising the discretion vested in them.

Very truly yours,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR—ALLOWANCE FOR SERVICES IN STATE CASES NOT DEPENDENT UPON ACTION OF COUNCIL.

January 20th, 1909.

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your communication of January 16th is received. In reply thereto I beg to say, in my judgment, it is not essential that council should first prescribe compensation to the city solicitor for his services as prosecuting at-

torney in the mayor's court before the county commissioners are authorized to allow compensation for such services as may be rendered by said solicitor in state cases.

It is true that section 137 of the municipal code, as amended, contains the provision that

> "the solicitor shall also be prosecuting attorney of the police court or mayor's court, and shall receive for this service such compensation as council may prescribe, and such *additional* compensation as the county commissioners may allow."

It is not my view, however, that the legislature intended to make the allowance by the county commissioners dependent upon the action of the council, but rather intended that the council should make an allowance for the services of the solicitor in the prosecution of offenses under ordinances, and that the commissioners should make allowance for the prosecution of offenses under the state laws.

Yours very truly,

U. G. DENMAN,
Attorney General.

BLIND—ASSISTANCE FROM COMMISSION—STATE SCHOOL FOR BLIND.

February 19th, 1909

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your inquiry is received in which you submit the following inquiry:

> "We have in our county a little boy three years old who was born totally blind. The child has good use of all other senses and faculties The mother is not in good circumstances and is dependent upon her own efforts for the support of herself and child. She has applied to the commission for the relief of the worthy blind. Query: Is said commission authorized, under the law, to grant any relief?"

In reply I beg to say section 2 of the act providing relief for the worthy blind, is, in part, as follows:

> "That all *male blind persons over the age of twenty-one years* and *all female blind persons over the age of eighteen years* who are declared blind in the manner hereinbefore set forth, and have no property or means with which to support themselves, shall be entitled to, and receive, not more than twenty-five dollars per capita quarterly."

This section expressly limits the blind commission in granting relief to male persons over the age of twenty-one, and female persons over the age of eighteen. It follows, therefore, that neither the child nor its mother is entitled to relief under this law.

Section 666 of the Revised Statutes, which provides the rules for admission of pupils to the Ohio State School for the Blind, does not permit admis-

sion of pupils under the age of six years The child, therefore, cannot be placed in that institution now.

I know of no way by which public assistance or relief may be granted either the child or its mother, at this time, save the statutes which provide relief for the pauper poor. After the lapse of three years, however, the child will be eligible to admission in the school for the blind and from that time may receive all the benefits provided in that institution.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—APPROPRIATION FOR CLERK HIRE INCIDENT TO DECENNIAL APPRAISEMENT.

February 27th, 1909.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Are the county commissioners authorized under the county officers' salary law to make appropriations for clerk hire incident to the decennial appraisement subsequent to the time when the aggregate sums to be expended for compensation to deputies, assistants, bookkeepers and clerks are determined as provided in section 3 of said law?

In reply I beg to say this office has heretofore advised the bureau of inspection and supervision of public offices that section 3 of the county officers' salary law contempates the making of but one appropriation by the county commissioners to the various offices to be expended for deputies, assistants, bookkeepers, clerks, etc. In my judgment the county commissioners, in determining the amounts to be expended for the year 1909 should have taken into consideration any additional sums which might be required by reason of the decennial appraisement and included the same in their annual appropriations.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUVENILE COURT ACT—MEDICAL EXAMINATION OF CHILDREN—PROBATION OFFICERS—EXPENSES OF.

Section 40 of the act 99 O. L. 192 authorizes expenditure of county's money for medical certificate for children committed to institutions designated in said act.

Said act authorizes probation officers to contract livery bills in issuing warrants, etc., under said act for bringing into court children to which act applies.

Probation officers authorized to incur expense incident to travel on street cars or interurban lines in discharge of duties.

March 3rd, 1909.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department, for opinion thereon, the inquiries of Probate Judge Samuel L. Black, which are substantially as follows:

1. Does section 40 of the juvenile court act passed April 23rd, 1908 (99 O. L. p. 192), authorize the expenditure of the county's money for the procuring of medical certificate for such dependent, neglected or delinquent children as may be committed under authority of said act, to the institutions therein designated to receive such children?

2. Does any section or sections of said act authorize the payment for medical examination, by physician, of children amenable to said act, upon their being committed to the juvenile detention home by a court designated by said law, to act in the premises?

3. Does any section or sections of said act authorize probation officers appointed under authority of said act, to contract livery bills in the issuing of warrants, citations of subpœnas and other writs under said act, and the bringing into court of those children to which said act applies?

4. Are such probation officers authorized to incur the expenses incident to the travel on street cars or interurban lines in the discharge of their duties as referred to in inquiry No. 3?

1. Replying thereto, in order, I beg to say section 40 of said juvenile court act is that:

"This act shall be liberally construed to the end that its purpose may be carried out, to-wit: That proper guardianship may be provided for in order that the child may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, and as far as practicable in proper cases that the parent, parents or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child. *And all fees and costs in all cases coming within the provisions of this act, together with such sums as shall be necessary for the incidental expenses of such court and its officers, and together with the costs of transportation of children to places to which they may be committed,* shall be paid out of the county treasury of the county upon itemized vouchers and certified to by the judge of the court."

From the language of this section it would seem that the legislature intended that the courts given jurisdiction to hear and determine complaints filed therein, under authority of this act, shall have and exercise a discretion to the end that the purposes and intents of the law shall be carried out to the best interest and welfare of the children amenable thereto. It seems highly proper and indeed necessary that the commitment papers for any child placed in an institution, as directed in this act, should be accompanied by a medical certificate; and particularly so when there is a possibility that the child is af-

flicted with an infectious or contagious disease. To neglect such medical examination of said child would be to endanger the health, morals and welfare of the other inmates of the institution to which said child may be committed, which would not be in accord with the "purpose" of this act. I am, therefore, of the opinion that section 40 of said act does authorize such medical examination and certificate.

2. I am of the opinion that section 40 authorizes the payment for such examination as is indicated in question 2 for the same reasons as are given in the answer to inquiry No. 1. To commit a child whose habits and life would be such as to render it subject to commitment in said detention home, without a medical examination, would be hazardous to the other inmates of the home, as well as to the child committed. I am, therefore, of the opinion that such examination and treatment of said child should be made as would prevent the endangering in any way the other inmates of the home.

3. Sections 20, 21 and 23 of said act confer upon said probation officer all the legal rights to incur expenses that sheriffs of any county may have, in so far as the law relating to sheriffs would be applicable, and which would seem to be full authority for whatever expense that may be necessary in serving warrants, citations of subpœnas and other writs, and the bringing into the juvenile court dependent, destitute and neglected children. Section 40 of said act would also authorize this expenditure.

4. The traveling on street cars or interurban lines would doubtless be cheaper than any other means of transportation and would, therefore, be a saving to the county of money Considering the object and purposes of this act, and particularly the authority vested in the court by section 40 thereof, I am of the opinion that the probation officers are proceeding in accordance with the provisions of said act when they keep an accurate itemized statement of any moneys they may pay out for traveling expenses for themselves, or for the bringing in or delivering children under the orders of the court, and presenting a voucher to the auditor and collecting the same from the county.

The general rule for the construction of statutory law was not applied herein in reaching the conclusion above set out, but a more liberal construction was given, which makes possible the proper and safe enforcement of this act, and which is clearly the intent of the legislature.

Very truly yours,

U. G. DENMAN,
Attorney General.

CHILDREN'S HOME—QUESTION OF CONSTRUCTION OF AT COST EXCEEDING $15,000—MUST BE SUBMITTED TO VOTE OF PEOPLE.

February 8th, 1909.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry with a request for an opinion thereon:

The county commissioners of Lucas county desire to construct a building upon a site now owned by them for a children's home. The building will cost approximately $50,000, and said commissioners desire to construct said building without first submitting the question to a vote of the people. Query: Is such power conferred upon the board of county commissioners under the fol-

lowing provision of section 2829 R. S., as amended in 99 O L. 456? Said provision is as follows:

> "Provided that this section shall not apply to the construction of any public buildings or bridges commenced or contracted for prior to the passage of this title, or for which the commissioners have in good faith purchased the grounds or acquired the material for the same, and are *not* proceeding to construct."

In reply I beg to say the word "not" as it appears in the last clause of the above quoted provision is unquestionably an error. This law has been amended four times since the revision of the statutes in 1880. A reference to the 93rd volume of Ohio laws at page 99, however, discloses the fact that the word "not" as it now appears was when originally enacted "now," and the clear intent of the provision is that the exception above refers to and applies only where the county commissioners have in good faith purchased the grounds or acquired the material for the same and are *now* proceeding to construct.

I am, therefore, of the opinion that the county commissioners will not be justified in relying upon this error in order to avoid a submission of the question to a vote of the people.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—CONTRACT FOR TOWNSHIP MAPS—COUNTY SURVEYOR.

County commissioners must advertise for bids to make maps for townships and if county surveyor is lowest bidder commissioners may award contract to him.

March 11th, 1909.

HON. H. B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this office the following inquiries:

> 1. "Can the county commissioners, under sections 2789 and 2789*a* privately contract, said contract probably amounting to more than $1,000.00, dispensing with advertising for sealed proposals, with the county surveyor or other civil engineer to perform the work?"
>
> 2. "Can the county surveyor become a bidder and be awarded the contract in case his bid is the lowest, or in case you held that it is in the discretion of the county commissioners to advertise for sealed bids, may they appoint or privately contract with the county surveyor under these conditions?"

Replying thereto in answer to your first inquiry I beg to say that section 2789 Revised Statutes provides:

> "The auditor of each county shall * * * make out and deliver to the assessor of each district in his county * * * a map of each town-

ship and town within such district, with such plat books as may be necessary to enable the district assessor to make a correct plat of each section, survey, and tract, in his district; provided, however, that if, in the opinion of the county commissioners of any county, it is deemed necessary to the proper appraisal of the real estate of such county, then said county commisioners may, on or before their June session, one thousand eight hundred and seventy-nine, and every tenth year thereafter, advertise for four consecutive weeks in one or more newspapers of general circulation in the county, for sealed proposals to construct the necessary maps and plats to enable the several district asessors in the county or any district thereof to correctly reappraise all real estate; and such advertisement shall particularly specify the extent and character of the work to be done. Each bid shall be accompanied by a good and sufficient bond of not less than one thousand dollars in amount, to become due and payable in case the aforesaid bidder shall fail or refuse to enter into contract in accordance with the advertised proposals, in case the same shall be accepted. The county commissioners shall open the bids on the day named in the advertisement, and shall within three days thereafter, award the contract to the lowest and best bidder, if, in their opinion, it is to the interest of the county so to do, or they may reject any and all bids."

This section provides that the commissioners shall decide in their discretion as to the necessity of such a map of each township and town within the district. After the commissioners have decided that such a map is necessary within the meaning of the statute, then, in my opinion, the statute provides that they shall advertise for proposals under the provisions of this section, and are not authorized thereby to dispense with such advertising for sealed proposals. Such advertising for proposals is the only way by which the bids may be received, accompanied by the bond, as provided in this section.

Second. Section 1183 of the Revised Statutes provides that the county surveyor shall be entitled to "charge and receive when employed by the day $5.00 for each day and necessary and actual expenses, etc." This section places no restriction on the nature of the work of the surveyor when not so employed by the county. I know of no law that would prohibit the county surveyor from becoming a bidder and being awarded the contract in case his bid is the lowest and best bid, if in the opinion of the commissioners, after opening and considering the bids, the contract for such a map should be awarded.

A consideration of section 2789*a* is not required in answering your inquiries. This section provides that

"* * * the county commissioners may appoint the county surveyor as a tax map draftsman for the purpose of *making, correcting and keeping up to date a complete set of tax maps of the county* * * * 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 * * *."

The provision by the commissioners for a map of this character is not governed by section 2789. However, if the auditor of the county is in possession of a map, whether prepared under section 2789 or section 2789*a*, that will, in their discretion, answer the purpose intended for the decennial appraisement of land as provided in section 2789, such a map would serve the purpose and

render unnecessary the expense of the preparation of "a map of each township and town within such district" in the manner provided by said section 2789.

Yours very truly,

U. G. DENMAN,
Attorney General.

DITCHES AND DRAINS—COMPENSATION OF CONTRACTOR.

Township trustees may not borrow money in anticipation of collection of ditch assessments for purpose of paying contractor for cleaning out ditches, etc.

January 16th, 1909.

HON. H. B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your communication of the 9th inst. has been received. You submit the following inquiry: Can the township trustees borrow money to pay contractors for cleaning out ditches, under an act of the general assembly passed April 2nd, 1906 (98 O. L. 280)?

In reply thereto permit me to say that sections 7 and 9 of said act provide as follows:

> "Section 7. If any land owner, corporate road, railroad, township or county, notified to clean out the ditch or water course under the provisions of this act, shall neglect or refuse to comply with same before the 15th day of October in each year, the ditch supervisor shall, after giving ten (10) days' notice by posting in three conspicuous places in said township, sell the work of cleaning said section or sections to the lowest responsible bidder, and take a bond as provided in section six (6) and certify the cost thereof to the county auditor, as provided in section six (6) of this act. And the ditch supervisor shall certify the amount due the contractor, or contractors, for the work done, according to the provisions of this act, to the township trustees, who shall order the same paid out of the township ditch fund."

> "Section 9. The townhip trustees of any township to which this act applies are hereby authorized and empowered to levy a tax upon all the taxable property of said township not to exceed five-tenths (5-10) of one mill upon each dollar valuation, to be known as the township ditch fund for the purpose of carrying out the provisions of this act."

There is nothing in either of the above sections, nor in any other section of the act, to authorize the township trustees to issue bonds in anticipation of the collection of moneys from land owners, upon their failure to clean the ditches. Nor do I know of any other provision of statute which authorizes township trustees to issue bonds or levy a tax other than is stated in section 9 above quoted.

It is true that section 2835 of the Revised Statutes authorizes the trustees of any township to issue and sell bonds for the improvement of water courses and for sanitary purposes, but in my opinion this section is not sufficient to confer the authority required. Township trustees have only such authority as is given them by statute, and their powers are to be strictly construed. It

is, therefore, my opinion that the trustees of a township have not the authority to borrow money to pay the contractors. The law should be amended, in this particular, at the present session of the legislature, and, until then, contractors will have to wait for their money until the amount certified to the county auditor has been paid into the township ditch fund by the county treasurer.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—AMOUNT THAT MAY BE EXPENDED FOR TUBERCULOSIS HOSPITAL.

March 8th, 1909.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of the 4th inst., in which you request an opinion as to whether or not the county commissioners are permitted to expend more than $15,000 for a tuberculosis hospital.

In reply thereto permit me to say that section 2825 R. S. provides:

> "The county commissioners shall not levy any 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, and except as hereinafter provided, the expenses of which will exceed fifteen thouand dollars, without first submitting to the voters of the county, the question as to the policy of building or buildings, or for the purchasing sites therefor, or for the purchase of lands for infirmary purposes by general tax."

It is my opinion, therefore, that the county commissioners are not authorized to expend more than $15,000 for a tuberculosis hospital, without first submitting the question to the voters of the county.

Very truly yours,

U. G. DENMAN,
Attorney General.

BLIND—RELIEF OF.

Removal from county of person receiving relief under act for relief of worthy blind forfeits right to such relief.

Quarterly payments under said act should be made in advance.

January 13th, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry: Under the law providing relief for worthy blind, a resident of your county was granted relief, and the first quarter of the relief was paid. Shortly thereafter the recipient of the relief removed to the adjoining county of Crawford, thereby changing his residence.

Upon this statement of fact you submit two questions: *First*, is said applicant entitled to receive the remaining three-fourths of the year's relief allowed him. *Second*, should the quarterly payments of the relief allowed be paid in advance?

In reply I beg to say:

First, section 3 of said law provides that blind persons must be residents of the state of Ohio five years, and of their respective county one year, in order to be entitled to the relief provided in said law. In other words, they must not only be a resident of the county when the quarterly payments for relief are made, but they must have been a resident of the county for a year before they are entitled to any relief at all. It follows, therefore, that the removal of a blind person from the county in which relief is granted forfeits the right to receive further relief.

Second, section 2 of said law is as follows:

> "That all male blind persons over the age of twenty-one years, and all female blind persons over the age of eighteen years, who are declared blind in the manner hereinafter set forth, and have no property or means with which to support themselves, shall be entitled to, and receive, not more than twenty-five ($25.00) dollars per capita quarterly, and that the probate judge shall authorize the auditor to issue warrants for the amounts due such person."

This section only provides that the relief shall be paid quarterly. Section 5, however, provides that the probate judge shall grant a certificate to each applicant entitled to relief, giving the name and address and the amount due quarterly, and further provides that on and after the first of each quarter payment shall be made.

I am, therefore, of the opinion that the first payment of relief should be made to the applicant on or after the first day of the first quarter of the calendar month next succeeding the date of the granting of said certificate.

Very truly yours,

U. G. DENMAN,
Attorney General.

TOWNSHIP TREASURER—BOND—LIABILITY OF SURETIES—ACTION ON.

February 5th, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your communication of February 2nd is received, enclosing copies of the two bonds given by O. E. Richardson, as township treasurer and school district treasurer, respectively. Relative thereto you submit two questions:

> *First.* Are the present bondsmen liable for a shortage which occurred prior to the execution of the bonds?
>
> *Second.* In whose name should suit be brought on the bond covering the school fund?

1. In reply I beg to say that the sureties' liability on each bond begins with January 6th, 1908, and continues for two years, and until Mr. Richardson's suc-

cessor is elected and qualified. The bondsmen are not, therefore, liable for any shortage or defalcation prior to the 6th day of January, 1908.

2. Mr. Richardson's bond, as treasurer, is given to the state of Ohio, therefore a suit to recover thereon should be brought in the name of the state on behalf of the board of education.

Very truly yours,

U. G. DENMAN,
Attorney General.

CORONER—FUNERAL EXPENSES OF PAUPER.

Coroner must not incur funeral expenses incident to burial of pauper.

March 10th, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this office the following inquiry:

> "The coroner of our county held an inquest over the body of one Bertha Fields (conceding it to be a proper case for an inquest) and in addition thereto the coroner employed Phillips & Son, who gathered up the body, took it to the home of the decedent and there prepared the same for burial. Phillips & Son have presented a bill for $20.00 (which amount is conceded to be reasonable for the services rendered) to the commissioners of this county. Should the bill be paid by the commissioners?"

In reply thereto I beg to call your attention to section 1500*a* of the Revised Statutes, which provides for the burial of unclaimed dead and for the refunder of expenses occasioned thereby. Your inquiry does not state whether the person over whose body the inquest was held had a legal settlement in Morrow county. I presume this to be so and that the deceased was a pauper. I do not find legal authority for the coroner to incur such expense as referred to in your inquiry. His proper course should have been to notify the trustees of the township of the unclaimed dead and the necessity for the expense of preparation thereof for burial.

I am of the opinion that this bill should be presented to the trustees of the township wherein the deceased had a legal residence. The action of the coroner made it impossible for the trustees to notify the infirmary directors of the county so that said directors might have had charge of said burial. However, the facts may yet justify the trustees of the township in presenting the bill to the board of infirmary directors of the county for allowance.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROBATE JUDGE RESIGNING HIS OFFICE MUST CONTINUE TO DISCHARGE THE DUTIES THEREOF, AND IS ENTITLED TO HIS COMPENSATION THEREFOR, UNTIL HIS SUCCESSOR QUALIFIES.

February 8th, 1909.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your communication is received in which you submit in substance the following inquiry with a request for an opinion thereon:

On the day previous to the last November election Probate Judge D. L. Rockwell tendered his resignation to Governor Harris. Judge C. D. Ingell, by virtue of an appointment made by Governor Harris for the unexpired term, assumed the duties of the office on the 10th day of November, 1908. Judge Rockwell continued in office after he tendered his resignation until Judge Ingell took charge of the office. Query: Is Judge Rockwell entitled to compensation for the services performed during said interim?

In reply I beg to say the supreme court of the United States has held in the case of Badger et al v. United States ex rel Bolles, 93 U. S. 599, that where a statute provides that an officer should hold until his successor was elected and qualified, a resignation does not release such officer from the performance of the duties of the office until such time as his successor has been duly appointed and qualified.

Section 8 of the Revised Statutes provides that

> "any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the constitution or laws."

I am, therefore, of the opinion that although Judge Rockwell had resigned he was required to perform the duties of the office until such time as his successor was appointed and qualified and that he is therefore entitled to receive the compensation provided for such services.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY TREASURY—EXAMINATION OF BY COMMISSION APPOINTED BY PROBATE JUDGE—AUTHORITY OF.

A commission appointed by probate judge to examine county treasury has not authority to go behind vouchers to auditor to ascertain legality of contract resulting in same.

April 1, 1909.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your letter in which you inquire if the commission appointed by the probate judge under favor of section 1129 R. S., to make an inspection and examination of all books, vouchers, accounts, moneys, bonds, securities and other property in the treasury of the county once every six months or oftener shall be construed to give to such commission so appointed authority to go behind the vouchers to the auditor for the purpose of ascertaining their correctness and the validity and legality of the contract or agree-

ment resulting in the same, and to receive $5.00 per day for the time spent in the performance of such duties.

I assume that your inquiry applies only to the commission appointed by the probate judge to make examination of the county treasury and does not extend to the commission appointed "at least once a year or oftener * * to make an examination of the auditor's office, etc.," as is also provided for in said section.

That part of the section applicable to the commission concerning whose powers you inquire provides that such commission:

> "* * after being sworn to faithfully perform the duties imposed upon them, shall forthwith, without previous notice or intimation to the county treasurer or any other person, of such intended inspection and examination, enter the county treasury, present their authority aforesaid, to the county treasurer, who upon demand, shall open the vaults and safes of the treasury and said examiners shall proceed immediately to count the money therein and inspect and examine the books, records and vouchers thereof, and after having ccunted the money inspected and examined the books, records and vouchers found therein, make due entry of the same, after which the said examiners shall proceed forthwith to the office of the county auditor and there ascertain how much money the county treasurer stands charged with on the auditor's books. Said auditor shall furnish such accountants with a statement of the exact amount of money, property, bonds, securities, assets and effects, also how much belongs to each particular fund and should be in said treasury; said accountants shall certify the exact amount of money in the treasury, together with the amount belonging to each particular fund, also all property, bonds, securities, vouchers, assets and effects as aforesaid in writing, * * * and said accountants so appointed and performing the duties therein required, shall be paid $5.00 per day for the time necessary to the performance of the same, out of the county treasury, on a warrant drawn by the county auditor and approved by the certificate of said court, particularly specifying the duty performed * * *."

This examination so provided for as often as every six months or oftener, and without notice to the county treasurer is primarily intended as an official check-up and review of the records and moneys in the office of the treasurer for the purpose of ascertaining if the treasurer has been faithful and accurate in the discharge of his duties as such officer. It seems to me that this particular examining commission is vested with the power to "proceed forthwith to the office of the county auditor" for the purpose of ascertaining the correctness of the condition of the funds in the county treasury as compared with the warrants issued by the auditor on the county treasurer, and this being done the function of this commission is performed to meet the requirement of the statute. This is not such an examination of the county auditor's office as is subsequently provided for in this section and under which a commission might make an *investigation* of the validity of vouchers issued to the auditor by boards, such, for instance, as infirmary directors.

In my opinion it is not within the authorized powers of this particular commission to investigate and report on the work or the propriety or legality of official duties performed and contracts let by boards, resulting in vouchers on the

county auditor. I therefore conclude that an examination and investigation of this character is not contemplated by the provisions of this act authorizing the appointment of the commission to make examination of the county treasury.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAX MAPS—COUNTY AUDITOR—COUNTY COMMISSIONERS.

It is duty county auditor to deliver abstract of real property on his books to assessor of each district in his county. County commissioners, under section 2789 R. S. still have discretionary power to advertise for bids of maps of real property in county.

April 5, 1909.

HON. A. O. DICKEY, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your letter in which you inquire if section 4 of "An act to provide for the election of assessors of real property," passed March 12, 1909, will repeal section 2789 of the Revised Statutes.

Replying thereto, I beg to say section 2789 Revised Statutes provides that:

> "The auditor of each county shall * * * * * make out and deliver to the assessor of each district in his county, an abstract from the books in his office, containing a description of each tract and lot of real property, situate within such district * * *; and also a map of each township and town within such district, with such plat books as may be necessary to enable the district assessor to make a correct plat of each section, survey, and tract in his district."

Said section further provides that if, in the opinion of the county commissioners of any county, it is deemed necessary to the proper appraisal of the real estate of such county, that surveys be made and new maps and plats be made therefor, then they may contract in the manner provided in the section for such surveys and maps and plats as will enable the several district assessors in the county or any district thereof to correctly reappraise all real estate therein.

Section 4 of the act passed March 12, 1909, imposes upon the auditor of each county similar duties relating to the making of such plats and maps for the appraisement of real estate as does said section 2789 except that it provides that the same shall be on or before the 10th day of January, 1910, and every fourth year thereafter.

Section 10 of the act passed March 12, 1909, provides that:

> "All of the provisions of the statutes of the state of Ohio, are hereby repealed insofar as they conflict with or are inconsistent with the provisions of this act, and not otherwise. All the powers and duties conferred by statute upon county auditors, the state auditor, county boards of equalization, boards of revision, boards of review of municipalities, state boards of equalization of real property are hereby made applicable and extended to quadrennial appraisements of real estate."

It is clear from the provisions of this section 10 that section 4 of said act is intended to and does repeal that part of section 2789 R. S., relating to the

duties of the county auditor in the preparation of such plats and maps, but leaves in full force and effect all authority vested in the commissioners by said section 2789 relating to the duties of the county auditor.
four years the same as they had every ten years prior to the act of March 12, 1909.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAX MAPS—MAKING OF DISCRETIONARY WITH COUNTY COMMISSIONERS.

April 5, 1909.

HON. WILLIAM MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—I am in receipt of your letter submitting for an opinion thereon the following inquiry:

> Is a county map, scale 1¼ inches to the mile, published in 1894, such a map as is contemplated in sec. 2789 R. S., and can such map be used for the purpose intended in said sec. 2789 for the decennial appraisement of land in this county in 1910?

Replying thereto, I beg to say that the act of March 12, 1909, to provide for the election of assessors of real property, in my opinion, repeals that part of section 2789 relating to the duties of the county auditor.

I enclose herewith to you copy of an opinion interpreting section 4 of the new act as compared with said section 2789 which will answer your inquiry as to that section.

Whether the books in the auditor's office contain sufficient information from which the auditor may furnish the assessor with a suitable abstract and map of each township and district, it is to be determined by the commissioners. They are not to advertise for sealed proposals to construct new maps until by them "it is deemed necessary to the proper appraisal of the real estate in such county" that new maps be furnished. It is, therefore, seen that the making of such maps is discretionary with the commissioners.

If your county commissioners are of the opinion that the map to which you refer answers the requirements of sec. 2789 R. S., I see no reason why the same may not be used for that purpose.

Very truly yours,

U. G. DENMAN,
Attorney General.

LOCAL OPTION—COUNTY VOTING WET, BUT PRIOR TO ELECTION SEVERAL TOWNSHIPS DRY—SECRET SERVICE.

Prosecuting attorney in county which voted wet, but where prior to election several townships are dry, may not employ secret service man under section 3 of act passed March 12, 1909.

April 6, 1909.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—I have your letter in which you state that Fairfield County in a recent election voted to continue the sale of intoxicating liquors therein. You

further state that prior to such election the greater portion of the county was dry under other laws, and consequently, is still dry. You then inquire if, under section 3 of "An act to further provide against the evils resulting from the traffic in intoxicating liquors," passed March 12, 1909, you, as prosecuting attorney, may appoint a secret service officer to aid in discovering evidence to be used at the trial of cases for violation of local option laws prohibiting the sale of intoxicating liquors.

Replying thereto I beg to say section 3 of said act provides that:

> "Any prosecuting attorney in any county in which the sale of intoxicating liquor as a beverage is prohibited may appoint a secret service officer, or officers, to aid in discovering evidence to be used at the trial of cases for violation of local option laws prohibiting the sale of intoxicating liquor * * *."

If the provision in said section 3, to-wit, "any county in which the sale of intoxicating liquor as a beverage is prohibited" is to be construed as meaning that the county, as such, is the political unit to be taken as the basis for the appointment of this secret service officer, you are not authorized by said section to make such appointment. That this was the legislative intent is indicated both by the language of the statute relating to such appointment and by the further provision in said section 3 that the compensation of the secret service officer so appointed "shall be paid out of the county fund upon the warrant of the county prosecutor."

I am, therefore, of the opinion that the prosecuting attorney in any county in which there is still territory wherein the sale of intoxicating liquor is not prohibited, may not avail himself of the provisions of said section 3 and appoint such secret service officer.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAX MAPS—MAKING OF DISCRETIONARY WITH COUNTY COMMISSIONERS—QUADRENNIAL APPRAISEMENT ACT—TOTAL COST OF—ASSESSORS—APPOINTMENT OF ASSISTANTS—FEE OF COUNTY AUDITOR ALLOWED BY COUNTY COMMISSIONERS.

The provisions of sec. 2789 authorizing county commissioners to have tax maps prepared is not repealed by any of the provisions of quadrennial appraisement act.

Total cost of quadrennial appraisement includes compensation of members of board of city assessors, chief clerk, expert assistants and such incidental expenses as board may incur, but such total cost may not exceed one-twentieth of one per cent. of total tax duplicate of city for year in which quadrennial appraisement is made.

County commissioners may in quadrennial appraisement year allow additional 25 per cent. of allowance under sec. 1069 for county auditor which must be paid by auditor into county treasury in compliance with sec. 1296-11.

Village and township assessors may, with approval of auditor, appoint assistants when, in their judgment, such appointments are necessary. City boards have power to appoint expert assistants without approval of county auditor.

April 7, 1909.

HON. CHARLES L. JUSTICE, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—You have submitted to this office certain questions relating to the construction of the act of March 12, 1909, providing for the quadrennial appraisement of real estate. Your questions are as follows:

1. Does the repealing clause of the act in question, together with section 4 thereof, effect a repeal of that provision of section 2789 R. S. which confers on the county commissioners power to cause tax maps to be prepared for the use of assessors of real estate?

2. What is the meaning of the phrase "total cost" as used in section 7 of the act?

3. What is the extent of the power of each of the classes of real estate assessors created by the act with respect to the appointment of assistant assessors?

4. Under the quadrennial appraisement act, the county officers' salary law and section 1076 R. S. (if the latter is still in force), may the county commissioners allow an additional 25 per cent. of the annual fee allowance of the county auditor for the use of the fee fund of that officer?

With respect to your first question I have heretofore advised various prosecuting attorneys and the bureau of inspection and supervision of public offices that in my judgment the provisions of section 2789 R. S., authorizing county commissioners to cause tax maps to be prepared for the use of real estate assessors, if, in their judgment, the preparation of such maps is advisable, is not repealed by any of the provisions of the quadrennial appraisement act, and that such discretionary power of the county commissioners still exists.

I have heretofore advised the Bureau of Inspection and Supervision of Public Offices that the total cost of a quadrennial appraisement in a city includes the compensation of the members of the board of city assessors and the compensation of the chief clerk, if any, employed by such board, that of the expert assistants, if any, employed by the board and such incidental expenses as the board may incur and that the sum total of all such expenditures may not exceed the sum of one-twentieth of one per cent. of the total tax duplicate of the city for the year in which the quadrennial appraisement is made.

Under section 2794 R. S., the district assessors, as such officers were designated under the decennial appraisement act, were authorized to appoint assistants, when, in their judgment, such appointments were necessary, and the approval of the county auditor was necessary to the validity of such appointments.

Section 1 of the quadrennial appraisement act confers upon the township assessors "all the powers and * * * duties heretofore conferred upon or required of the decennial assessors of real estate elected under any and all laws now in force pertaining to such assessors."

Section 9 of the act of 1909 confers upon village assessors "the same powers and duties as are hereinbefore conferred upon such assessors for townships and cities."

Section 7 of the recently enacted law provides that boards of city assessors shall have the power to "appoint such *expert* assistants as such board may deem necessary, and fix their compensation."

Section 10 of the quadrennial appraisement act repeals all provisions of the Revised Statutes "insofar as they conflict with or are inconsistent with the provisions of this act and not otherwise."

In my opinion, the general effect of the provisions above quoted is to retain in force section 2794 R. S., insofar as it authorizes the appointment of assistant assessors, with respect, however, to village and township assessors only. (Accordingly, such village and township assessors may, with the approval of the county auditor, appoint assistants when, in their judgment, such appointments are necessary.) City boards have the express power under section 7 above quoted to appoint expert assistants, and the making of such appointments is not, in my judgment, subject to the approval of the county auditor.

Answering your fourth question I beg to state that section 1076 R. S., is clearly not inconsistent with any of the provisions of the quadrennial appraisement act and is accordingly not repealed by that act. Section 1 of the county officers' salary law, being section (1296-11) Revised Statutes provides that:

> "All the fees, costs, percentages, penalties, allowances and all the other perquisites of whatever kind which by law may now be collected or received as compensation for services by any county auditor * * * shall be received and collected by all of said officers and each of them for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to said county and accounted for and paid over as such in the manner hereinafter provided."

In my judgment, therefore, the county commissioners may, in quadrennial appraisement years, allow the additional 25 per cent. of the allowance under sec. 1069 R. S. for the county auditor, which additional percentage must be paid by the auditor into the county treasury in compliance with section 6 of the salary act to the credit of the fee fund of his office.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—PART OF TOWNSHIP WITHIN MUNICIPALITY—MANNER OF SUBMITTING TO VOTE AND LEVYING TAX.

Township property within municipality not to be distinguished from township property not within municipality in improving of roads. submitting question to voters and levying tax to pay same.

April 7, 1909.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication is received in which you submit for an opinion of this department thereon the following inquiry:

> Under the provisions of an act "to authorize the improvement of public roads of townships, including streets of cities or villages therein, and to repeal sections, etc.," passed April 22, 1904, may the municipalities within the township join with the township outside the municipal limits and submit the question of road improvement at the same time to the electors of both the village and the township outside the village; and if the vote is affirmative may the tax for the improvement of such township road be levied upon the property of the township both

within and without municipalities?

Replying thereto, I beg to say that this act of the general assembly of 1904 provides for the improvement of public roads of townships including streets of cities or villages therein.

Section 1 of the act referred to in your inquiry, being section 4686-1 of the Revised Statutes, provides that:

> "The trustees of any township in this state shall, 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 any road running into or through any village or city, submit the question of the improvement of said roads to the qualified electors of such township at the next general election or at a special election, held after the presentation of such petition."

Section 17 of said act (section 4686-17 R. S.) contains the following provision:

> "For the purpose of providing the money necessary to meet the expenses of improving such roads and streets the trustees of any township may, if in their opinion it be advisable, issue the bonds of any township, * *"

Section 18 of the act (4686-18 R. S.) provides that:

> "When the trustees of any such township have determined to improve any road, as herein provided, * * they shall, in addition to the other road taxes authorized by law 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 * *."

Section 19 of said act (section 4686-18a R. S.) provides that:

> "The trustees of any such township, in this state, shall, when the petition of one hundred or more of the taxpayers of such township, *including any city or village* therein, is presented to them praying for an increase of tax levy for the improvement of public roads and streets of such township and city or village, submit the question for an increase of tax levy for the improvement of public roads and streets to the qualified electors of such township and such city or village, * *"

From these sections of this act, quoted in whole and in part, it is clear that the legislative expression and intent is that a township, as such political unit, may improve township roads in the manner provided in the section.

Section 1, 17, 18, 19 and others of said act, providing for the obtaining signatures and filing petition for such road improvement; for the issuing of bonds to provide the money necessary to meet the expenses of such improvement; for the levying of an annual tax to pay for such improvement, to redeem bonds issued and pay interest thereon; to submit the question of increased tax levy for the improvement of such roads; make no distinction between that part of the township lying within the municipal limits and that part lying without such municipal limits.

In section 5 of said act, being section 4686-5 R. S., the trustees of the town-

ship are authorized to appoint commissioners *who shall designate and determine the established roads and streets in such township which shall, in their opinion, be improved.*

The fact that the township trustees have authority, under favor of section 18, of said act (section 4686-18 R. S.)

> "to 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 all the roads and streets by said commissioners designated for improvements have been improved, as herein provided, and the bonds issued for that purpose, together with interest thereon, have been paid,"

is evidence that the property within municipalities is not to be distinguished from township property not within municipalities in the raising of taxes for or the improvement of township roads.

I, therefore, conclude that under this act the township as a whole is a unit, and that the question of road improvement therein is considered jointly and without distinction by the municipal and rural district therein.

Very truly yours,

U. G. DENMAN,
Attorney General.

BLIND RELIEF—BECOMING CITIZEN OF ANOTHER STATE.

April 7, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I am in receipt of your letter submitting to this department for an opinion thereon the following inquiry:

> A person who was a resident of the state of Ohio and drawing relief under the act to provide for the relief of needy blind moved from the state and has taken up her residence in the state of Indiana. Is she still entitled to the relief which she drew under said act the same as when she was a citizen of this state?

The language used by the legislature in sections 1 and 6 of this act provides that only citizens of this state, and of the counties wherein the application is made for such relief, may be entitled to the benefits to be derived from this law. A citizen of this state, obtaining relief under this act in accordance with its provision, forfeits the right to continue to draw such relief upon moving from the state and taking up a residence in another state.

I am, therefore, of the opinion that a person, resident of this state and of a county of the state in which they are drawing relief, forfeits such right to relief upon ceasing to be a citizen of such state and county and taking up a residence in another state.

Very truly yours,

U. G. DENMAN,
Attorney General.

NOMINATION PAPERS—NUMBER ELECTOR MAY SIGN.

Elector may only sign as many nomination papers as there are official positions to fill.

April 8, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication is received in which you inquire if the provision in section 19 in the act "to regulate the conduct of primary elections," passed April 28, 1908, to be construed as meaning that a qualified signer of a nomination paper may sign as many such nomination papers as there are candidates for nomination for a particular office, under this act; or, if such language is to be construed as meaning that each signer of a nomination paper may sign as many such papers as there are candidates to be elected for the office.

The language of said section 19, to which you refer, is as follows:

> "Each signer of a nomination paper may sign as may such papers as there are candidates for the office or position, but no more, and shall declare that he intends to support the candidate named therein."

There is a wide difference between a candidate for nomination for an office and a candidate nominated for the office. The language of the section is "candidates for the office or position," which I am of the opinion means that if there is one official position to fill a signer is entitled to sign but one nomination paper. If there are three official positions to fill, such as the board of county commissioners or infirmary directors, a signer may sign nomination papers for three candidates for nomination. This is true because there are and can be but three candidates "for the office or position."

That this is the expression and intent of the legislature is further evidenced by the provision that the signer "shall declare that he intends to support the candidate named therein."

To hold that this section authorizes a signer to sign nomination papers of as many candidates for nomination as there may be for a particular office or position would be to destroy the effectiveness and purpose of this act. The language of this section does not warrant any such construction.

Yours very truly,

U. G. DENMAN,
Attorney General.

ASSESSOR—HOW TO FILL VACANCY IN OFFICE.

County auditor only to appoint assessor where municipal corporation has no township organization; in all other cases township trustees make the appointment.

April 9, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your letter in which you ask for a construction of sections 1451 and 1518 R. S., with a view to determining whether the authority to fill a vacancy in the office of assessor in a ward of the city of Greenville is vested in the trustees of the township of which said municipal ward is a part, or whether such vacancy shall be filled by appointment by the county auditor.

Section 1451 R. S. provides that:

> "If, by reason of non-acceptance, death or removal of a person chosen to any office in any township, * * at the regular election, or upon the removal of the assessor from the precinct or township for which he has been elected or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

Section 1518 R. S. provides that:

> "In the event that there should be a failure to elect an assessor in any ward or precinct of a municipal corporation not having a township organization, etc."

The provision of section 1451 is general and applies to vacancies arising in "any office in any township" except trustees, while from the language used in section 1518 R. S., it is apparent that the county auditor is authorized to act thereunder only in cases where the municipal corporation has no township organization. That is to say, where the municipal limits and the township boundary are identical, such, for instance, as the city of Cincinnati and Cincinnati Township. This being the only instance in which the county auditor is authorized by statute to make an appointment to fill a vacancy in the office of assessor.

The township in which the city of Greenville is situate, having a township organization, and the municipal limits of said city not being identical with the boundaries of the township wherein said city is situate, I am of the opinion that your county auditor has no legal authority to fill the vacancy in the office of assessor in any ward or precinct in said city, therefore, the appointment by your township trustees was regular and legal.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY AUDITOR—EMPLOYMENT OF ATTORNEY TO BE PAID OUT OF PUBLIC FUNDS IN MANDAMUS SUIT.

County auditor may not employ attorney to defend him in mandamus suit and pay attorney out of public funds without consent of county commissioners. Where an official administrative act is sought to be compelled by mandamus such suit should be against official in his official capacity.

April 22, 1909.

HON. JOSEPH L. MCDOWELL, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I have your letter advising that a suit in mandamus is instituted against your county auditor seeking to compel him to sign a warrant upon the county treasurer and asking if such auditor is being sued in his official capacity. You further ask if he has power to secure the services of an attorney other than the prosecuting attorney to defend him in the mandamus proceedings and have such attorney paid from the county treasury.

From your letters it appears that it is an official administrative act of the auditor that is sought to be compelled, and in my opinion, the suit should be against him in his official capacity as county auditor.

Your question as to whether the auditor has the power to secure the services of an attorney other than the prosecuting attorney to defend him in the mandamus proceedings, and have this attorney paid from the public funds of the county involves a construction of section 1274 of the Revised Statutes. This section, insofar as the same is material, provides that

> "The county 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 * * * 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 at the expense of the county except on the order of the county commissioners * * *, duly entered upon its journal in which order the compensation to be paid for legal services shall be fixed * * *"

The language of this section as quoted above seems very clear in prohibiting any county officer from securing the services of any attorney other than the prosecuting attorney of the county to advise him in his official capacity and paying such services out of the public funds of the county, unless such authority should be given to such county officer by the board of county commissioners of that county.

I am, therefore, of the opinion that in the suit of which you speak your county auditor would not be authorized to retain counsel to defend him in that action and pay such counsel out of your county treasury unless your board of county commissioners would authorize such action according to the terms of section 1274 as quoted above herein.

Yours very truly,

U. G. DENMAN,
Attorney General.

SECRET SERVICE OFFICER—EMPLOYMENT OF UNDER SECTION 3 OF ACT OF MARCH 12, 1909.

Authority to appoint secret service officer to aid in discovering evidence for violation of local option laws does not exist in counties which have not as unit, voted dry.

April 27, 1909.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 24th in which you state that all the territory of Highland County is "dry" under municipal and township local option, but that the county as a unit has never held a local option election. You inquire whether, as prosecuting attorney, you may lawfully appoint a secret service officer under section 3 of the act of March 12, 1909, known as the "Dean-Crist law."

In a recent opinion of this department it was held that the power created by section 3 of the above mentioned act could not be employed in a county, the greater portion of the territory of which is "dry" under municipal and township local option laws.

Upon consideration of the precise question submitted by you I am inclined to extend that opinion to counties in the situation in which Highland County is. I am satisfied that the phrase "any county in which the sale of intoxicating

liquor as a beverage is prohibited" refers to prohibition by the county as a unit. Where the various subdivisions of the county are "dry" under other local option laws the question of the prohibition of the traffic in intoxicating liquors in any one of such subdivisions might be resubmitted at any time and a negative result would place the county again in the class discussed in the former opinion.

It is to be observed in this connection that section 10 of the Rose county local option law, 99 O. L. 38, imposes the prosecuting of offenses thereunder as a special duty upon the prosecuting attorney. No such provision exists in the other local option laws.

I therefore advise that the authority to appoint a secret service officer to aid in the discovery of evidence for violation of local option laws does not exist in counties which have not as a unit voted for the prohibition of the sale of intoxicating liquor as a beverage.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEMBER EXAMINING COMMITTEE APPOINTED BY COMMON PLEAS JUDGE UNDER SECTION 917 R. S.—TRAVELING EXPENSES.

April 27, 1909.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of April 24th, in which you inquire whether a member of the committee appointed by the common pleas court under section 917 R. S., to examine the report of the county commissioners may be allowed traveling expenses in going from his home in another part of the county to the county seat and returning therefrom.

Replying to your letter, I beg to state that section 917 R. S., contains no authority for the payment of any expenses incurred by members of the examining committee appointed thereunder, nor am I able to find any statutory authority whatever for the payment of such expenses.

I therefore advise that the bill which you say has been submitted by one of the examiners may not be allowed.

Yours very truly,

U. G. DENMAN,
Attorney General.

LEGAL SETTLEMENT—MARRIED WOMAN.

A legal settlement of persons in general within meaning of section 702 R. S. is continuous residence in county and township without relief for twelve consecutive months, but that of married woman is that of her husband.

April 27, 1909.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 16th enclosing the letter of Hon. John N. Hutchinson, probate judge of Allen County, and requesting my opinion as to the questions raised therein.

By the letter of the probate judge my attention is directed to section 702 of the Revised Statutes wherein the form of affidavit required in proceedings for admission of patients to asylums for the insane is set forth. The particular

language involved in the inquiry is as follows: "He has a legal settlement in ..... township in this county."

The questions of the probate judge are as follows:

> "How long does a person have to live in a county or township until they would have a 'legal settlement?'
>
> "Can a resident of Ohio, a married woman, who has separated from her husband, she having left him, be regarded as having a legal settlement in this county, where she has become insane, having only lived here sixty days prior to becoming insane, her husband being a resident of Coshocton County, Ohio?"

Inasmuch as insane persons are dependents, the definition of the term "legal settlement" as set forth in the act relating to the relief of the poor should be applied to the above quoted language of section 702 R. S. That definition is embodied in section 1492 R. S., which is as follows:

> "Every person shall be considered to have obtained a legal settlement in any county in this state in which he or she, shall have continually resided and supported himself or herself for twelve consecutive months, without relief, under the provisions of law for the relief of the poor, subject to the following exceptions: * * * * The wife or widow of a person whose last legal settement is or was in any township in this state, shall be considered to be legally settled in the same township; but if she has not obtained a legal settlement in this state, then she shall be deemed to be legally settled in the place where her last legal settlement was previous to her marriage."

Applying the statutory definition above quoted to the questions submitted it appears:

1. In general a person must reside continuously in a county and township without relief for twelve consecutive months in order to acquire a legal settlement.

2. The legal settlement of a married woman is that of her husband. She cannot acquire any other legal settlement during coverture, although she has left her husband, and in the case described by the probate judge the legal settlement of the woman is in Coshocton County. (See also Spencer Tp. v. Pleasant Tp., 17 O. S. 31; sec. 3110 Revised Statutes.)

I herewith return the letter of the probate judge in accordance with your request, and desire to acknowledge the assistance derived from your citations in formulating my opinion in this matter.

Yours very truly,

U. G. DENMAN,
Attorney General.

POOR FUND—EXHAUSTED ON ACCOUNT OF CESSATION OF DOW-AIKIN TAX.

Only means whereby infirmary directors may secure funds during period between present time and next semi-annual tax settlement is to transfer unexpended balances under sec. 876.

April 27, 1909.

HON. JOSEPH L. MCDOWELL, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of April 24th, in which you state that the poor fund of your county is now exhausted because of the cessation of revenue from the Dow-Aikin tax due to the prohibition of liquor traffic in the county at local option election held during the past year. You ask me to suggest a means whereby the infirmary directors may secure funds to meet their needs during the period between the present time and the next semi-annual tax settlement.

No statutory authority exists for borrowing money to meet such deficiency in the poor fund. The only alternative would seem to be the transfer of funds. Section 22*b*-2 of the Revised Statutes provides one method for the relief of depleted county funds, but this procedure may not be employed for the relief of the poor fund, since that section authorizes county commissioners and infirmary directors to "transfer the public funds *under their respective supervision* from one fund to another," while the poor fund is under the supervision of the infirmary directors, and is the only fund under their supervision (Annual Report of Attorney General 1908, page 241).

It seems, however, that the power of the county commissioners to transfer unexpended balances as set forth in section 876 R. S., might be invoked for the purposes at hand. That section is as follows:

> "The county commissioners shall have power to transfer any unexpended balances of any funds raised for the purpose of erecting public buildings, remaining in the treasury of their respective counties, to any other fund, or to any other purpose for which money is needed by such county; and in case there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the time fixed by law for the next payment of taxes, and any of the other funds of the county are exhausted, the commissioners may transfer such special fund, or such part thereof as is needed, temporarily, to such other fund as is exhausted, and reimburse such special fund out of the taxes levied for such other fund, as soon as the same are collected."

The authority vested in the county commissioners by this section is not limited to funds under their supervision, and accordingly the reason which forbids the application of section 22*b*-2 does not apply thereto. If then there are in the treasury of Coshocton County unexpended balances of funds levied and collected for special purposes which balances will not be needed for such purposes until after the next tax paying period, the commissioners may, in their discretion, transfer such balance temporarily to the poor fund. This is the only method available for the relief of the poor fund of your county.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES—AUTHORITY TO COMPEL OWNER TO ASSIST IN CONSTRUCTION OF LINE FENCE.

April 28, 1909.

HON. O. W. KERNS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 13th in which you submit the question as to the power of township trustees to compel the owner of uninclosed lands to pay any part of the costs of the construction of a line fence along the boundaries of such lands.

Sections 4239, 4242 and 4243 Revised Statutes seem to vest such power in the township trustees upon complaint of an aggrieved party. These sections, however, were held unconstitutional insofar as they attempted to authorize the trustees to compel the owner of uninclosed land to contribute to the payment of the expenses of constructing such a line fence in the case of the Alma Coal Co. v. Cozad, treasurer, decided by the supreme court February 2, 1909 (reported in full in the Ohio Law Reporter for March 8, 1909). The second paragraph of the syllabus in that case is as follows:

> "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."

The above decision seems clearly to establish the lack of authority of the township trustees to compel the owner of unenclosed land to pay any part of constructing and maintaining a line fence along such unenclosed land.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS -POOR FUND SURPLUS—PURCHASE OF LAND FOR INFIRMARY—SUBMITTING QUESTION TO VOTE.

County commissioners may by proper procedure spend not over $15,000 *of poor fund surplus to purchase land for infirmary without submitting question to vote.*

April 28, 1909.

HON. CHARLES KRICHBAUM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—You have submitted to this office the question as to whether or not a large surplus in the poor fund of Stark County may be expended in the purchase of lands for infirmary purposes without submitting the question of the policy of purchasing such lands to a vote of the people.

Confusion attendant upon office repairs has caused your letter to be mislaid, and my reply thereto has been delayed for this reason.

The money which you desire to use being in the poor fund is subject to the control of the infirmary directors, and may not, while it remains in the poor fund, be appropriated by the commissioners for the purpose of making the purchase in question. The question of the power of the commissioners to expend the money in the particular manner suggested cannot arise until it is ascertained that the commissioners may acquire general authority as to its expenditure.

I am informed by your letter that the revenues derived from the Dow tax

constitute a large portion of the surplus in the poor fund. To that portion of said surplus the procedure of section 2834*d* R. S., may be applied. That section is as follows:

> "Whenever there is in the treasury of any * * * county * * * any surplus arising under an act entitled 'An act providing against the evils resulting from the traffic in intoxicating liquors' * * * which surplus is not needed for the purpose named in section 9 of said act, such surplus may be, at any time, transferred to any other fund * * * by an order of the proper authorities entered on their minutes."

The "purpose named in section 9 of said act" as applied to counties means the relief of the poor. The "proper authorities" referred to in the above quoted section are the county commissioners. (Sections 22*b*-2 and 876 R. S.) The power to make temporary transfers conferred upon the commissioners by section 876 R. S., is enlarged by section 2834*b* R. S., so as to extend to permanent transfers from the poor fund as well as from any of the funds under the direct supervision of the county commissioners. It follows that the county commissioners by proper order entered on their minutes may effect a transfer to the general fund of so much of the surplus in the poor fund as has been accumulated from revenues under the liquor tax law.

By placing the money in the general county fund the commissioners acquire general power to expend the same, and under section 870 R. S., express power is conferred upon them to expend it for the purchase of lands for an infirmary. The question then arises as to whether section 2825 R. S., as amended 99 O. L. 456 imposes any limitation upon such power. That section as amended provides:

> "The county commissioners shall not levy any tax or *appropriate any money* * * * for land for infirmary purposes, the expense of which will exceed $15,000 * * * without first submitting to the voters of the county the question as to the policy of * * * the purchase of lands for infirmary purposes * * * *by general tax.*
>
> "Which said submission shall be made at the annual election, next after the proposition *for such levy* is adopted * * *.
>
> "* * * Printed tickets shall be provided by the commissioners on which shall be printed 'For.....tax, yes' and 'For.....tax, no' * * *.
>
> "If a majority of the vote so cast shall be against the policy of such improvements, the commissioners *shall not assess any tax* for that purpose * * *.
>
> "If at any such election a majority shall be found in favor of the improvement as aforesaid, then the commissioners shall be authorized to proceed to *levy the tax.*"

The first italicized phrase above quoted is meaningless unless it refers to such an appropriation of money as that which would have to be made in this instance. It is true that the question to be submitted to the electors under amended section 2825 is that of the policy of making a given improvement by levying a general tax and that the effect of an affirmative vote thereon is to authorize the commissioners to levy such a general tax. It is true also that aside from the single phrase referred to, no other mention of an "appropriation" by the county commissioners appears in this section. The act, then, is somewhat ambiguous and its effect is doubtful, particularly inasmuch as it imposes a limitation upon the general power granted by section 870, which power is one of

the primary and essential powers of the county commissioners and has existed for a long period of time. Nevertheless, I am satisfied that the legislative intent is to prohibit the appropriation of money under section 870 when the amount to be expended in the making of the improvement exceeds $15,000, unless the policy thereof has been favorably passed upon by the electors under section 2825 as amended.

I conclude, therefore, that by following the procedure above outlined, your commissioners may render a portion of the poor fund available for the purchase of land for infirmary purposes, but that they may not appropriate the money so made available if the sum thereof exceeds $15,000, without submitting to the electors of the county the question of the policy of purchasing such land.

Yours very truly,

U. G. DENMAN,
Attorney General.

DEFICIT IN COUNTY FUNDS CAUSED BY FAILURE OF DOW TAX—AUTHORITY OF COMMISSIONERS TO ISSUE BONDS TO MAKE UP DEFICIT.

April 28, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication is received in which you state that owing to the failure of Dow tax a deficit has arisen in the county funds of Trumbull County and you inquire as to whether the commissioners of said county have authority under favor of section 2834*a* Revised Statutes to borrow money and issue bonds to secure the same until the tax rate of the county is raised sufficient to provide additional revenue equal to the deficit.

Replying thereto, I beg to say that in my opinion you cannot obtain relief under section 2834*a*. This act (97 O. L. 514) is one "relating to refunding or extending time of payment of bonds." In section 1 thereof is found the provision:

> "Provided, however, that no indebtedness of any * * * county shall be refunded or extended unless such indebtedness shall first be determined to be an existing, valid and binding obligation of any such * * * county by formal resolution * * * of commissioners * *."

It is evident from this and other provisions of said act that the county cannot anticipate a deficit and make provision therefor under the provisions of this act. You state that the rate of taxation in your county is not equal to the limit prescribed by law. It would seem that the commissioners of your county should in some way be able to provide for the conducting of the affairs of the county until the tax rate thereof is raised and additional revenue is derived therefrom.

Yours very truly,

U. G. DENMAN,
Attorney General.

NEW PUBLIC BUILDINGS—AMOUNT THAT MAY BE EXPENDED FOR BY COUNTY COMMISSIONERS WITHOUT SUBMITTING QUESTION TO VOTERS.

April 28, 1909.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—In your letter of April 20th, receipt whereof is acknowledged, you inquire whether the county commissioners may construct a county jail at a cost of less than $15,000 and more than $10,000 wthout submitting the question of such construction to a vote of the people. You cite for my consideration in this connection section 2825 R. S., as amended 99 O. L. 456, and section 2825*a* R. S.

The first section above cited is in part as follows:

> "The county commissioners shall not levy any tax, or appropriate any money for the purpose of building public county buildings * * * the expense of which will exceed $15,000 * * without first submitting to the voters of the county, etc."

Section 2825*a* Revised Statutes provides that:

> "* * * whenever the county commissioners * * * shall determine to enlarge, repair, improve or rebuild any public county building * * * the entire cost of which expenditure shall exceed $10,000 * * *, the question as to the policy of such expenditure shall be first submitted to the voters of the county as provided in section 2825."

I find no inconsistencies between these two sections. The one clearly applies to the construction of new buildings and the other to the repair and improvement of old buildings. I find upon investigation that neither of these sections was amended during the last session of the general assembly.

I am of the opinion, therefore, that under the provisions above quoted a new jail may be constructed by the county commissioners at a cost of less than $15,000 without submitting the question as to the policy of such action to the voters of the county.

Yours very truly,

U. G. DENMAN,
Attorney General.

ADVERTISING AND SOLICITING DISTINGUISHED—NEWSPAPERS IN "DRY" TERRITORY ADVERTISING LIQUOR.

The term "solicit" as used in section 4 of the Dean Act does not include advertisements for intoxicating liquor in "dry" territory.

May 3, 1909.

HON. JOHN T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—Your letter of April 21st received, in which you ask the following question:

> "Under section 4 of the 'Dean Bill,' is it unlawful for any newspaper published anywhere containing advertisements soliciting orders for liquor, to be circulated in the 'dry' territory of this state?"

The determination of this question, which also incidentally involves the determination of whether it is unlawful for liquor dealers doing business in "wet" territory to insert similar advertisements in papers published in "dry" territory, and whether it is unlawful to do the same thing by means of billboards erected in "dry" territory, depends entirely upon what interpretation shall be put upon the words "directly or indirectly solicit," as used in section 4 of the so-called Dean Act, which reads as follows:

> "Any person, or persons, firm, or any officer of any corporation, who, directly or indirectly, after April 15, 1909, solicit orders for intoxicating liquor in any county or territory where the sale of such liquor as a beverage is prohibited, shall be subject to a fine of not less than $150.00 nor more than $400.00 for the first offense, and for the second offense, not less than $400.00 nor more than $800.00;"

In other words, whether the word "solicit" shall be held to include "advertisements" for orders for intoxicating liquor.

The definition of "solicit," which appears to fit the case in question, as given by the Century Dictionary, is as follows:

> "To seek to obtain, strive after, especially by pleading; ask (a thing) with some degree of earnestness or persistency, as, to solicit an office or a favor; to solicit orders."

And "advertisement" is thus defined by the same authority:

> "To make public announcement of anything of which it is desired to inform the public; announce one's wants, wishes or intentions by advertisement; as to advertise for something that is wanted."

See also Anderson's Dictionary of Law, "solicit," and Bouvier's Law Dictionary, "advertisement."

The act in question is penal and should, therefore, under the well-known principle of statutory construction, be strictly construed, and

> "* * * those who contend that a penalty may be inflicted, must show that the words of the act distinctly express that under the circumstances it has been incurred. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict a penalty."

2 Lewis' Sutherland Statutory Construction, section 523.

By a strained construction, the term "solicit" might possibly be held to include "advertisement" under the above definitions of those terms, but it must always be remembered that the intention of the legislature to forbid "advertising" for orders for intoxicating liquors in "dry" territory, must clearly appear from the express words used in the prohibitory act, and such intention cannot be reasoned into it.

> "It is a principle in the construction of statutes that the legislature does not intend the infliction of punishment * * * by doubtful language. * * *. Although a case may be within the mischief intended

> to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language."

2 Lewis' Sutherland Statutory Construction, section 521.

The question here involved might perhaps be held to "be within the mischief intended to be remedied" by the 4th section of the Dean Act, but, we must ascertain the intention of the legislature from the actual words which they have embodied in the act, and must give to those words their common and ordinarily accepted meaning, and it is my opinion that, under the accepted definitions of these two terms, as above given, "solicit" implies a more personal and individual application, or request, for orders by liquor dealers to inhabitants of "dry" territory, than is implied in the word "advertise," and the further use of the words "directly or indirectly" does not so enlarge the meaning of the term as to include "advertising" such as you have referred to in your question. The apparent intention of the legislature in using the words "directly or indirectly" was to reach offending agents of any such liquor dealers. The meaning of the word "advertise" is well known, and had the legislature intended the act to apply to such cases as the one stated in your question, it should, and undoubtedly would have used that particular term. It is also well to consider in construing this act, that an interpretation of it which would include "advertisements" such as you have spoken of, inserted in newspapers published in "wet" counties, would so broaden its scope as to include and indirectly regulate the traffic in intoxicating liquors in "wet" counties, for it is a well-known fact that any newspaper published in 'wet" territory, which is of any value as a general advertising medium, would undoubtedly have a greater or less circulation throughout the "dry" territory of the state. In my opinion, such an interpretation would give to this act a scope which it was not intended by the legislature to have when passed.

The only case I have been able to find in the reports which is exactly in point on the question here involved is that of Carter v. The State, 98 Southwestern Reporter 704, decided by the supreme court of Arkansas, in December, 1906. The question involved in that case was, whether an advertisement in the following terms—

> "J. M. Strange, in Texarkana, will be glad to have your order for Joel B. Fraser whiskey. * * * Please send your order to J. A. Wilson, of Texarkana, for Bonny Rye."

—inserted in a newspaper published in "dry" territory, was unlawful under the terms of section 5133 Kirby's Dig., which read as follows:

> "It shall be unlawful for any person, firm, partnership or corporation, engaged in the sale of alcohol, or any spirituous, ardent, vinous, malt, or fermented liquors, where the same may be lawful, *to solicit orders, either by agent or otherwise*, for the sale of alcohol or any spirituous, ardent, vinous, malt or fermented, liquors, in any place or places, in this state where the same is prohibited by law."

As can be seen, the above provision is in all essentials, and to all intents and purposes, identical with section 4 of the so-called Dean Act, and it is my opinion that the terms "either by agent or otherwise" appearing in the Arkansas statute, and "directly or indirectly" appearing in the Dean Act, are to all intents and purposes the same, and were intended to cover the same thing.

Hill C. J., for the court rendered the following opinion in the Arkansas case:

> "The facts of this case, which will be found stated by the Reporter, called for a decision as to whether an advertisement is within the meaning of the solicitation denounced by section 5133 Kirby's Dig., * * * The many uses of the term "advertise," in its various forms may be found in the Century Dictionary, from which this definition, the one most nearly reaching to the facts here, is taken:
>
> " 'The act or practice of bringing anything, as one's wants, or one's business, into public notice, as by paid announcement in periodicals, or by hand bills, placards, etc., as to secure customers by advertising.' To 'solicit' is thus defined:
>
> " 'To importune, entreat, implore, ask, attempt, try to obtain.' Anderson's Law Dictionary. See, also, Century Dictionary, 'solicit.'
>
> "None of the uses of this term embrace 'advertising,' although 'advertising' is a method, in a broad sense, of soliciting the public to purchase the wares advertised. But 'soliciting' is a well-known and defined action, and 'advertising' is an equally well-known and defined action, and they are not identical. It is true that they are intended to reach the same result, the sale of wares, but different routes are traveled in reaching that end. One is legislated against, and the other is not. *If the legislature intended to make criminal the advertisement in prohibited district of liquor, it would have said so and not left such an important matter to be implied from the use of a general term. It would be a strained and unnatural use of the term 'solicit' to include in it advertisements in newspapers.*"

As I have said, the above is the only judicial interpretation of such a provision as we here have under consideration, which I have been able to find in the reports, and the above decision would undoubtedly carry some weight with our courts should such a question as you have stated come before them for decision.

I am, therefore, inclined to the opinion that the term "solicit" as used in section 4 of the so-called Dean Act does not include "advertisements" soliciting orders for intoxicating liquor in "dry" territory, and that your question, therefore, must be answered in the negative. This question, however, is one of such state-wide importance, and involving interests throughout the state to such an extent, that there should, in my opinion, be steps taken to produce a judicial interpretation of this section of the so-called Dean law.

I beg to enclose opinion heretofore rendered by me, on the question whether detectives can be employed by prosecuting attorneys only in counties voted dry under the "Rose Bill," as per your request contained in your letter of April 21st.

Yours very truly,

U. G. DENMAN,
Attorney General.

PETITION FOR PIKE ROAD—VILLAGE RESIDENT LAND OWNERS NEED NOT SIGN.

A petition for a pike road need only have majority of land owners residing outside of municipality sign same even though route of road is through municipality.

May 5, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 1st, in which you request my opinion upon the following question:

> "Our commissioners have been presented with a petition for a pike road under the provisions of the law as the same are found in the 99 O. L., at page 489. The route of the proposed improvement is through the village of Marengo, a municipality of this county. By counting the resident land owners within the municipality there has a majority of all resident land owners signed, but without counting those within the municipality there has not a majority signed.
>
> "Under this statement of facts has there a sufficient number of resident land owners signed the petition?"

Replying thereto I beg to state that the above cited act contains the following paragraph:

> "Provided that it shall not be necessary in determining such majority petitioners to count any such resident land owners residing within any municipality."

I find upon investigation that this paragraph was incorporated in the law by the amendment found in 99 O. L. 489. Prior to said amendment, therefore, the resident owners of land residing within one mile of a public road would include the residents of municipalities situated along the line of such road, and it would have been difficult for resident owners not residing within such municipalities to have secured the signatures of a majority of resident owners, so constituted, on an improvement petition, without securing those of a large number of the residents in the municipalities. The amendment under consideration is apparently designed to obviate this difficulty. As I read it, the meaning thereof is that a majority of all the resident land owners residing outside of all municipalities shall be sufficient. From your statement of the question which now confronts you, I am not certain whether, in determining the number "of all resident land owners," you have counted those within the municipality. If you have not done so, then the petition which you describe is insufficient; but, if you have done so, the sufficiency of the petition depends on the answer to the further question, whether or not a majority of resident land owners residing outside of the municipality have signed it.

Yours very truly,

U. G. DENMAN,
Attorney General.

DEAN-CRIST BILL—GAMBLING.

Where cards are played or dice shaken for purpose of ascertaining who pays for drinks is gambling within meaning of Dean-Crist bill.

May 5, 1909.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 2nd and to apologize for my delay in replying to it.

The offices of this department have recently been remodeled, and in the confusion resulting therefrom, your letter was temporarily mislaid.

You submit for my opinion the following question:

> "With reference to question three in the list of five questions embraced in the Dean Bill for the regulation of the liquor traffic. Where the only cards played or dice shaken is for the purpose merely of ascertaining who wins the game, and the only reward offered is that of the supplying of a glass of beer or a glass of whisky, is this gambling within the meaning of the act as construed by your department?"

The third question required by the so-called Dean Law to be answered by saloon-keepers is as follows:

> "Have you, within the past twelve months, knowingly permitted gambling to be carried on in, upon or in connection with your place of business?"

It is unnecessary, in answering your question, to consider any of the other provisions of the Dean law. Nor is it necessary to frame a definition of the term "gambling." It is sufficient to state that all the authorities unite in holding that a stake must be played for, in order that a game of chance may amount to "gambling."

Your inquiry is as to whether, in case a game of cards or dice is played without any stake being put up in advance, and with the understanding that one of the contestants is to "treat" the other to a glass of liquor at the conclusion of the game, which is played to determine which contestant shall purchase the liquor, there is a stake within the meaning of the term as used in the definition of the word "gambling."

In my opinion, your question should be answered in the affirmative.

The following authorities establish the rule, that drinks or cigars to be purchased by the loser of a game of chance for the use of the winner, or of all the contestants, constitute a stake sufficient to render the game a gambling one, whether the agreement to "treat" is expressly entered into by the contestants before the game or is simply an understanding arising from custom:

State v. Wade, 43rd Ark. 77, 51 Am. Rep. 560.
Brown v. State, 49 N. J. L. 61, 7th Atl. 340.
Hay v. Reid, 85 Mich. 296, 48 N. W. 507.
Walker v. State, 32 Tenn. 287.
Com. v. Taylor, 80 Mass. 26.
Com. v. Goerdier, 80 Mass. 390.
McDaniel v. Com. 69 Ky. 36.
Hitchens v. Peo. 39 N. Y. 454.
Ulsamer v. State, 11th O. D. Reprint, 889 (circuit court).

I trust that the above stated principle will be of assistance to you in meeting the questions which you say you will have to encounter.

Yours very truly,

U. G. DENMAN,
Attorney General.

SECRET SERVICE OFFICER IN DRY TERRITORY—COMPENSATION OF.

May 10, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The "Dean law" authorizes the prosecuting attorney to appoint a secret service officer to aid in discovering evidence for violation of the local option laws in "dry" territory, and further provides that such officer's compensation "shall be paid out of the county fund upon the warrant of the county prosecutor." *Query:* Shall the county prosecutor draw his warrant direct on the county treasurer or should payment be made through the county auditor's office?

In reply I beg to say the quotation from section 3 of the "Dean law" as contained in your inquiry, expressly provides that the compensation shall be paid upon the warrant of the prosecuting attorney. That means that the prosecuting attorney is to draw the warrant on the county treasurer for the money. The second paragraph of section 3 further provides that if the prosecuting attorney fails to perform his duty in the appointment of a secret service officer that the probate judge shall have the power to appoint, and in that case the compensation is to be paid out of the county fund upon the warrant of the probate judge.

My opinion is that the prosecuting attorney, if he makes the appointment, will draw the warrant for the pay and that it is not necessary for such warrant or voucher to go through the hands of the county commissioners or county auditor.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PINEGROVE SPECIAL SCHOOL DISTRICT—SPECIAL LEGISLATION.

May 13, 1909.

HON. A. P. MILLER, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Your letter of May 8th received, in which you ask the following question:

> "Under the decision of the supreme court in regard to special school districts, and special acts of the legislature, is the Pine Grove Special School District, which was created by a special act of the legislature in the year ——, an illegal district, and should the county auditor place

the levy made by the township school board on the tax duplicate to the exclusion of the levy made by the Pine Grove Special District?"

The cases to which you refer in the question are, I take it, those of Bartlett et al. v. The State of Ohio, 73 O. S. 54, and State ex rel v. Spellmyre et al., 67 O. S. 77.

In the former case, at the conclusion of its opinion, the court says:

> "We are, therefore, of the opinion that the original section 3891, and the amended sections 3891 and 3928, of the Revised Statutes, are ineffectual and void, so far as they would make legal and valid special school districts of those special school districts which had been created under or by special statute."

It is, therefore, my opinion that, under ruling in the above cases, the Pine Grove Special School District is an invalid one, and that the auditor should place the township school board's levy on the tax duplicate, and refuse to place thereon the levy of the Pine Grove Special School District.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL DIRECTORS—POWER OF WOMEN TO VOTE FOR.

Under sections 3970-12 *and* 3921 *a woman may not vote to choose a school director in a subdistrict.*

May 13, 1909.

HON. W. E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Have women, under sections 3970-12 and 3921-a Revised Statutes, a right to vote at an election to choose a school director in a subdistrict?

In reply thereto, I beg to say section 3921-a R. S. provides for the annual election of one school director in each subdistrict, and fixes his powers and duties.

Section 3970-12 grants the privilege to women to vote for members of the boards of education. This section, however, as originally passed, 91 O. L., page 182, gave women the right to vote at any election held for the purpose of choosing any *school director*, member of the board of education, or school council, under the general and special laws of the state, but by the enactment of the school code in 1904, it was changed by amendment to its present form. The result of which amendment is that, whereas, under the original section, women were permitted to vote for the purpose of choosing any school director, member of the board of education, or school council "they are now under the amended section entitled to vote for 'members of the boards of education,' and upon no other question."

Under the provisions of section 3921-a the director elected in a subdistrict is not a member of the board of education, but, to use the language of the statute, "shall act as the organ of communication between the inhabitants and the

township board of education." In other words, he is a committeeman to represent the electors of a subdistrict in business dealings with the board of education.

It follows, therefore, that under the wording of section 3970-12 as it now stands, women would not be entitled to participate in an election held for the purpose of electing a director for subdistrict.

Yours very truly,

U. G. DENMAN,
Attorney General.

BLIND RELIEF—DRAWING PENSION NOT A BAR.

May 13, 1909.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your communication of May 12th is received, in which you submit the following inquiry:

> The blind commission of this county desires to know if the clause "and such relief shall be in lieu of any other relief of a public nature as contained in the act for the relief of needy blind, will prevent giving aid to a soldier drawing a pension, provided such soldier has all the other qualifications required by said act to make him a needy blind person.

In reply I beg to say, I assume that you mean by the concluding clause of your inquiry, "providing such soldier has all the other qualifications required by said act to make him a needy blind person," that the soldier referred to is without the means of support other than the pension that is provided by the government, and that the pension is inadequate to maintain him. If I am right in this, then the mere fact that he draws a pension from the federal government would not, in my judgment, disqualify him from receiving aid under the needy blind law. The language "and such relief shall be in lieu of any other relief of a public nature," is not intended to disqualify a soldier who is the recipient of a small pension, and who, if not given relief under the needy blind law, would become a charge upon the public.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—COMPENSATION OF MEMBERS—MANNER OF FIXING SAME—MUST BE PUBLISHED.

The statute relative to compensation of councilmen in villages is not self-executing and some action must be taken on part of council either by ordinance or resolution before they may be compensated, and such action must be published.

May 13, 1909.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I have the letter of May 11th from your assistant, Mr. Reed H. Game, making inquiry as to my opinion rendered to Mr. Joseph T. Tracy of the

Bureau of Inspection and Supervision of Public Offices on March 22, 1909, relative to the right of members of council in villages to draw the sum of $2.00 for each meeting, not to exceed twenty-four meetings in any one year, without the passage of an ordinance fixing the compensation of members of such council.

An opinion was rendered from this department on January 18, 1909, and another one on March 22, 1909, both on the question as to whether members of council in villages are entitled to receive any compensation for their services as councilmen without the prior enactment of legislation fixing the amount of such compensation, and in each of these opinions it was held by me that such prior legislation is necessary. That is that council must adopt proper legislation fixing the amount of their compensation within the limits prescribed by section 197 of the Municipal Code, as amended in 97 O. L. 118, before they will be entitled to receive any compensation whatever.

The request made by the officer calling for each of these opinions was for my ruling as to whether the statute is self-executing, or is it the duty of council to first take some action fixing their compensation for the future. Our attention was not drawn to the point as to whether this action of the council should be by *ordinance* or *resolution* nor as to whether it might be done by either one of these, and from the reading of the opinions, copies of both of which I enclose herewith, it would appear that we meant to hold that the legislation must be by *ordinance* alone. Such, however, was not the intention, and later on I was asked for an opinion on this last mentioned point by Mr. A. W. Geissinger, solicitor for Grove City, Ohio, and I herewith enclose you a copy of the opinion given him on that question to the effect that the action of council in fixing the amount of compensation within the limits of the statute, 97 O. L. 118, may be taken by either a resolution or an ordinance and that this action of council in either one of these modes, that is by resolution or ordinance, is legislation of a general nature and must be published according to section 1695 of the Revised Statutes, which section is made a part of the Municipal Code by adoption under section 124 of the Municipal Code.

I am of the opinion that the words "ordinance of a general nature," etc., as used in this section 1695 Revised Statutes include resolutions of the same nature, it being provided by section 122 of the Municipal Code that the action of council shall be by either *ordinance* or *resolution*. So that Mr. Ralston is in error in claiming that my ruling on the question has been reconsidered and changed. It was simply an oversight that we used the word "ordinance" alone in the first two opinions mentioned above, and as heretofore stated the question as to whether it would be proper to fix the compensation by either one or the other as council might see fit was not before us until the letter came from Mr. Geissinger.

That council must first take some action fixing their compensation before they may receive the same, see the case of *Walker et al. v. Dillonvale*, reported in the issue of November 30, 1908, of the Ohio Law Reporter, Vol. 6, No. 34, advanced sheets.

That Mr. Ralston is in error in his contentions on this matter seems very clear. His claim is that the statute, 97 O. L. 118, is self-executing, and that under it each member of the council is entitled without any legislation on the part of council at any time to receive $2.00 a meeting, no more nor no less, for not to exceed twenty-four meetings in any one year.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—CONTRACT WITH RELATIVE OF MEMBER.

May 24, 1909.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your communication of May 21st is received relative to the provision contained in section 6975 R. S., which forbids "any local director or member of the board of education to vote for, or participate in the making of any contract with any person as a teacher or inspector in any of the public schools of this state to whom he is related as father or brother." You inquire whether or not such provision includes son, uncle, sister or daughter.

In reply I beg to say, said provision is penal in its nature and is to be construed strictly. It cannot, therefore, apply to any persons other than those specifically enumerated. Inasmuch as a son, uncle, sister or daughter are not named in the section, they are not included in the inhibition.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—APPLICATION FOR STATE AID—TIME SAME MUST BE FILED.

An application for state aid in constructing roads must be made prior to January 1st and state highway commissioner may not undertake construction when application is not properly made, even if county, township and abutting property owners pay entire cost.

May 25, 1909.

HON. LYMAN R. CRITCHFIELD, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I beg leave to acknowledge your letter of May 19th in which you state that the county commissioners, township trustees and abutting property owners have agreed to pay the full cost of the construction of one-half mile of road adjoining that one mile portion of the Orrville road which is this year being constructed by the State Highway Department under the state highway law. The half-mile which you desire to construct, however, is not contained in any application to the state highway commissioner filed prior to January 1st of this year, so that the state highway commissioner is without legal authority to undertake the construction of this road even though the county, township and abutting property owners pay the entire cost. See section 6 and following sections of the state highway law.

The language of section 16 provides that:

> "Nothing contained in this act shall prevent any board of county commissioners or township trustees from agreeing to appropriate a larger amount for any road improvement than the amount specified in this act, up to the full cost and expense of the same,"

applies only to roads or sections thereof, for the construction of which applications have been duly made prior to January 1st, as is provided by the state highway law in the case of all roads to be constructed under the State Highway Department. Since the state highway commissioner must inspect all roads for which applications are filed and prepare plans and specifications as well as supervise the construction of state highways in each of the eighty-eight counties of

the state, the requirement that all applications shall be filed prior to the 1st of January is absolutely essential to enable him to perform the many duties required of him by law and any departure from this rule would very seriously interfere with the regular and systematic work of this department.

I would suggest that you may secure the results desired by you by constructing this half-mile as a county road under section 4637-1 and the following sections of the Revised Statutes. Mr. Wonders states that he desires very much that this additional half-mile should be constructed, that he will furnish copies of his plans and specifications for the mile adjacent to this for the use of the county commissioners, and that he will be glad to render any help or assistance that may be asked of him, even though this half-mile cannot, this year, be constructed under the state highway law.

Yours very truly,

U. G. DENMAN,
Attorney General.

MEMORIAL DAY APPROPRIATION TO G. A. R.

May 27, 1909.

HON. WILLIAM F. ORR, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your letter is received in which you submit the following inquiry:

> "Does the act of May 9, 1908, 99 O. L. 320, authorizing county commissioners to appropriate money to each post of the Grand Army of the Republic, apply to a post of Spanish-American war soldiers regularly established, etc.?"

In reply I beg to say said act is as follows:

> "That the county commissioners of the several counties, of the state of Ohio, are hereby authorized, to appropriate annually, to *each post of the Grand Army of the Republic*, in their respective counties, a sufficient sum of money, not exceeding twenty-five dollars ($25.00) each, to aid in defraying expenses of Memorial Day."

The appropriation under this law is specific and can only be made to "posts of the Grand Army of the Republic." If a post of Spanish-American soldiers is an integral part of the Grand Army of the Republic, then, in my judgment, the appropriation applies to it, and is available.

Very truly yours,

U. G. DENMAN,
Attorney General.

Y. M. C. A.—MINORS IN POOL ROOMS OF.

May 27, 1909.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your communication is received in which you inquire as to whether or not a permission to minors under eighteen years of age to play pool and billiards in a Y. M. C. A. building is in violation of section 6998 R. S.

In reply, I beg to say that said section makes it unlawful to permit or suffer a minor under the age of eighteen years to play at the game of billiards or pool in "such saloon, grocery, or other *public place.*" I do not regard a Y. M. C. A. building as coming within the meaning of public building as used in this section. A regularly organized Y. M. C. A. is only quasi public; that is, it is available to the public under certain restrictions of membership, and is not accessible to the public in general.

Yours very truly,

U. G. DENMAN,
Attorney General.

INTOXICATING LIQUORS—DESTRUCTION OF, AFTER CONVICTION—SEARCH AND SEIZURE ACT.

After judgment of conviction court has final control of liquors and may order same destroyed.

May 27, 1909.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Your letter of recent date is received, in which you request a construction of sections 6 and 10 of the Search and Seizure Act, 98 O. L., page 12, relative to the power of the court, after conviction, to order the destruction of liquor seized.

In reply I beg to say section 6 provides that:

> "upon final judgment of the court on the affidavit or complaint provided for in section 2, such intoxicating liquors shall be returned to their lawful owners, or be otherwise disposed of according to law."

Section 10 is as follows:

> "Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officer by writ of replevin, or other process, while the proceedings herein provided are pending; a final judgment of conviction in such proceedings is in all cases a bar to all suits for the recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizing and detention thereof."

The provision in section 6 that "such liquors shall be returned to their lawful owners, or be otherwise disposed of according to law" is somewhat ambiguous. It does not say, however, that *upon conviction* the liquors shall be returned to their lawful owners or be otherwise disposed of according to law, but "*upon final judgment.*" In my judgment, the legislature meant that upon final judgment of acquittal, the liquors were to be returned to their lawful owners, and that if there was a final judgment of conviction that the liquors were to be disposed of according to law.

Section 10 provides that a final judgment of conviction is a *bar* to all suits for the recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizure and detention thereof.

It follows, therefore, that the court is not required, after conviction, to return the liquors to the alleged owners, and, while specific authority is not given to the court in the act to destroy said liquors, yet it is clearly intended by the

legislature that the court shall have final control of the same. Should the court order said liquors to be destroyed, the provisions of section 10 of the act will prevent any suits for recovery or damages.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—CONSTRUCTION OF.

Section 2834b as amended in 99 O. L. 520 in no wise affects provisions of section 4759.

June 2, 1909.

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

DEAR SIR:—Your communication of May 29th is received in which you submit the following inquiry:

> Section 4759 Revised Statutes contains a provision that section 2834*b* "shall not apply to the making of any of the improvements under this chapter." Said section 2834*b* as amended 99 O. L. 520 provides that "all acts and parts of acts inconsistent herewith are hereby repealed as to such inconsistencies, but not otherwise."
>
> Query: Is the above quoted provision in section 4759 R. S. repealed for inconsistencies by the amendment to section 2834*b* above quoted?

In reply I beg to say chapter 6, title 7 of the Revised Statutes in which is contained section 4759 provides the manner in which turnpikes may be constructed by road commissioners appointed by the county commissioners, and said section 4759 expressly provides that section 2834*b* shall have no application to the making of any improvements under said chapter. Said chapter also provides for the filing of a petition by a majority of the land owners residing in the county whose lands will be assessed, upon which petition the county commissioners are required to take action. Said section further provides for the submission of the question of levying a general tax for said improvement to the qualified voters of the county, and if said election results in the affirmative vote for the improvement, the county commissioners are authorized to "levy tax, issue bonds and appropriate and expend money in the construction of such turnpike roads as, in their judgment, may be necessary to public convenience and promotive of the public interest."

In view of the above provisions contained in said chapter 6, title 7 of the statutes, whereby special provisions are made for the construction of certain road improvements, I am of the opinion that section 2834*b* as amended by the last legislature is without application, and that the provisions of said chapter 6 are not inconsistent therewith. Where provision is made for the submission of the question of levying a general tax for the improvement to the qualified electors of the county there would seem to be no necessity for the additional safeguards provided in section 2834*b*.

I am, therefore, of the opinion that said section 2834*b*, as amended by the last legislature, in no wise affects the provisions of section 4759, as contained in chapter 6, title 7.

Yours very truly,

U. G. DENMAN,
Attorney General.

INFIRMARY SUPERINTENDENT—TERM OF OFFICE.

Statute fixes no definite term for infirmary superintendent. Directors may appoint until successor is elected and qualified, and such appointment will terminate when successor is elected and qualified.

June 3, 1909.

HON. JAMES W. GALBREATH, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—You have submitted copies of two resolutions passed by your board of county infirmary directors under date of January 21, 1908, and March 27, 1909.

Under the resolution adopted under date of January 21, 1908, Harvey Imhaff was appointed superintendent and Alice Imhaff matron, to serve until their successors are elected and qualified. Under the resolution adopted March 27, 1909, Harvey Imhaff was appointed superintendent for one year beginning April 1, 1909, and ending April 1, 1910. The board of infirmary directors has requested Harvey Imhaff, superintendent, to give a new and additional bond for the term beginning April 1, 1909. Said superintendent refuses to comply with said request, claiming that the second resolution is void and of no effect for the reason that he is entitled to continue in the office of superintendent under the appointment by the first resolution until removed "for good and sufficient cause."

Query: Does the action of the board of infirmary directors, as expressed in the resolution adopted March 27, 1909, terminate Mr. Imhaff's term of appointment as provided in the resolution adopted January 21, 1908?

In reply I beg to say section 962 of the Revised Statutes provides for the appointment of infirmary superintendents and the following quotations therefrom contain all the provisions pertinent to your inquiry:

> "The 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 * * * and he shall not be removed by them except for good and sufficient cause; * * * the superintendent shall, before entering upon his duties, execute a bond, with two or more sureties to the acceptance of the directors in a sum not less than $2,000 nor more than $20,000 as they may require, payable to the state and conditioned for the faithful discharge of his duties; which bond with the approval of the board and his oath of office endorsed thereon shall be deposited with the county treasurer."

You will observe that the statute fixes no definite term, and the infirmary directors are therefore authorized to appoint a superintendent for any period of time, not, however, to exceed their own tenure of office. Mr. Imhaff's appointment under the first resolution was to continue until his successor was elected and qualified, and it is my judgment that under said appointment Imhaff's term of service would terminate with the appointment and qualification of his successor. True, under the above quoted provisions of section 962 he cannot be removed "except for good and sufficient cause," but expiration of term is not a removal. The pertinent question then is, has a successor been elected and qualified? Under the second resolution Mr. Imhaff has been elected as his own successor, but the facts disclose that he has not yet qualified and refuses so to do.

I am, therefore, of the opinion that Imhaff will hold under his first appointment until such time as the infirmary directors, by proper action, elect a successor and such successor qualifies.

Yours very truly,

W. H. MILLER,

Assistant Attorney General.

CREAMERIES—MANUFACTURING WITHIN MEANING OF SECTION 2742—TAXATION OF.

Creameries are subject to tax imposed by sec. 2742 of Revised Statutes.

June 4, 1909.

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

DEAR SIR:—Your communication of June 1st in which you present the following statement of facts, and ask the following question, received:

> "In this county we have some creameries established by the farmers, who have embodied themselves in a corporation for the purpose of carrying on their business and sending out among the residents of the community men who gather up the milk from the farmers and haul it to the factories and make it into butter and ship the butter, and keep an account of the sales, retaining six (6) cents a pound for the factories' trouble of gathering up the milk and manufacturing it into butter, and paying the balance to the farmers who furnish the milk. The factory pays on its land, buildings, machinery, tools, etc.; in fact, is listed for taxation on its plant.
>
> "Query: Is the manufacturer subject to a tax under 2742 R. S. of Ohio?"

In reply I beg leave to submit the following opinion. Section 2742 R. S. reads in part as follows:

> "Every person who shall purchase, receive, or hold personal property of any description for the purpose of adding to the value thereof, by any process of manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, shall be held to be a manufacturer, and he shall when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, also include in his statement the average value estimated, as provided herein, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining, and also, of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining, or adding thereto, which, from time to time, he shall have had on hand during the year next previous to the first day of April annually, if so long he shall have been engaged in such maufacturing business, and if not, then during the time he shall have been so engaged. * * *"

In my opinion, the language of this section clearly includes the business set forth in your statement of facts, for the process used by said creameries in making milk into butter, is undoubtedly a form of "manufacturing."

Manufacture is thus defined in the Century Dictionary:

> "The operation of making goods or wares of any kind; the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery."

It is also clear that the milk so produced, received, or held by said creameries is "personal property," and that the process of making it into butter "adds to the value thereof" and that said creameries do such manufacturing "with a view of making a gain or profit by so doing."

I am, therefore, of the opinion that the manufacturer in the above statement of facts, is subject to a tax under 2742 R. S. of Ohio.

Yours very truly,

U. G. DENMAN,
Attorney General.

HUBBARD, TRUMBULL COUNTY, HIGH SCHOOL ACT—83 O. L. 376—SPECIAL LEGISLATION.

Act in 83 O. L. 376 relative to high school in Hubbard, Trumbull county, is special legislation and unconstitutional.

June 8, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication of June 3rd, in which you ask my opinion on the following question, is received:

> "Is the act entitled an act to provide for the control and maintenance of the high school of Hubbard, Trumbull county, Ohio, 83 O. L. 376, a special act within the ratio decidendi of State v. Spellmire, 67 O. S. 77, and, therefore, unconstitutional and void?"

In reply, would say that the question as to whether this particular act is unconstitutional and void has never been passed upon by the courts. If, therefore, the boards of education of these two school districts see fit to continue conducting this school under the old special act, and there is no objection made to their doing so, I can think of nothing to prevent their doing it, if they deem it advisable. I am, however, of the opinion—and I take it from your letter that that is what you wish to learn—that the above act is unconstitutional within the meaning of State v. Spellmire.

For the case of State v. Spellmire established the following proposition in regard to the requisites for constitutionality of all laws. The first paragraph of the syllabus of that case reads as follows:

> "Whenever a law of a general nature having a uniform operation throughout the state, can be made fully to cover and provide for any given subject-matter, the legislation, as to such subject-matter, must be by general laws, and local or special laws cannot be constitutionally enacted as to such subject-matter."

In rendering the decision in this case Burket, C. J., uses the following language (page 82):

> "As a subject-matter which is general can and must be legislated upon by general laws having a uniform operation throughout the state, it follows from the above rules, when carried to their full extent, that every subject-matter which can reasonably be covered and provided for

by a general law, can have no special or local legislation as to it, or any of its parts. If the general law should be found too broad or too narrow, the remedy lies in an amendment of the general law so as to remedy the defect throughout the whole state, and not in passing a special or local law as to some special subject-matter to be carved out of, and separated from, the general subject.

"The above rules when carried to their full extent and import, prohibit special or local legislation upon a subject-matter which is general in its nature, and which can be reasonably covered and provided for by a general law having a uniform operation throughout the state. *And the best evidence that a subject-matter can be covered and provided for by a general law having uniform operation, is the fact that such general law has been passed upon that subject-matter.* When such is the case no local or special law can be constitutionally enacted on that subject-matter."

Not only has the legislature covered this subject by a general act (4009-15 R. S. O.), and specified the manner in which such high schools shall be established and maintained, but it has gone still further, for section 4009-16 R. S. O. reads as follows:

"Joint township high school districts heretofore established, as provided for in section 4009-15 to 4009-20 inclusive, of the Revised Statutes of Ohio, as they existed prior to the passage of this act, are hereby abolished, and the schools in said districts shall be hereafter conducted as provided for in section 4009-15 of the Revised Statutes of Ohio, as contained herein. Boards of education of special districts for high school purposes, as provided in section 4009*b* of the Revised Statutes of Ohio, as it existed prior to the passage of this act, are hereby abolished, and the high schools in said district shall hereafter be conducted and maintained as provided in section 4009-15 of the Revised Statutes of Ohio, as herein contained."

The above quoted section of the statutes plainly shows the intention of the legislature to make the method of establishment and maintenance of high schools which is provided in 4009-15, inclusive.

I am, therefore, of the opinion that the act found in 83 O. L. page 376, is a special act, and is unconstitutional within the meaning of State v. Spellmire 67 O. S. 77.

Yours very truly,

U. G. DENMAN,
Attorney General.

COURT STENOGRAPER—FEES OF.

June 9, 1909.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your communication of June 6th, together with copy of the court's order fixing the compensation of the official stenographer of your county is received. In your letter you submit the following inquiry:

The official court stenographer, at my request, took shorthand notes of the testimony given before the grand jury and furnished me a tran-

script of the same. Said stenographer has rendered a bill to the county commisioners for said services at the rate fixed by the court of common pleas.

Query: Is the official stenographer entitled to compensation for said services?

In reply, I beg to say that the services required of an official stenographer under section 7195 are a part of his official duty and under the order of the court making the appointment the salary of the stenographer is fixed at $780 per annum, and for transcripts furnished 8 cents per 100 words for the first copy and 4 cents per 100 words for carbon or second copies. Said order of appointment is in compliance with section 474-5 and succeeding sections of the Revised Statutes. The stenographer is therefore only entitled to be paid for the transcript furnished at the rate prescribed in the order of appointment.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—EXTENSION OF TIME FOR COLLECTION OF TAXES—TREASURER NOT ENTITLED TO EXPENSES PROVIDED IN 100 O. L. 76 FOR EXTENSION.

June 10, 1909.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

In case the county commissioners have extended the time for collection of taxes from June 20th to July 20th or from December 20th to January 20th as provided by the act of May 9, 1908 (99 O. L. 435), is the county treasurer entitled to the expenses provided in the act passed March 12, 1909 (100 O. L. 76), where the same are incurred after June 20th or December 20th?

In reply, I beg to say section 1 of the act passed March 12, 1909, is as follows:

"That the county treasurer in any county may, when in his opinion it is necessary, open an office for the receiving of taxes in any city or village, not to exceed one in each township, in which is located a bank of deposit, at which office the county treasurer, his deputy or clerks, may attend and receive taxes, on any day or days prior to the 20th day of June and the 20th day of December of each year; and they shall be authorized to remove from the county treasury to the place of collection such records as may be necessary for the receiving of taxes upon such day or days as shall be fixed for that purpose as herein provided."

You will observe that this section 1 authorizes the county treasurer to open an office for the receiving of taxes in cities or villages on days prior to the 20th day of June and the 20th day of December of each year, and section 4 provides that said county treasurer shall receive out of the county treasury his expenses incurred in the receiving of taxes "as herein before provided."

It follows, therefore, that while the county commissioners may extend the time of the payment of taxes, yet the county treasurer is only authorized to

attend and receive taxes at places other than the county treasury on days prior to the 20th of June and the 20th of December of each year.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—QUADRENNIAL APPRAISEMENT ACT—REPEALS SECTION 2786 REQUIRING COUNTY TO BE DIVIDED INTO DISTRICTS FOR ELECTION OF ASSESSORS.

June 10, 1909.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your communication of June 9th is received, in which you submit the following inquiry:

> "Is it necessary under section 2786 R. S. of Ohio, and the amendment thereto, 100 O. L. 81, for the county commissioners to divide the county into districts, and give notice by publication in some newspaper, setting forth the boundaries of such districts?"

In reply, I beg to say the act entitled "An act to provide for assessors of real property," as found in 100 O. L. 81, is not an amendment to section 2786 R. S., but is an entirely new act providing for the quadrennial appraisement of real property.

Section 2786 and succeeding sections of the Revised Statutes provide for the decennial appraisement of real property.

The last section of the act providing for quadrennial appraisement repeals all laws in conflict or inconsistent therewith. Inasmuch as section 1 of the quadrennial appraisement law provides for the election of an assessor in each township of the county except where all of such township lies within the corporate limits of the city or village, and in that case so much of the township as lies without the corporate limits of the city, the provision in section 2786 R. S., requiring the county commissioners to divide the county into suitable and convenient districts in the election of assessors, is repealed for inconsistency. Under the new law the assessors are to be elected by the township and not by districts.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—EXPENSES OF PERSON BITTEN BY MAD DOG —PAYMENT OF DISCRETIONARY.

June 10, 1909.

HON. WM. DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Where a person has been bitten or injured by a dog afflicted with rabies, is the owner of the dog liable under section 4212-2 R. S., for the

expense and damage sustained, or are the county commissioners compelled to pay said expense and damage under the provisions of section 4215-1 as amended 99 O. L. 82?

In reply thereto, I beg to say that under the amendment to section 4215-1 (99 O. L. 82) the county commissioners are not compelled to pay any of the expenses incurred by reason of the injuries sustained by any person who has been bitten by a dog afflicted with rabies. Said commissioners are only required, under the amendment, to examine the "detailed statement" when properly filed and may order the payment of any portion thereof which they, in their discretion, may find just and correct.

Section 4212-2 R. S. provides that the owner of any dog that injures a person shall be liable to any person so damaged to the full amount of the injury so done. These two sections are, however, unrelated, and relief granted under one is not a bar to a recovery under the other.

Yours very truly,

U. G. DENMAN,
Attorney General.

BLIND RELIEF—PERSON ENTITLED TO NEED NOT BE TOTALLY BLIND.

June 12, 1909.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

"Section 2 of the act entitled 'An act to provide for the relief of needy blind,' 99 O. L. page 56, is as follows:

"A needy blind person shall be construed to mean any person who, by reason of loss of eye sight, is unable to provide himself with the necessities of life, and who has not sufficient means of his own to enable him to maintain himself."

Query: Should the language, "loss of eye sight" as used in this section be construed to mean "total blindness?"

In reply I beg to say, in my opinion, in the construction of the words "loss of eye sight" it is immaterial whether it be a total or partial blindness. The evident intent of the legislature in the passage of this act was to provide for the worthy blind, who, by reason of that disability, were incapacitated from earning a livelihood.

In my judgment, the commission should be guided by this rule:

Is the applicant, whether totally or partially blind incapable of self-support by reason of said disability?

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES MUST BE ELECTED IN NOVEMBER, 1909.

June 14, 1909.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Your letter of June 11th is received in which you submit the following inquiry:

> "The trustees of Newbury township, this county, were elected in November, 1907, took office in January, 1908. Query: Should their successors be elected at the coming November election, and if so, for what length of time."

In reply, I beg to say section 1442 R. S., as amended March 31, 1906, is as follows:

> "Township officers shall be chosen for a term of *two years*, and justices of the peace for a term of four years, by the electors in each township, on the first Tuesday after the first Monday in November, in the odd number of years, and their terms of office shall commence on the first day of January next after their election."

Under the provisions of this section it follows that township trustees will be elected in all the townships in the state at the coming November election for a term of two years, such terms to begin on the first day of January, 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

DITCHES—SECTIONS 4584-1 TO 19 APPLICABLE ONLY TO OPEN OR SURFACE.

June 14, 1909.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your communication of June 11th is received in which you inquire as to whether or not sections 4584-1 to 19 Revised Statutes apply to tile as well as open ditches.

In reply, I beg to say the sections referred to in your inquiry are contained in an act to provide for township ditch supervisors and the cleaning out and keeping in repair of public ditches, drains and water courses, passed by the legislature April 2, 1906; and under section 3 of the act the duty of such township ditch supervisor is limited to cleaning out and keeping in repair "township and county ditches." Section 11 of the act contains a provision that county and township ditches or parts thereof which have been tiled or may hereafter be tiled are not to be affected by the provisions of the act, provided that the tile in said ditches is of sufficient capacity to carry all the water drainage so as not to flood adjacent lands above, otherwise a service ditch shall be kept open by the ditch supervisor.

It follows, therefore, that the provisions of the act are only applicable to open or surface ditches.

Yours very truly,

U. G. DENMAN,
Attorney General.

PASTEUR INSTITUTE—EXPENSES OF PERSON AFFECTED WITH RABIES.

It is discretionary with county commissioners to pay expenses of person affected with rabies at Pasteur Institute.

June 14, 1909.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your communication of June 11th is received, in which you submit the following inquiry:

> "A dog bit a mule, the man who took care of the mule had a sore on his hand, and the mule licked his hand. That same night it became certain that the mule was afflicted with rabies, and it died. The man was advised to go to a Pasteur institute, and he did so. He now presents a bill to the county commissioners for the expenses incurred. Query: Can the county commissioners allow the bill?"

In reply, I beg to say section 1 of an act entitled "An act to provide for the protection of persons injured by mad dogs," passed April 8, 1908, 99 O. L., page 82, is as follows:

> "That any person who shall be bitten or injured by a dog or canine, cat or feline, or other animal, which at the time of the biting or injury to said person was suffering from or afflicted with what is known as rabies, and which said bite or injury by said dog or canine or other animal, cat or feline, caused said person to employ medical or surgical treatment, and required of said person the expenditure of money in the care and treatment resulting from said bite or injury, may present a detailed and itemized account of the actual expenses incurred and amount paid for medical and surgical attendance, verified by affidavit of said injured person, administrator or executor and attending physician; but if said injured person be a minor the said affidavit must be made by the parent of said minor or his duly appointed and qualified guardian, attending physician or administrator or executor. Said detailed statement as aforesaid must be presented within four months after the injury was received, at a regular meeting of the county commissioners of the county where the said injury was received. The county commissioners shall, within a reasonable time and not later than the third regular meeting after the presentation of said verified account as aforesaid, examine the same, and if found in whole or in part correct and just, may in their discretion order the payment thereof, or such parts as they may have found in their judgment correct and just to be paid out of the general fund of the county, but no one person shall receive for any one injury under this act a sum exceeding five hundred ($500.00) dollars."

Under the provisions of the above section, a person who is either bitten or injured by any animal afflicted with rabies, and who has been required to expend money in the care and treatment resulting from the bite or injury, may present his claim to the county commissioners as provided therein.

In the statement of fact submitted it is assumed that the mule was afflicted with rabies at the time he licked the man's hand. It is not affirmatively stated, however, that any injury resulted therefrom. If, as a matter of fact, it were

shown that the licking of the man's hand by the mule infected the man with rabies, then, in my judgment, the man would be entitled to present his claim to the commisioners. However, the licking of the man's hand by the mule may or may not have been injurious. That is a question of fact that will have to be determined by the county commissioners.

Very truly yours,

U. G. DENMAN,
Attorney General.

PRIMARY LAW—PARTY VOTERS NOT DEFINED—TO BE DETERMINED BY ELECTION BOARD.

June 17, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Section 16 of the primary election law provides that "such nomination papers shall be signed by 2% of the party voters in the county, municipality, etc., and that the basis of percentage in each case shall be the vote of the party for the head of the ticket at the last preceding election for the same office in said territory."
>
> Query: Are only those persons who supported the head of the ticket at the last preceding election qualified to sign nomination papers for candidates?

In reply, I beg to say, in my opinion, the provision in section 16 that the "basis of percentage in each case shall be the vote of the party for the head of the ticket at the last preceding November election for the same office in such territory" has no application to the qualifications of an elector who seeks to sign a nomination paper. The law provides that "such nomination papers shall be signed by 2% of the *party voters* in the county, municipality, precinct, ward or other political subdivision for which such nomination is to be made."

The term "party voter" is not defined in the primary election law. It is, therefore, left to the judgment of the election board to determine from all the facts whether or not all of the signers to nomination papers are party voters.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY AUDITOR—LISTING ESTATES OF DECEASED PERSONS—DUTIES BOARD OF REVIEW MAY REQUIRE.

County auditor as secretary of board of review does not meet legal requirements of office when he hesitates or refuses to examine and report to board all inventories that may come to him as auditor from probate court.

June 17, 1909.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you inquire as to the respective duties of the county auditor and special boards of

review relative to listing for taxation of the estates of deceased persons with special reference to the inventories of such estates, and to what extent such boards of review may require the county auditor to make examination and investigation of such inventories, and report thereon to the said boards of review.

Replying thereto I beg to say that the duties devolving upon the county auditor and the city boards of review in connection with the official service about which you inquire, is defined and prescribed by statutory provision, and it may be proper to add that the nature of the work is of such character and so necessarily interwoven as between the two parties, that it has been impossible for the legislature to particularize as to just where the service of the auditor shall terminate and that of the board of review begin. It would seem that an earnest desire on the part of both auditor and board of review to so work and perform their official duties that all property should be placed on the tax duplicate as contemplated by law, would render unnecessary such finished distinction as they ask of you in this inquiry.

The powers and duties of the board of review for municipalities are given and defined in section 2819-1 as follows:

> "Said board of review shall within and for their respective municipalities have all the powers and perform all of the duties heretofore conferred upon or required of the annual city board for the equalization of the value of real and personal property, moneys, and credits; the decennial city board, for the equalization of the value of real property; and the annual city board of revision; and the decennial city board of revision, under any and all laws now in force, pertaining to such municipalities. And said board of review shall be the successor of said board of revision, said annual city board and said decennial city board, all of which boards shall, upon the appointment of a board of review in any municipal corporation under this act be abolished. Said board of review shall have power to hear complaints and to equalize the valuation of real and personal property, moneys and credits within such municipal corporation as said board of review may be located, and shall be governed by rules prescribed for the government of decennial county and city boards, and annual county and city boards, for the equalization of real and personal property."

The express provision of this section gives to the board of review ample power to invoke such agencies as may be necessary to bring before them full information as to the existence and amount of any property or estate concerning which there may be question.

The relationship of the county auditor to this board is expressly defined in section 2819-4 of the Revised Statutes, as follows:

> "The county auditor of any county in which any of such municipal corporations are located shall be secretary to such board, and shall in addition to his other duties provided by law, be present at each meeting of the board in person or by deputy; he shall keep a correct record of the proceedings of the board in a book to be kept for that purpose, and perform such other duties as the board may order, or as may be incident to his position. For his services as secretary to such board he shall receive out of the county treasury upon the order of the board five ($5.00) dollars per day for each and every day the board shall be in session."

This section contains the wise provision that the county auditor shall be the secretary of such board, and shall perform such other duties as the board may order, or as may be incident to his position. Having in mind that the county auditor is the keeper and maker of the tax duplicate and transfer records of the city and county, the legislature evidently considered it proper that the board of review should have a right to command the auditor to furnish such information in connection with the duties of their office as may be particularly within the knowledge of the auditor, and in my opinion, if the board should decide it proper and necessary for the auditor to examine, investigate and compare inventories of estates as furnished him by the probate court with the records in his (the auditor's) office, and report thereon to the board of review, it would be the plain duty of the auditor so to do. I think this conclusion is strengthened by the provision of section 6044 R. S., which provides that the probate court

> "shall, at the end of each month, deliver to the county auditor, a statement showing as to each inventory the aggregate value of each class of property other than real, as shown by the inventories filed during that month, for his use and the use of the proper board of equalization, in the performance of their respective duties in relation to returns for taxation of personal property, moneys, rights and credits, and the equalizing and correction of the same;"

It is apparent from this and other sections above set out and references therein contained that the county auditor is the official to whom the board of review are legally and rightly entitled to look for all property records, and they "may order" (2819-4 R. S.) said auditor as a clerk of their board to examine any inventory furnished him by the probate court, or any official record in his (the auditor) office, and report the result of his investigation and findings to the board of review for their information. I find no express law authorizing the board of review to go back of the current year in their investigation as to whether property is all placed on the tax duplicate according to law; but this is not the case as to the county auditor, for under provision of section 2781-*a* and 2782, he may, and it is his duty to "ascertain as near as practicable the true amount of personal property, moneys, credits and investments as such persons ought to have returned or listed for not exceeding five years next prior to the year in which the inquiries and corrections provided for in this and the next section are made." (Quotation from section 2781.)

From the full authority given the auditor to investigate as to the existence of property in the city and county, the fact that the probate judge makes monthly statements to him of all inventories filed in the probate court during the month, as provided for in said section 6044, and the further fact that the auditor prepares the tax duplicate and keeps the transfer records of property, and is the custodian of the assessors' returns of property listed, must be convincing that the auditor is the one eminently qualified to furnish the board of review with detailed information relative to the existence of property, and whether the same is listed for taxation according to law. That the legislature had this in mind when in section 2819-4 it provided that the auditor should be secretary of the board of review, and be subject to the order of said board as to the performance of such other duties as the board may require, or as may be incident to his position, is apparent. Therefore, in my opinion, the county auditor as secretary of said board of review does not meet the legal requirements of his office, or render a full measure of official service, when he hesitates or refuses to examine and report thereon to the board of review of which he is clerk, such

inventories, or all inventories as may come to him as auditor from the probate court. Your auditor's suggestion, as incorporated in his letter, to the effect that, in the report of the Bureau of Inspection and Supervision of Public Offices, that these duties properly devolve upon the board of review, is not well taken, as may be seen from a conjunctive reading of pages 467 and 468 of the report on Franklin county.

Very truly yours,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEES—LIABILITY FOR SURGICAL WORK—VILLAGE AND TOWNSHIP JOINT ERECTION OF BUILDING.

Township trustees in absence of contract not liable for surgical work performed where notice has not been given.
Village and township may join in erecting building for joint use.

June 21, 1909.

HON. THOMAS MULCAHY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiries:

> 1. Dr. Hane, a practicing physician of this county, was legally employed as township physician by the township trustees of Flatrock township. The terms of his employment, however, did not include surgical work. In the month of July, 1908, a man living in said Flatrock township met with an accident which required the immediate attention of a surgeon. Dr. Hane called to his assistance Dr. Hanison, who performed the necessary operation. Dr. Hanison then requested Dr. Hane to report the case to the township trustees. Dr. Hane died in October, 1908. The trustees deny having received any notice, and it cannot now be shown that notice was given. Later on it was discovered that the injured man was not a legal resident of Henry county, but this fact was discovered too late to make the surgeon's fees a charge against the county in which said person had a legal residence.
>
> Query: Can the board of trustees of Flatrock township or the infirmary directors of Henry county legally pay Dr. Hanison?
>
> 2. May an incorporated village join with the township in which said village is situated in the erection of a building to be jointly used by the township and village?

Replying to the first inquiry I beg to say, section 1499-1 of the Revised Statutes authorizes the trustees of any township or the proper officers of any corporation in any county of the state of Ohio to contract with one or more competent physicians to furnish medical relief and medicines necessary for the persons of their respective townships or corporations who come under their charge under the poor laws of Ohio. Such contracts, however, are limited to one year.

Section 1499-2 provides that such contracts shall be let at competitive bidding.

Section 1499-3 provides "that when the trustees of a township or the proper officers of a corporation shall enter into such contract, as herein provided, such

township or corporation *shall not be liable* for any relief thereafter furnished any person under the provisions of section 1494 R. S., so long as such contract remains in force."

Under the statement of facts above given, Dr. Hane's employment as township physician did not include "surgical work." It follows, therefore, that the township trustees had not exercised the power granted them under the provisions of section 1499-1 insofar as surgical work would be required, and had the injured person been a legal resident of the county and the proper notice given as is required in section 1494, the township would have been liable for the services rendered by the surgeon. The statement of facts, however, discloses that the giving of notice is denied and that evidence and proof of same is not available.

I am, therefore, of the opinion that said township trustees are without authority to pay said bill.

In reply to your second inquiry, I refer you to section 1480*a*-1 R. S., and succeeding sections in which the electors of an incorporated village and the electors of a township in which the village is situated, may, if both so determine, as therein provided, unite in the enlargement, improvement or erection of a public building.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—JOINT BOARD—PURCHASE OF LAND FOR DISTRICT TUBERCULOSIS HOSPITAL.

A joint board of county commissioners may not purchase more land than is required for suitable site upon which to erect necessary buildings for district tuberculosis hospital.

June 23, 1909.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Shelby, Miami, Montgomery, Darke and Preble counties have formed a joint district for the purpose of purchasing a site and erecting thereon a district tuberculosis hospital in accordance with the provisions of an act entitled "An act to provide for county hospitals for the care and treatment of inmates of county infirmaries and other residents of the county suffering from tuberculosis," etc., amended March 12, 1909, 100 O. L. 86.
>
> Query: Has the joint board under the provisions of said act empowering them to purchase a site, authority to purchase a farm of 100 or more acres, the same being more than is required for the erection of the necessary buildings for the purpose of a general farm to be used in the maintenance of said hospital?

In reply I beg to say, section 6 of said act as amended is as follows:

> "In accordance with the purposes, provisions and regulations of the foregoing sections, except as herein provided, the commissioners of any two or more counties, not to exceed five, may form themselves into a

joint board for the purpose of establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis, and may provide the necessary funds for the purchase of a site and the erection of the necessary buildings thereon, in the manner and for the purposes hereinbefore set forth; provided that said joint board of county commissioners in the selection and acquirement of a site for said hospital shall have the same powers for the appropriation of lands as are conferred upon boards of trustees of benevolent institutions of the state by section 623 of the Revised Statutes; and they are hereby authorized to receive and hold in trust for the use and benefit of any such institution, any grant or devise of land, and any donation or bequest of money or other personal property that may be made for the establishment or support thereof."

It will be observed from a reading of this section that the joint board of county commissioners is only authorized to provide the necessary funds for the *purchase of a site* and the erection thereon of the necessary buildings. While authority is given to said joint board to receive and hold in trust for the use and benefit of any such institution any grant or devise of land that may be made for the establishment or support thereof, no express power is given to said joint board to provide funds for the purchase of additional lands for farming purposes.

The word "site," as defined by the Century Dictionary, means "the ground on which anything is, has been or is to be located." This definition, in my judgment, cannot, in this instance, include ground or land in addition to a suitable site for the location of the necessary buildings. Had the legislature meant otherwise it would have expressly provided that the joint board of county commissioners should have authority to purchase land in some quantity to be used for the support and maintenance of the hospital.

I am, therefore, of the opinion that the joint board of county commissioners are without authority to purchase more land than is required for a suitable site upon which to erect the necessary buildings.

Yours very truly,

U. G. DENMAN,
Attorney General.

AUTOMOBILE REGISTRATION—DATE OF EXPIRATON.

Certificates obtained in 1908 *expire one year from the date of their issue and must then be renewed for the period between such renewal and January* 1, 1910.

June 29, 1909.

HON. ALTON F. BROWN, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 23rd, requesting my opinion upon the following question:

"It is contended by the Lebanon Automobile Club of Lebanon, Ohio, that under the automobile registration act passed March 2, 1909, Vol. C. Extra Session, page 72, persons registered in 1908, registration expiring in 1909, have until January 1, 1910 to make new application for registration. Their contention is based on the provision of section 6: 'Shall

annually before the first day of January of each year' thus giving persons until January to make application. That the last clause of said section 6 of said act bears out this interpretation as it provides as to 'subsequent applications' which refers to purchasers or persons becoming owners of motor vehicles subsequent to the passage of the act. The last part of the last clause of section 6 of the act does not provide for new application for registration upon expiration of year from date of registration in 1908, but 'as provided in this section for registration beginning January 1, 1910,' and there being no such provision that part must refer to the provision mentioned, 'shall annually, before the first day of January of each year.'"

Registration of automobiles during the year 1908 was made under section 6 of the act of May 11, 1908 (99 O. L. 538-539), which provides that:

> "Every owner of a motor vehicle * * * shall annually for each motor vehicle * * * cause to be filed * * an application for registration * *."

The succeeding sections of the 1908 act prescribe the duties of the secretary of state with respect to the registration of such motor vehicles, and said succeeding sections have not been amended since their enactment.

Under the law as originally enacted it is clear that certificaies of registration were effective during the twelve months next succeeding the date of their issue. Had the law not been amended therefore, certificates issued in 1908 would expire during 1909.

By the act of March 23, 1909 (100 O. L. 72), it was sought by amendment to sections 1, 6, 10 and 11 of the act of 1908 to render more definite the provisions regarding annual registration and to simplify the machinery of registration by making all certificates effective from and after January 1st of each year. Section 6 as amended in this act provides in part as follows:

> "Every owner of a motor vehicle * * * shall annually, *before the first day of January of each year* * * * cause to be filed * * * an application for registration, for the *following* year beginning on the first day of January of *such* year * *."

This clause of the amended act clearly does not operate to extend 1908 certificates until January 1, 1910. Its effect is limited to certificates issued on or after January 1, 1910, and it has no relation to certificates for any period of time preceding January 1, 1910. It is true that an application for a 1910 certificate may be made at any time between the present date and the first day of January, 1910; but it does not follow that for this reason registration for a portion of the year 1909 may be dispensed with.

The last clause of said amended section 6 instead of militating against the above construction of the first clause thereof rather strengthens it. Said last clause contains the following provision:

> "All applications of owners * * filed subsequent to the passage of this act for registration for a period of time including any part of the year 1909, shall be entitled to receive * * only certificates * * for the period of time ending December 31, 1909, and new applications shall be required as provided in this section for registration beginning with January 1, 1910."

The inference of the Lebanon Automobile Club that the word "owners" as used in this last clause means "purchasers or persons becoming owners of motor vehicles subsequent to the passage of the act" is unwarranted. It seems to me that herein lies the fallacy of the view adopted by the club. The clause, in terms, applies to all applications filed subsequently to the passage of the act. It is as broad as it could be phrased; it includes, therefore, applications for renewal certificates. So reading it, the clause does not require the labored construction contended for in order to render it intelligible. The clear and unmistakable meaning thereof is that the applications, whether of owners of newly acquired vehicles or for renewal certificates, made during the year 1909 for any part of that year shall be effective only until January 1, 1910, and must renewed on that date.

The foregoing conclusions, it seems to me, are those properly deducible from the express language of section 6 as amended. They are supported, however, by the fact that nowhere in the amended section is there a provision extending the effect of 1908 certificates until January 1, 1910. These certificates are in the nature of licenses or grants and the provisions of law which give them effect are to be strictly construed against the licensees. Therefore, no express extension of the 1908 certificates being found it is not permitted by forced construction to read an implied extension into the law.

I am, therefore, of the opinion that certificates obtained in 1908 expire one year from the date of their issue and must then be renewed for the period between such renewal date and January 1, 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

ASSESSOR—RESIDENCE MUST BE WHERE.

Real estate assessors must be residents of territory for which they are elected.

June 28, 1909.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Is a person residing in a village located within a civil township eligible to election as a real estate assessor for that part of the township outside of the village?

In reply I beg to say, section 1 of the act providing for the election of assessors of real property, passed March 12, 1909, is in part as follows:

> "At the election to be held in November, 1909, and every fourth year thereafter, there shall be elected by the qualified electors of each township, in each county of the state, except where all of such township lies within the corporate limits of a city or village, and in that case in so much of the township as lies without the corporate limits of a city, one citizen having the qualifications of an elector as an assessor of real property within such township or village; provided, further, that when a part only of a township lies within the corporate limits of a city or

village, the township assessors provided for herein shall be elected by the electors of the township outside of said village or city and all such boards of city and village assessors shall perform their duties as defined herein only in the territory in which he or they are elected, and in any county within the limits of which there is a city there shall be elected by the electors of said city a board of five citizens of said city having the qualifications of electors as assessors of real property within such city."

The part of said section above quoted requires township assessors so elected to be electors of the township for which they are elected and further provides that in case an assessor is to be elected in a part of a township lying without a municipality, such assessor is to be elected by the electors residing within said territory.

While the statute does not expressly provide that an assessor elected in only a part of a township shall be an elector of such territory, yet it is apparent that such was the legislative intent and, inasmuch as residence is a necessary qualification of an elector, it follows that all real estate assessors must be residents of the territory for which they are elected.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—NUMBER TO BE ELECTED IN 1909—TERM OF APPOINTED MEMBER.

July 6, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of the 30th ult., in which you state that at the 1907 election in the city of Niles, four members of the school board were elected for two years and three were elected for four years. You inquire what number of the members of this board shall be for election in the year 1909.

Replying thereto, beg to say that the provision of section 3897 Revised Statutes relating to board of education, as amended in 99th Ohio Laws, page 586, determines this question. The section first provides that,

"In city school districts the board of education shall consist of not less than three members nor more than seven members elected at large, by the qualified electors of such city school district, provided that in city school district which, at the last preceding federal census, contained a population of more than fifty thousand persons, the board of education shall consist of not less than two nor more than seven members elected at large by the qualified electors of such city school district, etc."

Your board, therefore, is legal in consisting of seven members.
A further provision of said section is that

"If the board consists of an odd number of members, then one-half plus one shall be elected in the year 1909, or four, or a multiple of four, years thereafter, and the remaining number in the year 1911, or four, or a multiple of four, years thereafter."

It follows, therefore, that the terms of office of the four members of your school board elected in 1907 for two years, expired in the year 1909, and there will, therefore, be four members of the school board in the city of Niles to elect in the year 1909, and the terms of the remaining three members will expire in the year 1911.

You also inquire what shall be the length of the period of service of a member of school board appointed to fill a vacancy in said board under the provisions of section 3981.

This section is clear in its provision, to-wit:

> "Such vacancy shall be filled by the board of education at its next regular or special meeting, or as soon thereafter as possible *for the unexpired term.*"

In my opinion, the phrase "for the unexpired term" when properly construed, means that the appointee will serve for the same period of time the retiring member would have served had no vacancy occurred.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION—INDEPENDENT TICKET—MANNER OF NOMINATING IN CITIES AND VILLAGES.

Cities and villages may nominate an independent ticket by one petition if petition is signed in aggregate for each candidate by not less than fifty qualified electors of cities and twenty-five qualified electors of villages.

July 6, 1909.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you submit to this department for an opinion thereon the following inquiries:

> "Query 1: Under the primary election law may the citizens of Nelsonville (a city) by one petition, place in nomination an independent ticket, including a candidate for every office from mayor down, and, if so, will this ticket be entitled to a separate place on the official ballot and so placed thereon that a person can vote the entire ticket by marking at the head of the ballot?
>
> "Query 2: Would your answer to query one be different in the case of Athens, which is a village, and, if different, in what respect?"

In reply I beg to say, that nominations of candidates independent of voluntary political parties or associations are not controlled by the provisions of an act "to regulate the conduct of primary elections," and known as the "Bronson Act," 99 O. L., page 214, as this act applies only to nominations made by political parties which "at the next preceding general election" held in the state or any district, county or subdivision thereof, or municipality, at least ten per centum of the entire vote therein.

If, therefore, the nominations about which you inquire may be made, authority therefor must be found in sections of Revised Statutes not repealed by the above-mentioned act. Section 2966-20 Revised Statutes provides that

> "nominations of candidates * * * for any municipal or ward office * * * may be made by nomination papers signed in the aggregate *for each candidate*, by not less than * * * fifty qualified electors of the city, or twenty-five qualified electors of the * * * ward or village, etc."

Nelsonville not being a city where annual registration is required, the subsequent provisions of this section, and applicable to cities having annual registration, does not apply there.

Section 2966-21 Revised Statutes provides that,

> "All certificates of nomination and nomination papers shall, besides containing the names of candidates, specify as to each (1) the office for which he is nominated; (2) the party or political principle which he represents, expressed in not more than three words; (3) his place of residence, with street and number thereon, if any; provided, however, that in nominations by petition, the certificate may designate, instead of a party or political principle, any name or title which the signers shall select and candidates nominated by petition, without distinctive appellations shall be certified as independent candidates."

From a consideration of the general provisions of these two sections applicable to nominations or independent candidates nominated by petition, and applying what I believe to be the correct rule, to-wit.: That election laws are to be so construed as to give all persons who comply with the qualifications prescribed for electors the opportunity to vote for any person who may be qualified to fill the office sought to be filled by election, I am of the opinion that it is possible, and it would be legal for the number of qualified voters required by statute to nominate an independent ticket on one petition, if, in doing so, the nomination paper is signed in the aggregate for each candidate by not less than fifty qualified electors of the city.

From the conclusion that an "independent ticket" may be so nominated, it would logically follow that such ticket may be so placed on the official ballot that a qualified voter may vote the entire ticket by marking at the head thereof in such way as is provided by law for voting "a straight ticket."

Your second inquiry is answered in my reply to your first, with the exception that Athens, Ohio, being a village, the number of signers of the nomination papers would be twenty-five qualified electors instead of fifty qualified electors, as is required by the provision of section 2966-20. Yours very truly,

U. G. DENMAN,
Attorney General.

SHERIFF—GENERAL DEPUTIES AND LOCAL DEPUTIES NOT TO BE DISTINGUISHED.

July 7, 1909.

HON. WARREN W. COWEN, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—In your letter of July 1st, receipt whereof is acknowledged, you state that the county commissioners of Belmont county have fixed the aggregate amount to be paid to deputy sheriffs; that the sheriff has, from time to time, appointed deputies designated as "local deputies" as distinguished from "regular deputies," who, I presume, constitute the office force of the sheriff; that the

aggregate amount of the salaries of all the deputies of both classes for the entire year will exceed the sum fixed by the county commissioners. You inquire whether the county auditor may issue treasury warrants for the salaries of the "local deputies," the balance of the fund now being sufficient only to pay the salaries of the "regular deputies" for the remainder of the year.

I find no authority for any distinction between "regular deputies" and "local deputies." The appointment of deputy sheriffs is governed by section 1209 R. S. It is evident therefrom that but one class of deputies may be appointed by the sheriff and that all deputies serve at the pleasure of the sheriff. The county auditor may, therefore, not assume that certain deputies are to be retained by the sheriff during the whole year as a part of his regular office force while others are appointed for local service of some different nature, but he must honor all salary warrants presented to him as long as there is money in the fund. When the fund becomes exhausted the loss, if any, will fall equally upon the office deputies and local deputies.

Yours very truly,

W. H. MILLER,

Assistant Attorney General.

PROSECUTING ATTORNEY—PROSECUTIONS UNDER COUNTY LOCAL OPTION LAW IN MAYOR'S COURT—NEED NOT APPEAR.

July 7, 1909.

HON. JOSEPH L. MCDOWELL, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 2nd, in which you inquire whether you are required by law to prosecute criminal proceedings under the county local option law in the mayor's court in your county without additional compensation.

Replying thereto I beg to state that in my opinion it is not the duty of the prosecuting attorney to appear for the state in such cases. The county local option law (99 O. L. 35) does not expressly or by implication impose upon the prosecuting attorney any duty with respect to the criminal provisions thereof different from those which rest upon him respecting other classes of misdemeanors.

Section 1273 R. S. provides that:

> "The prosecuting attorney 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, circuit court, and he shall also prosecute cases in the supreme court in cases arising in his county, * *."

The act relating to the duties of the prosecuting attorney contains no amplification of the duties set forth in section 1273 with respect to the prosecution of criminal cases. Neither the so-called "search and seizure" act (99 O. L. 12), sections 4364-30*n* to 4364-30*zh*, inclusive, Bates' Revised Statutes, nor the so-called "Dean-Crist" law (100 O. L. 89), adds anything to the duty of the prosecuting attorney as set forth in section 1273. On the contrary section 20 of the "search and seizure" act, section 4364-30*zg*, Bates, provides for the possibility of counsel, other than the prosecuting attorney, appearing for the state in the original case and this provision clearly negatives the assumption that the

prosecuting attorney must appear in courts inferior to the probate court. (Gilliam v. State, 7 N. P. n. s. 482.)

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

INTOXICATING LIQUORS—SEIZED FOR TAXES—TREASURER MAY SELL IN DRY TERRITORY.

July 8, 1909.

HON. H. B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 7th in which you submit the following for my opinion:

> "Under section 4364-12 Revised Statutes, the county treasurer of your county has levied upon bar fixtures and some intoxicating liquors to enforce payment of the Aiken law assessment, and you desire to know if the county treasurer may sell such liquors under his levy without violating the local option law or other liquor laws, as Madison county has voted dry under the Rose law."

Section 4364-12 Revised Statutes, in substance, is as follows:

> "If any person * * * shall refuse or neglect to pay the amount due from them under the provisions of this act * * * the county treasurer shall thereupon forthwith make said amount due with all penalties thereon, and four per cent. collection fees and costs, by distress and sale, as on execution, of any goods and chattels such person, * * *; in case of the refusal to pay the amount due he shall levy on the goods and chattels such person, * * *, or on the bar, fixtures or furniture, *liquors*, leasehold and other goods and *chattels used in carrying on such business* * * *. The treasurer shall give notice of the time and sale of the personal property to be sold under this act, the same as in cases of the sale of personal property on execution; and all provisions of law applicable to sales of personal estate on execution shall be applicable to sales under this act."

This statute clearly gives to the county treasurer the right to sell all personal property levied under this act, the same as in cases of the sales of personal estate on execution, and undoubtedly includes the right to sell the liquors levied on. The only question which may be raised is, is such a sale prohibited by the county local option law, 99 O. L. 35?

The county local option law was enacted to provide against the evils resulting from the traffic in intoxicating liquors, and the sales which are prohibited by it are the sales of intoxicating liquors to be used as a beverage, and I am of the opinion that such a sale by a county treasurer does not come within the meaning of this law, and that the county treasurer of your county may sell the liquors levied upon under section 4364-12, and as provided therein.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BLIND RELIEF—WHEN ALLOWANCES PAYABLE

July 8, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 1st, in which you inquire whether allowances for the support of the needy blind under the act of April 2, 1908 (99 O. L. 56), are payable on the first day of the quarter or at the end thereof.

Section 6 of the act in question provides in part that:

> "If the board (the blind relief commission) is satisfied * * * that the applicant is entitled to any relief hereunder, it shall issue an order therefor in such sum as it finds needed not to exceed $150 per annum *to be paid quarterly* out of the fund herein provided for on the warrant of the county auditor * *."

The allowance thus authorized to be made is primarily an annual allowance or an annuity, the relief granted being for the period of one year. It is a provisions for the support of the beneficiary thereof, and with respect to the time of the payment of the installments thereof it seems to me to be analogous to an annuity, testamentary or otherwise. Assuming this analogy to be proper, the rule respecting the payment of annuities is to be applied in the present instance. That rule is to the effect that if an annuity is directed to be paid monthly or quarterly, the first installment is payable at the end of the first month or quarter. Wiggin v. Swett, 6 Metcalf (Mass.) 194; 2nd American & Eng. Enc. of Law, 402 and cases cited.

I therefore conclude that allowances under the act for the relief of the needy blind are payable at the end of each quarter.

In this connection I beg to suggest the propriety of the formulation by resolution, of the blind relief commission, of a rule designating certain quarters at which all allowances shall be payable. I believe that the commission has authority in this manner to provide that the first installments of all allowances shall be payable on the quarterly date next succeeding the date of the issuance of the orders. The rule above defined is applicable only when no such regulation has been made by the commission.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TUBERCULOSIS HOSPITAL ACT—BUILDINGS ERECTED ON INFIRMARY GROUND.

Tuberculosis hospital act is constitutional and buildings for same may be erected on infirmary grounds.

July 8, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letters of July 6th and 7th, presenting inquiries respecting the county tuberculosis hospital act, 99 O. L. 62, and the acts amendatory thereto.

In your first letter you desire my opinion as to the authority of the county commissioners to erect the hospital provided for by said acts on the farm now

used for infirmary purposes at a proper distance from the infirmary buildings and to place the same under the general supervision of the superintendent of the infirmary.

Section 1 of the act as amended 100 O. L. 86, provides that:

> "It shall be unlawful to keep any person suffering from pulmonary tuberculosis * * * in any county infirmary *except in separate buildings* to be provided and used for that purpose only."

Section 2 provides, in part, that:

> "The * * * county commissioners * * * may construct in each county a suitable building or buildings which shall be separate and apart from the infirmary buildings to be known as the county hospital for tuberculosis * *. The infirmary directors shall provide for the treatment, care and maintenance of patients received at said county hospital and for necessary nurses and attendants and all expenses so incurred shall be audited and paid as are other expenditures for county infirmary purposes."

On consideration of the foregoing and related provisions, I am satisfied that not only is it unobjectionable for the county commissioners to construct the tuberculosis hospital building on the infirmary farm at a suitable distance from the infirmary buildings, but it is in strict accordance with the spirit of the act for them so to do.

The attorney general has heretofore held that the county commissioners may not condemn land for a site for a county tuberculosis hospital and that they may not provide land adjacent to an independent site, to be used in connection therewith for farming purposes. The general assembly having failed to make any provision for such a site and having by implication provided in section 1, above quoted, that tubercular patients may not be kept in the infirmary *except in separate buildings*, I am of the opinion that it would be advisable for the commissioners to construct the tuberculosis hospital on the site suggested by you.

I am also of the opinion that the superintendent of the infirmary may properly be authorized to exercise general supervision over the tuberculosis hospital, providing, of course, that necessary nurses and attendants are employed in accordance with section 2 above quoted.

Your second letter inquires whether there is any question concerning the constitutionality of the county tuberculosis hospital act. In this connection I beg to advise that I know of no constitutional objections to the validity of this act. The attorney general has had occasion to express the opinion that the county hospital act 99 O. L. 486 is unconstitutional, but it will appear upon examination of this act that it is entirely unrelated to the tuberculosis hospital act.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF COUNTY COMMISSIONERS—FILLING OF VACANCY—TERM FOR WHICH APPOINTEE HOLDS.

One appointed to office of county commissioners will hold office until successor is elected and qualified.

July 9, 1909.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 7th, in which you submit the following for my opinion:

> A member of the board of county commissioners died July 1st; he began the service of his first term of office the third Monday of September, 1907, and this term expired the third Monday of September, 1909; he was re-elected for another term of two years at the November election of 1908, which term of office he would, had he lived, have begun the third Monday of September, 1909, and which term would have expired the third Monday of September, 1911, and you desire to know if an appointment should be made for the residue of the first term and until a successor is elected and qualified or whether an appointment should be made for the residue of the first term, and another appointment made at the time th second term would begin.

I beg to call your attention to section 842 Revised Statutes, which is as follows:

> "When a vacancy occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat; and when a vacancy happens, whether more than thirty days before such election, or within that time, and the interest of the county require that the vacancy shall be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until the successor is elected and qualified."

Under authority of the above statute, a successor may be appointed who shall hold office until his successor is elected and qualified. The successor appointed would, therefore, be in office on the third Monday of September, 1909, and would keep the office from becoming vacant, for, while he is so serving there can be no vacancy in the office in any proper sense of the term, as there is an actual incumbent of the office legally entitled to hold the same, and an appointment could not be made at the beginning of the second term of the commissioner deceased, as there would be one holding who is entitled to hold office until his successor is elected and qualified.

In this connection I wish to call your attention to the case of State ex rel Hoyt v. Metcalfe, 80th O. S. 244, in which it was held by the the supreme court,

> "Where, after the election of a judge of the circuit court, the person so elected, prior to the time when the term is to commence, and without qualifying as judge, dies, and the judge then holding the office resigns before the expiration of his original term, and another is appointed, the appointee succeeds to the entire term, including the capacity to hold over enjoyed by his predecessor, and is, * * * clothed with the power to hold office until his successor is elected and qualified. If after such

appointment the appointee qualifies and enters upon the duties of the office, such appointee succeeds to the entire term and capacity to hold over enjoyed by his predecessor, and no vacancy occurs at the expiration of the original term for which the resigning judge was elected. Hence an appointment made by the governor to take effect at the expiration of the six years' term of the resigning judge confers no authority on the appointee to take or enjoy the office."

I am, therefore, of the opinion that an appointment may be made to fill the vacancy on the board of county commissioners, and such appointee will hold office until his successor is elected and qualified.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

JUSTICE OF PEACE—TOWNSHIP TRUSTEES MAY ONLY APPOINT UNTIL SUCCESSOR ELECTED AND QUALIFIED.

July 14, 1909.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 13th, in which you submit the following inquiry for the opinion of this department thereon:

Several justices of the peace in Monroe county were elected at the November election, 1907, and took office January 1, 1908, after which some of the offices became vacant by death and others by removing from the county, and the trustees appointed a suitable person in each case to hold office until a successor was elected and qualified, and you desire to know if it will be necessary to elect justices at the November election, 1909, to succeed the men appointed, or if the men appointed will hold for the unexpired term of the justices who were elected in 1907, which would be four years.

I beg to advise that section 567 is in part as follows:

"When a vacancy occurs in the office of justice of the peace in any township * * *, the trustees having notice thereof, shall within ten days from and after such notice, fill any such vacancy by appointing a suitable and qualified resident of the township who shall serve as justice until the next regular election for justice of the peace, and until his successor is elected and qualified; * * *.

"At the next regular election for such office some suitable person shall be elected justice in the manner provided by law for the term of four years commencing on the first day of January next thereafter."

I am, therefore, of the opinion that at the November election, 1909, justices of the peace should be elected who will, on January 1, 1910, take the offices now held by the persons appointed by the trustees of the various townships, and hold said offices for a period of four years from January 1, 1910.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

APPRAISEMENT OF REAL PROPERTY—AUDITOR'S ALLOWANCE FOR CLERK HIRE.

July 15, 1909.

HON. J. A. SCHAFFER, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 10th, in which you submit for my opinion the following questions under section 1076 Revised Statutes, which provides for an additional allowance to the county auditor for clerk hire in the years when real property is required by law to be reappraised.

> "1. Is this additional allowance of 25% to be paid out of the general fund, or from the auditor's fee fund?
>
> "2. Has the auditor any right to the additional 25% allowance for clerk hire for year commencing January 1, 1910, and ending December 31, 1910?"

Answering your first question, I beg to state that the attorney general has heretofore held that the additional allowance of 25% is to paid *into* the auditor's fee fund. That being the case it should of course be paid out of the general county fund.

I do not know that I understand your second question exactly. I beg leave, however, to submit the following suggestions with respect to the same:

1st. The auditor himself has no personal right to the allowance made under section 1076. As above stated, the allowance goes into the fee fund of the auditor and is to be disbursed therefrom in accordance with the provisions of the county officers' salary act.

2nd. The additional allowance is for the year in which the real property is required by law to be reappraised. This, of course, is the year 1910. In my opinion, the year referred to in section 1076 is the calendar year beginning January 1, 1910, and ending December 31, 1910. (See in this connection section 3 of the county officers' salary law—sec. 1296-13, Bates.)

Yours very truly,

U. G. DENMAN,
Attorney General.

WILL OF REX PATTERSON—CONSTRUCTION OF.

July 16, 1909.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 13th requesting my advice with respect to the following statement of facts and questions presented thereon:

> "About sixty years ago Rex Patterson, of this county, made a will, a part of which was as follows:
>
> "'Item Fifth: The balance of my estate, real and personal, I give and devise to the township of Mt. Pleasant, for the use of the common schools thereof; the principal of which I hereby authorize my executor hereafter named to place in some permanent fund and the interest

thereon to be paid annually into the common school fund of said township of Mt. Pleasant forever, the principal to remain forever as a permanent fund for the purpose above specified.'

"The fund is five thousand dollars cash, which has been on interest at the rate of five per cent.

"Since the date of the above will two graded school districts were formd within the township. Should the interest from the above fund be applied to all the schools in the township, including the village school districts which have high schools for which tuition is charged, would sections 3954 and 3955 cover this case?"

I assume that the will in question became effective about the year 1850 and that the trust was created at that time. It seems to me that the question, being one of the testator's intent, the answer is not to be found in statutes now in force, but if we are to look to acts of the general assembly as aids to the construction of the will, the law in force at the time the will was made and at the death of the testator should be examined. I am satisfied that the act of March 7, 1838, 36 O. L. 21, was in force at the time the will must have been executed and at the time it went into effect. The following are pertinent provisions of said act:

"Sec. 6. That the trustees of each incorporated township in this state, where the same is not already done, shall, on or before the first day of June next, lay off their respective townships into school districts, in the manner most convenient for the population and different neighborhoods thereof. * *"

"Sec. 7. That there shall hereafter be a meeting in each school district * * annually * * and the voters present may * * elect three directors to serve for the ensuing year * *.

"Sec. 8. That said directors shall * * be a body politic and corporate * * and * * shall be capable of receiving any gift, grant, donation or devise made to or for the use of such district; * *.

"Sec. 12. That the township treasurer in each township shall be the treasurer of all school funds of the township * * *.

"Sec. 21. That the township clerk of each township shall be superintendent of common schools within his respective township * *.

"Sec. 30. That the county auditor of each county shall apportion to the several school districts in such county all the money then in the treasury of such county for the use of schools therein as follows to-wit: * *, and give to each township treasurer an order on the county treasurer for the amount of money belonging to the several districts in his respective township * *.

"Sec. 33. That each and every incorporated city, town or borough, * * shall be and is hereby created a separate school district * *."

"Sec. 37. That in all districts consisting of incorporated towns, cities or boroughs * * where the school funds furnished by this act shall be deemed insufficient and the township shall have refused to assess additional school tax, the directors may" (hold an election to provide for an additional tax)."

Comparing the general scheme of this act as evinced in the above quoted provisions thereof with the present laws relating to school districts a fundamental difference becomes apparent. Under the law of 1838 the township was not a school district; it was instead an administrative unit with respect to

schools superior to the district and including several districts, municipal as well as otherwise. The township treasurer was the treasurer, not of any one school district but of all the school districts within the township, including municipal districts. The school directors of the various districts within a township had the express power to receive and administer gifts and devises. The treasurer had no such statutory power.

However, it is a familiar principle of equity with regard to charitable trusts that the want of express power on the part of a public officer as a trustee to administer such trust, will not prevent the court from carrying the gift or devise into effect, by appropriate decree, directed to the officer and his successor. Not the trustee but the *cistin que trust* is the particular concern of a court of equity in such cases.

Returning again to the comparison above suggested it may be said that the present scheme of school districts is one primarily of township districts. Each civil township is, exclusive of municipalities, a separate school district, and the subdivisions called districts under the law of 1838 are now designated as subdistricts. Revised Statutes, sec 3885, etc.

The change in the law in this respect occurred in 1853, 51 O. L. 429. I assume that this was after the death of the testator or at least after the will was executed.

It seems to me, therefore, that the testator in making his devise to "the township of Mt. Pleasant for the use of the common schools thereof" intended to make the treasurer of the township the legal custodian of the fund thereby created and all the common schools in all the districts of the township the beneficiaries thereof. The disposition of the legal title upon the change in the law which took from the township treasurer the power and duty to serve as treasurer of all the school districts within the township is unimportant. Personally, I believe the fund is still to be regarded as in the township treasury and not in the treasury of the township school district. But ignoring this conclusion, I am firmly of the opinion that the common schools of the *township*, not the township *district*, are the beneficiaries of the trust, and that all such schools, whether they be in municipal districts or otherwise, are entitled to share in the interest of the fund.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PRIMARY LAW — INDEPENDENT CANDIDATE'S PETITION — SIGNING SAME PRECLUDES ONE FROM PARTICIPATING IN PRIMARIES.

July 17, 1909.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Your communication is received in which you submit for the opinion of this department thereon the following inquiry:

> A circulates a petition as an independent candidate for mayor of a municipality prior to the primary at which the regular party candidates for mayor are to be nominated. May the signers of A's petition thereafter vote for nominees for mayor at the regular party primaries?

Our laws are made and administered by officers selected by the qualified

voters belonging to political parties or political organizations, the object being that a citizen might have free opportunity to express his desire and vote for the individual whom he would have make and administer the laws. To secure that end the legislature has provided that there may be an independent party as an official party, and further, that independent nominations may be made for county, township and municipal or ward offices, etc., by petition as provided in section 2966-20 R. S. But this section 2966-20 also provides that:

> "Such nomination papers shall contain a provision to the effect that each signer thereto thereby pledges himself to support and vote for the candidate or candidates whose nominations are therein requested."

In section 2919-1 R. S., which designates who shall be allowed to vote at primary elections, this language is found:

> "Nor shall any person vote more than one time or at any other than at the polling place in that precinct, ward or township wherein he resides."

From these two sections in particular, and other more general provisions relating to nominations for public office, I have come to the conclusion that the signers of A's petition for the nomination of mayor of a municipality, thereby pledging themselves to support A at the election, are precluded from participating in the making of other nominations at the regular party primaries for the office of mayor of the municipality.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS—MAY NOT PAY FOR HEADSTONES OF SOLDIERS WHO DIED PRIOR TO PASSAGE OF 99 O. L. 99.

July 17, 1909.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 15th, in which you ask to be advised if section 3 of the act contained in the 99 Ohio Laws, page 99, authorizes the county commissioners of your county to place government headstones at the graves of soldiers who died before the passage of the act. I beg to advise that I am of the opinion that the above act applies only to such soldiers who have died since its passage. The statute should not be construed so as to create new obligations or impose new duties in respect to past transactions, unless such plainly appears to be the intention of the legislature.

It would only be a just compliment to the soldiers if the legislature would authorize county commisioners to make application to the United States government for placing headstones at the graves of the soldiers who died before the passage of the act, and, much as I regret the same, section 3 cannot be construed so as to give the county commissioners such authority.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

INFIRMARY DIRECTORS—AUTHORITY TO REPAIR INFIRMARY OUT OF POOR FUND—SHERIFF—FEE FOR BOARDING INSANE PERSON.

July 19, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your letter of July 6th, in which you ask an opinion on the following questions, is received:

> 1. The infirmary of Morrow county is in need of about $1,000 worth of repairs. The building fund of the county is not sufficient to make these and other contemplated repairs, but the poor fund is amply sufficient to make all repairs of the infirmary. Have the infirmary directors authority under sec. 964 or any other of the Revised Statutes, to make these repairs?
>
> 2. What fee, or charges, per day, is the sheriff entitled to make for boarding an insane person while confined in the jail during the proceedings to commit such person to the state hospital?

In reply, I beg to say that section 964 of the Revised Statutes is as follows:

> "The board of infirmary directors shall on the first Monday in March annually, certify to the county auditor the amount of money they will need for the support of the infirmary for the ensuing year, including the amount for all needful repairs at the infirmary; and the county auditor shall place the amount so certified by the infirmary directors on the tax duplicate of the county, and said infirmary directors shall have full control of said poor fund and shall be held responsible for the same."

Under the provisions of this section the board of infirmary directors is authorized to include in their annual levy a sufficient amount of money to cover "all needful repairs at the infirmary." The "repairs" herein referred to do not, however, in my judgment, include any alterations or additions to the infirmary, but is limited to such improvements as result from the ordinary wear and tear of the buildings.

I am, therefore, of the opinion that the infirmary directors have the authority to make such repairs and to pay for the same out of the levy authorized in the above section.

In answer to your second question would say, section 1235 of the Revised Statutes is in part as follows:

> "The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail * *."

It is my judgment that an insane person while confined in the jail during the proceedings to commit such person to the state hospital is a prisoner within the meaning of the above quoted provision of section 1235 R. S.

I am, therefore, of the opinion that the sheriff is entitled to the same allowance from the county commissioners for an insane person so held in jail as that to which he is entitled for any other prisoner.

Yours very truly,

W. H. MILLER.
Assistant Attorney General.

COUNTY COMMISSIONERS—MAY REDUCE CLAIM FOR SHEEP KILLED BY DOGS.

July 21, 1909.

HON. O. W. KERNS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts:

> Mr. B., of our county, had sheep killed by dogs. Said sheep were regularly appraised, claim properly passed on by the trustees of the proper township, and duly and legally presented and filed with the county commissioners. In passing upon said claim, said commissioners made a reduction of $4 on each sheep.
>
> Query: Had the county commissioners authority to make such reduction?

In reply, I beg to say section 4215 Revised Statutes provides the method by which persons damaged by the killing or injuring of sheep by dogs may be compensated out of the dog tax. Paragraph 3 of said section is as follows:

> "The county commissioners shall, at their next regular meeting, examine the same, *and if found in whole or in part* correct and just, order the payment thereof, *or such parts as they may have found correct and just,* to be paid out of the fund created by the per capita tax on dogs."

The above provision confers express power upon the county commissioners to pass upon the claims filed by the township trustees and to pay such claims in whole or in part as they may find correct and just. I am, therefore, of the opinion that your county commissioners were fully authorized to make the reduction referred to in your statement.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

DEPUTY STATE SUPERVISORS OF ELECTION—SALE OF MERCHANDISE TO MUNICIPALITY OR COUNTY.

A deputy state supervisor of election may not, as agent, legally sell merchandise to county or any municipality within which board exercises its powers.

July 21, 1909.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 29th, in which you inquire if a member of the deputy state supervisors of elections may, as the agent of a company or firm legally sell merchandise to the municipality or county within which he serves as such officer.

Your letter does not so state, but I assume that the supplies sold by the deputy state supervisors of elections are bought by certain boards or officers of the county or of some municipality therein in which the deputy performs his official services.

Section 2966-2, 2966-3 and 2966-7 of the Revised Statutes of Ohio provide that the secretary of state shall be the state supervisor of elections and that he

shall appoint four deputy state supervisors for each county in his state who shall be qualified electors of the county for which appointed. The official services performed by said deputies are not specially for the county or for the municipality within which they reside. This being true, and they being for all intents and purposes deputies of the secretary of state, would lead to the conclusion that they should be classified as state officers. The common law is prohibitive against the interest in any public contract or expenditure by a public officer or employe who is or may be vested with discretionary power to act for the public in some capacity respecting the contract and its incidents. However, this common law doctrine would seem too narrow to include the interest contemplated in your question.

Dillon on Municipal Corporations, sec. 444.
Troop on Public Officers, sec. 610 et seq.
Findlay v. Pertz, 66 Fed. 427.

It remains then to inquire if such relationship is prohibited by section 6969 Revised Statutes which provides that:

> "It shall be unlawful for any person holding any office of trust or profit in this state, either by election or appointment, or any agent, servant or employe of such officer, or of a board of such officers to become directly or indirectly interested in any contract for the purchase of any property, supplies or fire insurance for the use of the county, township, city, village, hamlet, board of education or public institution with which he is connected. And it shall be unlawful for any such person, agent, clerk, servant or employe to become interested in any contract for the purchase of property, supplies or fire insurance for the use of any county, township, city, village, hamlet, board of education or public institution with which he is (not) connected when the amount of such contract exceeds the sum of fifty dollars, unless the contract is let on competitive bids, duly advertised as provided by law. Any person violating the provisions of this act shall be imprisoned in the penitentiary not more than ten years nor less than one year."

This section of the Revised Statutes was first enacted in the year 1876 and provided for the punishment of officers of the Ohio Soldiers' and Sailors' Orphans' Home who should be directly or indirectly interested in any contracts made on the part of the institution. Later the section was amended to include officers of the penitentiary, and again it was amended to include officers of hospitals for the insane. In 1880 it was amended to its present form, with the evident intent on the part of the legislature to include any officer or agent of the state who may be interested in contracts for the use of the state. From a comparison of this statute with the common law rule above set forth it becomes clear that the statute is an extension of the common law doctrine and therefore remedial. The fact that the statute is remedial invokes a less rigid application of the rule of strict construction of criminal statutes. (Lewis' Sutherland Statutory Construction, sec. 337.)

The legislature used the language "with which he is connected." Now have the deputy state supervisors of elections connection with the county or the subdivisions thereof or municipalities therein within the meaning of this statutory provision? The manifest intention of the act is for the protection of public treasuries and to prevent a public officer from abusing a public trust. (Find-

lay v. Parker et al., 17 C. C., 294-301.) That these deputy state supervisors of elections are paid for their official services out of public funds is made clear and provided for in section 2966-27 Revised Statutes.

From these considerations I am led to the conclusion, though not free from doubt that such deputy state supervisors of elections may not, as the agent of a company or firm, legally sell merchandise to the county within which his board exercises its powers nor to any of the municipalities therein nor subdivisions thereof. I may also add that some doubt may exist as to the interpretation and effect of section 6969 Revised Statutes in view of the omission from the enrolled law of the word "not," in the second sentence of the section. The effect of the apparent ambiguity resulting from such omission is problematical, and in the absence of judicial decision in respect thereto I express no opinion as to that question.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS—BOARD OF EQUALIZATION—PASSING ON OBJECTIONS TO ENGINEER'S REPORT.

County commissioners, when acting as a board of equalization, are not required to pass on objections to engineers' report when objections are not filed within one week.

July 21, 1909.

HON. WARREN W. COWEN, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I am in receipt of your favor of the 20th inst., in which you inquire if the county commissioners, when acting as a board of equalization as provided for in section 4670-16 Revised Statutes, are required to pass upon any objections that may be made to them, other than those objections which have been filed within the week mentioned in said statute; and second, if the board is not required to do so, may it at its option do so.

In making reply to your inquiry it may be well to first observe that this section 4670-16 Revised Statutes is section 3 of "An act to provide for the improvement of public roads," 94 O. L. 96. A full reading of this act shows that the commissioners are authorized to make assessments on abutting property for the purpose of such improvement. We therefore ascertain that as against the abutting property owners this act shall not be strictly construed, but a more liberal construction shall be placed on the provisions of the act with a view to giving full justice to all parties directly and financially concerned.

Section 4670-16 R. S. provides that the county commissioners shall either before or after said improvement is commenced or after the same is completed employ an engineer, who, upon actual view, shall make and report to the commissioners an estimated assessment of the proportion of the cost and expense of the road improvement upon the real estate to be charged therewith. The statute further provides that before adopting the assessment so made and reported to the commissioners by the surveyor the commissioners shall publish notice for three weeks consecutively in some newspaper of general circulation in the county, that such assessment has been made and that the same is on file in the office of the auditor for inspection; and if no objections are filed thereto within one week after the date of the last publication of said notice the commissioners *may confirm the same.* Then follows in the statute this provision:

"If the owner of any property assessed objects to the assessment so made, he shall file his objections in writing with the said commissioners within one week after the date of the last publication of said notice, and thereupon said commissioners shall appoint three other disinterested freeholders to act as an equalizing board * * * who shall hear and determine all objections to said assessment, equalize the same or approve the assessment already made *as they shall deem just.* They shall report their action to said commissioners who shall have power to confirm the same or set the same aside and cause a new equalization board to be appointed with like powers and qualifications. *When said assessment is confirmed by the county commissioners the same shall be final.*"

The legislature, in the enactment of this law, has evidently sought to confer full authority on the county commissioners to prosecute the work of road repair to a conclusion without unnecessary delay, and at the same time give the abutting land owner or anyone aggrieved at any official act of the commissioners in connection therewith an opportunity to be heard. This is evidenced by the use of the laguage "and if no objections are filed thereto within one week after the publication of said notice the commissioners may confirm the same," instead of using at the conclusion of this sentence "the commissioners shall confirm the same." It will be further noted in that part of the section above quoted that the legislature used the language "when said assessment is confirmed by the county commissioners the same shall be final."

From these considerations, and applying the more liberal rule of statutory construction, which I think applicable here, I am led to the conclusion that the correct answer to your first inquiry is that, if no objections are filed to the engineer's report as published within one week after the date of the last publication of said notice the commissioners may confirm the same and refuse to hear objections, or if said commissioners do not confirm the same at the termination of said one week, I believe it is then optional with the commissioners as to whether they shall hear objections or not, and this answers your second inquiry.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TOWNSHIP SCHOOL DISTRICT—SPECIAL SCHOOL DISTRICT CREATED OUT OF—ORIGINAL BOARD OF EDUCATION LOSES JURISDICTION.

July 26, 1909.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your communication of July 23rd is received in which you submit the following statement of facts together with a request for an opinion thereon:

"On March 8, 1909, a petition was filed in the probate court of this county for the establishment of a special school district out of territory embracing what was known as subdistrict No. 3, in German township. A hearing was had on May 10, 1909, an opinion handed down on May 20, 1909, favorable to the petitioners, but no entry was filed until June 24, 1909, when it was done, by its terms establishing the special school

district and ordering the treasurer of the school board of German township to pay to the special district $587.18 of the funds in his hands, and one-ninth of funds in process of collection for said township board. An election has been called for July 24, 1909, for the election of members of a board of education for the newly created district.

"On May 17, 1909, the township board of education elected a staff of teachers for the coming year for all the schools in the township, including a teacher for subdistrict No. 3, which has since been taken from the control of the township board and established as a special district.

"Query: Is the board of the special district bound by the contract of the township board to accept the teacher appointed for the old subdistrict school prior to the establishment of the special district, or can it proceed to elect a teacher itself?"

In reply, I beg to say the township board of education lost jurisdiction over the territory embraced in the special school district referred to when said special school district was created by proceedings in the probate court. It follows, therefore, that the action of the township board in the employment of a teacher for subdistrict No. 3 cannot be enforced for the reason that subdistrict No. 3 no longer exists.

I am, therefore, of the opinion that the board of education to be elected July 24, 1909, for said special school district will have the authority, and it will be its duty to employ the necessary teachers for said special school district.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BONDS, ISSUE OF BY MUNICIPALITIES—OFFICIAL BALLOT, FORM OF.

July 29, 1909.

HON. THOMAS MULCAHY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiries:

1. As to the constitutionality of sections 1480a-1, 1480a-2 and 1480a-3 Revised Statutes.
2. Has the mayor and trustees authority to issue bonds to build a public building as provided for in said sections?
3. In submitting the question to build a public building pursuant to the provisions of said sections, what words should be placed on the official ballot?

Replying thereto seriatim, I beg to say as to the first that a legislative enactment is presumed to be constitutional until declared unconstitutional by a court of competent jurisdiction. This very proper presumption in favor of the constitutionality of a law is so generally understood and acted upon that I would be reluctant to hold in an official opinion that a law is unconstitutional unless it is clearly so and in apparent violation of the plain provisions of our constitution. I do not find such apparent constitutional defect in the act inquired about.

As to your second inquiry, the act itself does not provide for the issuance

of bonds for the construction of such public building. We must, therefore, look to the general statutes to see if such power is given. As to municipalities, section 1536-211-281 and section 2835 provide when and what for municipal bonds may be issued. As to the power of township trustees to issue bonds, sections 1487, 1489 and said section 2835 govern. Said section 2835 enumerates the purposes for which townships and municipalities may issue and sell bonds. Unless your proposed building comes within the express provisions of these sections, and particularly section 2835, the power must be denied. If it does come within the provisions of section 2835 the authority is given and the trustees of the township and council of the municipality may proceed to issue bonds as provided by law.

In answer to your third inquiry would say there is no provision in the act providing for such public building, as to what words shall be printed on the ballot. This must be determined from the language of the act and with view to having the ballot indicate the object sought to be accomplished. I might suggest the following:

"Shall a tax be levied upon all the property subject to taxation in said, the village of..... and township of .....
for the erection of a public building to cost $.....?

YES.

"Shall a tax be levied upon all the property subject to taxation in said, the village of ..... and township of .....
for the erection of a public building to cost $.....?

NO."

Upon more extended reflection I might be able to improve the above phraseology, but it is sufficient to say that any wording that would clearly indicate the purpose for which the vote is to be cast would meet the requirement of the act.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS—DEPENDENT FATHER OF SOLDIER—NO AUTHORITY TO BURY.

July 30, 1909.

HON. F. R. HOGUE, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Your letter of July 22nd requesting a construction of sections 3107-45 and 3107-46 as to the authority of the county commissioners to pay the expenses of the burial of a dependent father of a soldier, is received.

In reply, I beg to say the two sections referred to in your communication were amended by the general assembly on April 9, 1908, 99 O. L. 99, and as amended the first section prescribes the duties and confers the powers to be discharged and exercised by the committee as appointed by the county commissioners. Section 2 refers specifically to the committee to be appointed under section 1 by the county commissioners and imposes upon the members thereof the duty to "satisfy themselves * * that the family of such soldier, sailor

* * * dependent father * * * above mentioned, is unable to defray the expenses, etc.," and the power to "cause to be buried such soldier, sailor * * * as provided in section 1 of this act." You will observe that "dependent father" is omitted from the catalogue of dead bodies therein mentioned.

I am, therefore, of the opinion that the county commissioners are without authority to defray the burial expenses of a dependent father of a soldier.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

DITCHES AND DRAINS—MANNER OF COLLECTING AMOUNT DUE TOWNSHIP FROM COUNTY—NO METHOD PROVIDED.

August 2, 1909.

HON. O. W. KERNS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—This department is in receipt of your communication of recent date in which you submit the following for an opinion:

> "If, under the provisions of the act of the 99 O. L., page 238, which provides for the cleaning out and keeping in repair all township ditches, the township ditch supervisor should apportion a portion of the cleaning out of a ditch, drain or water course, to the county, and if the county commissioners should refuse to clean same, and the same was sold, as provided in sections 6 and 7 of the above act, and certified to the county auditor, and there are no lands upon which an apportionment given the county that is liable for any tax or assessment, how, if at all, may the county commissioners be compelled to pay of that part of the ditch, a portion to the county under the provisions of this act? Could the proper township authorities bring an action against the county commissioners to enforce payment, assuming that all steps have been regularly taken by the ditch supervisor and township trustees?"

I beg to call your attention to section 6 of the above act, which is as follows:

> "If there were assessed to any tract or land, road, railroad, township, or county, for the cleaning out and keeping in repair of any ditch or water course, the sum less three dollars, the township ditch supervisor may group these small sections together as conveniently as possible, and if the parties to whom they are assessed, neglect or refuse to clean out the same, and keep the same in repair, the ditch supervisor is hereby authorized to sell the work of cleaning out said sections to the lowest responsible bidder and take a bond with approved surety for the faithful completion of the work, and certify the cost of said work to the county auditor, *who shall place the same upon the tax duplicate, against the lands so assessed, pro rata, and the same shall become a lien upon the land and be collected as other ditch taxes.*"

You will note that this section is the only place in the entire act which provides a method for collecting the amount assessed against lands for cleaning out of a ditch. The method provided in section 6 is that the auditor shall place the amount assessed against the lands upon the tax duplicate, and that the same

shall become a lien upon the land so assessed as other ditch taxes. As the lands of the county which have been assessed are not taxable, it will be impossible to collect from the county as provided in section 6.

I do not find in the statutes authority for the township trustees to bring an action against the county commissioners to collect the amount assessed against the lands of the county. It is a very well established rule in this state that a suit cannot be brought against a county except for a cause authorized by a statute.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PRIMARY ELECTIONS—MUNICIPAL AND TOWNSHIP—EXPENSES OF—HOW PAID.

August 13, 1909.

HON. LEWIS P. METZGER, *Prosecuting Attorney, Salem, Ohio.*

DEAR SIR:—In your letter of August 12th, receipt whereof is acknowledged, you desire my opinion as to the manner in which the expenses of the township and municipal primary elections, soon to be held, shall be met.

Section 35 of the primary election law, 99 O. L. 214-223, provides in part as follows:

> "All expenses of primary elections, * * * shall be paid in the manner now provided by law for the payment of similar expenses for general elections, and the county commissioners, township trustees, or council of municipal corporations, or other taxing bodies duly authorized, shall make the necessary levies to meet the same."

In my judgment, the reference in the foregoing provision is to the act of April 8, 1908, 99 O. L. 84, which provides in part as follows:

> "All expenses arising for printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and all other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid out of the county treasury as other county expenses.
>
> In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from the funds due to such township, city, village or political division, at the time of making the semi-annual distribution of taxes; the county commissioners, township trustees, councils, boards of education, or other authorities authorized to levy taxes, shall make the necessary levy to meet such expenses, which levy may be in addition to other levies authorized or required by law; the amount of all such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor."

I am, therefore, of the opinion that the expenses of the coming primaries, together with those of the elections following, should be defrayed, in the first

instance, out of the county treasury; but that the board of deputy state supervisors of elections should certify to the county auditor the respective proportions of such expenses of the various subdivisions of the county, and the county auditor should retain such apportioned sums from the amounts due such subdivisions at the time of making the semi-annual distributions of taxes, as provided in the act above quoted.

Yours very truly,

U. G. DENMAN,
Attorney General.

DEPUTY STATE SUPERVISOR OF ELECTIONS MAY NOT BE CANDIDATE.

August 17, 1909.

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

DEAR SIR:—Pursuant to your telephone request of recent date asking for a written opinion on the following question:

> "Whether a deputy state supervisor of election may be a candidate for member of city school board, and if he may serve as such member of school board if he is elected."

I beg to call your attention to section 2966-17 of the Revised Statutes, which is as follows:

> "No person being a candidate for any office to be filled at an election shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of election, in any precinct at such election; and any person serving as deputy state supervisor or clerk thereof, judge or clerk of election, contrary to the provisions of this section, shall be ineligible to any office to which he may be elected at such election."

The above section clearly holds that a deputy state supervisor of elections may not be a candidate for member of school board of a city, and the section clearly provides that he shall be ineligible to any office to which he may be elected at such election.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS MAY RELEASE AN INDIGENT PRISONER CONFINED IN COUNTY JAIL FOR FINE AND COSTS ALONE.

September 3, 1909.

HON. W. E. LYTLE, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication of August 30th is received in which you submit the following inquiry:

> "Have county commissioners under section 7349-46 Revised Statutes the power to release prisoners confined in the county jail for the non-

payment of fine and costs where the fine is payable to a municipal corporation, and where the prosecution was had before the mayor?"

In reply, I beg to say section 7349-4 is as follows:

"The county commissioners of any county in this state not having a workhouse, be and the same are hereby authorized and empowered to release on parole any indigent prisoner confined in the jail of such county for fine and costs alone; the parole in every such case to be in writing, signed by the prisoner so released, and conditioned for the payment of the fine and costs by the prisoner released in labor or money in installments or otherwise, and shall be approved by the prosecuting attorney of such county."

This section authorizes the county commissioners "to release on parole any indigent prisoner."

It follows, therefore that the power of parole extends to all indigent prisoners confined for "fine and costs alone," and it is not material that the fines assessed are payable to a corporation or that the prosecution was had in a mayor's court.

Yours very truly,

U. G. DENMAN,
Attorney General.

ELECTIONS—TOWNSHIP AND MUNICIPAL—EXPENSE.

All expenses of township and municipal elections, excepting certain expenses in registration cities, must be defrayed out of county treasury in the first instance.

February 2, 1909.

HON. F. A. MCALLISTER, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your communication of recent date in which you ask the opinion of this department as to the duty of the county to pay the general election expenses of an election held in an odd numbered year.

Replying thereto permit me to say, first, that the last general assembly amended original section 2966-27, R. S., so as to read as follows:

"Sec. 14. All expenses arising for printing and distributing ballots, cards of explanation to officers of the election and voters, blanks and all other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid out of the county treasury as other county expenses.

"In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from the funds due to such township, city, village or political division, at the time of making the semi-annual distribution of taxes; the county commissioners, township trustees, councils, boards of education, or other authorities authorized to levy taxes, shall make the necessary

levy to meet such expenses, which levy may be in addition to other levies authorized or required by law; the amount of all such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. In the case of municipalities situated in two or more counties, the proportion of expense charged to each of the counties shall be ascertained and apportioned by the clerk of the corporation, and certified by him to the several county auditors."

Section 1443, R. S., provides in part that:

"The trustees shall fix the place of holding elections within their township or of any election precinct thereof, and they may purchase or lease for this purpose a house and suitable grounds, or by permanent lease or otherwise, a site, and erect thereon a house."

Section 1536-982, R. S., provides:

"The council of every municipality shall designate the place or places for holding the regular elections, and in all corporations divided into wards there shall be a place or places in each ward designated for holding elections."

Section 2923 R. S., provides, in part:

"Elections shall be held for every township precinct at such place within the township as the trustees thereof shall determine to be most convenient of access for the voters of such precinct, and for each municipal or ward precinct at such place as the council shall designate, provided that in registration cities the deputy state supervisors of elections shall designate such place of holding elections in each precinct."

Section 2926c R. S., authorizes the board of elections to fix the place of registration and election in registration cities, and directs such boards to "provide suitable booths or hire suitable rooms for such purpose and for their own offices at such rents as they deem just."

By section 2926*d* R. S., it is provided that;

"The cost of the rents, furnishing and supplies of all rooms, hired by the said board for their offices and for places of registration of electors and holding of elections in such cities, shall be borne and paid by any such city out of its general fund."

The above statutes should be so construed as to establish a constitutional and uniform system of conducting elections throughout the state. Our present system of supervising elections is one of county boards and not of city boards, and the county has been adopted as the unit of our election system. Expenses arising in the conduct of elections should be borne by the county except in so far as a different intention appears by the statute.

The only clear exception noted above is in the act relative to registration cities, which act preceded the general law. While it is the duty of the trustees of the township, and the council of municipalities, other than registration

cities, to fix or designate a place of holding elections, yet the general act passed by the last general assembly, and the one first above quoted, provides that all of the expenses arising from such election shall be paid out of the county treasury, as other county expenses, but that in odd numbered years the amount so paid is to be retained by the county auditor, as above stated.

It is my opinjon, therefore, that the county is liable for all of the election expenses arising out of the election held in November, 1908.

Very truly yours,

U. G. DENMAN,
Attorney General.

TAX SALE OF REAL ESTATE—TITLE THAT PASSES BY AUDITOR'S DEED.

May 18, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication is received in which you inquire as to the title that passes in an auditor's deed for real estate sold at tax sale.

In reply thereto I beg to say the auditor's authority to execute and deliver a deed for land sold at a delinquent tax sale is given in section 2876 of the Revised Statutes, and under the provisions of section 2877 a deed so executed and delivered "shall vest in the grantee, his, or their heirs and assigns, a good and valid title both in law and equity, and shall be received in the courts as prima facie evidence of a good and valid title in such grantee, his heirs and assigns."

Section 4114 Revised Statutes fixes the presumption as to possession by purchaser at tax sale.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROAD SUPERINTENDENT—NUMBER HOURS MAY COMPEL MEN TO WORK WHO ARE WORKING OUT POLL TAX.

May 18, 1909.

HON. E. B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—You submitted to me by telephone this afternoon the following inquiry with a request for an opinion thereon:

> May road superintendents require men working out the poll tax to labor more than eight hours a day?

In reply I beg to say section 4364-62*a* of the Revised Statutes which provides that a day's work upon any work done for the state of Ohio or any political subdivision thereof is restricted to eight hours in any one calendar day has been declared unconstitutional by the supreme court in the case of *Cleveland* v. *Construction Company*, for the reason that said law is in conflict with section 1 and 19 of the Bill of Rights. The court's opinion, delivered by Judge Crew, is exhaustive. The case is reported in 48 W. L. B., page 87.

There is, therefore, no existing law in Ohio defining or restricting a day's labor upon public works.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOL TEACHER—EXAMINATION OF SEVENTH DAY ADVENTIST.

A Seventh Day Adventist may take teacher's examination on some other day than Saturday.

May 19, 1909.

HON. JOHN G. ROMER, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> A school teacher in our county in religious faith is a Seventh Day Adventist, and objects to taking the teachers' examination on Saturday, which is the Sabbath of the people of her creed. She desires to take the examination at some other time.
>
> Query: Is the county board of examiners authorized to hold a meeting for examinations for her benefit at a time different than is prescribed in section 4071 Revised Statutes?

In reply I beg to say section 4071 provides that the board of examiners shall hold public meetings for the examination of applicants for teacher's certificates on the first Saturday of every month of the year, unless such Saturday shall fall on a legal holiday, in which case the examination shall be held on the succeeding Saturday.

Section 4071*a* R. S., provides that after the first day of September, 1904, the questions for county teachers' examinations shall be prepared and printed by the state school commissioner and by him delivered, under seal, to the clerks of the boards of examiners, not less than five days before each examination, and further provides that such sealed packages shall be broken at the time of the examination and in the presence of the applicants and a majority of the examining board.

My judgment is that the time fixed for holding county examinations in section 4071 is only directory, and that the board of examiners may, in their discretion, hold additional examinations at such times as they deem advisable or necessary, and I am also of the opinion that it would be the exercise of sound discretion upon the part of the examining board to hold a meeting for the examination of applicants for teachers' certificates whose religious faith forbids them taking the examination at the time fixed by statute.

Difficulty may arise by reason of the restrictions contained in the statute relative to the preparation, printing and transmission of the examination questions. The law says that the questions shall be prepared, printed and sent under seal to the clerks of the boards of examiners, and the seals broken in the presence of the applicants and a majority of the board. It is manifest that this same list of questions may not be used upon any other day than the one upon which the package seal is broken. The board of examiners may, however, request the state school commissioner to furnish a list of questions to be used at this particular examination, and while the statute makes no pro-

vision for the furnishing of a list of questions for single examinations, and while the aim of the law seems to be that teachers shall take examinations at regular stated times, and that the same list of questions shall be used all over the state, yet this teacher has a constitutional right to take this examination, and in the exercise of that right she may not be required to violate her religious convictions.

My judgment is that a meeting should be called for the purpose of permitting the teacher in question to take the examination, but the *modus operandi*, however, will have to be worked out by the board of examiners and the state school commissioner.

Yours very truly,

U. G. DENMAN,
Attorney General.

BLIND RELIEF—TEMPORARY ABSENCE FROM COUNTY DOES NOT CHANGE RESIDENCE.

June 7, 1909.

HON. HARRY C. PUGH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "Under the provisions of section 5 of an act to provide for the relief of the needy blind, is a man a resident of this county who has lived here all of his life, before and after his marriage, who has always voted in this county since being a voter; who during the last winter, in company with his wife, went to Columbus, and has there been engaged in selling papers on the street, and who claims that he has gone there temporarily, and declares that it is his intention to return to this county in the near future?"

In reply I beg to say section 5 of said act is as follows:

> "A needy blind person, in order to receive relief under this act, must be a resident of this state at the passage of this act, or become blind while a resident of this state, and shall be a resident of the county for one year."

In order to qualify under this section "a needy blind person" must be a *resident* of the county for *one year*, and in addition thereto must have been a resident of the state at the time of the passage of the act, or become blind while a resident of the state. A temporary absence from the county accompanied with the declared intention to return, does not, in my judgment, change the residence.

I am, therefore, of the opinion that the person referred to in your inquiry meets the requirements as to residence, as provided in section 5 of said act.

Yours very truly,

U. G. DENMAN,
Attorney General.

SUSPENSION OF SCHOOLS IN SUBDISTRICT—SECTION 3923 CONSTRUED.

June 11, 1909.

HON. FRANK Z. BALLINGER, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Jerome and Darby townships are two adjoining townships in Union county. District No. 7, of Jerome township, was for many years a joint subdistrict under the control of the board of education of Jerome township school district proper, and was composed of territory in Darby township. Jerome township has for the last two years suspended the schools in said district No. 7, the pupils being transported to another school in the township. Darby township has suspended the schools in two or three of its subdistricts and transports the pupils to the school at Unionville Center. Each township school district contains about nine subdistricts.
>
> Query: Does the part of subdistrict No. 7 above mentioned, which lies in Darby township, revert back and become part of Darby township school district by operation of section 3923 R. S., as amended 99 O. L. 105?

In reply I beg to say section 3923, as amended, is in part as follows:

> "Joint subdistricts are hereby abolished and the territory of such districts, situated in the township in which the schoolhouse of the joint subdistrict is not located shall be attached for school purposes to the township school district in which said schoolhouse is located, and shall constitute a part of said township school district, * * * provided further, that when such subdistrict is a part of two townships, both of which have centralized schools and no school is maintained in said subdistrict within the boundaries of the civil township so situated, shall form the boundaries of the township school district, and each township shall have entire control of the territory of such subdistrict lying within its boundaries."

Under the above quoted provisions of said section joint subdistrict No. 7, including all of its territory, belongs to the township in which the joint subdistrict schoolhouse is located and will so remain until both Jerome and Darby township centralize their schools. The abandonment of schools in subdistricts is not to be regarded as a centralization of township schools. The method for centralization of township school districts is provided for in section 3927-2 Revised Statutes, in which the submission of the question of centralization must be submitted to the qualified voters of the township district. Boards of education are, however, authorized under section 3922 to suspend the schools in any or all of the subdistricts in a township district, but must provide transportation for the pupils to some other public schools. Such suspension, however, shall continue at the pleasure of the board of education and cannot be regarded as a permanent abandonment of the subdistricts. When schools in subdistricts are so suspended, boards of education may at any time resume the schools therein.

Under the statement of facts herein submitted, I am, therefore, of the opinion that the territory comprised in joint subdistrict No. 7 belongs wholly to the township in which the schoolhouse in said joint subdistrict is located.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—ESTABLISHING LIBRARIES—MAY LEVY ONE MILL IN ADDITION TO THAT AUTHORIZED IN SECTION 3959.

June 17, 1909.

HON. DAVID R. WILKIN, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> May a board of education levy the one mill tax for a library fund as provided in section 3998-1 in addition to the 12 mills levy for all school purposes as provided in section 3959 Revised Statutes?

In reply I beg to say that section 3959 R. S., is in part as follows:

> "The local tax levy for all school purposes shall not exceed twelve mills on the dollar of the valuation of taxable property in any school district."

Section 3998-1 R. S., provides that:

> "Where a board of education has by proper resolution provided for the establishment, control or maintenance, in such school district, of a public library, free to all inhabitants of such district; such board of education may annually make a levy upon the taxable property of such school district *in addition to all other tax allowed by law*, if not to exceed one mill for a library fund to be expended by such board of education, for the establishment, support and maintenance of such public library."

While the general tax levy for all school purposes is limited to 12 mills on the dollar under the above quoted provision of section 3959 R. S., yet a board of education is expressly authorized in section 3998-1 R. S., to make a levy "in addition to all other taxes allowed by law" of one mill on the dollar for library purposes.

It follows, therefore, that the levy provided for in section 3998-1 is entirely independent of the levy authorized in section 3959.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAX LEVY—MAXIMUM AMOUNT OF MUNICIPALITY—EXCEPTION WHEN OWNING WATERWORKS OR ELECTRIC LIGHT PLANT.

There is an exception to the general maximum tax rate when municipality owns a waterworks or electric light plant, and is within exact conditions provided for in section 1536-194*b*.

July 27, 1909.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I acknowledge receipt of your favor of the 26th inst., in which you advise that the village of Glouster, Athens county, has, through its clerk, and by action of its council, certified the corporation tax levy, and in addition to the ten mills levy have provided for a levy of five mills for "support of municipal waterworks and electric light plant." You further state that your county auditor does not wish to place this levy on the tax duplicate as against the property of the village of Glouster until he is satisfied of his legal authority to do so, hence your inquiry as to such authority as the municipality of Glouster has assumed to exercise.

In reply to your communication I beg to call your attention to section 1536-193 Revised Statutes, which provides that:

> "The aggregate of all taxes levied by any municipal corporation, exclusive of the levy for county and state purposes, for schools and schoolhouse purposes, for free public libraries and library buildings, for university and observatory purposes, for hospitals, and for sinking fund and interest on each dollar of valuation of taxable property in the corporation on the tax list, shall not exceed in any one year ten mills."

This section became effective May 4, 1903, and placing a maximum levy of ten mills on each dollar of valuation of taxable property in the corporation is binding upon the municipalities of the state, which would include the village of Glouster, unless the municipality avail itself of the provisions contained in section 1536-194 Revised Statutes, and make an additional levy as result of having first submitted to a vote of the electors of the corporation such question of additional levy and two-thirds of such voters approve the same. This section provides the only manner by which municipal corporations may increase their tax rate unless the legislature has made special exception to the general limit as fixed in said section 1536-193. The legislature has from time to time made exceptions to this general rule, and in section 1536-194*b* Revised Statutes, there is authority vested in the council without submitting the question of increased taxation to the voters of the municipality to raise such levy, as follows:

> "That when waterworks and electric light plants or either of them are owned, run and controlled by any village, and such village receives its street lighting and fire protection from such plant or plants and the proceeds derived from the operation of such plant or plants is found to be insufficient to pay the expenses of running and conducting such waterworks and electric (light) plants, or either of them, the council of such village may levy a tax not to exceed five mills on each dollar valuation of all the taxable property listed for taxation in said village,

both real and personal, to pay the running expenses and the extensions made to such plant after applying the proceeds of such (said) plant thereto. Said tax to be in addition to all other tax now authorized by law."

This section was passed and went into effect March 14, 1906. It therefore is an exception to the general maximum tax rate, but being a provision for an increased rate of taxation it must not be applied until all the conditions precedent to its application exist and are strictly complied with. It therefore follows that the village of Glouster may make such additional five mill levy provided such municipality owns and runs municipal waterworks or electric light plant or both and which plants are within the exact condition as provided for in said section 1536-194*b* R. S.

I return herewith the certificate of corporation levy for the village of Glouster.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PRIMARY ELECTION—AFFIDAVIT FOR NOMINATION PAPERS—MANNER OF MAKING AND BY WHOM MADE.

August 3, 1909.

HON. G. P. GILLMER, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon, the following inquiry:

"Under section 20 of an act "to regulate the conduct of primary elections," 99 O. L. 214, who is the proper party to make the affidavit to each nomination paper, and how, and by whom, shall the affidavit be made when one candidate may have more than one circulating petition in the hands of different electors, and, also, may the candidate himself make such affidavit to his own nomination paper?"

Section 20 is as follows:

"The affidavit of a qualified elector shall be appended to each such nomination paper, stating that he believes the persons who have signed the same to be electors of the political subdivision described in such nomination papers, and that they signed the same with full knowledge of the contents thereof; that he believes that each signer signed the same on the date stated opposite his name, and that the affiant intends to support the candidate named therein. Each candidate shall file with his nomination papers a declaration that he will qualify as such officer if nominated and elected."

The subject-matter for the affidavit is indicated in the section and it is apparent that the policy of the law is that a nomination paper shall contain all the signers for any one candidate and the qualified elector who circulates such paper shall have such personal information and belief that he may make and subscribe to the affidavit to be appended to such nomination paper.

The doctrine of strict construction should not be rigidly applied to election laws and therefore a construction of this section is permissible which will admit of a candidate having in circulation more than one nomination paper with affidavit appended, but, in this event, it would be required that each qualified voter circulating a nomination paper for a candidate must make and subscribe to the affidavit as required by the section. The candidate himself being a qualified voter, is not precluded by the language of the section from making such affidavit appended to a nomination paper for himself, the signatures to which he procured. No one qualified voter may, under the provisions of this section, procure signatures to a nomination paper and then pass the nomination paper to his neighbor, who will then procure signatures to such paper, and make the affidavit, because he has not the necessary information as to the signatures obtained by the second party to that nomination paper. In other words, the qualified voter obtaining signatures to a nomination paper for a candidate is the proper person to make the affidavit.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL OF CITIES OF 11,000 OR MORE MAY NOT PROVIDE FOR GENERAL REGISTRATION.

August 4, 1909.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Your communication is received in which you state that upon the advice of the secretary of state nine precincts of the city of Lima, Ohio, have been divided in subdivisions, and that two of those precincts as subdivided cast over five hundred votes, and four of them had over five hundred registered voters. You then inquire if, under this state of facts, the council of the city of Lima has authority under section 1 of an act "to provide for general registration of electors in villages and cities upon the action of the city council."

The answer to your inquiry will depend upon whether the population of Lima will permit its availing itself of the provisions of the act of April 2, 1906. Sec. 2926*h* Revised Statues, provides that:

> "In all cities which now and hereafter may have a population of one hundred thousand or more, when ascertained in the manner provided in section 2926*a*, there shall be an annual general registration of all the electors therein, in the several wards and precincts, on the days and in the manner herein provided; in all cities which now or hereafter may have a population of eleven thousand eight hundred and less than one hundred thousand, a general registration of all the electors therein shall only be had at each and every presidential election, etc."

There is no statutory provision making registration mandatory to cities within the state with a population of less than eleven thousand eight hundred. The population of Lima in 1900 was 21,723. Registration of the voters in said city is, therefore, required under the provisions of the above section, and under the supervision of registrars appointed by the deputy state supervisors of election.

Section 2926*a* Revised Statutes.

The council of the municipality is not given authority relating to registration in cities, the population of which exceeds eleven thousand eight hundred.

Section 1 of an act "to provide for a general registration of electors in villages and cities upon action of council," provides that:

> "The council of any city or village in which registration is not now required by law, may provide for a general registration of electors in the several wards or precincts thereof, etc."

It becomes apparent from the provisions of this section that its object is to give the right of registration to cities within the state having a population less than eleven thousand eight hundred, if such cities so desire. Your city having a population in excess of eleven thousand eight hundred, does not bring it within the purview of this section, and your council, therefore, may not provide for general registration of electors under its provision.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BRIDGE—JOINT COUNTY—MANNER OF REPAIRING.

August 4, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—This department is in receipt of your communication of July 26th, in which you submit the following for an opinion:

> "A bridge on the county line between Wood and Ottawa counties is in need of repairs. The county commissioners of Ottawa county decline to meet with the board of county commissioners of Wood county to consider having the bridge replaced. Query: What method is best to pursue under the above facts?"

Section 862, Revised Statutes, provides as follows:

> "When it becomes necessary for the public convenience to bridge any stream of water which is on or near the lines of two or more counties, which counties are traversed by, or lie on or near the road or roads on which such bridge is needed, the commissioners of such counties interested, may build, or authorize the building of such bridge, jointly, to be paid for, with the approaches thereto, in proportion as the commissioners agree; and the expense of keeping such bridge in repair shall be paid by the counties interested, in the same proportion as the expense of building such bridge was paid by such counties."

I also beg to call your attention to the case of Commissioners of Lake County v. Commissioners of Ashtabula County, 24 O. S. 393. In this case the court specifically holds that if a bridge is built or repaired under the above section solely under the authority and direction of one board of county com-

missioners, without concurrence of the other, that no right of action or contribution arises in favor of the county expending the money. But you will note, however, in this same case, page 401, the opinion of the court is, in substance, as follows:

That the above statute contemplates the joint action of the commissioners of the several counties interested in repairing the highway, but, before the duty of making the repairs attaches, under this clause, to the commissioners of either county, their concurrence is required as to the expediency of the work proposed to be done. That the determination of such expediency requires the exercise of judgment and discretion on the part of the commissioners of each county, of which they cannot be deprived. Where it is the duty of a board to exercise its discretion and it refuses to act, it may be compelled to do so by mandamus; but the writ cannot be used to control the discretion of the board.

In 48 O. S. 607, in the case of Dalton v. State ex rel. Richardson, the court sustains this proposition. Therefore the conclusion is reached that the commissioners of Wood county, in case the commissioners of Ottawa county decline to meet with them to consider having the bridge repaired, may mandamus the commissoners of Ottawa county to exercise their discretion relative to the repairing of such bridge.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS—EMPLOYMENT OF ENGINEER ON IMPROVED ROADS.

August 6, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 26th in which you inquire whether boards of county commissioners proceeding under the county line road improvement act, section 4670-11*a*, Bates' Revised Statutes, must employ the county surveyor of one of the counties, or those of both, or whether they may employ any competent engineer to make the necessary estimates and to superintend the performance and completion of the work.

In my opinion, section 1166 Revised Statutes, which you cite in your letter, imposes upon the county commissioners the duty of assigning to the county surveyor all *county* engineering work. This is the contention of this department in a case now pending in the supreme court of this state, but which has not yet been decided by that court. The last sentence of that section is particularly in point in this connection:

> "He (the county surveyor) shall * * * perform all necessary services to be performed by a surveyor or civil engineer in connection with the construction, repair or opening of all *county* roads * * * constructed under the authority of the board of county commissioners."

Without quoting extensively from the county line road improvement law, it may be said that the enterprise therein contemplated is a joint one, and I believe not a *county* improvement within the contemplation of section 1166.

I am, therefore, of the opinion that the joint board of county commissioners

acting as a single body, should employ a single engineer for the performance of all engineering services in connection with the making of such an improvement.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PRIMARY ELECTION—BOARD OF EDUCATION—NUMBER OF BALLOTS TO BE FURNISHED BY ELECTION BOARD—MANNER OF PLACING NAMES ON BALLOTS.

Separate ballots for names of candidates for nomination for member of board of education should be prepared for members of each political party participating in primary election and such ballots should be sufficient in number to accommodate women voters as well as those entitled to vote for other candidates.

August 13, 1909.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 11th, in which you request my opinion on the following questions:

> "1. How many ballots is the board of elections required to furnish at the primary election where more than one political party submits nominations for members of the school board?
>
> "2. Can the names of the persons appearing upon the nomination papers of all the political parties for members of the school board be placed on one ballot in alphabetical order, or
>
> "3. Is the board of elections required to furnish a ballot for the names of the members of each political party for members of the school board, also a ballot box for each of the political parties to receive said ballots? For your information would refer you to section 3970-10 of the Ohio Revised Statutes, also section 23 of 99 O. L. 220.
>
> "4. In the event either of the political parties do not nominate the required number of township trustees to be elected at the coming election, can the vacancy be filled after the primary election?"

The first three questions may be considered together. In my judgment, section 2 of the primary election law, 99 O. L. 214-215, provides the exclusive method for the nomination of candidates for members of the board of education by the political parties which, at the next preceding general election, polled in a school district at least ten percentum of the entire vote cast therein.

Section 23 of said act, 99 O. L. 220, provides that:

> "Separate tickets shall be provided for each political party entitled to participate in such primary; such tickets shall contain the names of all persons whose names have been duly presented and not withdrawn, arranged under the designation of the office in alphabetical order according to surnames, and bear the official signature of the members of the board of elections; such tickets shall conform, *as nearly as practic-*

able, to the form provided in the act of April 18, 1892 (O. L. 432), commonly known as the 'Australian Ballot Law,' and the acts amendatory thereof and supplementary thereto, except that no device or circle shall be used at the head of said tickets; on the back shall be printed the words 'Official Ballot' and 'Primary Election,' and the name of the political party for which such ballot is printed."

Section 24 in part provides that:

"There shall be separate poll books, tally sheets and ballot boxes at each voting place provided for each party participating in the election * * *."

Section 23 above quoted affords considerable latitude with respect to conforming a primary election for a particular office, both to the general intent of the primary law, and to the specific provisions of the laws regulating the election of the particular officer involved.

Section 3970-10 provides that:

"There shall be separate poll books and tally sheets used for all elections for school purposes, and the ballots of the electors at said elections shall be deposited in a separate ballot box."

Section 3970-10*b* provides in part that:

"The names of all the candidates for members of the board of education * * * however, nominated, shall be placed on one independent and separate ballot, without designation whatever, except for member of board of education, and the number of members to be elected."

Section 3970-12 provides that:

"Women shall be entitled to vote and be voted for for member of the board of education."

This department has heretofore held that women are entitled to vote at the primaries for member of board of education.

The manifest purpose and intent of the primary law election is to provide an exclusive method for the nomination by certain political parties of all candidates for public offices, and in my opinion, the various specific provisions of the act should be construed and applied liberally, in order that the general intent above described may be effected. The liberal construction alluded to should be a practical one, such as will meet the exigencies of each particular case. With respect to the election of members of boards of education, it is apparent that neither section 3970-10 nor section 23 of the primary election law, is to be given a restricted application in accordance with a literal interpretation of the language thereof. In order that all political parties participating in the primary election may nominate candidates for members of the board of education; that the votes of women for such members at such primary election may be cast without confusion, and possibility of error; and that the nomination of candidates for members of the board of education may be separated,

as far as possible, from that of other candidates to be voted for at the same primary election—all of which seem to be essential requirements of the two related sections, not in any event to be disregarded—I am of the opinion that the following course should be pursued by the deputy state supervisors of elections:

Separate ballots for the names of candidates for nomination for members of the board of education should be prepared for the members of each political party participating in the primary election, as evidenced by the nomination papers on file with the board; separate ballot boxes, poll books and tally sheets may be provided, but I deem this matter of minor importance, and the board may, in its discretion, use a single ballot box for each party; the number of ballots prepared by the board should be sufficient, in the judgment of the board, to accommodate the women voters as well as those entitled to vote for other candidates. In other words, assuming that two political parties are to participate in the primary election, there should be two ballots for candidates for members of the board of education, both separate from the other party ballots, and two separate poll books and tally sheets; either one or two pairs of ballot boxes may be used.

I herewith enclose a recent ruling of the secretary of state, as chief supervisor of elections, which has come to my notice since dictating the above, and which is in accord with my own views on the subject.

Your fourth question involves a construction of section 34 of the primary election law, 99 O. L. 222, which provides in part as follows:

> "In case of a vacancy or vacancies in the list of nominations occurring by death or otherwise, after the result has been declared, such vacancy or vacancies shall be filled by the proper controlling committee of the party in which such vacancy or vacancies shall occur * * *."

In my judgment this procedure applies to vacancies occurring after the declaration of the result of the primary election only, and to vacancies in the list of nominations actually made at the primary election only. Partisan nominations can be made only by complying with the primary election law, and failure of any political party participating in a primary election to nominate a candidate at such election absolutely prevents such nomination from being made in any other manner.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY DEPOSITARY LAW—METHOD OF DEPOSITING FUNDS.

Where several banks under county depositary law make same bid for funds, the commissioner must divide the funds with all or deposit with only one.

August 16, 1909.

HON. C. A. LEIST, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 11th, in which you state that the county commissioners of Pickaway county advertised for bids under the county depositary law, section 1136-1 et seq., Bates' Revised Statutes; that bids were received from four national banks, three of which are

located in the county seat, Circleville, while another is located in a village twenty miles distant therefrom; that the bids all offered the same rate of interest and were accompanied by security, the sufficiency of which is unquestioned; that the county commissioners desire to divide the funds to be deposited and award portions thereof to the banks in the county seat and to refuse to accept the bid of the bank located elsewhere. You desire my opinion as to the power of the commissioners to take this course.

I beg to quote the following provisions of the act above referred to:

> "Section 1136-1. In each county the commissioners thereof shall designate * * * the bank or banks or trust company *situated in such county* and duly incorporated under the laws of this state, or organized under the laws of the United States, as a depositary or depositaries of the money of the county. * * * Provided where the county seat in any county has no bank of the description as defined in section 1 of this act, that any private bank may be authorized to receive such funds. * * *
>
> "Section 1136-3. * * * The commissioners shall * * * award the use of the money of the county to the bank or banks or trust companies that offers the highest rate of interest therefor, on the average daily balance, provided proper sureties, securities, or both, are tendered * * *. Provided, that if such award shall be to a bank * * * outside the municipality at which the county seat of such county is fixed, the expenses and risks of making deposits therein by the county treasurer * * * shall be borne by such bank * * * and if two or more banks offer the same highest rate of interest, with proper sureties, securities, or both, the use of the money shall be awarded to *either of them*, or the commissioners may divide the fund to be deposited, and award a portion thereof to *each* of such banks or trust companies * * *."

The banks which have bid for the funds of Pickaway county are upon an equality under the provisions above quoted. I cannot agree with your conclusion that the legislature intended that section 1 should apply only to banks in the county seat; such a conclusion ignores the plain language of the first sentence of said section, wherein the phrase "situated in such county," is employed. The proviso in section 1 is clearly intended, in my judgment, to authorize the acceptance of a private bank where there are no incorporated banks in the county seat, but no further inference can be drawn from this proviso. Again, section 3 of the act, section 1136-3 above quoted, provides specifically for the case of an award to a bank or banks located outside of the county seat. I conclude, therefore, that all of the banks described by you are entitled to the same consideration by the commissioners.

Assuming that there is no inherent difference among the banks, the question becomes one as to the discretion of the commissioners in dividing the funds under section 3, above quoted. The general assembly has provided specifically for a situation such as that encountered by the commissioners. The law is that, in case of equal bids by banks equally qualified, the commissioners have discretion to do one of two things, viz: to award the use of the funds to any one bank or to divide the funds among all the banks making the same bid. I am aware that this conclusion does not agree with yours, but I am unable to decide otherwise in view of the language used in describing the alternatives, which is as follows: *to either of them*, or *to each*." The primary meaning of the pronoun

"either" is "one of two." It will be seen, therefore, that the general assembly has been guilty of a grammatical error in its use of this word. The error is a common one, however, and the use is permissible in law, the meaning then being "one of a group." See Standard Dictionary and Words and Phrases Judicially Construed. Even if these definitions should be disputed, as universally correct, the manner in which the word is used in the statute, precludes, it seems to me, any different interpretation. It will be noted that the phrase in which this word appears is that in which the award is described as being made in a single sum, while that phrase of the statute which speaks of the division of funds uses the word "each." As to the meaning of this term, there can be no dispute, especially when used in connection with the distribution subject "portion," as here employed. The meaning of the word is equivalent to the term "each one" (Standard Dictionary), and the signification of the entire phrase is that when the funds are divided, each and every bank bidding the same rate shall receive a portion.

From the foregoing, it will appear that the construction sought by the commissioners cannot be justified by the language of the act, and I am clearly of the opinion that the commissioners must either divide the funds to be deposited among *all* of the banks bidding the same rate of interest and otherwise equally qualified, or award the whole sum to be deposited to a single bank so bidding.

I venture to suggest in this connection that there is no provision requiring the portions, into which the commissioners are authorized to divide the funds to be deposited, to be equal. Yours very truly,

U. G. DENMAN,
Attorney General.

ROSE LAW—VIOLATION OF, NOT NECESSARY TO SHOW DEFENDANT SOLD ANY LIQUOR.

August 16, 1909.

HON. ERNEST THOMPSON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 12th, in which you submit the following for my opinion:

> C, a defendant in dry territory, was found upon search to have in his possession, in a former bar room, several bottles of intoxicating liquor; all the screens and bar fixtures are the same as when the county was wet; no proof that defendant ever sold or furnished any intoxicating liquor to any person or persons; defendant offered no evidence in the case. Query: Should the court hold defendant guilty of keeping a place where intoxicating liquors are kept for sale or furnishing under the Rose law? In other words, is it necessary to hold the defendant guilty of keeping a place under the above law, to find that the defendant has sold or furnished intoxicating liquor to any person or persons?

I beg to call your attention to Senate Bill No. 345, 99 O. L. 35, latter part of section 2, which is in part as follows:

> "It shall be unlawful for any person * * * to keep a place where * * * liquors are kept for sale, given away or furnished for beverage

purposes, and whoever * * *, keeps or uses a place, structure or vehicle, either permanent or transient, for such selling, furnishing, or giving away, or in which or from which intoxicating liquors are sold, given away, or furnished, or otherwise dealt in as aforesaid, shall be guilty of a misdemeanor."

You will note from the above quoted section, that the keeping of a place where liquors are *kept for sale, given away or furnished for* beverage purposes, is a misdemeanor and that the gist of the action is the *keeping for sale, giving away or furnishing liquors for beverage purposes.* Therefore the real question before me is, has the state, under the facts contained in your query, produced any evidence tending to prove the gist of the action mentioned above. I am clearly of the opinion that the state has produced such evidence. True, it is not direct evidence, but it is circumstantial evidence, and should be sufficient against a motion to dismiss on account of failure of proof, and, in case the defendant should be found guilty, I believe such evidence would be sufficient to protect the court against a reversal on the ground of a verdict against the weight of the evidence.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION—PLACES ON BALLOT TO BE SECURED BY NOMINATION PAPERS—VACANCIES MAY NOT BE FILLED WHERE NO CANDIDATE AT PRIMARY—METHOD OF ELECTING CONTROLLING COMMITTEE.

August 18, 1909.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 7th, in which you request my opinion upon the following questions, arising under the primary election law, 99 O. L. 214:

"First. In the event that by reason of the lack of application several offices in the respective townships that make up the county are not filled by reason of the failure of anyone to circulate a petition for a particular office or offices, what provision, if any, is made to fill that vacancy before the primary election? If the vacancy can be filled before the primary election, then by whom?

"Second. If the vacancy cannot be filled before the election, what, if any, provision has been made for filling the vacancy after election, and if the vacancy can be filled, when, by whom?

"Third. A careful inspection of the statute reveals no method for the election or selection of the committeemen of the respective parties. How is this to be done and in what manner?"

Replying to your first question, I beg to state that section 16 of the act above referred to provides in part as follows:

"Nominations for places on the primary ballot shall be by nomination papers which shall be filed with the board of elections at least twenty days before the day for holding the primary election."

The method provided in the foregoing clause of the statute is exclusive, and names of persons may not be placed upon the primary election ballot in any other manner.

Replying to your second question, I beg to state that names may not be placed upon the ticket of any of the political parties subject to the primary election laws, save by the votes of the partisan electors polled at an election under the act above referred to. The provisions of section 34 are applicable to cases in which persons nominated at a primary election cannot for any reason be candidates at the ensuing general election. In other words, the "vacancy" described in your first and second questions is unknown to the primary election law, and if there are no nominations by petition for places on the party tickets, such places cannot be filled in any manner whatever. Persons may, of course, be nominated by petition as independent candidates, but these may not be placed upon the ticket of any political party at the general election.

With respect to your third question, I beg to refer you to the first sentence of section 8 and to that provision of section 9, which is as follows:

> "The controlling committees of all such voluntary political parties or organizations shall be a * * * county central committee, consisting of one member from each board of township or of one member of each precinct in the county * * * to be chosen by direct vote at the primary held in the even numbered years * * * provided that existing * * * county * * * committees shall continue to act * * * until their successors are chosen hereunder."

From the foregoing, it will be seen that members of controlling committees must be nominated by petition and voted for at the primary election held under the act referred to, but that the personnel of committees now existing may not be changed until the year 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

INHERITANCE TAX LAW — MANNER OF COMPUTING ANNUITIES — LEGACIES TO FIRST COUSINS AND DISCHARGING DEBTS SUBJECT TO TAX.

Annuities to be taxed at present worth which is to be computed by tables of mortality with 5% compound interest, payments to be regarded as made at end of regular period.

Legacies to first cousins taxable.

Legacies discharging debts, not barred by statute of limitation, subject to tax.

August 18, 1909.

HON. ALBERT F. BLAKELY, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 14th, enclosing a copy of the will of the late James Corrigan, of Wickliffe, Ohio, together with certain papers and statements submitted by Messrs. Goulder, Holding & Masten, attorneys-at-law, with regard to the application of the collateral inheritance tax law of this state to certain legacies thereof and the method

of computing the amount of the same. You desire my opinion as to the correctness of the conclusions reached by Messrs. Goulder, Holding & Masten.

Your letter does not advise me specifically as to the matters in controversy between the probate judge of your county and the above named gentlemen. I assume, however, from an examination of the papers enclosed, that you desire information upon the following questions:

> First. Should the present worth of those legacies which are in the nature of annuities, be computed for the purpose of valuation under the inheritance tax law, and if so at what rate of interest should the computation be made? When, in making such computation, should the monthly installments of such annuities be regarded as payable?
>
> Second. Are legacies to first cousins of the testator exempt from the provisions of the act?
>
> Third. By one of the items of the will, the testator discharged a debt due to him from the legatee and made no further provision for the latter. Is such legacy subject to the tax?

Counsel have caused the present worth of the annuities in question to be computed by the actuary of the Cleveland Life Insurance Company by the use of the experience tables of mortality with five per cent. compound interest. This method of computing the value of the annuity for the purpose of fixing the amount of the tax is in exact compliance with section 12 of the collateral inheritance tax law of section 2731-12 Bates' Revised Statutes, which in part provides that:

> "In case of an annuity * * * the value thereof shall be determined by so-called actuaries' experience tables and five per centum compound interest."

In this connection, I beg to advise that in making these computations, the monthly payments of the annuities as directed by the will should be regarded as being made at the end of the respective months. 2 Am. and Eng. Ency. of Law, 402, and cases there cited.

Legacies to first cousins of a testator are not exempt from the provisions of the act. The language of section 1 in this connection is as follows:

> "All property * * * which shall pass by will * * * other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child or person recognized as an adopted child, under the provisions of section 4142 of the Revised Statutes of Ohio, or a lineal descendant thereof or the lineal descendant of an adopted child, the wife or widow of a son or husband or the daughter of a decedent shall be liable to a tax of five per centum of its value * * *."

First cousins are not expressly or by fair implication included in the foregoing catalogue. Exemption clauses like the one above quoted are to be strictly construed against a claim of exemption. Dos Passos on Inheritance Tax Law, page 74.

One of the legacies otherwise subject to the tax under the rule last discussed above is in the nature of a discharge of a debt due the estate from the legatee. This legacy is subject to the tax.

In re Tuiggs Estate, 15 N. Y. Supp. 548.
Tyson's Appeal 10 Pa. St. 220.

If, however, the debts are barred by the statute of limitations the tax, of course, does not apply, while if, as suggested by counsel, the debtor is insolvent, the value of the legacy should be fixed accordingly by the probate court, and when so fixed would, of course, be less than $200.00 and would therefore be exempt from the tax.

I herewith return the papers submitted to me.

Yours very truly,

U. G. DENMAN,
Attorney General.

SHERIFF, COLUMBIANA COUNTY—COUNTY COMMISSIONERS MAY REIMBURSE FOR CERTAIN EXPENDITURES—MORAL OBLIGATION ON PART OF COUNTY.

August 19, 1909.

HON. L. P. METZGER, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—You have requested my advice as to whether or not the sheriff of Columbiana county can be legally reimbursed for certain expenditures made by him under the following circumstances:

By order of the probate court the sheriff went to a remote point in the county and apprehended a person suspected of being insane and brought him to the county seat. No proceedings of any kind were brought in the probate court, but it appeared both that the suspect was insane and that he was a resident of Pennsylvania. It being desired to deport this person and to place him in charge of the Pennsylvania authorities, the county commissioners of Columbiana county directed the sheriff to pay the expenses of such deportation together with those of the mother of the insane person who had come to Lisbon, the county seat of Columbiana county, for the purpose of taking her son home with her. The young man eluded his mother on this occasion and the probate judge ordered the sheriff to convey him to the city of Pittsburg, and to place him in care of the authorities there. All of the expenses thus incurred by the sheriff were paid by him personally.

It appears that the sheriff, while he may have acted voluntarily in the strictest sense, proceeded in this case only upon order of the probate judge and the county commissioners. Upon careful search, I have failed to find any statutory provision, authorizing the procedure adopted by the court and the county commissioners or for the allowance of such claims as that of the sheriff. The general assembly has apparently failed to foresee the contingency presented by the facts in this case. The strict legal principle being that public funds may not be paid out save under authority of a specific provision of law, the sheriff's bill cannot be said to be legal.

However, the officers involved in the matter have all acted in good faith and with a view to the proper transaction of the county's business.

The moral strength of the sheriff's claim is so great, therefore, that I believe it proper for the commissioners, under section 19 of the county officers' salary law, 1296-29, Bates' Revised Statutes, to allow the same.

Should the question be raised by the bureau of inspection and supervision of public offices, I shall advise them not to question the expenditure.

Yours very truly,

U. G. DENMAN,
Attorney General.

DITCHES—TOWNSHIP DITCH SUPERVISOR MAY ASSESS COUNTY FOR CLEANING, BUT NO METHOD PROVIDED FOR COLLECTION.

August 21, 1909.

HON. F. A. MCALLISTER, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—In your letter of August 10th you ask whether or not a township ditch supervisor, under the powers conferred by section 3 of the act of 98 O. L. 280, as amended by the act of 99 O. L. 237, can apportion to the county any part of a ditch for benefits to a county road.

Such section 3 provides that:

> "For the cleaning out and keeping in repair of township and county ditches, it shall be the duty of the township ditch supervisor to divide the same into working sections and apportion the same to the land owners, corporate roads, railroads, township and county, according to the benefits received."

Section 7 of the act in 99 O. L. 37 provides that, in case the county neglects or refuses to comply with the notification of the township ditch supervisor, the ditch supervisor shall "certify the cost thereof to the county auditor, as provided in section six (6) of this act." Such section 6, as contained in the act of 98 O. L. 280, provides that the county auditor "shall place the same upon the tax duplicate against the lands so assessed, pro rata, and the same shall become a lien upon the land and be collected as other ditch taxes."

Since no other remedy is provided in case the county refuses to clean the portion of the ditch assigned to it by the township ditch supervisor, and since there is no legal way of assessing the lands included in a county road for the payment of the expense incurred by the township in cleaning out such portion of the ditch, I do not see how the apportionment of the township ditch supervisor can be enforced as against the county in case the county refuses to comply with the terms of such apportionment. There is, in this case, also, the further objection, under our constitution and laws, of permitting a township official to control the action of his entire county.

To obviate such difficulties in carrying out the provision of this act, I would suggest that the township enter into an agreement with the county, in such cases as to the county's apportionment, preliminary to the apportionment of sections of such ditch to other persons and parties.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION—CANDIDATE'S NAME MAY APPEAR ON PARTY AND INDEPENDENT TICKET.

August 23, 1909.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Replying to your letter of August 15th, in which you inquire whether a person nominated in compliance with law by a political party, may, by the circulation of petitions, become an independent candidate and have his

name appear twice upon the ballot at the municipal election as a candidate for the same office, I beg to state that, in my opinion, this may be done. The same is not prohibited by the primary election law, nor by any other provision of the statutes. It was formerly prohibited by section 2966-19 R. S., but the same was amended so as to strike out this provision. That section now applies merely to the filling of vacancies by the controlling committee of a political party.

Yours very truly,

U. G. DENMAN,
Attorney General.

MAUMEE SCHOOL DISTRICT—MANNER OF ELECTING SCHOOL BOARD FULLY DISCUSSED.

August 23, 1909.

HON. JAMES S. MARTIN, *Assistant Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 19th, in which you cite additional facts with respect to the situation of the village of Maumee as regards the schools thereof. You desire me, in the light of facts thus presented, to reconsider a portion of my recent opinion to the secretary of state, upon questions presented by the board of deputy state supervisors of elections for Lucas county, in which I held that a board of education consisting of five members should be elected in the village of Maumee, as a village school district at the coming November election. The facts you submit are in brief as follows:

The village of Maumee is located in Waynesfield township, Lucas county; Waynesfield township has, since 1845, been divided into two special school districts, the subdividing boundary line of which passes through the village of Maumee.

You call my attention to the provisions of sections 3909-3928 and 3935 Revised Statutes, and question whether these statutes, in so far as they are applicable to the question, operate to preserve the boundaries of special school districts, and constitute an exception to the general rule respecting village school districts.

The additional information submitted by you, together with the arguments advanced in your letter, have invited a reconsideration of my former opinion, and the same has been most carefully given.

However, I cannot alter the conclusion already reached by me in the matter.

The two special school districts in Waynesfield township having been created prior to the adoption of the present constitution, the validity of the act or acts creating them need not be questioned, and it may be assumed that they were lawfully created. However, as special school districts, they were undoubtedly subject to change by the enactment of any law which would affect their existence or their boundaries. It may be assumed that no such law was enacted prior to the adoption of the so-called Harrison School Code, 97 O. L. 334 to 331 inclusive. The evident object of the enactment of this code as disclosed by the first section thereof—section 3885—was to reorganize the schools of the state, and to construct a simple and comprehensive system therefor.

Section 3888 as amended by that act provides that:

> "Each incorporated village, now existing or hereafter created, together with the territory attached to it for school purposes, and exclud-

ing the territory within its corporate limits detached for school purposes, shall constitute a village school district."

This section was later amended by providing that villages having a total tax valuation of less than one hundred thousand dollars should not constitute a village school district (98 O. L. 217). Village districts are further defined in section 3909 cited by you, wherein it is provided that:

"In all incorporated villages *not now organized as school districts* * * * there shall be a board of education elected * * *."

I cannot agree with you that the underscored portion of the above quoted provision means "not now included within a duly organized school district."

I am unable to construe this language otherwise than as meaning "not now organized as *village* school districts." Surely it could not be said that the village of Maumee is "organized as a school district" when one-half of it is in one special district and one-half in another.

Further light is thrown upon the question by a provision of section 3928 also cited by you. The provision from which I shall quote was, as you state, held unconstitutional in so far as it attempts to legalize special school districts created under special acts of the general assembly (Bartlett vs. State, 73 O. S. 54). The pertinent provision is probably unconstitutional. It is as follows:

"* * * nothing herein contained shall be so construed as to abolish any special school district now existing * * * excepting, however, such special school districts which do now, or may hereafter, include within their boundaries an incorporated city or village, and in such cases such special school district shall become a city or village school district, with or without territory attached or detached, as the case may be."

As you point out, this provision is probably not applicable to either of the special districts in Waynesfield township, as neither one of them includes within its boundaries an incorporated city or village. Therefore, it is true that the village district of Maumee when created, would not carry with it all the territory of the township of Waynesfield "attached for school purposes" as provided in the foregoing language. However, the effect of the entire proviso, is, in my opinion, simply to prevent the abolition of special school districts by inference from the prior provisions of section 3928, and the same is not as you suppose a limitation upon sections 3909 and 3888. Considering all the above sections together, I have reached the conclusion that the following general rule may be laid down:

All villages incorporated prior to 1904, and having a tax valuation of over one hundred thousand dollars in 1906, are village school districts. In case such villages lie partly in one former district, and partly in another, whether such former districts be township districts or special districts, the boundaries of the village districts are identical with those of the corporation. In case the village lies wholly within a valid special district, the boundaries of the special district are co-extensive with those of the village district, but the district is called a village district and not a special district. The village of Maumee finds itself in the first of the two situations above described, and I am, therefore, of the opinion that it should now be organized into a village school district, the boundaries of which are co-extensive with the corporation limits.

My former opinion related to the necessity of electing a board of educa-

tion in the village of Maumee, and as then expressed and now adhered to, it is to the effect that it is the duty of the board of deputy state supervisors of elections to provide, so far as may be within their power, for the election of a board of education for the village district as above defined. Until such election is held, however, the old organization remains in full force and effect.

Cist. v. State, 21 O. S. 339.

You make certain comments relative to the inconvenience of changing the present arrangement. It is true, in my opinion, that having taken the village of Maumee out of the two school districts of Waynesfield township, the territory in the latter outside of the municipality would constitute two separate special school districts as before. However, the provisions of section 3894 may be invoked so as to leave the two districts substantially as they are with regard to the territory thereof. One of such reorganized districts, however, would have to be known as the village district of Maumee with territory attached and detached for school purposes.

Again, the two special districts remaining after the organization of the village district might be, by appropriate proceedings under section 3894, attached for school purposes to the village district, making the boundaries of the latter identical with those of the township. The two special districts may also be dissolved, leaving the territory outside of the municipality a township school district. In short, the statutes cited, together with related sections afford, seemingly, means whereby any territorial subdivision of the township for school purposes may be affected, so long as there is therein a district known as the village district of Maumee.

It is not with a desire to be technical that these formalities are advised and suggested, but because, the question having been submitted as to what board of education is to be elected in the village of Maumee at the ensuing election, the answer above detailed could not be avoided.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY SURVEYOR—ANNUAL ESTIMATE—EXPENSES OF DEPUTIES NOT INCLUDED.

The annual estimate and appropriation of county surveyor may not be overdrawn; statute does not contemplate allowance of any additional sum at any time during the year; expenses of deputies should not be included.

August 24, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 18th, in which you state that on January 1, 1908, the county surveyor of Wood county, complying with section 1133 R. S., as amended 98 O. L. 247, filed a statement of the number of, and aggregate compensation to be allowed for all assistants in his office, and included therewith a statement of estimated expenses of such assistants. You desire my opinion upon the following questions arising out of this transaction:

"First. Should the surveyor have asked in his statement the amount of the expense of his assistants?

"Second. Can the commissioners pay the expense of these assistants regardless of the amount asked for in the statement filed by the surveyor? In other words, can they pay all the necessary expenses to September 1, 1909, although this is more than the surveyor asked for in his statement?"

I have been unable to find any statutory authority for the payment of the expenses of any assistants employed in the office of county surveyor.

Section 1183 R. S., was last amended twice on the same day. The two amendments are quite dissimilar and are, in all probability, to be regarded as in force, at least in so far as they are not inconsistent. This section, as amended, 98 O. L. 247, is in full as follows:

"On or before the first Monday in June of each year the county surveyor shall file a statement of the number of and aggregate compensation to be allowed for all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office, for the year beginning September 1st next succeeding, with the county commissioners of such county who shall examine the same and after making such alterations therein as may be just and reasonable, shall fix an aggregate sum to be expended for such year for the compensation of such assistants, deputies, draughtsmen, inspectors, clerks or employes. The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he shall deem necessary for the proper performance of the duties of his office and shall fix their compensation, but such compensation shall not exceed in the aggregate the amount so fixed by the county commissioners as herein provided, and the compensation after being so fixed shall be paid to such assistants, deputies, draughtsmen, inspectors, clerks or employes monthly out of the treasury upon the warrant of the county auditor out of the general fund."

The following provision is found in section 1183 as amended 98 O. L. 296:

'The surveyor shall be entitled to charge and to receive the following fees: When employed by the day, five dollars for each day, and necessary and actual expenses."

In all probability assistants, when acting as deputies, are entitled to expenses when employed by the day under section 1183 R. S., as amended 98 O. L. 296. In my opinion such expenses should be allowed by the county commissioners upon bills duly presented and should not be included in the estimate filed by the surveyor. Expenses incurred by the assistants as such, however, may not be paid by the county in any manner. Some question arises as to the exact meaning of the word "compensation," as used in 98 O. L. 247. I believe, however, that this term is to be taken in its restricted sense and is to include salary only.

The surveyor may, of course, fix the compensation of each assistant in a sum sufficient to reimburse him for expenses, but such expenses are not, as such, payable out of the county treasury, and the annual estimate and appropriation may not be overdrawn, as the statute does not contemplate the allowance of any additional sum for this purpose at any time during the year.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—WITHDRAWAL FROM JOINT BOARD FOR DISTRICT TUBERCULOSIS HOSPITAL.

County commissioners having participated in preliminary organization of joint board of county commissioners for establishment of district tuberculosis hospital may withdraw from such organization if site selected by joint board is not satisfactory.

August 31, 1909.

HON. WILLIAM F. ORR, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—You have submitted to this office for an opinion thereon the question as to whether the county commissioners of a county having participated in the organization of a joint board of county commissioners for the establishment of a district tuberculosis hospital under the provisions of the act in 100 O. L. 86-87 may withdraw from such organization if the site selected by such joint board is not satisfactory to them.

Section 6 of the act above cited provides that:

> "* * * the commissioners of any two or more counties * * * may form themselves into a joint board for the purpose of establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis and may provide the necessary funds for the purchase of a site and the erection of the necessary buildings thereon, in the manner and for the purpose herein above set forth * * *."

Section 7 provides that:

> "Immediately upon the organization of the joint board, or as soon thereafter as possible they shall appoint a board of trustees to consist of one member from each county represented * *."

Section 8 provides that:

> "The board of trustees herein provided for shall prepare plans and specifications * * and proceed to erect the necessary buildings and furnish the same for a district hospital for tuberculosis. They shall appoint some suitable person who shall act as medical superintendent, such nurses and other employes as may be necessary * *. The superintendent shall have entire charge and control of said hospital subject to such rules and regulations as may be prescribed by the board of trustees."

Section 10 provides that:

> "The first cost of the hospital, 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 * * each county comprised in the district shall pay its share (the costs) * * . The boards of commissioners of counties jointly maintaining a district hospital for tuberculosis shall make annual assessments of taxes sufficient to support and defray all necessary of such hospital."

You inform me that the commissioners of Greene county have met with those of certain other counties, and have perfected the preliminary organization described in the first clause of section 6 above quoted, and that as yet they have not provided the necessary funds for the purchase of a site and the erection of the necessary buildings thereon; that the site proposed to be selected by a majority of the members of the joint board is unsatisfactory to the Greene county commissioners, who now desire, as above stated, to withdraw from the organization.

The question thus presented is somewhat difficult of satisfactory solution, in view of the fact that the provisions of section 6 which relate especially to the duties of the county commissioners in the premises are very vague. Consideration of all of the above quoted provisions, however, leads to the conclusion that the provision of section 6 as to the furnishing of necessary funds is permissive, while that of section 10 respecting funds for the support of the hospital once established is mandatory. In my judgment the commissioners of any one county are not required to proceed with the construction of a hospital against their will because of the mere fact that they have participated in the preliminary organization of the joint board. Should they assent to the selection of a particular site, however, and should the site be purchased and the buildings erected thereon, or should the other counties acting upon the faith of such assent furnish funds for the erection of the necessary buildings, then the duty to take further action would become mandatory upon the commissioners and they could not withdraw from the organization. In short, the commissioners of any county incur no duty which may be enforced by mandamus until they have assented to the selection of a particular site. Thereupon the duty to provide funds, to appoint the board of trustees for the construction and management of the buildings and contribute to the support of the hospital becomes mandatory.

I therefore conclude that the commissioners of Greene county, under the facts as above stated, may at this time withdraw from the board referred to and refuse to participate in the establishment and maintenance of a district hospital.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—TOWNSHIP TREASURER EX-OFFICIO TREASURER SCHOOL DISTRICT.

September 9, 1909.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your letter of September 6th requests my opinion upon the following questions:

> "Section 4056 of the Revised Statutes of Ohio provides that the board of education of each school district shall fix the compensation of its clerk and treasurer, and section 1532 provides that he shall be allowed as his fees 2 per centum of all the money paid out by him upon the order of the township trustees. Do you think that the latter section 1532 in any way affects or governs the amount to be fixed by section 4056? Is it not a question of discretion for the board of educa-

tion to fix the salary of the treasurer and clerk? Can the board of education elect a treasurer for the school funds other than the treasurer elected for the township?"

Section 1532 R. S. has no application to the matter of the compensation of the township treasurer, as it provides for a fee based upon the money paid out by him upon the order of the township trustees, not the township board of education. Accordingly the salary of the treasurer should be fixed by the board of education under section 4056 R. S.

Section 4042 R. S. provides in part that:

"In each * * township school district, the treasurer of the * * township funds shall be * * the treasurer of the school funds."

In view of this provision it is my opinion that a township board of education may not elect a treasurer, but that the treasurer of the township is *ex officio* treasurer of the school district.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—FEES FOR DITCH WORK—POWERS AND DUTIES OF DITCH SUPERVISOR.

September 9, 1909.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of two letters from you under date of September 7th, in one of which you request my opinion upon the following statement of facts:

"A county commissioner went out of office in November and his bill for ditch work from September 1st to the time he went out of office was $117. The county commissioner following him had a bill for over $200, covering the time from the said November until the September following. Can the commissioner receive the full amount of his bill, or can he only receive the difference between the amount received by the former and $300?"

Section 397 Revised Statutes provides in part as follows:

"* * In counties where ditch work is carried on by the commissioners, in addition to the salary hereinbefore provided, each county commissioner shall receive three dollars per day for the time they are actually employed in ditch work, the total amount so received for such ditch work not to exceed the sum of three hundred dollars in any one year."

Under the foregoing provision it is my opinion that the bill of the second commissioner, alluded to by you, may be paid in such sum of money as will

make the amount received by the incumbent of his office for the year amount to three hundred dollars; in other words, the difference between the amount received by the former commissioner and three hundred dollars.

Your other letter requests my opinion as to the extent of the powers and duties of the ditch supervisor over tiled ditches under 99 O. L. 237.

The provision in question is as follows:

> "When any county or township ditch, or any part thereof, has been tiled, or may hereafter be tiled, said ditch, shall be subject to the provisions of this act. If in the judgment of the township ditch supervisor, said tile is small and insufficient to provide the necessary drainage, the surface ditch shall be kept open by the provisions of this act."

Under this section, in my judgment, the township ditch supervisor has no power to retile a tiled ditch which may be out of repair, or to construct a tiled ditch in the first instance. His power over such ditches extends only to that of opening them and converting them into surface ditches in case they prove insufficient to provide the necessary drainage, and to clean them out and to keep them in repair when such cleaning and repairs do not necessitate the construction of a new ditch. Furthermore, the power of the township ditch supervisor over tiled ditches applies only to such tiled ditches as are county or township ditches.

Yours very truly,

U. G. DENMAN,
Attorney General.

PRIMARY ELECTION AND SPECIAL ELECTION HELD ON SAME DATE—COMPENSATION OF JUDGES AND CLERKS.

Where primary and special election held on same date judges and clerks entitled to but one per diem fee for the one day's work and only additional compensation payable in such case is that of judges for making returns.

September 10, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—In your letter of September 8th, receipt of which is acknowledged, you ask my opinion concerning the following question:

> "A primary election was held in this county under the general law, on Tuesday, September 7, 1909. At the same time a special election was called by the commissioners of said county under section 2825 (99 O. L. 456) to determine the question of levying a tax for the building of a court house.
>
> "It is claimed that the judges and clerks are entitled to extra compensation for conducting the special election, and that the judge making the return to the auditor is entitled to $2.00 for making such return under section 2966-52, which allows $2.00 for a return made by a judge.
>
> "Please advise as to whether the judge is entitled to pay for making return to the auditor, and whether the judges and clerks are entitled to

additional compensation for services in connection with the courthouse election over and above that provided for services in connection with the primary election."

Section 35 of the primary election law, 99 O. L. 214-223, provides in part that:

"Judges and clerks of elections shall receive the same compensation as is provided by law for such officers at general elections."

The above provision refers to and adopts section 36 of the so-called Australian ballot law, section 2966-52 R. S., which in full is as follows:

"The judge of election 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 service, and in addition thereto mileage at the rate of five cents per mile to and from the county seat if he live one mile or more therefrom. The judge of the election 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. Judges and clerks shall each receive as compensation the sum of three dollars for their services for each election day; provided, however, that in cities where registration is required the compensation shall remain as now fixed by law, except that the chairman elected at the meeting for organization shall receive one dollar for calling for the sealed package of ballots."

Section 2825 R. S. as amended 99 O. L., page 456, provides in part as follows:

"The county commissioners shall not levy any tax * * * for the purpose of building public county buildings * * * the expense of which will exceed fifteen thousand dollars * * * without first submitting to the voters of the county, the question as to the policy of building * * *

"Which said submission shall be made *at the annual election*, next after the proposition for such levy is adopted by the commissioners * * * or at a special election at a time fixed thereafter by resolution of the county commissioners for that purpose * * *

"It shall be the duty of the judges of election in the several townships and wards * * * on the day of said election, to open a poll for taking said vote, and to receive and count the ballots cast, on each of such propositions, and within *three days* thereafter to return to the auditor of said county, a full and correct abstract of said votes; and the said judges of election shall, in all respects, be governed by the laws regulating general elections, and shall be entitled to the same compensation for returning said poll-books, which shall be paid out of the county treasury on the order of the auditor * * *."

Examination of section 2966-52 *supra* discloses the fact that two kinds of compensation are therein provided, viz: a fee in the nature of *per diem*, though not exactly such, payable alike to judges and to clerks, and a fee attaching to the particular services of delivering the paraphernalia of election and carrying returns, together with mileage. The distinction will be more clearly observed

when it is remarked that the remuneration in one case depends upon and attaches to the *day's work* measured in units of time, while in the other case it is dependent upon the performance of a single act. The primary election law, quotation from which is above made, adopts, as has been remarked, all these items of compensation to judges and clerks. Section 2825 as amended, and as above quoted, does not specifically adopt both of the kinds of compensation described. It refers to the fee receivable for making returns, and while it provides that the judges of election shall "in all respects be governed by the laws regulating general elections," it does not specifically mention either the specific fee payable for delivering ballots, etc., or the *per diem* fee payable under section 2966-52. The distinction thus made by that paragraph of section 2825 is emphasized by the prior provision also above quoted to the effect that the question to be submitted under that section may be submitted at an annual election or at a special election. The effect of the quoted portions of section 2825 in case a special election is held at a date other than that of the primary or annual election is not questioned in your letter, and I express no opinion on that point. The significance of the mention of the annual election, however, taken in connection with the specific mention of one of the several fees provided by section 2966-52 is, in my opinion, that it evinces the intent of the general assembly to deny to judges and clerks the payment of *two per diem fees for the same day's work*. The rule of public policy applicable to the case is so plain that it seems to me, it should be applied in construing the statutes in the light of the peculiar facts submitted by you.

All of the above quoted provisions are to be construed together, and such a construction having regard to the considerations above mentioned, leads to the conclusion that the phrase "primary election" is to be read into the second paragraph of section 2825 as above quoted, and that in case the date of submitting the question under said section coincides with that of holding an annual or primary election, whether the same be called a "special election" or not, the judges and clerks are entitled to but one *per diem* fee for the one day's work, and that the only additional compensation payable in such case is that of the judges for making returns, viz: two dollars and mileage at the rate of five cents per mile.

Answering your question specifically, it is my opinion that in case a special election is held under section 2825 on the date of holding a primary election under the act in 99 O. L., page 214, the judges and clerks are entitled to receive for all services thus devolving upon them, all the fees and emoluments provided by section 2966-52 R. S., and, in addition, the judges are entitled to receive two dollars and mileage for making returns of the special election.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOXWELL-PATTERSON GRADUATE—SELECTION OF SCHOOL TO ATTEND—FULLY DISCUSSED.

September 15, 1909.

HON. M. O. BURNS, *Prosecuting Attorney. Hamilton, Ohio.*

DEAR SIR:—Your letter of September 11th, in which you request my opinion on the following question, received:

"Does section 4029-3 Revised Statutes as amended in 100 Ohio Laws 74 authorize and allow so-called Boxwell-Patterson graduates, and grad-

uates of second and third grade high schools, to select the high school which they shall attend when such graduates live outside the three mile limit?"

A careful reading of section 4029-3 R. S. O. as amended in 100th O. L. 74, will show that the legislature evidently intended to provide that all pupils in Ohio should have equal high school advantages, and when read with this intention in view, the apparent ambiguities and contradictions of the section are all cleared up, and it forms a consistent whole. Reading it in this light also the section may be roughly subdivided into the following divisions.

The first division reads as follows:

"The tuition of pupils holding diplomas and residing in township, special (or joint subdistricts), 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, and an attendance any part of the month shall create a liability for the entire month; but the board of education maintaining a high school shall charge no more tuition than it charges for other non-resident pupils."

This division deals exclusively with so-called Boxwell-Patterson graduates residing in township or special districts in which no high school is maintained, and assures to them a four-year high school education.

The second division reads as follows:

"A board of education providing a third grade high school as defined by law, shall be required to pay the tuition of graduates from said school residing in the district at any first grade high school for two years, or at a second grade high school for one year, and a first grade high school for one year. A board of education providing a second grade high school, as defined by law, shall be required to pay the tuition of graduates residing in the district at any first grade high school for one year; provided, however, any such board of education maintaining a second or third grade high school shall not be required to pay any such tuition after the rate of taxation permitted by law for such district shall have been reached, and all the funds so raised are required for the support of the schools of said district."

This division of the section deals exclusively with pupils who have graduated from second and third grade high schools, and who reside in the districts in which such high schools are maintained, and it assures to them the same privileges as are given by the first division to Patterson graduates residing in township and special school districts in which no high school is maintained, in this, that it allows them, tuition free, to have a four-year high school course which shall be as nearly equivalent as possible to the course given in first grade high schools.

The third division reads as follows:

"No board of education shall be required to pay the tuition of any pupil for more than four school years; provided the board of education shall be required to pay the tuition of all successful applicants who have complied with the provisons of this act, residing more than three

miles from the high school provided by said board, when said applicants attend a nearer high school."

The first part of this division applies to the first division of this section, and the proviso applies to the second divison.

The fourth division reads as follows:

"When the elementary schools of any township school district in which a high school is maintained, are centralized and transportation of pupils is provided, all pupils resident of the township school district holding diplomas, shall be entitled to transportation to the high school of said township school district, and the board of education of said school district shall be exempt from the payment of the tuition of said pupil in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education may include."

This division is really a part of the third division, and controls the proviso contained in such third division.

The fifth division reads as follows:

"A board of education not maintaining a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils, and when such agreement is entered into, the board making the same 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; provided the school or schools selected by the board are located in the same civil township, or some adjoining township as that of the board making the agreement. Where no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma; provided 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, said notice to be filed not less than five days previous to said beginning of attendance."

This divison applies to pupils coming within the class established by the first division herein.

The fifth division prescribes the funds from which such tuition shall be paid, and empowers the board of education to levy a tax not exceeding two mills on each dollar of taxable property in the district in excess of that allowed by section 3959 R. S. O. for use as a separate fund to apply to the payment of such tuition.

Throughout this whole section the intention appears to allow both classes of pupils which come under the first and second divisions of the section to choose the particular high school which they shall attend, when entitled under the provisions of this section to attend such a high school. There is no limitation on the right of the class of pupils established by the second division to choose such particular high school, but there is a limitation placed on the choice of a particular high school by the class of pupils established by the first division of the section. This limitation occurs where a board of education not maintaining a high school enters into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. Should

the board make such an agreement, and should a pupil of said first division class reside within three miles of a school designated in such agreement, then he must attend such school, or if he should attend any other school than the one so designated, the board of education of his district shall not be liable for the payment of his tuition at such other high school.

I am, therefore, of the opinion that section 4029-3 R. S. O. as amended in 100 Ohio Laws, does not allow so-called Boxwell-Patterson graduates residing in a school district, the board of education of which does not maintain a high school and has entered into an agreement with another board of education maintaining such school for the schooling of all its high school pupils, to choose what high school they shall attend when such pupils live within three miles of the school so designated in such agreement, but said section does allow such a Boxwell-Patterson graduate to make a free choice of the high school which he shall attend when he lives in a township or special school district, the board of education of which maintains no high school and has entered into no such agreement as aforesaid, or when he resides more than three miles distant from the high school designated as aforesaid.

I am further of the opinion that the graduates of a second or third grade high school who reside in the district in which such second or third grade high school is maintained may choose what particular high school of the first or second grade they shall attend, in order to complete the four years' high school training assured to them by this section.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—TUITION—LOCATION OF SCHOOL PROVIDED BY BOARD.

Board of education must only pay tuition of pupils who attend a high school nearer than one provided by board when one provided by board is more than three miles from residence of pupil.

September 27, 1909.

HON. M. O. BURNS, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—A question has been raised as to the meaning of the words "provided by said board," as used in the following quoted paragraph of section 4029-3 R. S. O. as amended in 100 O. L. 74.

> "No board of education shall be required to pay tuition of any pupil for more than four school years; provided the board of education shall be required to pay the tuition of all successful applicants who have complied with the provisions of this act residing more than three miles from the high school provided by said board when said applicants attend a nearer high school."

And the consideration of such question has produced a further construction of said section which bears on the question decided by my opinion heretofore rendered to you on September 15, 1909. And in considering the opinion rendered to you in this light it does not seem to be as clear as it should be, I therefore submit the following opinion as a supplement and amplification of such opinion:

The words "provided by said board" as used in the above quoted paragraph are evidently meant to include both high schools provided by such board by "maintenance" and "contract," and this view of the matter leads to the following conclusion in regard to the section:

That the above quoted paragraph of said section, which in my former opinion is called the "third division" of the section governs and controls the first, second and fifth divisions, and leads to the following conclusions:

A board of education maintaining a second or third grade high school may enter into a contract with a board of education maintaining a first or second grade high school, as the case may be, for the further education of its graduates as provided in the second division of this section, and when a pupil resides more than three miles from the high school so contracted with by his board of education and he attends a nearer high school of such higher grade, his board of education must pay his tuition at such nearer high school. Should he reside within three miles of the high school designated by such contract he must attend that high school, but should he reside more than three miles from such designated high school and attend a high school that is farther away from his place of residence than the designated high school, then his board of education is not required by this section to pay his tuition. When a pupil resides in a district, the board of education of which does not maintain a high school, but which board has entered into an agreement with one or more boards of education maintaining such high school for the schooling of its high school pupils, and when such pupil resides more than three miles distant from all of the high schools so designated by such agreement, such pupil may attend a nearer high school and his board of education must pay his tuition in such nearer high school, it, of course, being understood that the board of education is limited in its power to make such agreements to high schools located in the same civil township or some adjoining township as that of the board making the agreement.

In view of this further and more particular consideration of this section I should perhaps add that for the purpose of preventing mistake, the concluding sentence of the next to the last paragraph of my former opinion to you, "or when he resides more than three miles from the high school designated as aforesaid," should be changed to read as follows: "and when he resides more than three miles distant from the high school designated as aforesaid he may choose a nearer high school which he shall attend." And the last paragraph of my former opinion should have the following words added to it: "when his board of education has entered into no agreement with the board of education maintaining such higher grade high school for the schooling of its graduates.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAXES AND TAXATION—CHATTLES IN HANDS OF TRUSTEE IN BANKRUPTCY TAXABLE.

September 29, 1909.

HON. JOSEPH C. RILEY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—Your communication is received in which you state that on the day preceding the second Monday of April, 1909, a trustee of a bankrupt estate had in his possession several thousand dollars' worth of personal property. You further state that subsequent to said date the trustee has made sale of the

property as per the court's order and refuses to pay the taxes thereon which the county is seeking to collect. You inquire if the county is legally entitled to collect this tax.

In reply thereto I beg to say, that under section 2736 Revised Statutes, the taxes levied by law on this chattel property in the possession of the trustee did on the day preceding the second Monday of April, 1909, become legally due.

Section 2838 Revised Statutes provides that:

> "All personal property subject to taxation shall be liable to be seized and sold for taxes."

Now, unless the federal enactment, known as the "bankruptcy act," provides that property in the possession of a trustee in bankruptcy shall be exempt from local taxation, it would seem that the local taxes levied on this property should be paid by the trustee before distribution of the general fund, derived from the sale thereof, to the creditors of the bankrupt.

Section 70 of the bankruptcy act provides that:

> "The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or succesors, if he shall have one or more, upon his or their appointment, and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

The funds of the bankrupt which have come into the hands of the trustee are subject to taxation in the district where they would be taxable if bankruptcy had not intervened. (Swartz v. Hammer, 194 U. S. 441.)

If property in the hands of an assignee, trustee, executor or administrator is not taxable under the local law, it is not taxable in the hands of a trustee in bankruptcy, and where property in the possession of the bankrupt is taxed by the local authorities, the trustee shall pay these taxes in the same manner as the taxes due at the time of bankruptcy are paid. (Loveland on Bankruptcy, page 770.)

By the provision of section 64*a* of the bankruptcy act of 1898, the court is required to order the trustee to pay all taxes legally due and owing to the United States, state, county, district or municipality in advance of the payment of dividends to creditors.

From a consideration of these and other provisions of the law applicable to the questions under consideration, I reach the conclusion that it is the duty of the trustee in bankruptcy to pay to the county the taxes which he is now refusing to pay. I may add, however, that this is a proper question for the court of bankruptcy to determine. Section 64*a* of the bankruptcy act declares that in case of disputes as to the amount or legality of any taxes they are to be heard and determined by the court.

A state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of the bankruptcy act, giving a preference to taxes, is a federal question to be decided by the courts of the United States. (203 U. S. 483.)

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—WHAT CHILDREN ENTITLED TO RELIEF—WHOSE DUTY TO PROVIDE.

Board of education only required to make provisions to relieve children coming within classes specified in section 4022-9, and it is duty of officers upon whom general relief of poor is enjoined to furnish such relief.

September 30, 1909.

HON. D. H. ARMSTRONG, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Your letter of September 15th, in which you submit the following question for my opinion, is received:

> Have boards of education authority to furnish relief to any children in their district other than those children who are unable to attend school because absolutely required to work at home or elsewhere in order to support themselves or help to support or care for others legally entitled to their services who are unable to support themselves?
>
> If not, is it the duty of any official to provide the relief mentioned in section 4022-9 as amended in 99 O. L. 477, for children other than those described in said section?

The provision of the statutes which govern these questions are the following: Section 4022-9 R. S. O., as amended in 99 O. L. 477, reads in part as follows:

> "When any truant officer is satisfied that any child, compelled to attend school by the provisions of this act, is unable to attend school because absolutely required to work at home or elsewhere in order to support itself or help to support or care for others legally entitled to its services who are unable to support or care for themselves, the truant officer shall report the case to the president of the board of education, and it shall be the duty of such president of the board of education to furnish text-books free of charge, and such other relief as may be necessary to enable the child to attend school for the time each year required under this act; the expense incident to furnishing said books and relief to be paid from the contingent fund of the school district."

Section 1491 R. S. O. reads as follows:

> "The trustees of each township in the state or the proper officers of each corporation therein shall afford at the expense of their township or corporation public support or relief to all persons therein who may be in condition requiring same, subject to the conditions, provisions and limitations herein."

Section 4022-9 is a special statute which takes the classes therein specified out of the action of section 1491, which is the general statute governing relief for the poor. Therefore, "any child compelled to attend school by the provisions of this act (the school code)," who is not included within the meaning of section 4022-9, as amended, must be given relief by the authorities upon whom general relief of the poor is enjoined by the statutes. It is, therefore, a question of fact as to what children under section 4022-9 are entitled to the relief therein specified. The wording of this section, however, in my opinion, is so broad

as to practically cover every possible case of relief to children who are compelled to attend school by the provisions of the school code. Broader terms could hardly be used to evidence such intention on the part of the legislature than the following:

> "When any truant officer is satisfied that any child, compelled to attend school by the provisions of this act, *is unable to attend school because absolutely required to work at home or elsewhere in order to support itself or help to support or care for others legally entitled to its services who are unable to support or care for themselves.*"

I concede that there might be a case of a child compelled to attend school by the provisions of the school code, the facts of which are so peculiar as not to come within the broad provision of section 4022-9, but such a case would seem to me to be an exception rather than the general rule. This section is broad and comprehensive and evinces the intention of making it the duty of the board of education to see to and provide for the attendance at school of needy pupils compelled to attend school by the provisions of the school act.

I am of the opinion, however, as above stated, that it is the duty of the board of education to make the provision for the relief specified in section 4022-9 only in the case of pupils coming within the classes specified in such section, and that it is the duty of the officers upon whom the general relief of the poor is enjoined by the statutes to make provision for the relief of all pupils other than those coming within the classes so specified by section 4022-9.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY AUDITOR—MAY BE SCHOOL EXAMINER.

September 10, 1909.

HON. JAMES A. DOUGLAS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your letter of August 30th, in which you ask my opinion on the following question, received:

> May a county auditor, while holding that office, also legally hold the position of county school examiner?

In reply, I beg leave to submit the following opinion: The points to be considered in the above question are:

First, whether there are any statutory inhibitions against the holding of these two offices, and

Second, if there are no such inhibitions, are the duties of these offices such as to render them incompatible?

I have been unable to find any inhibitions in the statute against the holding of these two offices, nor, in my opinion, are their duties such or so conflicting as to render the offices incompatible. I am, therefore, of the opinion that a county auditor may legally hold the position of county school examiner.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—CLERK MAY NOT BE APPOINTED TEACHER.

September 10, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your letter of August 31st, in which you ask my opnion upon the following question, received:

> Is the clerk of the township board of education eligible for appointment as a school teacher in one of the elementary schools of the township?

In reply I beg leave to submit the following opinion: I have been unable to find any statutory inhibition against the holding of these two positions by the same person. The question therefore resolves itself into whether their respective duties are such as would render the offices incompatible.

Section 4051 R. S. O. reads in part as follows:

> "It shall be unlawful for the clerk of a board (of education) to 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; * * *."

The above quoted section makes it the duty of a clerk of a board of education to accept and approve certain reports of a teacher hired by such board before issuing a voucher on the treasurer for the payment of such teacher's salary, and for this reason I am of the opinion that the two positions of clerk of the board and teacher would be incompatible.

There is a further reason to be considered in deciding this question and that is that a certain amount of favoritism might arise in the appointment of such a clerk because of the influence which such clerk might have with the board appointing him as teacher owing to the confidential relationship bound to exist to a greater or less extent between himself and such board, and this state of affairs alone would render it highly inadvisable, if not actually contrary to public policy, that the same man should hold these two positions.

I am, therefore, of the opinion that the clerk of a township board of education is not eligible for appointment as a school teacher in one of the elementary schools of the township.

Yours very truly,

U. G. DENMAN,
Attorney General.

CORONER—FEES OF PERSON WHO SERVES WRIT IN EMERGENCY CASE.

September 14, 1909.

HON. HOLLAND C. WEBSTER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of recent date in which you ask my opinion on the following:

Section 1223 of the Revised Statutes provides in part as follows:

> "The coroner may issue any writ required by this chapter to any constable of the county * * * or if, in his opinion, the emergency requires, to any discreet person of the township."

Query: May the discreet person, who is not a qualified constable of the county or specially appointed or deputized by some magistrate, appointed by the coroner in emergency cases under the above section receive any compensation for serving such writs?

I beg to call your attention to section 913 of the Revised Statutes, which is as follows:

> "The county commissioners shall audit and allow a reasonable compensation to any person who is summoned to aid any sheriff or constable or other officer, as the case may be, in the execution of any writ or process in favor of the state, but such compensation shall not exceed one dollar per day, and be allowed only upon certificate of such officer."

I am, therefore, of the opinion that under the authority of the above section, where a discreet person in emergency cases has been appointed by a coroner under section 1223 R. S. to serve a writ issued by said coroner, that such discreet person is entitled to compensation under section 913 Revised Statutes.

I beg to remain,

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS MAY NOT DONATE LAND TO CORPORATION FOR PURPOSE OF MAINTAINING CHILDREN'S HOME.

September 14, 1909.

HON. CHARLES L. JUSTICE, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—You have submitted to me for my opinion thereon the following question:

> "May the county commissioners of Marion county purchase a farm that costs at least $8,700 and present the same to a corporation formed for the purpose of and now maintaining a children's home in the county, no aid of any kind having previously been extended by the commissioners to such corporation? If this may be done, out of what fund must the money be paid?"

Section 921-1 Bates' Revised Statutes provides in effect that, commissioners of a county wherein a children's home society may be incorporated and maintaining a home may, if they deem it judicious in aid thereof to purchase land, make a direct donation in amount not to exceed $6,000.

Section 921-2 provides that if six thousand dollars has been donated as authorized in the preceding section, and such donation is not sufficient to purchase the needed land or erect the needed buildings, commissioners may donate

$2,500 in addition to said sum of $6,000, and that in consideration of such additional donation the county shall have a lien upon the property to the extent of the total amount donated, or may, if the corporation ceases to discharge the objects of its organization, assume control and management of the home. No question has, so far as I am informed, been raised concerning the constitutionality of these sections, although the same might be seriously challenged under section 6 of article 8 of the constitution.

It is not necessary, however, to consider the validity of these provisions. In the case stated by you, the commissioners are without authority under these sections, for the reason that the donation proposed to be made by them exceeds in amount both the initial donation authorized under section 921-1 and the total amount authorized to be given under both the sections.

It is, therefore, my opinion that the donation contemplated by the commissioners may not be made.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS MAY NOT MAKE ALLOWANCE FOR ATTORNEY ACCOMPANYING OFFICER TO PROCURE FUGITIVE.

September 20, 1909.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—A member of your department has submitted to this office, for opinion thereon, the following question, viz:

> An agent designated to pursue and procure the extradition of a fugitive from justice was accompanied on his journey by an attorney, in order that expected opposition to the extradition of the fugitive might be provided against. The bill of expenses on account of the pursuit of the felon includes not only the expenses of the agent or officer, but also the expenses of the attorney. May the county commissioners allow the claim of the attorney?

In the letter in which the question is submitted, sections 920 and 1310 R. S. are cited. These sections, so far as I have been able to ascertain, constitute the only statutory provisions applicable to the question at hand. They are as follows:

> "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 to the agent designated in such requisition or request to execute the same, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just, out of the county treasury.
>
> "The county commissioners may allow and pay any necessary expense incurred by an officer in the pursuit of a person charged with a felony, who has fled the country, in addition to the allowance provided for in the preceding section."

Under the foregoing provisions it is, in my judgment, unlawful for the commissioners to make an allowance to any other person than the agent designated in the requisition to execute the same, but the determination of what expenses of such agent are necessary and just is a matter which lies within the discretion of the commissioners, to be determined by them with regard to all the facts of the case.

Yours very truly,

U. G. DENMAN,
Attorney General.

APPOINTMENT OF ROAD INSPECTORS—MADE BY COMMISSIONERS OR SURVEYOR.

Road inspectors should be appointed by county surveyor and not commissioners.

September 20, 1909.

HON. F. A. MCALLISTER, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 14th, in which you submit the following question:

> "In Delaware county, county roads are being improved and macadamized under the authority conferred by section 4670-14, and subsequent sections of the Revised Statutes. It has been the custom also to appoint separate inspectors for the several roads being so improved, and a controversy has arisen as to the power of making such appointments—whether by the county commissioners or by the county surveyor. These inspectors are temporary employes, and the allowance of the county commissioners for the surveyor's office, under section 1183, was not made so as to include payment to such inspectors.
>
> "Kindly advise me, at your earliest convenience, who, in your opinion, has the power of making such appointments."

Section 4670-15, being section 2 of the one-mile assessment pike law, referred to by you, provides in part as follows:

> "* * The commissioners shall appoint a competent engineer to superintend the performance and completion of the work, who, being under the direction and approval of said commissioners, shall prepare and file the necessary plans, plats, profiles and specifications of the work * * *." (94 O. L. 97.)

Section 1166 R. S., as amended 93 O. L. 245, provides in part as follows:

> "The county surveyors shall perform all duties for such county as are now or may hereafter be authorized or declared by law to be done by any civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost * * for the construction or repair of all * * roads * * and other public improvements * * which may be constructed under the authority of any board within and in such county * * *. He shall be responsible for the inspection of all public improvements that are made under authority of the board of county

commissioners * *. He shall make all surveys required by law to be made, and perform all necessary services to be performed by a surveyor or civil engineer in connection with the construction, repair or opening of all county roads, turnpikes, * * constructed under the authority of the board of county commissioners, and shall perform such other duties as said board may, from time to time, require."

It is the contention of this department, in a case now pending in the supreme court, that the effect of section 1166 R. S. is to repeal, by implication at least, all of the prior provisions of law authorizing county commissioners to appoint civil engineers in road work, and to make the duties of such engineers, heretofore appointed by the county commissioners, devolve upon the office of the county surveyor. To this contention I am, at present, disposed to adhere. It follows, therefore, that the work prescribed by you must be performed by the county surveyor and that, if it requires the employment of additional assistants or inspectors in the office of the county surveyor, the same should have been provided for under section 1183, as amended 98 O. L. 245.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE—VACANCY IN OFFICE—TIME OF ELECTING SUCCESSOR.

September 22, 1909.

HON. IRVING MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 17th, in which you submit the following for my opinion:

> At the November election, 1907, Mr. Warren W. Johnson was elected justice of the peace, and on the seventh day of September, 1909, Mr. Johnson died. On the 11th of September a successor was appointed by the township trustees, and you desire to know if a successor to Mr. Johnson should be elected at the coming November election.

I beg to call your attention to section 567 of the Revised Statutes, which is in part as follows:

> "When a vacancy occurs in the office of justice of the peace in any township, * * * by death, * * *, the trustees having notice thereof shall, within ten days from and after such notice, fill any such vacancy by appointing a suitable and qualified resident of the township who shall serve as justice until the next regular election for justice of the peace, and until his successor is elected and qualified; * * *.
>
> "At the next regular election for such office some suitable person shall be elected justice in the manner provided by law, for the term of four years, commencing on the first day of January next thereafter;"

You will note from the above quoted section that the person appointed to fill the vacancy in the office of the justice of the peace caused by the death of

Mr. Johnson is to hold office until his successor is elected and qualified; and it is further provided that such successor shall be elected at the next regular election for such office, and such person elected shall take office on the first day of January next thereafter.

Section 1442 Revised Statutes provides that justices of the peace shall be elected at the November election in odd numbered years. Therefore, the next regular election for the office of justice of the peace will be in November, 1909, and the term of the person elected at that time will commence on the first day of January, 1910.

Very truly yours,

U. G. DENMAN,
Attorney General.

SHERIFF ONLY ENTITLED TO MILEAGE FOR ONE PERSON WHEN TWO CONVEYED AT SAME TIME.

September 24, 1909.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The probate judge of this county adjudged two women insane, and appointed an assistant in each case to convey them to the asylum. The same person was appointed in both cases. The sheriff and the assistant conveyed both women to the asylum at one time.
>
> Query: Is the assistant entitled to draw mileage in both cases?

In reply, I beg to say section 719 of the Revised Statutes provides that an assistant appointed by the probate court to convey an insane person to an asylum shall receive "five cents per mile each way and nothing more, for said services, the number of miles to be computed in all cases by the nearest route traveled."

Inasmuch as but one trip was made the assistant is only entitled to one mileage. In my opinion the statute does not contemplate the payment of mileage in excess of the distance traveled.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS—JANITOR OF COURT HOUSE—APPOINTMENT OF.

September 24, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> In January, 1909, the board of county commissioners of this county consisting of T. L. Brewer, W. H. Townsend and N. D. Sipple, appointed Bert Marker as clerk of said board and Perry Turner and Wm. T. Hayes

as janitors of the court house. The terms of all these appointees to expire on Monday, September 20, 1909. A record of the terms of said appointments was placed upon the journal of said board. The term of office of said T. L. Brewer expired on September 19, 1909, and his successor, D. F. Amspaugh, assumed the duties of the office on Monday, September 20, 1909. On the same day said Sipple and Townsend commenced their second terms as county commissioners. On Saturday, September 18, 1909, the board of county commissioners, consisting of said Brewer, Townsend and Sipple, without the approval and consent of said Sipple, and in his absence, appointed E. K. Lott as clerk of the board and said Hayes and Turner as janitors at the court house for the term of one year, commencing on September 20, 1909.

Query: Was the action of the board in making such appointments valid?

In reply, I beg to say the circuit court of Franklin county has passed upon the question submitted by you, and the case is reported in 9 Circuit Court Reports, at page 301. In that case the board of county commissioners assumed to and did enter into a contract in writing whereby one Frank M. Ranck was employed as a janitor of the court house in Franklin county for the year next ensuing at a salary of $80 per month. On the next day, viz., Sunday, January 6, 1895, the term of office of one member of said board expired and on the following day his successor was qualified and entered upon the discharge of his official duties. Thereupon the new board adopted a resolution by the terms of which it was declared that the action of the former board in the employment of said Ranck was "reconsidered, rescinded and held as null and void."

The question before the court was whether or not the appointment made on the 5th day of January, 1895, was a valid appointment, and the court held the contract of appointment to be void as against public policy. The facts in that case are on "all fours" with your inquiry.

I am, therefore, of the opinion that the county commissioners were without authority to make such appointments on the 18th day of September, 1909, and that said appointments are not now binding upon the present board of county commissioners.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS MAY FURNISH DIRECTORIES TO COUNTY OFFICES.

September 25, 1909.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your communication is received in which you inquire as to the right of the county commissioners to furnish city directories to the various county officers, and pay for the same out of the public funds.

In reply, I beg to say section 859 of the Revised Statutes requires the county commissioners to provide offices for the county officers, and this office has heretofore held in opinion to the bureau of inspection and supervision of public offices, December 30, 1906, that:

"The county commissioners may, under section 859, which provides that the county commissioners shall provide the offices for the county officers, furnish such offices with telephones, and such other equipment as they deem necessary for the proper discharge of official duties."

It follows, therefore, that the county commissioners may, if they deem the same necessary to the proper discharge of the duties of the various county officers, equip the county offices with city directories.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—NOT ENTITLED TO TRAVELING EXPENSES.

September 25, 1909.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

"May items of expense of Highland county commissioners for livery hire, railroad fare, board, lodging or feed stable charges, be lawfully paid out of the county treasury?"

You also cite the following statutes and cases: Section 897 as amended in 97 Ohio Laws 254, section 897-5, Richardson v. State, 66 O. S. 108.

In reply, I want to express my appreciation of your thoughtfulness in citing in your letter the various sections of the Revised Statutes and the cases bearing upon the question submitted. These are always helpful in the preparation of the opinion, and enables me to give the opinion with more dispatch.

Section 897 as amended in 97 O. L. 254, provides a salary for all county commissioners and abolishes the *per diem* compensation. This law is uniform in its operation, and applies to all the counties in the state.

Section 897-5 was enacted in 1902 prior to the amendment of section 897 under which county commissioners were placed on a salary, and was intended to apply to those counties in which county commissioners were paid a *per diem* compensation. An examination of section 897-5 discloses the fact that the allowance for expense therein provided does not apply "in counties where the compensation of county commissioners is now or hereafter may be fixed by a stated salary." Inasmuch as all county commissioners are now on a salary, it follows that the allowance of expenses, as provided in said section, are no longer available.

The commissioners of Highland county are, therefore, not entitled to be reimbursed out of the county treasury for expenses incurred for livery hire, railroad fare, board, lodging, etc.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—TRANSFER OF FUNDS TO FEE FUND—COUNTY SALARY ACT FULLY DISCUSSED.

October 5, 1909.

HON. A. O. DICKEY, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—You have asked me for an opinion as to the powers of the county commissioners in any county to transfer funds under section 7 of the act of the general assembly passed March 22, 1906, 98 Ohio Laws, pages 89 to 97, inclusive, and fixing the salaries of probate judges, county auditors, county treasurers, county recorders, clerks of the court of common pleas and sheriffs, and providing for the employment and compensation of their clerks, deputies and assistants.

By section 24 of this act, being the last section thereof, the act was made to take effect January 1, 1907. Section 7 of the act as originally passed was amended by the general assembly on April 27, 1908, 99 Ohio Laws, pages 208 and 209, and in its amended form reads 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.
>
> "But nothing herein shall authorize any such transfer to be made for the payment of the county recorder or any person appointed or employed by him.
>
> "At the end of any quarter as fixed herein, the board of county commissioners shall transfer from the county officers' fee funds any amount therein, derived from any of the aforesaid offices, in excess of what is considered necessary to pay the salary and compensation of such respective officer and his deputies, assistants, bookkeepers, clerks or employes, for the next ensuing quarter; and in any case any transfer of moneys shall have been theretofore made to said fee funds, the funds from which they were taken shall be fully reimbursed, and thereafter, or where no such previous transfer has been made, such funds shall be taken from the said fee funds and placed to the credit of the general fund of the county. Such transfers may be made upon the authority of this act alone, any law to the contrary notwithstanding; and from the action of the commissioners thereon an appeal may be taken to the common pleas court by a taxpayer of the county, which shall be heard and determined by said court or a judge thereof within twenty (20) days after being perfected."

The words "three years" as underscored in the above quoted amended section, were submitted by the amendment for the words "one year" in the original section 7.

Section 6 of the original salary act has not been amended, and provides as follows:

> "Each of the officers named herein shall at the end of each quarter, pay into the county treasury on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances and perquisites of whatever kind collected by his office during said quarter, for his official services, which moneys shall be kept in separate funds by the county treasury, and credited to the office from which the same has been returned."

Section 3 of the original act has never been amended and it provides that on November 20 of each year each county officer above mentioned 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 in his office for the following year, beginning January 1st after said November 20, and that within five days after such statement is filed the county commissioners must take up and consider the same, and fix an aggregate sum to be expended during the coming year beginning January 1st for the compensation of all such deputies, assistants, bookkeepers, clerks and other employes in and of the office where they are so employed.

Another provision of the act provides that the salary of the officer and the compensation paid to the deputies, clerks and other employes under him shall be paid out of the fees collected in the office, and kept in the separate funds as provided in section 6 quoted above.

By the plain language of section 7 as above quoted it is made the duty of the county commissioners to make certain transfers of funds. The first duty laid upon the commissioners by this section 7 is found in the first paragraph of the section, and that duty is that on the first Monday of April, July, October and January respectively, *whenever necessary, during three years after this 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 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. The purpose of this paragraph evidently was, and is, to enable each of these county officers to meet his pay-roll without drawing on his private funds, and was no doubt deemed necessary by the general assembly because of the difficulty and delays in collecting the fees due the office, and from the further fact that all the fees earned by any officer in office prior to the day the salary act took effect, January 1, 1907, belong to such officer, and not to the county. It was evident that under these conditions the fees which would be collected from week to week or month to month, after January 1, 1907, might not be sufficient to pay the salary of the officer and those working under him, and it was apparently thought by the general assembly that at least a year would elapse from the time the act took effect, January 1, 1907, until the currently earned fees would be coming into the treasury in sufficient amounts to pay the current salaries, because in the original section 7 the commissioners were to make the transfers spoken of in this first paragraph of section 7 whenever necessary during one year after January 1, 1907, "but not thereafter." It appearing to the general assembly in 1908 that the collections of currently

earned fees were still in some instances insufficient to pay current salaries, section 7 was amended April 27, 1908, and the time during which these particular transfers mentioned in this first paragraph of section 7 could be made was extended to three years after the original act took effect, namely: to January 1, 1910. Under this first paragraph of said section 7, therefore, it was the duty of county commissioners on the first Monday of this present month of October, or within a reasonable time thereafter—the designation of this particular date being merely directory—to enter an order on their journal transferring to any county officer's fee fund sufficient funds to make good any deficiency in such fee fund as to the commissioners may seem likely to arise during this current ensuing quarter after the first Monday of October, 1909, and the funds so transferred may be transferred from *any other fund or funds of the county* at the *discretion* of the county commissioners. By the language of the act as quoted the three years' limitation will expire with December 31, 1909, so that these particular transfers cannot be made after the expiration of this year.

Section 7 forbids any such transfers as those just mentioned to be made for the county recorder, or any person appointed or employed by him. The third paragraph of said section 7 lays another duty upon the county commissioners with respect to the transfer of funds, and this transfer is of a different nature or character from those specified in the first paragraph. From this third paragraph of section 7, and from the other provisions of the act, it is plain that the general assembly intended that these county officers and those working under them should be paid from the fees coming into the treasury from the respective offices; that is, the sheriff, for instance, and those working under him, must be paid from the fees coming into the treasury from the office of sheriff, if this can be done, and this intention is clear as to the other county offices named in the act.

By this third paragraph of section 7 it is the duty of the county commissioners at the end of any quarter as fixed herein; that is, on or just before the first Monday of January, April, July and October, respectively, to transfer from each county officer's fee fund any amount therein derived from that office in excess of what is considered necessary to pay the salary and compensation of such officer and those employed under him, for the next ensuing quarter, and these excess funds must be transferred in the following manner:

First: In case any transfer of moneys shall have been theretofore made to said fee fund, the funds from which the transfer was made shall be fully reimbursed from such excess, and

Second: If there is still an excess remaining, or if no such transfer has been made, then such excess shall be taken from such fee fund and placed to the credit of the general fund of the county.

Section 7 now under consideration must, of course, be read and construed in connection with sections 8 and 11 of the original act, neither of which has been amended.

Section 11 provides that out of the fees earned by any one of these county officials he must first pay the salaries and compensations of his deputies, assistants, clerks, bookkeepers and other employes under him, and then after deducting from his fee fund the compensation of all such deputies, assistants, etc., such county officer shall then receive from such fee fund the annual salary fixed for him by section 12 of this act.

Section 8 above mentioned provides that if any probate judge, sheriff, clerk of the common pleas court, or recorder shall not have received the full amount of his salary as provided under said section 12, for any year of his term, but shall during such year have earned fees payable to his office in an amount equal

to the aggregate of his salary and the compensation paid for that year to his deputies and other employes, he shall be entitled to receive from the proper fee fund on the allowance of the commissioners, an amount equal to the difference between his salary for such year paid to him during his incumbency of the office and the salary for that year as fixed by said section 12, whenever that amount is collected by any successor to him in office from the unpaid fees earned during said year; or, if the entire difference be not collected, then he shall receive such part of such difference as may be so collected.

I am, therefore, of the opinion,

First: That the transfer of funds to the fee fund of any officer mentioned in the beginning of this opinion, and which is authorized under the first paragraph of said section 7, to be made from *any fund or funds of the county in the discretion of the commissioners* must be made during this present current quarter, beginning on the second Monday of this present month of October, and ending with the last day of December, 1909; that such transfer must be made in such sums only as may be necessary to make good any deficiency in the officer's fee fund which the commissioners may find likely to arise during this ensuing quarter of October, November and December, and that no other or further transfer can be made to meet similar deficiencies, if any shall occur, after the expiration of this present year, 1909.

Second: It will hereafter be the duty of the county commissioners at the end of each quarter; that is, on or just before the second Monday of each January, April, July and October, to transfer from each county officer's fee fund any amount therein derived from his office in excess of what is considered necessary to pay the salary and compensation of such officer and those employed under him for the next ensuing quarter, and that this transfer must be made as to each officer in the following manner and order:

One: In case any transfer of moneys shall have been theretofore made to said fee fund, the funds from which the transfer was made shall be fully reimbursed from such excess, and

Two: The balance of such excess, or where no such previous transfer has been made then the whole of such excess, shall be taken from said fee fund and placed to the credit of the general fund of the county.

The last sentence of section 7 as quoted above provides that the transfers provided for in the section may be made upon the authority of this salary act alone, any law to the contrary notwithstanding.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY DEPOSITARY ACT—IRREGULAR BIDS—WHAT ARE.

Bank may not bid for definite amount of county fund under depositary act, but must offer to become depositaries for maximum amount allowed by law, to-wit. four hundred thousand dollars.

October 7, 1909.

HON. J. A. SCHAEFFER, *Prosecuting Attorney. Mount Vernon, Ohio.*

DEAR SIR:—Your communication is received in which you advise that the county commissioners of Knox county, Ohio, desiring to deposit the approxi-

mate $200,000 balance of county money, in accordance with the provisions of the county depository act, Revised Statutes, section 1136-1 et seq., as amended 99th Ohio Laws, page 465, gave due published notice for proposals from banks within the county as per the terms of the act. You advise that as result of such publication the following proposals have been filed with and opened by the county commissioners:

Savings Bank..... $75,000 at 3% on daily balances.
First National..... 20,000 at 3% on daily balances.
Guar. Savings..... 25,000 at 2½% on daily balances.
Knox Natl. All of the $200,000 and up to $400,000.
(All or none) at $2.80 on all daily balances.

You then inquire what should be the action of the commissioners in considering these proposals.

In reply, I beg to say that sections 1, 2, 8 and 9 of the act are particularly applicable to the questions presented to your commissioners in consideration of these bids or proposals.

The first question to be determined is, may a bank under the terms of this act bid for a definite amount of county money at a certain rate per cent., or, on the contrary, bid for an amount of the county's money, the maximum of which shall be less than four hundred thousand dollars.

Section 1 of the act provides that the bank designated by the commissioners as a depositary shall at no time receive such deposits in excess of four hundred thousand dollars, and section 2 provides that each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted. The act also authorizes the commissioners to require additional security as the amount of the deposit may become larger.

These facts considered in connection with the provision of section 8 of the act, wherein it is provided that the treasurer, upon written notice from the commissioners, stating that a depositary or depositaries have been selected in pursuance of the provisions of the act, shall deposit

> "all money in his possession except such as may be necessary to meet current demands, in such bank, banks or trust companies, and thereafter he shall, before noon of each business day, deposit in such bank or banks or trust companies all money received by him the preceding business day, except as hereinbefore provided, and such money shall be payable only on the check of the treasurer, etc."

lead to the conclusion that the bank making such proposal to become a county depositary should not specify for a deposit of a certain amount, and less than four hundred thousand dollars. By the plain provision of the act a time or inactive deposit was not contemplated; but on the contrary, the provision is made for a change in deposit to be increased by the daily deposits in the bank made by the treasurer of the county, and to be decreased at such times as the county treasurer, to meet current expenses, may check against said account.

This conclusion is fully sustained by the provision contained in section 9 of the act wherein it is provided that the depositary or depositaries shall, on the first business day of each month, notify the auditor in writing of the amount of deposits made by the treasurer for the preceding month, and the balance on deposit to the credit of the county at that time.

The provision in section 1 of the act that no bank or trust company shall receive as such depositary an amount of the county's money to exceed four

hundred thousand dollars, makes necessary the provision in the act that other banks having bid the next highest rate of interest to the first may be designated as depositaries when the county deposit is in excess of four hundred thousand dollars.

Applying these principles and conclusions to the bids under consideration by your commissioners, we find that the first three bids as set out in your inquiry are irregular, not meeting the requirements of the act, and may, therefore, be disregarded. According to your advisement, the last mentioned bank bidding for the county's money, namely, the Knox National, does comply with the provisions of the act. It offers to become the county depositary and pay a rate of interest in excess of two per cent., as required by the act, on all daily balances in an amount up to four hundred thousand dollars, and to furnish satisfactory security therefor.

From these considerations I conclude and advise that your commissioners would properly disregard the bids of the Savings Bank, the First National Bank, the Guaranty Savings, and shall designate the Knox National Bank as the county depositary for Knox county.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—EMPLOYMENT OF SURVEYOR TO MAKE TAX MAP—COMPENSATION.

County commissioners may not make compensation to surveyor for making tax maps in lieu of all other compensation allowed by law.

October 14, 1909.

HON. DON. J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I am in receipt of your communication of recent date in which you submit the following for my opinion:

> "The board of county commissioners of Huron county have, by resolution, appointed the county surveyor of Huron county as tax map draughtsman, and said resolution attempts to make an allowance to the surveyor, in lieu of all other compensation, by way of fee or otherwise, and the effect of such resolution will be that the county surveyor shall receive a salary fixed by the county commissioners."

I beg to call your attention to section 2789*a* of the Revised Statutes, which is as follows:

> "The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as may be necessary, not exceeding four, to provide for making, correcting and keeping up to date a complete set of tax maps of the county, and which maps shall show all original lots and parcels of land, and, also, all divisions, subdivisions and allotments of the same, together with the name of the owner of each original lot or parcel and of each division, subdivision or lot in the same; also, 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 equalization and the auditor, and shall be kept in the office of the county auditor."

Section 2789*b* fixes the compensation of such draughtsmen and assistants. From the above sections the board of county commissioners of your county derive their authority to employ and fix the compensation of the county surveyor for making, correcting and keeping up-to-date a complete set of tax maps of the county, and the above section only authorizes the board of county commissioners to appoint and fix the salary of the county surveyor for a particular purpose, to-wit: making, correcting and keeping up-to-date a set of tax maps.

Section 1165-1 is as follows:

"The county surveyor in each county of the state of Ohio shall receive in full compensation for his services a salary, not to exceed $3,000 per annum, and the judges of the court of common pleas of each county are hereby constituted a commission to fix the amount of compensation of the surveyor of the county. Such annual compensation shall be so fixed once each year. When such commission shall deem it necessary the county surveyor may appoint deputies, not exceeding three (3) in number, as prescribed in section 1166 R. S. of Ohio, at a salary for one, not exceeding two-thirds of the salary of the surveyor; and for the other two, not exceeding for each, one-half of the salary of the surveyor per annum; and shall appoint such other assistants as are provided in this act."

This section provides the manner for fixing the compensation of a county surveyor, and the board of county commissioners have no authority to increase or decrease, or in any manner regulate the compensation of a surveyor, as this is left to the judges of the court of common pleas of each county.

I am, therefore, of the opinion that the resolution passed by your board of county commissioners attempting to make an allowance to the county surveyor for making, correcting and keeping up-to-date a complete set of tax maps, in lieu of all other compensation, is an attempt to usurp the authority conferred upon the judges of the court of common pleas in section 1166-1, and the board of county commissioners is without authority to pass such a resolution.

Yours very truly,

U. G. DENMAN,
Attorney General.

JURORS—PETIT AND GRAND—AMOUNT OF MILEAGE ALLOWED.

Jurors, both petit and grand, may only be allowed mileage to county seat and not returning.

October 15, 1909.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following question:

"May jurors, both petit and grand, in criminal cases, be allowed as mileage five cents per mile to the place of holding court and returning therefrom?"

A reply to your inquiry requires a construction of section 5182 Revised Statutes, which reads as follows:

"Each grand and petit juror drawn from the jury box pursuant to law, and each juror selected by the court, pursuant to section five thousand one hundred and seventy-three of this chapter, and each talesman shall be allowed two dollars per day, for each day he serves, and if not a talesman, five cents per mile from his place of residence to the county seat, and such compensation shall be certified by the clerk of the court, and paid by the county treasurer on the warrant of the county auditor."

The pertinent question herein is, is the language of this section, to-wit, "five cents per mile from his place of residence to the county seat" to be construed as meaning five cents per mile for each mile traveled in going both to and from the county seat, or five cents per mile for each mile the county seat is distant from the juror's place of residence. The legislature does not say five cents per mile from his place of residence to the county seat and return, but the language is limited to "to the county seat." However, the legislative intent herein need not be a matter of conjecture.

Section 1391 Revised Statutes provides for the payment of mileage to witnesses as follows:

"All witnesses in civil causes shall be allowed the following fees: For each day's attendance at court of common pleas or other court of record, to be paid by the party at whose instance he is summoned (on demand), and taxed in the bill of costs, one dollar, and five cents per mile from his place of residence to the place of holding said court, *and returning therefrom;* * * *."

Comparing the language of these two sections relating to mileage, I reach the conclusion that when the legislature intended either a juror or witness to have mileage for each mile traveled going to and from the county seat, it expressly said it. This conclusion is strengthened by the provision that "each grand and petit juror drawn from the jury box, pursuant to law, and each juror selected by the court, pursuant to section 5173," shall receive *two dollars* per day and mileage of "five cents per mile from his place of residence to the county seat," while in section 1301 a witness in the court of record receives but "*one dollar*, and five cents per mile from his place of residence to the place of holding said court and returning therefrom."

My conclusion, and therefore, my opinion, is that under said section 5182 each grand and petit juror is entitled to mileage of five cents per mile for each mile traveled to the county seat, and is not entitled to mileage returning therefrom.

Yours very truly,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS—NUMBER OF SIGNATURES REQUIRED FOR IMPROVEMENT—MAY REMONSTRATE AFTER SIGNING.

Persons who sign petition for road improvement are not precluded from signing a remonstrative petition thereafter.

A petition for improved road signed by majority of land owners both within and without municipality is sufficient.

October 19, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiries:

1. A petition signed by a majority of the resident land owners for the improvement of a certain road in this county was filed with the auditor. On the 5th day of October, 1909, the following action was taken by the unanimous vote of all the county commissioners: "In the matter of the Fulton No. 1 road improvement. The petition for the above styled improvement was presented to the board this day. We find that there is a majority on said road asking for said improvement. The following date was fixed for viewing said road—October 14, 1909."

Thereafter, on the 9th day of October, 1909, eleven of those who had signed the petition filed a paper asking that their names be taken off and that they be counted as remonstrators against said improvement, thereby reducing the signers of the petition to less than a majority.

Query: Should these eleven be counted as against the improvement?

2. On the 9th day of September, 1909, a petition was filed for the improvement of a road beginning at a point within the limits of the corporation of Mt. Gilead, running west to the corporation line; thence west over a road connecting the corporations of Mt. Gilead and Edison. By counting all the land owners both within and without the corporation a majority have signed, but a majority of those outside of the corporation have not signed.

Query: Under section 4670-14, as amended 99 O. L. 489, is this petition sufficient to warrant the commissioners in proceeding with the improvement?

In reply, I beg to say the answer to both the questions submitted is determined by the provisions of section 4670-14 R. S., as amended 99 O. L. 489. Said section is in part as follows:

"That when a majority of the resident owners of any real estate lying and being within one mile of any public road, shall present a petition to the county commissioners of any county in the state of Ohio, asking for the grading and improving of any such road, the board of county commissioners shall go upon the line of such road, described in such petition, and if in the opinion of the county commissioners the public utility requires such road to be graded and improved, the commissioners shall determine whether the improvement shall be constructed of stone, gravel, or brick, any or all, and they shall determine what part or parts of such road improvement shall be of stone, gravel, or brick, any or all, and shall enter their determination on their journal,

* * * provided that it shall not be necessary in determining such majority petition to count any such land owners residing within any municipality."

While this section makes no reference to remonstrators, yet I assume that land owners have the right to remonstrate the same as if the improvement was under the two-mile assessment law, and in that instance land owners who have signed the petition may thereafter sign a remonstrance and will be counted as against the improvement, provided, however, that if the petition fails the accrued costs shall be paid by such petitioners who have thereafter remonstrated.

In my judgment, a land owner who signs a petition under section 4670-14 is not precluded from signing a remonstrance thereafter, provided such remonstrance is filed before the commissioners determine that the improvement shall be made.

The provision in section 4670-14 "that it shall not be necessary in determining such majority petitioners to count any such resident land owners residing within any municipality" seems to invest the county commissioners with discretion as to whether or not land owners within a municipality shall or shall not be counted in determining whether or not a majority of the resident land owners have signed the petition.

I am therefore of the opinion that a petition for an improvement signed by a majority of all the land owners both within and without the municipality is sufficient to warrant the commissioners to take action thereon.

Yours very truly,

U. G. DENMAN,
Attorney General.

COLLATERAL INHERITANCE TAX LAWS—EXEMPTION OF PUBLIC INSTITUTIONS OF LEARNING OF FOREIGN RESIDENCE.

Bequest by citizen of Ohio to public institution of learning existing under corporation laws of other state is subject to Ohio collateral inheritance tax law, and same is true if such institution is subordinate to college incorporated in Ohio.

October 22, 1909.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiries:

1. Is a bequest made by a citizen of Ohio to certain public institutions of learning, existing under corporate laws of other states, subject to the Ohio collateral inheritance tax law?

2. If the first inquiry is answered in the affirmative, would the statute still be applicable to an institution of learning existing under the corporate laws of another state, which, since the execution of the will making the bequest, and before the death of the testator became a part of an institution of learning located in Ohio, and which is subordinate to a college incorporated in Ohio?

In reply to your first inquiry, I beg to say that the part of the Ohio collateral inheritance tax law under sectional number 2731-1 Revised Statutes, applicable to your inquiry, is as follows:

"That all property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift made or intended to (take) effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, * * * shall be liable to a tax of five per centum of its value, above the sum of two hundred dollars, seventy-five per centum of such tax to be for the use of the state, and twenty-five per centum for the use of the county wherein the same is collected; and all administrators, executors and trustees and any such grantee under a conveyance made during the grantor's life shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property, and be and remain a lien until paid.

"But the provisions of this act shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of this state, or embraced in any bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of any municipal corporation or other political subdivision of said state for exclusively public purposes, or public institutions of learning, or to or for the use of any institution in said state for purposes of purely public charity or other exclusively public purposes; and the property, or interests in property so transmitted or embraced in any such devise, bequest, transfer or conveyance is hereby declared to be exempt from all inheritance and other taxes, while used exclusively for any of said purposes."

If these various institutions of learning, legatees under the will referred to in your inquiry, were Ohio corporations they would, by the terms of this section be exempt from the payment of the above taxes. The question then remains, does the language of this section, to-wit, "or public institutions of learning," exempt such institutions existing under Ohio corporation laws and apply to such institutions existing under the corporation laws of states other than Ohio?

In the matter of the estate of Prime, deceased, 136 N. Y. 347, the circuit court of appeals of New York, in discussing the liability of a foreign corporation to a state legacy tax statute, used the following pertinent language:

"The claim that the test of liability of foreign corporations to a legacy tax is the liability of a domestic corporation of the same character to the payment of such tax, and that if one is exempt the other is exempt also, has, we think, no foundation."

Continuing, the court said:

"It is the policy of society to encourage benevolence and charity, but it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large."

In the case of Matter v. Balleis, 144 N. Y. 132, the court expressly approved the decision in the Prime case, and added:

> "A statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state over which it has the power of visitation and control. The legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control."

The supreme court of the United States in the case of U. S. v. Perkins, 163 U. S. 625, referred to the Prime case with approval.

The above decisions have not, since their deliverance been distinguished. In addition to these foreign decisions our own supreme court in the case of Humphrey v. State, 70 O. S. 84, when considering this same section of the Revised Statutes and the language thereof, to-wit:

> "or to or for the use of any institution in said state for purposes of purely public charity or other exclusively public purposes,"

and after citing many authorities, including the above mentioned, stated the following conclusion:

> "From the foregoing cases, we see that the exemptions of charitable institutions, would relate only to domestic institutions of that class, even if the words 'in the state' had been omitted from the statute."

This conclusion seems to be reached as a result of the consideration that inasmuch as the state of Ohio has no power of visitation and control over corporations existing under the laws of other states, that the legislature intended, and I think properly, that Ohio corporations only should be the beneficiary of the exemption clause of this act.

I therefore answer your first inquiry in the affirmative.

Your second inquiry presents a more intricate question still. You state in that inquiry that the institution of learning, while still a foreign corporation, is now a part of a theological school located in Ohio, but the corporation which is directly the beneficiary of the legacies has a home outside of the state of Ohio. It has selected its abiding place in a state other than Ohio, and it is an elementary principle that a corporation being the mere creation of local law can have no legal existence beyond the sovereignty where created. It must dwell in the place of its creation, and cannot migrate to another sovereignty. In my opinion, the fact that this foreign corporation is now interested in and may be part owner of an Ohio institution of learning, does not change the application of the Ohio statute to a foreign corporation. The recognition of its existence in this state and the enforcement of its contracts made herein, depend purely upon the comity of states. The state of Ohio may exclude the foreign corporation entirely. These and many other matters relating to foreign corporations doing business in Ohio rest wholly in the discretion of this state.

Sufficient is said, I believe, to justify the conclusion that the liability of the corporation referred to in your second inquiry for the inheritance tax is not different than that of the corporation referred to in your first inquiry.

Yours very truly,

U. G. DENMAN,
Attorney General.

QUADRENNIAL APPRAISEMENT ACT—COST OF PRINTING AND COMPENSATION OF ASSESSORS TO COME WITHIN LIMITATION—WORK MUST BE COMPLETED BY JULY 15TH.

The limitation of one-twentieth of one per cent. of the total tax duplicate must meet all expenses of quadrennial appraisement act and all work must be completed from January 15 to July 1.

October 25, 1909.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your communication is received in which you submit for an opinion thereon inquiries relating to the provisions of an act "to provide for the election of assessors of real property" (100 O. L., page 81), as follows:

> "1. Is the cost of printing the pamphlets required in section 8 to be included in the limitation of one-twentieth of one per cent. of the tax duplicate, as provided in section 7?
>
> "2. Are the assessors compelled to complete their assessment within such a time that their compensation at the rate fixed by the commissioners, together with all the other expenses of the assessment shall not exceed the limitation in section 7?
>
> "3. If the assessing board at the minimum salary provided in section 6, with minimum clerk hire, and other allowances, are unable to complete the assessment within the limitation of section 7, are they to cease work, or work without pay? And if neither, how are they to be paid?"

For answer to your first inquiry I call your attention to the provision contained in section 7 of the act, as follows:

> 'Provided, however, that the total cost of any quadrennial appraisement in any city shall not exceed the sum of one-twentieth of one per cent. of the total tax duplicate of said city, for the year in which said quadrennial appraisement is made."

In my opinion, this language is sufficiently clear to leave no doubt but that the sum of money obtained from the above assessment was intended by the legislature to meet any and all expense incident to the quadrennial appraisement, and would, therefore, include the expense incurred in printing and mailing the pamphlets provided for in section 8 of the act.

My reply to your first inquiry has answered your second. Section 7 of the act above quoted controls as to the expense that may be incurred in making the decennial appraisement, and there is no provision of law whereby the appraisers may draw additional compensation.

Answering your third inquiry I call your attention to section 5 of the act, which provides that:

> "The assessors elected under this act shall begin the valuation of the real property in their respective districts on or before the fifteenth day of January after their election, and *shall complete the same on or before July first following.*"

This language can mean nothing else than that the assessors are to draw no per diem for services after July first, and the provision is explicit that the

work shall be completed by this date. It is quite clear from the provision in this act that the legislature thought from January 15th to July 1st would be adequate time for the work to be done, and this maximum time limit was evidently fixed in order to facilitate the work so that the expense incident thereto would not become a burden upon the taxpayers of the municipality. It is possible, perhaps probable, that there will be instances where the assessors working earnestly and in good faith will not be able to complete the work by July 1st with the same thoroughness and care that they might desire to. The act fixes the time when the work shall be completed, and unless the legislature to convene in January, 1910, is of the opinion that the fund provided for in section 7 of this act is not adequate, and provides for more, there will be no provision of law whereby a greater sum of money may be obtained for the quadrennial appraisement of real estate than is provided for in section 7 of this act, and as quoted in reply to your first inquiry. Very truly yours,

U. G. DENMAN,
Attorney General.

ARMORIES—LEASING OF BY ADJUTANT GENERAL.

November 1, 1909.

HON. JAMES R. STILLINGS, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 18th, in which you submit the following question for an opinion thereon:

> "Under section 3085 has the adjutant general of the state authority to lease rooms or buildings for armory purposes, for local military organizations, or has this authority been superseded by the provisions of section 2 of an act passed March 12, 1909, pages 25, 26, 27 and 28, 100th Ohio Laws?"

I have already advised the adjutant general that until the "state armory fund" provided under authority of section 4 of the act of March 15, 1909, 100 O. L. 25-27, comes into existence, which will not be until January 1, 1910, all existing laws relating to the leasing, government and inspection of armories remain in force.

I am, therefore, of the opinion that any proceedings may be had under section 3085 R. S., at least until after the act of 1909 goes into effect. It is my judgment also that the enactment of the latter law does not impose any limitation upon the time for which leases entered into prior to January 1, 1910, under section 3085 may be made to run. Yours very truly,

U. G. DENMAN,
Attorney General.

DITCHES AND DRAINS—SUPPLEMENTAL PETITION TO CHANGE FILED AFTER CONTRACT LET—AUTHORITY OF COMMISSIONERS TO GRANT SECOND PETITION.

November 2, 1909.

HON. H. B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts, together with a request for an opinion thereon:

> On the 25th day of November, 1907, a petition for the construction of an open ditch was filed with the county auditor under section 4451 of

the Revised Statutes. The auditor fixed a day for a view of the same, and upon a view by the commissioners said ditch was granted, surveys made, assessments determined, construction of ditch sold, contractor qualified, and the work of construction of said ditch according to the profile, plans and specifications is in progress at the present time; proceedings in all respects according to law.

On the 27th day of September, 1909, one of the petitioners of the aforesaid ditch filed a new petition with the county auditor, asking that a certain portion of the aforesaid ditch be tiled. The ditch asked to be tiled is over the exact line that the commissioners have granted an open ditch and this open ditch is in process of construction. Upon this new petition being filed the auditor fixed a day for the review and the commissioners have viewed the same, but have made no report.

Query: Under this statement of facts have the county commissioners jurisdiction to grant the prayer of the second petition for tiling? If so, what is to be done with the contract for the construction of the open ditch?

In reply, I beg to say that chapter 1, title 6 of the Revised Statutes, of which section 5541 is a part, contains no provision whereby the county commissioners may make changes, alterations or additions to a proposed county ditch after all of the preliminary requirements have been complied with and the proposed improvement properly "sold" and in process of construction. The county commissioners are authorized under section 4448 R. S., to change either terminus of a proposed ditch before its "final location," thereby inferring that no changes may be made after the ditch is finally located.

In the case submitted the contractor certainly has the right to rely upon his contract with the county commissioners. While, as above stated, there is no express authority granted the county commissioners to vary the profile, plans and specifications after the contract is let, yet if the "public health, convenience or welfare" will be benefitted by such changes, it might be possible for the county commissioners to enter into a supplementary contract with the contractor embodying the changes desired, the payment for which, of course, would have to be regarded as extra. Such a course, however, would likely require a new apportionment on the land benefitted by such changes. In any event, the consent of the contractor is necessary before any change can be made.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY SURVEYOR'S ASSISTANTS' SALARY MUST BE PAID OUT OF COUNTY FUND AND NOT BY FEES.

November 2, 1909.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—In your letter of October 25, receipt of which is acknowledged, you submit the following question:

Under the provisions of the surveyors' law, as it appears at page 247 of volume 98 of the Ohio Laws, is it legal for the surveyor to appoint

a deputy surveyor and not certify him for any salary from the county, but allow his compensation to consist of fees received for services to the citizens generally of the county?

Section 1183, as amended 98 O. L. 247, provides unequivocally that:

> "The county surveyor shall appoint such assistants * * * as he shall deem necessary * * * and shall fix their compensation, * * * and the compensation after being so fixed shall be paid to such assistants * * * out of the treasury upon the warrant of the county auditor out of the general fund."

The effect of this provision is, in my judgment, to prohibit the compensation of the county surveyor's assistants in any manner otherwise than by salary payable out of the county fund.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—PURCHASE OF FILING CASES—MUST ADVERTISE.

If filing cases to be purchased by commissioners when installed constitute permanent accession to realty contract for purchase must be governed by public building act.

November 2, 1909.

HON. JOHN F. MAHER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 23rd, in which you request my opinion as to the following question:

> "Has the board of county commissioners the right to contract for the purchase of steel filing cases and steel office equipment for an office in the court house, the contract price for the same being $2,800, without first advertising the same according to law?"

The sections referred to by you prescribe the duties of the commissioners with respect to the making of "any addition or alteration" to any public building. The precise question involved in your general inquiry is with regard to the meaning of the phrase "addition or alteration of any public building."

Various considerations have suggested themselves to me in attempting to define the meaning of this phrase. In the first place it might be contended that the addition or alteration in order to be governed by the provisions of the public building act must needs be to or of a *building* rather than in connection with some office or room in the building. Thus a heating system or elevator service designed to accommodate the occupants of the entire structure would be an addition to the building as distinguished from one to a single office. It is my conclusion, however, that this distinction is immaterial, and that the existence of an addition to or alteration in a county building is not to be determined by reference to the location thereof or the generality of its purpose. Whenever any question has been raised in this state so far as I have been able to ascertain,

respecting the meaning of the terms now under discussion, the test suggested by the court has been that existing in common law with regard to the distinction between fixtures and personal property.

> "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 sections just quoted, as not being a building, an addition or an alteration of a building * * *. The suggestion is not warranted 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 is included and referred to in the section as, 'an addition to a building.'"
>
> State ex rel. v Commissioners, 17 C. C. 370-375.
>
> "It seems * * * clear to us that the improvement in question (installation of elevator) 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."
>
> State ex rel. v. Commissioners, 18 C. C. 275-277.

Hon. J. A. Kohler, attorney general, in construing the first portion of the public building act which relates to state buildings and institutions, and contains provisions similar to those of the sections cited by you, makes the following remarks:

> "I draw the line between such things as pertain to the erection of the building and which constitute, when finished, the real estate or is connected therewith, and not when it is simply personal property, and used merely for furnishing and equipping the institution with articles of necessary use.
>
> "To hold that the section applies to the thousand and one things that must be provided to furnish such an institution would, it seems to me, be absurd. It would be very difficult to do in any case. You must furnish crockery, furniture, household goods of every description, and to make complete plans and get the benefit of competition upon it would be a hard thing to do.
>
> "It is very likely that some of the things you specify, such as ranges, laundry machinery and other things, would become part of the real estate, depending upon what it is and how connected; * * * but in respect to what is movable property, used simply in furnishing the building, I do not believe that this section applies."
>
> Opinions of Attorneys General, vol. 3, page 1000.

I feel satisfied that the distinction suggested in the decisions above quoted is the one which should be applied to the case presented by you. The rule in this respect is fully and accurately stated in the leading case of Teaff v. Hewitt, 1 O. S. 511, the entire syllabus and opinion of which is worthy of consideration in the present connection, and therefore I shall not select any particular passage for quotation.

It is my opinion, therefore, that if the steel office equipment referred to by you, but not exactly described, will, when installed, constitute a permanent accession to the realty, the contract for its purchase is governed by the public building act; but if, on the other hand, the property to be purchased when devoted to its intended use, is movable furniture and would remain personal property, then the sections cited by you do not apply.

Yours very truly,

U. G. DENMAN,
Attorney General.

BLIND RELIEF—NO LIMITATION AS TO AGE.

November 2, 1909.

HON. EMMETT C. SAYLES, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Under the act for the relief of worthy blind, 99 O. L. 56, a needy blind person is construed to mean "any person who by reason of loss of eyesight is unable to provide himself with the necessaries of life, and who has not sufficient means of his own to enable him to maintain himself." This law as originally enacted authorized the payment of relief "to all male blind persons over the age of twenty-one and all female blind persons over the age of eighteen years."
>
> Query: Does the provision of the amended act, as above quoted, authorize the payment of relief to blind persons who are under the age of majority?

In reply, I beg to say the law as it now stands contains no limitation as to the age of applicants for such relief, and it is my judgment that all persons who meet the other requirements are entitled to the relief provided, irrespective of their age.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—TOWNSHIP—APPOINTEE SERVES FOR UNEXPIRED TERM.

November 3, 1909.

HON. WILLIAM MAFFETT, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—In your letter of November 1st, receipt whereof is acknowledged, you request my opinion as to the tenure of office of a person appointed to fill a vacancy in a township board of education.

Section 3981 R. S. provides in part that:

> "Vacancies in any board of education * * * shall be filled by the board of education * * * for the unexpired term."

This section relates to a particular subject-matter and supplants the general provision of section 11 R. S., which is to the effect that a vacancy occurring more than thirty days before the next proper election for the office in which

the vacancy occurs shall be filled by appointment until a successor is elected at such election and may lawfully qualify. (See State ex rel. v. McGregor, 44 O. S. 628.)

It is my opinion, therefore, that the appointee in the case mentioned by you will serve out the unexpired term of his predecessor.

Yours very truly,

U. G. DENMAN,
Attorney General.

DITCHES—TOWNSHIP DITCH SUPERVISOR—AUTHORITY TO OPEN SURFACE DITCH OVER TILED DITCH.

November 3, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 25th, in which you request my opinion as to the power of a ditch supervisor to open up a surface ditch over a tiled ditch in case the original specifications of the tiled ditch do not provide expressly for a surface ditch.

I have previously held that the township ditch supervisor may exercise no power respecting tiled ditches unless in his judgment the tile is insufficient to provide the necessary drainage. I assume that in the case you submit a supervisor has reached the conclusion that the tiled ditch is not adequate to provide the necessary drainage. If this is the case the supervisor has undoubted authority, in my judgment, to open up a surface ditch over the tiled ditch, regardless of whether or not the tile was originally covered so as to be level with the surface of the adjacent land. The plain provisions of section 11 of the act found in 99 O. L. 237-239 leads to no other conclusion.

Yours very truly,

U. G. DENMAN,
Attorney General.

TAX MAPS—COMMISSIONERS' AUTHORITY TO EMPLOY SURVEYOR—COMPENSATION—IMPROVED ROADS—COMMISSIONERS' AUTHORITY TO CONTRACT WITH TOWNSHIP.

Commisioners may contract with surveyor for making tax maps and provide compensation for such work, and surveyor may also retain such compensation in addition to five dollars provided by statute.

Commissioners may contract with township trustees for furnishing material and labor for repairs of improved roads, but township should furnish portion of labor by requiring road labor to be performed.

November 3, 1909.

HON. WILLIAM DUNIPACE, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of several communications from you submitting two questions for my opinion, viz:

"1. The county commissioners have contracted with the county surveyor for the making of tax maps at a compensation of $50 per

month. May the surveyor retain the amount paid under such contract for his own personal use, in addition to receiving $5 per day for ordinary services under section 1183 R. S.?

"2. The county commissioners of Wood county have made an arrangement with the trustees of several of the townships therein for the repair of improved roads whereby the commissioners are to furnish the stone and machinery, and the trustees are to hire the labor. Is such an arrangement lawful, or must the commissioners supervise the entire work of road repair including the employment of laborers?"

Answering your first question I beg to state that I have heretofore held that the county commissioners may appoint the county surveyor to make tax maps under section 2789*a*, and fix his compensation *for such services* under section 2879*b* R. S. The surveyor is entitled to retain such compensation, and the commissioner in fixing the same may not make it a substitute for the surveyor's regular compensation of five dollars per day to which he is entitled for the *per diem* work in the regular course of his official employment under section 1183 R. S.

In respect to the second question submitted by you I assume that the same relates to the *repair* of improved roads, and not to the original improvement thereof. A sharp distinction is made in our statutes between these two proceedings. Certain of the sections cited in your letters relate to the matter of original improvement as distinguished from repair.

The entire subject of repair of improved roads is governed by the provisions of chapter 10 of title 7, part 2, Revised Statutes of Ohio, being section 4876 et seq. thereof. This chapter may, for our consideration, be divided into two parts:

First, the group of sections relating to repair of improved roads in certain counties enumerated, and which do not apply to Wood county, and

Second. A number of related general statutes, beginning with section 4896 Revised Statutes, which is as follows:

"In every other county the county commissioners are hereby constituted a board of turnpike directors, in which the management and control of all such roads therein shall be exclusively vested."

The constitutionality of the special laws relating to repairs in certain counties, and also of the turnpike directory laws above referred to, has been seriously questioned, and is involved in a case now pending in the supreme court of this state. Inasmuch, however, as the turnpike directory law has not been declared unconstitutional, and as a decision to that effect would leave all of the counties of the state without any machinery for the ordinary repair of improved roads, it is my judgment that the existing statutes should be followed until such time as the same shall have been repealed or declared unconstitutional.

Section 4899 Revised Statutes, being a portion of the turnpike director law, provides in part as follows:

"They (the directors, i. e., the county commissioners) may contract for labor and material either at public sale or private contract as will best subserve the interests of the different roads, and shall certify to the county auditor on or before the first Monday in June each year, the amount of money necessary for the purpose of keeping such roads, including the bridges and culverts thereon, in good repair * * *."

The word "such" as employed in section 4896 and 4899 refers to improved roads as enumerated in section 4876, which, in substance, mentions all possible kinds of improved roads.

Section 4901 provides for a general levy for the repair of improved roads. Section 4902 Revised Statutes is as follows:

> "In townships where such roads are located * * * the township trustees shall * * * designate and set off such portion of the two days' labor as they may deem just and equitable to be performed under the control of the board of directors or their superintendents, subject to all the rules and regulations of law for its performance under the direction of road supervisors."

Under the foregoing section I am of the opinion that the county commissioners acting as turnpike directors may make all contracts relating to the employment of the teams and labor for repairs on improved roads, but the trustees of each township may and should furnish a portion, at least, of such labor by requiring road labor to be performed upon such improved roads under section 4902 Revised Statutes.

In this connection it is interesting to note that the act of April 6, 1888, as amended 95 O. L., 917, which relates to the repair and maintenance of the Western Reserve and Maumee state road, a portion of which passes through Wood county, provides that:

> "The county commissioners of the respective counties of Wood and Sandusky are hereby authorized and required to * * * keep in repair so much of said road as lies within their respective counties in the manner prescribed by sections 4876-4896 et seq. of the Revised Statutes of Ohio, providing for the repair of improved roads."

I have examined the three citations to the 99 O. L. submitted by you in connection with this question. I find that the act printed on page 204 thereof relates exclusively to the purchase of machinery and tools by the county commissioners, and to the employment of labor to operate the same, referring obviously to road rollers and such other apparatus as requires the employment of skilled labor. This section authorizes the commissioners to use such machinery in the repair of roads, but it is not material in the present connection. 99 O. L. 353 and 360 are acts amendatory of and supplementary to certain sections of chapter 11 of title 7, and both relate to extraordinary repairs and not the ordinary maintenance and repair of improved roads.

Yours very truly,
U. G. DENMAN,
Attorney General.

JOINT WORKHOUSE—CONTROL OF UNDER PAINE LAW.

Director of public safety will act for city and county commissioners for county in matters relating to joint workhouses. All matters involving an expenditure of over five hundred dollars must be submitted to board of control.

November 5, 1909.

HON. WILLIAM F. ORR, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 1st, in which you request my opinion regarding the following question:

"The city of Xenia and Greene county, jointly own a workhouse under the provisions of section 1536-377 Bates' Statutes. Under the provisions of the act, the control of the institution is vested in a 'joint board of public service of the city.' Since at the time the act was passed, there were three members of the board of public service, a workhouse board was thus established on which both the county and city had an equal representation of three members.

"What authorities will control the joint workhouse when the Paine law, so called, 99 O. L. 562, becomes effective, after January 1, 1910?"

Section 1536-377, old section 2107, provides in part as follows:

"The commissioners of any county may unite with any city or village located in such county in the acquirement or erection, management and maintenance of a workhouse for the joint use of such county and city, or village, upon such terms as such county and city, or village, may agree; * * * that the workhouse shall be managed and controlled by a joint board composed of the county commissioners and the board of public service of the city or the board of trustees of public affairs in villages; the said joint board shall have all the powers and duties in the management and control and maintenance of such workhouse as are conferred upon the board of public service in cities, and in addition thereto such board shall also have the right to construct sewers for said workhouse * * * to lease or purchase suitable property and buildings * * *."

The Paine law, 99 O. L. 562, abolishes the board of public service, and provides instead that "in every city there shall be a department of public service which shall be administered by a director of public service." (Section 138.)

The same act also abolishes the previously existing powers of the board of public service respecting the control and regulation of the municipal workhouse, and provides instead that:

"The director of public safety shall * * * manage and make all contracts in reference to * * * workhouses * * * *now or hereafter established and maintained.* And in the control and supervision of such institutions, said director shall be governed so far as consistent with this act by the provisions of sections 2050, etc." (enumerating a number of sections, some of which are similar to section 2107, but omitting mention of that section).

The general scheme of the Paine law as evidenced by the particular provisions quoted is clearly inconsistent to some degree at least with section 2107. The law last enacted, however, does not specifically repeal or amend the previously existing section. The effect of the former upon the latter is, therefore, an implied one, and under the general principles of statutory construction applicable to implied amendments and repeals, the old section is to be preserved as far as not necessarily repugnant to the new one.

Lewis' Sutherland Statutory Construction, section 247.

Analyzing section 2107 we find that it provides first for the construction of a workhouse under joint supervision, and second for the management, control and maintenance thereof when the same has once been constructed. The first of

these two purposes of the statute has been already achieved in the case submitted by you, and, as you state, there is accordingly a workhouse owned jointly by Greene county and the city of Xenia. I do not find that there is anything in the Paine law that terminates the power of a city to participate in such joint ownership.

The second of the two general objects above outlined is, under the section as originally enacted, to be attained through a joint board to consist of the members of the board of public service, and those of the board of county commissioners. While the statute does not refer to the members I am satisfied that this is its meaning ,and that the joint board created by it is one in which there are six votes, a majority of which, viz., four, would be sufficient to determine the action of the board upon any question coming before it for decision.

Mecham on Public Officers, section 572 et seq.

As has been pointed out, the Paine law not only abolishes the board of public service, but it expressly vests in the director of public safety management and control of existing workhouses on the part of a city. The Paine law, therefore, is irreconcilably inconsistent with section 2107, with regard to that provision of the latter section which creates the joint board. Section 2107 is, therefore, in my opinion, repealed or amended in part by the Paine law, but in part only. There can no longer be any joint board as defined by the old section, but there may and will continue to be joint control and ownership of the workhouse by the county and the city.

The question then becomes one as to the machinery for the management and control of the joint workhouse. Under the sections above quoted the director of public safety has sole authority to act for the city respecting its workhouse, and the county commissioners under their joint powers would act for the county. A concurrence of these two authorities, the director on the one hand and the commissioners as a body on the other, will be necessary upon every question regarding the management and control of the joint workhouse. In other words, there might be said to be "a joint board" consisting of *two* members, the commissioners having one vote and the director one; but this would be an erroneous view to take of the situation. There will be in fact no joint board whatever, but the proper city authorities and the proper county authorities will have to agree on all questions.

In this connection the director of public safety will, of course, be subject in assenting to contracts respecting the workhouse and involving the expenditure of more than five hundred dollars on the part of the city, to the approval of the board of control, under section 154-*a* of the Paine law. Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—PATTERSON GRADUATE—TRANSPORTATION OF

November 8, 1909.

HON. FRANK Z. BALLINGER, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—Your letter of November 5th, in which you ask my opinion upon the following statement of facts and questions, is received:

> "The board of education of Liberty township has suspended the school in one of its subdistricts, and is transporting the pupils living

in that subdistrict to the school in Raymond, another subdistrict in the township. The board maintains a township high school at Raymond. A. and B., two pupils living in the suspended subdistrict, have passed the requirements of the board (the Patterson test) and are attending the high school at Raymond. The wagons provided by the board for the transportaton of the pupils pass by the door of the pupils A. and B. and have room in them to accommodate them.

"1. Can the board and the drivers who have contracted to haul the pupils be compelled to haul the two pupils A. and B. to Raymond in their wagons, under the provisions of section 3922 Revised Statutes as amended 99 O. L. 203?

"2. Can the board of education, under the circumstances above stated, provide transportation to the two high school pupils A. and B.?"

In reply thereto I beg leave to submit the following opinion.

Section 3922 of the Revised Statutes, as amended in 99 O. L. 203, reads in part as follows:

"The board of education of any township school district is authorized to suspend the schools in any or all subdistricts in the township district, *but upon such suspension the board must provide for the conveyance of the pupils residing in such subdstrict or subdistricts 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; * * *."

Under the above quoted section your question in its final analysis is whether the word "pupils" as used in section 3922 as amended, includes Boxwell-Patterson graduates.

Section 4013 of the Revised Statutes defines what shall be a "pupil" who is entitled to attend the schools free within the meaning of the school code, 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, * * *."

Under the above quoted section 4013, I am of the opinion that if scholars A. and B., who reside in a suspended subdistrict of such Liberty township school district, are within the ages specified in section 4013, they are "pupils" within the meaning of section 3922 of the Revised Statutes as amended in 99 Ohio Laws 203, and that, therefore, your first question above must be answered in the affirmative. Such an answer to your first question makes it unnecessary to answer your second.

Yours very truly,

U. G. DENMAN,
Attorney General.

PATTERSON GRADUATE—BOARD OF EDUCATION NOT LIABLE FOR TUITION AFTER AGE OF TWENTY-ONE.

November 8, 1909.

HON. J. C. WILLIAMSON, *Prosecuting Attorney, Mount Gilead, Ohio.*

DEAR SIR:—Your letter of October 27th, in which you request my opinion on the following statement of facts in question, is received.

> "Lawrence Barry, who was 21 years of age on the 5th day of September, 1907, is a resident of Harmony township, this county; he is the holder of a Patterson diploma and has been attending school at the Cardington high school; Harmony township has no contract with any high school, and that is the high school nearest to where Barry lives.
>
> "Barry attended school at Cardington for one school year after he was 21 for which the board of education of Harmony township paid; he also attended school there the next, for which the board of education of Harmony township refuses to pay. The diploma was granted in 1905.
>
> "Under this statement of facts, who is liable for the tuition of Barry for the second year of school after he became of age?"

In reply thereto, I beg leave to submit the following opinion:

Section 4029-3 of the Revised Statutes as amended in 100 Ohio Laws, 74, provides for the payment of "the tuition of *pupils* holding diplomas and residing in township and subdistricts in which no high school is maintained * * *," and your question resolves itself down to the inquiry whether the word "pupils" as used in section 4029-3 as amended would include Lawrence Barry who, in the year concerning which you inquire, had attained the age of twenty-one.

Section 4013 of the Revised Statutes, which is the general section providing for free attendance in the public schools, reads in part 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 * * *."

It will be seen from the above quoted section that the policy of the school code is to furnish free schooling only to such pupils as are between the ages specified therein, to-wit: six and twenty-one years of age.

In my opinion, section 4013 defines the meaning of the term "pupil" as used in section 4029-3 as amended in 100 Ohio Laws, and I am, therefore, of the opinion that the board of education of Harmony township is not liable for the tuition of Lawrence Barry for the second year of school after he became of age.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS MAY NOT CHANGE ALLOWANCE MADE AND ACCEPTED BY PRINTERS FOR PUBLISHING REPORTS.

November 9, 1909.

HON. JAMES A. DOUGLAS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

"Recently the bureau of inspection and supervision of public offices and the attorney general have sent out instructions to the effect that printers are entitled to $1.50 per square for publishing the commissioners' annual report.

"Query: Can printers legally be allowed by the commissioners upon bills presented therefor an additional fifty cents per square for the years 1903 to 1908, inclusive, the commissioners having allowed and they having accepted $1.00 per square for said years?"

In reply I beg to say, that under section 4366 Revised Statutes, publishers may receive for advertisements "containing tabular or rule work, an additional sum of fifty per cent." in addition to the regular rates. Payment for the same, however, is made on the allowance of the county commissioners as provided in section 894 of the Revised Statutes. If, in the instances cited in your inquiry, the county commissioners have allowed, and the printers have voluntarily accepted, a fee of $1.00 per square for publishing the commissioners' report, then in my judgment, no valid claim may now be made for the additional fifty per cent. If said printers felt that they were aggrieved by the action of the commissioners in allowing only one dollar per square, they could have appeal from decision of the county commissioners under the provisions of section 896. Such an appeal, however, is required to be made within fifteen days after the county commissioners have taken action, but where the allowance made by the county commissioners has been voluntarily accepted and no appeal taken, it is my judgment that the printers are bound by said allowance and acceptance, and that no further allowance may be made. Very truly yours,

U. G. DENMAN,
Attorney General.

COURT HOUSE BUILDING COMMISSION—COUNTY AUDITOR TO SERVE AS SECRETARY—PRESIDENT BOARD OF COUNTY COMMISSIONERS TO ACT AS PRESIDENT OF COMMISSION.

November 11, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

1st. Is it necessary or proper for a court house building commission, appointed under the provisions of sec. 794-1 and succeeding sections to appoint a secretary to the commission, or is it the duty of the county auditor to serve as secretary to said commission?

2nd. Will the president of the board of county commissioners be the president of the building commission or may said commission select a member other than the president of the board of commissioners to act as president of said building commission?

In reply I beg to say, first, section 794-5 R. S., which is section 5 of the building commission act, is as follows:

"Full and accurate records of all proceedings of said building commission shall be kept by the county auditor upon the journal of the county commissioners, and he shall carefully preserve in his office all plans, drawings, representations, bills of material and specifications

of work and estimates of costs in detail and in the aggregate pertaining to said court house or other county building."

Under the provisions of this section it is clearly intended that the county auditor is to be the clerk or secretary to the building commission.

Second. I find no provision in the building commission act providing for any organization of said commission, but inasmuch as all the records of the proceedings are to be kept upon the journal of the county commissioners, I am inclined to the view that the commissioners appointed under the provisions of said act are auxiliary to the county commissioners and that the president of the board of county commissioners will act as the president of the building commission.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION OF TOWNSHIP SCHOOL DISTRICTS—TRANSPORTATION OF PUPILS WHO LIVE TWO TO THREE MILES FROM SCHOOLHOUSE.

November 11, 1909.

HON. WILLIAM F. ORR, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your letter of November 1st, in which you request my opinion upon the following question, is received:

> Has a board of education of a township school district a right to provide for the transportation of pupils who live from two to three miles from the schoolhouse in the district in which they live and where they attend school; the district where such transportation is to be furnished not being a special district (as in section 3934 R. S.) and the pupils not being residents of a subdistrict in which the school has been suspended as provided for in section 3922 R. S. O., as amended in 99 O. L. 202?

In reply thereto, I beg leave to submit the following opinion:

Section 3987 of the Revised Statutes confers the general powers which are possessed by all school boards. This section would, in my opinion, be broad enough to authorize a school board to provide for conveyance in the case as set forth in your question, were it not for the fact that the legislature has, in sections 3934 and 3922 of the Revised Statutes specifically given the power to boards of education in the cases therein set forth. Under such a condition of the law, it must be inferred that the intention of the legislature was to confine the power of boards of education in providing for such transportation to the cases specifically provided in such sections.

I am, therefore, of the opinion that a board of education of a township school district has no right to provide for the transportation of pupils who live from two to three miles from the schoolhouse in the district in which they live and in which they attend school, except where the district, in which the pupils for whom transportation is to be furnished live, in a special district or a subdistrict in which the school has been suspended.

Yours very truly,

U. G. DENMAN,
Attorney General.

PROSECUTING ATTORNEY—ALLOWANCE FOR STENOGRAPHIC HIRE.

November 11, 1909.

HON. J. W. SMITH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The judge of the common pleas court of Putnam county has recently made an allowance of $200 to the prosecutor's office under the provisions of section 1271 Revised Statutes for stenographer hire.
>
> Query. May any part of said $200 be used to compensate a stenographer whose services were rendered during the current year, but prior to the making of the allowance by the common pleas court?

In reply, I beg to say the allowance authorized by section 1271 is for the entire year and, in my judgment, it is not material whether the services were performed before or after the allowance is made, provided such services were performed during the year for which the allowance is made.

Yours very truly,

U. G. DENMAN,
Attorney General.

FOREIGN SHERIFFS' COSTS—DUTY OF CLERK OF COURTS RELATIVE TO.

November 11, 1909.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Before the county officers' salary law went into effect the sheriff and the clerk of courts would personally guarantee the foreign sheriff's costs on all foreign executions for the recovery of costs due said sheriff and clerk for the reason that such costs when collected belonged personally to said sheriff and clerk.
>
> The county officers' salary law provides that all costs heretofore belonging to the sheriff and the clerk shall be paid into the county treasury for the benefit of the county and credited to their respective fee funds. The clerk of the court is still required, however, to collect all unpaid costs. If a party from whom the costs are due is a non-resident of the county and an execution for such costs is issued to the sheriff of the county in which the party resides, the clerk issuing the execution is required to endorse on said writ "costs on deposit" before the sheriff of the foreign county will serve the writ.
>
> In case the costs are not made upon the execution is the clerk personally liable for the costs due the foreign sheriff for his services under the writ of execution?

In reply I beg to say that I find no provision in the statutes requiring a clerk of the court to endorse upon a foreign writ of execution "costs on deposit," and it is my judgment that he is not required so to do, and that further, he

may not be held personally liable for any costs made upon such writs. The practice adhered to under the old law was a matter of comity among the officers of the various counties and was prompted solely by personal interests.

Yours very truly,

U. G. DENMAN,
Attorney General.

SECURITY FOR COSTS GIVEN UNDER SECTION 7136—WHEN RELEASED.

November 11, 1909.

HON. R. W. HORTON, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Section 7136 Revised Statutes gives magistrates in cases of misdemeanor the right to require complainant, or if he considers him irresponsible, some other person to acknowledge himself liable for costs in case the complaint is dismissed.
>
> Query. If security for costs is given as is provided in said section, and the defendant waives examination, is bound over to the court and the grand jury fails to indict, is the surety liable for the costs?

In reply, I beg to say that the surety for the costs as provided in section 7136 is only "bound for the costs in case the complaint be dismissed." It is my judgment, therefore, that where the complaint is not dismissed by the magistrate, and the defendant is bound over to the common pleas court and the proper transcript filed, the collection of the costs will have to be made through the common pleas court.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP TRUSTEE AND TOWNSHIP BOARD OF EDUCATION—JUSTICE OF PEACE AND TOWNSHIP CLERK—COMPATIBLE OFFICES.

November 16, 1909.

HON. F. R. HOGUE, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your letter of November 13th, receipt whereof is acknowledged, submits for my opinion thereon the following questions:

> "1. May the offices of township trustee and member of the township board of education be held by the same person?
>
> "2. May the offices of justice of the peace and township clerk be held by the same person?"

With respect to your first question I beg to state that I have carefully examined the statutes relating to the powers and duties of township trustees and members of township boards of education. I find therein no provision expressly prohibiting these offices being held by the same person, nor am I aware of any

statute to that effect. I do not find that any of the powers and duties imposed by law upon either of these offices are such as to place them in any contingency in an adversary relation. I conclude, therefore, that the offices are compatible and that they may be held by the same person.

Upon similar investigation I have reached the same conclusion with respect to the offices of justice of the peace and township clerk. It is true that section 1506 Revised Statutes requires the official bond of the justice of the peace to be filed with and recorded by the township clerk. The recording of the bond, however, is clearly a ministerial act, and I do not believe that the imposition of this duty upon the clerk will place him in such a relation with respect to the office of justice of the peace as would give rise to the incompatibility that is condemned by the common law. Section 581 Revised Statutes cited by you has been repealed.

Yours very truly,

U. G. DENMAN,
Attorney General.

QUADRENNIAL APPRAISEMENT ACT—VILLAGE ASSESSORS—NO METHOD PROVIDED FOR FILLING VACANCIES.

November 16, 1909.

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

DEAR SIR:—I have your letter of November 15th, in which you call attention to the fact that the quadrennial appraisement law, 100 O. L. 81, fails to provide specifically for the compensation of village assessors, or for the filling of vacancies in the office of village assessors, and request my opinion as to whether or not village assessors may receive compensation, and whether or not there is any method of filling such vacancies.

I have heretofore, on April 7, 1909, advised the bureau of inspection and supervision of public offices, as follows:

> "The quadrennial appraisement act does not authorize the county commissioners to fix the compensation of village assessors, and that it does not in its present form permit such assessors to be compensated in any manner. The general assembly at its next session will have an opportunity to amend the law so as to authorize such compensation to be be paid, if such a course is deemed advisable."

By a parity of reasoning there would seem to be no method provided for filling vacancies in the office of village assessor. The procedure outlined in section 3 of the act with respect to vacancies in the offices of township assessor and member of the city board of assessors, is clearly inapplicable to village assessors. There appears to be a plain defect in the law which will have to be remedied by appropriate legislation.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—VILLAGE—FAILURE TO ELECT MEMBERS.

A village board of education failing to elect members, who were elected in November, 1904, does not create vacancies, such members hold until successors elected and qualified.

November 17, 1909.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 15th, in which you request my opinion on the following question:

> "Lithopolis is an incorporated village in the county of Fairfield, Ohio, and under the school code passed April, 1904, section 3908 Revised Statutes of Ohio, O. L. vol. 97, page 341, are required to have a school board composed of five members to be elected as per above section. The terms of three members of the present board of said village will expire on the first Monday of January, 1910, and by inadvertence, carelessness or neglect no election for members to take the place of these members whose terms so expire, was held at the recent November election. The question, therefore, arises whether the old members will hold over until the next regular election, or whether it will become the duty of the county commissioners to appoint to fill the vacancy. I believe the statutes involved are sections 3908 to 3911 and 3969 Revised Statutes. There seems to be no decisions covering this question."

Replying thereto, I beg to state that section 3 of article 17 of the constitution of Ohio, being the so-called biennial election amendment, provides that:

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

This provision controls to the exclusion of section 3908, which contains similar provisions now probably, however, invalidated by section 2 of the constitutional amendment above referred to. The effect of said section 3 is to extend the terms of persons in office at the time of its adoption. This extension of terms, it will be noted, is indefinite, and confers upon the incumbent the right to serve until his successor shall be qualified. This right is

> "No less a part of his statutory term of office than is the fixed period itself; and while he is so serving, there can be no vacancy in the office, in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same."
>
> State ex rel. v. Wright, 56 O. S., 540-553.

The three members of the board of education of the village of Lithopolis referred to by you must have been elected in November, 1904, for original terms of four years each. They being in office on November 7, 1905, their original terms were indefinitely extended by section 3 of the amendment adopted on that date, which section is above quoted.

Upon the authority of the above cited case, which is but one of a number of similar decisions made by the supreme court of this state, I am of the opinion

that the failure to elect, at the late local election, successors to the three members of the village board of education of Lithopolis, above referred to, does not create vacancies in such offices which may, after the first Monday in January, 1909, or at any other time, be filled by the remaining members of the board under the general provisions of section 3981 Revised Statutes.

The only way vacancies may occur as to the places filled by the three members mentioned is for them to resign and their places may then be filled by the remaining members of the board.

Yours very truly,

U. G. DENMAN,
Attorney General.

QUADRENNIAL APPRAISEMENT ACT—TOTAL COST IN CITIES, TOWNSHIPS AND VILLAGES—ASSISTANTS OF TOWNSHIP ASSESSORS—COUNTY COMMISSIONERS.

Total cost of quadrennial appraisement in a city not to exceed one-twentieth of one per cent., as no other funds may be used.

No limitation on amount that may be expended in defraying costs in a township or village.

Township assessor with approval of county auditor may appoint assistants, but no compensation is provided.

County commissioners may not designate time for assessors to begin or finish work.

November 24, 1909.

HON. JOHN A. CLINE, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of a letter of November 22nd, addressed to me by Hon. Fielder Sanders, assistant prosecuting attorney, in which the following questions are submitted for my opinion:

1. What funds, if any, other than the one-twentieth of one per cent. of the total tax valuation of a city may be used to defray the total cost of the quadrennial appraisement in such city?
2. Is there any limitation of the amount which may be expended in defraying the total cost of a quadrennial appraisement of real property in a township or a village?
3. May township assessors employ assistants, and if so, by whom is the compensation of such assistants to be fixed?
4. May county commissioners in fixing the salaries of real property assessors under section 6 of the quadrennial appraisement law, designate the time when the assessors shall begin their work or fix the limit necessarily employed by them in the performance of their duties?

Answering your first question I beg to state that, in my opinion, the laws at present existing afford no relief in case the total cost of the quadrennial appraisement of real property in a city will necessarily exceed one-twentieth of one per cent. of the total tax duplicate of said city. If there be here a practical defect in the quadrennial appraisement law, it is one of several which the general assembly will have an opportunity to remedy at the coming session.

With respect to your second question, I beg to state that the quadrennial

appraisement act, 100 O. L. 81, does not fix any limitation of the amount which may be expended in townships and villages defraying the cost of the quadrennial appraisement.

Your third question invites consideration of section 2794 Revised Statutes, together with certain provisions of the quadrennial appraisement act. Section 2794 R. S. is in part as follows:

> "Any district, township or ward assessor who shall deem it necessary to enable him to complete within the time prescribed the listing and valuation of the property, moneys and credits of his * * * township, may with the approbation of the county auditor appoint some well qualified citizen of his county or township to act as an assistant * * * and each assistant so appointed shall * * * perform all the duties enjoined upon, vested in or imposed upon assessors by the provisions of law."

The foregoing section was section 49 of the act of April 5, 1859 (56 O. L. 175-198), which has never been amended nor repealed. It originally applied to and probably still does apply both to assessors of real property and assessors of personal property. By the act of 1859 real property was required to be appraised every sixth year (sec. 24, 56 O. L. 187, now section 2786 R. S.), and the work of appraisement was to be done by district assessors elected in districts fixed by the county commissioners. However, the township assessors elected annually and whose duties related primarily to the appraisement of personal property were by section 2 of the original act (56 O. L. 186) required to list all real property in the township that should have become subject to taxation since the last previous listing of property, and all new buildings, etc. The *township assessor*, therefore, corresponded to the personal property assessor of today, while the district assessor referred to in section 2794 was the assessor whose duties related primarily to the appraisement of real estate, and who was elected only in the years when real estate was to be appraised.

The general scheme of the act of 1859 has been followed in our statutes with certain modifications, particularly with regard to the intervals at which real property was to be appraised until the enactment of the quadrennial appraisement act (100 O. L. 81). Section 1 of that act provides with respect to township assessors that:

> "Such real estate assessors when so elected as aforesaid shall within and for their respective districts have all the power and perform all the duties heretofore conferred upon or required of the decennial assessors of real estate elected under any and all laws now in force pertaining to such assessors."

While section 10 of the same act provides in part that:

> "All of the provisions of the statutes of the state of Ohio are hereby repealed insofar as they conflict with or are inconsistent with the provisions of this act and not otherwise."

While in some cases the joint effect of these two provisions of the act of 1909 might be doubtful, I am of the opinion that the legislative intent evinced thereby is to preserve as to the township assessors all the powers formerly conferred by statute upon district assessors except insofar as the same may be inconsistent with the express provisions of the act.

I am accordingly of the opinion that township assessors of real property have the power with the approval of the county auditor to appoint assistants. The compensation of assistants was formerly fixed by section 2795 R. S. This section did not relate to the *powers and duties* of real estate assessors, and is accordingly not retained in force by section 1 of the act of 1909. On the contrary, it is quite inconsistent with section 6 of that act, which attempts to provide a complete scheme for compensating assessors of real property, and under the repealing clause above quoted must be regarded as no longer in force. Said section 6 does not provide any method for fixing the salaries of assistant township assessors. I am, therefore, of the opinion that unless the general assembly shall change the law in this respect at its next session, the assistant assessors, if appointed, will be entitled to no compensation.

With respect to your fourth question, I beg to state that, in my opinion, the power of the county commissioners under section 6 of the quadrennial appraisement act to

> "fix the salary of the township assessors and the boards of city assessors * * which * * shall not be less than $3.50 per day * * * for the time necessarily employed in the performance of their duties * *."

does not in any way amplify or limit the plain provision of section 5 of the act that

> "the assessors * * shall begin the valuation of the real property * * on or before the 15th day of January after their election and shall complete the same on or before July 1st following."

The commissioners may not, therefore, designate the time when the assessors shall begin their work nor fix the limit of the time necessary to be employed by the assessors in the performance of their duties.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

QUADRENNIAL APPRAISEMENT ACT—ABSTRACT OF OPINIONS RENDERED.

November 26, 1909.

HON. RICHARD H. SUTPHEN, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Replying to your letter of November 15th, in the matter of the joint application of sections 1076, 1296-13, 1296-16 and 1296-19 Revised Statutes of Ohio, I beg to state that I have heretofore rendered to different prosecuting attorneys and to the bureau of inspection and supervision on public offices, opinions of which the following is an abstract:

1. The annual determination of the amount necessary to be expended for deputies, assistants, etc., under section 1296-13 R. S., should include the compensation of the additional clerk or clerks, employment of whom is rendered necessary by the additional work connected with the appraisement of real estate. This determination would take place on November 20th of the year preceding the year in which the appraisement of real property is to take place.

2. When such determination is made as outlined above, the same will constitute an allowance under section 1076, and the additional amount may be equal to twenty-five per cent. of the annual allowance under section 1069 R. S.; the money so allowed constitutes a part of the fee fund of the auditor, payable into it under section 1296-16 and disbursed from it under section 1296-19 R. S., but only to clerks actually employed by the county auditor in the work of reappraisement.

3. If the county commissioners, in determining the amount to be expended, etc., under section 1296-13, fail to take into consideration the allowance under section 1076, this does not prevent them from acting under the latter section, and they may nevertheless allow to the county auditor a sum equal to twenty-five per cent. of the allowances under section 1069 R. S. If said allowance is not made as a part of the annual determination, however, it does not go into the fee fund as above outlined, but is to be regarded as in the general fund of the county, and is payable only to the clerks employed by the auditor in connection with the work of the appraisement during the year in which such reappraisement is made.

4. Whether the allowance under section 1076 is made at the time of fixing the total amount to be expended for clerk hire by the auditor, or at some other time, and whether it is to be regarded as a part of the fee fund or as a part of the general fund of the county, it may in any event be expended only for the compensation of clerks actually employed by the county auditor for the work or reappraisement and may not be used to increase the compensation of any of the clerks regularly employed by the auditor for the general business of his office. The recipients of such compensation may be members of the regular force of the auditor's office, and their regular salaries may be thus temporarily increased on account of *additional work performed by them, incident to reappraisement;* or the auditor may employ additional clerks to do such work, in which event the compensation of such additional clerks should be paid out of the allowance in question. The bureau of inspection and supervision of public offices has been advised by this department to this effect.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP REAL ESTATE ASSESSOR AND PERSONAL PROPERTY ASSESSOR—OFFICES COMPATIBLE.

November 26, 1909.

HON. F. M STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 13th, wherein you request my opinion upon the question whether the offices of township real estate assessor and personal property assessor may be held by the same person.

I have been able to find no statutory provision expressly prohibiting the two offices mentioned from being held by the same person. The duties of the offices are not so related as to render them in any way checks upon each other. It is true that generally speaking the duties of the two offices are discharged during the same period of the year. However, the real property assessors have from January 15th to July 1st to complete their work, while the assessors of personal property are required to do their work between the second Monday

in April and the third Monday in May. While the policy of electing one person to both of these offices is ill advised, and while in some thickly settled townships and populous villages it would undoubtedly result in a sacrifice of the public interests, yet I do not believe that it can be said, as a matter of law, that the two offices are incompatible. I am strengthened in this conclusion by the fact that the compensation payable to each of these officers is in the nature of per diem fees, indicating clearly that the officers are not absolutely required by law to be employed continuously in the discharge of their respective duties. It is my opinion therefore that a person elected as township real estate assessor and personal property assessor may qualify for both offices.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF THE PEACE WHO IS NOT CANDIDATE AND DEPUTY STATE SUPERVISOR OF ELECTION—OFFICES COMPATIBLE.

November 30, 1909.

HON. R. W. HORTON, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Replying to your letter of November 27th, I beg to state that neither section 18 nor section 2966-17 R. S., nor any other sections of the Revised Statutes expressly prohibit a justice of the peace, who is not a candidate for election, from holding the office of the clerk of the board of deputy state supervisors of elections. The two offices are not incompatible as measured by the common law test of compatibility.

It is my opinion, therefore, that a justice of the peace may serve as a clerk of the board of deputy state supervisors of elections.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

MAYOR—FAILURE TO TAKE OATH WITHIN TEN DAYS.

The mere fact that mayor for ten days after being notified of election fails to take oath of office and file bond does not forfeit office.

November 30, 1909.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—In your letter of November 24th, receipt whereof is acknowledged, you submit for my opinion the question whether a person elected to the office of mayor of a municipal corporation forfeits his office by failing to file his bond and take the oath of office within ten days after receiving notice of his election.

The following sections of the Revised Statutes are in point:

Section 224 M. C.:

"With respect to oaths of office and official bonds and the effect of the failure to take or give the same sections 1737, 1738, 1739, 1740,

1741, 1742 and 1743 of the Revised Statutes of Ohio where not inconsistent with this act shall be and remain in full force and effect * * *."

Section 1737 R. S.:

"Each officer of the corporation * * * before entering upon his official duties, shall take an oath * * *."

Section 1738 R. S.:

"The official appointees of all municipal officers shall * * * be subject to the approval of the mayor, except that the mayor's bond shall be approved by the council."

Section 1739 R. S.:

"Each officer * * * who may be required so to do, * * * shall give bond before entering on the duties of the office."

Section 1740 R. S.:

"The council may declare vacant the office of any person elected or appointed to an office who shall fail to take the oaths required in section seventeen hundred and thirty-seven or to give any bond required of him within ten days after he has been notified of his * * * election * * *."

Section 222 M. C.:

"All elective and municipal officers * * * shall be chosen on the first Tuesday after the first Monday in November in the odd numbered years, for a term of two years * * * and their respective terms of office shall commence on the first day of January next after their election."

In order to properly understand the application of section 1740 R. S., it is necessary to examine the related provisions as they existed at the time of the original enactment of this section.

Section 1709 R. S., now repealed, provided for the term of office of elective municipal officers, but did not designate the date at which such terms should begin.

Section 1723, also repealed, provided that the regular annual election for municipal officers should be held on the first Monday in April.

The supreme court has held in the case of Koons v. Bushnell (unreported) that in the absence of specific provisions of law the term of office of an elective officer begins on the day of his election. It will be easily understood, therefore, that under the old municipal code great inconvenience might result from failure of a mayor elected to qualify within ten days after being notified of his election, in as much as those ten days would be a part of the term for which he was elected. Such, however, is not the case under the present code, as the term of office of the mayor does not begin until nearly two months after his election.

Section 1740 R. S., should, therefore, in my opinion, be now construed in favor of the mayor-elect and against any possible forfeiture. Under its express provisions the power of council to declare vacant the office of an officer who fails to take the oath of office and file his bond within ten days after being notified of his election is discretionary, and it seems very clear that no vacancy exists *ipso facto* by virtue of such failure to qualify. In other words, section 1740 does not require that bonds shall be filed within ten days. The requirement as to the time in which bonds shall be filed is found in section 1739, viz.: "Before entering upon the duties of the office." Therefore, section 19 R. S., quoted in State ex rel. v. Commissioners, 61 O. S. 506-511, is not applicable to section 1740.

This is also clear from the opinion of the court in the case of Davies v. State ex rel., 30 C. C. 527-529, in which case the joint effect of sections 19 and 1518 R. S., was deemed to create a vacancy *ipso facto* upon failure to file bond. Section 1740 was quoted in the decision of the court, but not relied upon to support the conclusion reached.

It is my opinion, therefore, that the failure of the mayor-elect to take the oath of office and file his official bond within ten days after being notified of his election does not *ipso facto* create a vacancy in the office. Council must at least declare the office vacated, and I may state also that I have grave doubts as to the power of council to declare the office vacant before the beginning of the term for which the mayor is elected.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

RABIES CAUSED BY CAT BITE—COMMISSIONERS MAY PAY EXPENSES OF PERSON BITTEN.

December 1, 1909.

HON. CHAUNCEY L. NEWCOMER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "Under the provisions of section 4215*a*-1, 97 O. L. 68, may a person that is bitten by a cat or feline suffering from or afflicted with what is known as rabies, recover from the county the amount expended for medical or surgical treatment in the care resulting from said bite?"

In reply I beg to say section 4215*a*-1 as originally amended, 97 O. L. 63, only applied to persons who were injured or bitten by dogs or canines. This law, however, has been amended, 99 O. L., page 82, and now provides "that any person who shall be bitten or injured by a dog or canine, cat or feline, or other animal, etc."

It is, therefore, not material, as the law now stands, whether the injury is caused by a bite of a dog, cat or other animal.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OHIO NATIONAL GUARD—COUNTY MAY REIMBURSE MEMBER FOR UNIFORM.

December 1, 1909.

HON. POPE GREGG, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Your letter of November 27th is received enclosing a certificate made by the commanding officers of Company H, 67th Regt., O. N. G., as provided in section 64 of an act entitled, "An act to organize and discipline the militia of Ohio, and to repeal an act therein named," passed March 31, 1864, 61 O. L., 110. You inquire whether or not payment may now be made upon said certificate out of the county treasury of Fayette county.

In reply I beg to say section 64 of the act provides:

> "that any member of any volunteer company who has heretofore uniformed or shall hereafter uniform himself, as provided in this act, may, upon presenting to the county auditor a certificate from the commanding officer of his company to that fact, approved by the regimental or battalion commander, draw from the county treasury, upon the warrant of the auditor, *out of the military fund of the county*, the sum of five dollars; provided, the said fund shall be sufficient for that purpose after paying to companies the company fund and the cost of subsistence at the annual encampments in said county, as provided in this act;"

Under the above quoted provision it is prerequisite to the payment as provided in said certificate that there be an existing military fund, and as stated in your letter, there is now no existing law authorizing a county military fund.

I am, therefore, of the opinion that the county auditor is without authority of law to draw a voucher in satisfaction of said certificate to be paid out of the general fund of the county.

Yours very truly,

U. G. DENMAN,
Attorney General.

TUITION—RESIDENCE OF PUPIL—FULLY DISCUSSED.

December 2, 1909.

HON. R. H. PATCHIN, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Your letter of November 29th, in which you request my opinion on the following statement of facts and query is received:

> "A controversy has arisen between the board of education of the Chardon high school, which is rated as a first-class school in this state, and the board of education of Munson township. There is a young lady from the said Munson township who has passed the Patterson examination and is a student in the Chardon high school. During the school year she works for her board in Chardon while attending school and during the past summer she stayed at the same place during the summer months and received $2.00 a week as wages. This did not en-

tirely pay for her maintenance and she has received money and clothes from her parents at different times, both during the school year and during the vacation. The Munson board has refused to pay her tuition on the ground that she is a resident of Chardon and is self-supporting.

Query: Is the board of education of Munson township liable for the payment of tuition in this case to the board of education of Chardon, or must the board of education of Chardon allow this pupil to attend the Chardon high school free?"

In reply thereto I beg leave to submit the following opinion. Section 4013 of the Revised Statutes reads in part 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, * * *; provided that all youth of school age living apart from their parents and 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 above quoted section is the general statutory provision governing the subject of free schooling throughout the state of Ohio, but since the original enactment of this section the legislature has enacted section 4029-3 R. S. O., which was amended in 100 Ohio Laws, 74, to read in part as follows:

"The tuition of pupils holding diplomas and residing in township * * * 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, * * *."

By the enactment of the above section the legislature has, in my opinion, taken the classes of pupils therein enumerated out of the action of section 4013, and these two sections must be construed together.

It is a well settled principle of statutory construction that:

"The courts presume an intention in the legislature to be consistent in the making of laws; and also to have had a purpose in each enactment and all its provisions. Special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in a statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general provisions of the statute. In this way, without disregarding any of its provisions, effect is given to each and all the provisions of a statute."

State v. McGregor, 44 O. S. 631.

2 Lewis' Sutherland Statutory Construction (2d Edition) section 346.

Under the above authorities, therefore, I am of the opinion that section 4029-3 as amended in 100 Ohio Laws constitutes an exception to the general

rule contained in section 4013, and that when the facts of a case are such as to bring it within the purview of the latter section it will be governed by the provisions of that section.

I take it from the brief statement of facts above given that the pupil in question has a legal school residence in Munson township, and that the Chardon high school is the proper high school for her to attend, under the provisions of section 4029-3 R. S. O., as amended in 100 Ohio Laws 74. Such being the case I am of the opinion that the board of education of Munson township must pay her tuition to the board of education of Chardon. This holding, as you will see, is not in any way in conflict with the ruling in the note to section 4013 in the volume of the Ohio school laws as issued in 1906 by Commissioner Jones.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

SCHOOLS—SECTION 4022-1 CONSTRUED.

A child kept out of school for purpose of working upon farm of father within term "regular employment" as used in section 4022-1.

December 3, 1909.

HON. FRED H. WOLF, *Prosecuting Attorney, Wauseon Ohio.*

DEAR SIR:—Your communication is received in which you request an opinion from this department construing the phrase "engaged in some regular employment" as used in section 4022-1 Revised Statutes of Ohio, and if a boy over fourteen but under sixteen years of age being kept out of school to work on the farm for his father comes within this limitation. And also will a certificate from a superintendent of an orphans' home to a person taking from the home children under the age of sixteen, certifying that the children need not be sent to school to exceed five months in each year, be legal authority for keeping the children out of school except for a period of five months each year.

Section 4022-1 R. S., containing the phrase "engaged in some regular employment," provides that:

> "Every parent, guardian or other person having charge of any child between the ages of eight and fourteen years, shall 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 less than twenty-four weeks * * *, unless the child is excused from such attendance by the superintendent of the public schools * * *, 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 * * * to teach the branches named in this section * * *."

The section further provides that:

> "All children between the ages of fourteen and sixteen 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 be seen from the above quoted provisions that employment is no excuse for a child not attending school until it has attained the age of fourteen years, and that a child over fourteen and under sixteen must be kept in school by the legally responsible custodian of the child unless the child is engaged in "some regular employment." The authorities are silent in so far as judicially defining the words "regular employment" as used in this connection. In the absence of such definition, I think it within the meaning of this section to say that by "regular employment" is meant a regular, continuous and defined service and for which a specific remuneration is given. To illustrate, a boy under sixteen years of age employed to do a particular work in a factory, workshop or business office and for a fixed salary as is authorized in the act of February 28, 1908, 99 O. L., p. 30.

In my opinion, therefore, the work of a child upon the farm of its father, when kept out of school for that purpose, does not come within the meaning of the term "regular employment" as used in the section inquired about.

Applying this reasoning to your second inquiry I reach the conclusion that the person in your county who took the boy and girl from the orphans' home and refuses to send either of them to school to exceed five months in the year, relying upon the certificate from the superintendent of the home as his justification for the denial, is not acting within the provisions of this statute. The superintendent is without legal authority to furnish such certificate. The statute provides that "*all* children between the ages of fourteen and sixteen 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," and this applies to every parent, guardian or other person having charge of the children.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY OFFICERS' SALARY LAW—TIME OF TAKING EFFECT.

December 7, 1909.

HON. JOHN Q. LYNE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—I have your letter of December 4th, requesting my opinion upon the following question:

> "Did the clerk of courts remain under the fee system from April 11, 1906, to January 1, 1907, or was such clerk entitled to the salary, for that period, as provided in the act of March 22, 1906? Volume 98 Ohio Laws, at page 117, Revised Statutes, sec. (1296-25) section 15."

I presume the question in your mind relates to the effect of the amendment to the county officers' salary law found in 98 O. L. at the page mentioned by you. The second section of the amending act provides simply "that said section 15 is hereby repealed." No time being mentioned at which the amending act shall go into effect it, of course, took effect immediately upon its being filed in

the office of the secretary of state, to-wit, April 11, 1906. The act was passed March 22, 1906, the same day on which the general county officers' salary law (98 O. L. 89) was passed.

Section 24 of that act provides "that this act shall take effect January 1, 1907."

In my opinion there is no doubt but that any court would regard the amendatory section as correcting section 15, as set forth on page 94 of the 98 Ohio Laws, and that the intention of the legislature as expressed in the two acts was that the whole law, including the amended section, should take effect January 1, 1907. Accordingly, the clerk of courts did not become entitled to the salary prescribed in said amended section 15 until January 1, 1907.

Yours very truly,

U. G. DENMAN,
Attorney General.

INFIRMARY BUILDING—NECESSARY PROVISIONS OF CONTRACT FOR HEATING SYSTEM.

December 7, 1909.

HON. CARL W. LENZ, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 6th, requesting my opinion upon the following question:

> "In a contract for installing a heating system for a county infirmary building, is it necessary to include the provision as to time under section 793, Revised Statutes?"

In my opinion section 793, which provides that:

> "In contracts made under the provisions of *this chapter* there shall be a provision in regard to time, etc., * * *."

and that:

> "the said contractor * * * *shall forfeit and pay to the state* a sum to be fixed and determined in said contract * * *."

relates to the prior provisions of chapter 1. That is to say, the section governs the construction of public improvements on behalf of the state, and the state only as distinguished from the subdivisions of the state. In addition to the inference fairly deducible from the language of the section in its present form, this conclusion is supported by the fact that section 793 has never been amended since its original enactment, save as revised by the codification of 1880. It was originally section 13 of the act of April 3, 1873, 70 O. L. 102-107, which act related entirely to contracts made on behalf of the state. It is not, therefore, the duty of the county commissioners and other local authorities to include in contracts, such as that described by you, a provision for liquidated damages or a penalty for failure to complete the work within the time stipulated.

Yours very truly,

U. G. DENMAN,
Attorney General.

LOCAL OPTION LAW—COST OF PROSECUTION—MANNER OF PAYING.

December 9, 1909.

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

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> "The county local option law provides that in prosecutions thereunder in a mayor's court, the fines collected shall be turned into the municipal treasury. If the defendant proves insolvent or is discharged, may the costs of the prosecution be paid out of the county treasury under the allowance of the county commissioners, under sections 1306-7-8, or under any other sections which provide for the payment of costs wherein the state fails?"

In reply I beg to say, the fact that the fine assessed by the mayor is required to be paid into the municipal treasury in no wise affects the collection of the costs if the defendant proves insolvent. Allowances for lost costs will be made under the sections providing for the payment of lost costs to magistrates and mayors in state cases.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY TREASURER NOT AUTHORIZED TO APPOINT COLLECTORS FOR VARIOUS VILLAGES.

December 13, 1909.

HON. DON J. YOUNG, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your communication is received in which you request an opinion at the instance of your county treasurer as to the propriety of appointing tax collectors in the various villages within your county. You say this has been the custom for many years in your county, the treasurer giving these collectors the book of duplicate receipts and the taxes being paid by the property owners at the different villages.

In reply I beg to say the statutes contain no provision authorizing the county treasurer to appoint collectors in the various villages and townships in the county for the purpose of receiving taxes. There are two sections, however, to-wit, 1083*a* and 1083*b* R. S., applying specifically to the counties of Columbiana and Adams, whereby the county treasurer is required to have "an office open for receiving taxes in each township in the county," but neither of these sections, by its terms, is uniform in their operation throughout the state.

Section 1089 R. S., authorizes the county treasurer to appoint one or more deputies, and makes the treasurer liable and accountable for the proceedings and misconduct in office of such deputies. While section 1088 requires the treasurer to keep his office (which under section 1084 is to be at the seat of justice of his county) open for the collection of taxes from the time of the delivery of the duplicate to him until the 25th day of January, and from the

first day of April until the 20th day of July, yet in my judgment this section will not prevent the treasurer, either by himself or deputy, from collecting taxes at other localities within the county.

I am, therefore, of the opinion that the treasurer is not authorized to appoint collectors in the various villages in the county to collect the taxes, but that he may, if it suits his convenience, either by himself or deputy attend at any of the villages within the county for the purpose of collecting taxes.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—IMPROVEMENT OF LIVING STREAM.

Commissioners of any two counties may join in improvement of living stream by proper petition; power to assess.

December 17, 1909.

HON. T. T. COURTRIGHT, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 14th, of which the following is a partial copy:

> "A petition for the deepening, widening and straightening of the south fork of Licking creek, a living stream, was filed with the commissioners of Licking and Fairfield counties, acting as a joint board, the stream located partly in Licking and partly in Fairfield county. The joint board of commissioners of these counties have asked me for an opinion on the following questions, which I refer to you:
>
> "1. Have the county boards of commissioners of Fairfield and Licking counties a right to join in a proposed improvement of this character?
>
> "2. The south fork of Licking creek being a living stream, have the board of commissioners a right to improve, construct, deepen, widen, or straighten or convert the same into a county ditch? Have they, in fact, any jurisdiction whatever in this matter, the creek being a living stream?"

The two questions thus submitted to me, which may be considered together, involve the construction of sections 4447 et seq., Revised Statutes of Ohio. For the purpose of calling attention to certain provisions of these related statutes I deem it convenient to quote somewhat extensively from them.

Section 4447 R. S.:

> "The commissioners of any county * * * may, in the manner provided in this chapter, when the same is necessary to drain any * * * lands * * * and will be conducive to public health, convenience or welfare, cause to be located and constructed, straightened, widened, altered, deepened, * * * any ditch, drain or watercourse * * * or cause the channel of all or any part of any river, creek or run, without such county to be improved by straightening, widening, deepening or changing the same, or by removing from adjacent lands any timber, brush, trees or other substance liable to form obstruction thereto."

Section 4448 R. S.:

"The word 'ditch' as used in this chapter shall be held to include a drain or watercourse * * *. The words 'according to the benefits' used in this chapter * * * shall not be held to authorize any measurements for benefits conferred upon laws by nature nor the right of easement of the owners of superincumbent lands to pass the water therefrom through natural watercourses * * *."

Section 4450 R. S.:

"Application for *any such improvement* shall be made to the commissioners of the county * * *."

Section 4451 R. S.:

"The petition shall be filed with the county auditor and shall set forth the necessity and benefits of the improvement * * * . It shall also contain the names of all persons and corporations * * * who in the opinion of the petitioner * * * are in any way affected or benefited thereby * * *."

Section 4456 R. S.:

"The commissioners shall * * * direct the county surveyor * * * to make and return a schedule of all the lots and lands * * * that will be benefited, with an apportionment of the cost * * * according to the benefits which will result to each * * *."

Section 4479 R. S.:

"When * * * the costs and expenses * * * are ascertained, the commissioners shall * * * order that the assessments, as made by them, be placed on the duplicate accordingly against all the lots or lands."

Section 4488 R. S.:

"When a ditch or *improvement* is proposed, which will require a location in more than one county, application shall be made to the commissioners of each of said counties * * *."

As may be inferred from the above quoted provisions, the chapter beginning with section 4447 R. S., being chapter 1 of title 6, part 2, of the Revised Statutes of Ohio, purports to deal both with the location, construction and improvement of county ditches, or artificial drainage systems, and with the improvement of the channels of living streams or natural drainage systems. At first glance there would seem to be no distinction between these two powers.

That there is a real and substantial difference both between the actual process of locating a ditch and that of straightening a river channel, and between the jurisdiction and procedure in these respective instances, is pointed out by the supreme court in the case of Commissioners v. Harbine, 74 O. S.. 318. The syllabus in that case is as follows:

"Word 'watercourse' synonymous with word 'drain,' when—County commissioners without authority to convert stream into ditch, when.

"The word 'watercourse' 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."

In reaching this conclusion the court traces the history of section 4447 and establishes two propositions which are of assistance in determining questions similar to that submitted by you, viz:

1. The original act from which section 4447 was evolved by amendment, and the section itself in the code of 1880 related exclusively to ditches, drains and watercourses, and all the supplementary sections relating to the procedure of making the improvements mentioned in section 4447 had to do with such ditches, drains and watercourses. It was only by a recent amendment that the power to widen, deepen and straighten a river channel was conferred, by amendment to the section, upon the county commissioners.

2. The term "watercourse" as used in section 4447 R. S., is to be taken as synonymous with the word "drain," and, therefore, as referring to an artificial means of removing surface water and not a natural or living stream.

The decision in Commissioners v. Harbine should not, it seems to me, be regarded as having simply set aside and avoided the provision of section 4447, which confers power upon the commissioners to improve the channels of living streams. However, it is clear that, under this decision, the procedure for making such improvement must be different from that for making an ordinary ditch location or improvement. This difference is illustrated by the decision in the case of Mason v. Commissioners, 80 O. S. 151, in which section 4448 R. S., as above quoted, is invoked to show that the cost and damages incurred in improving the channel of a natural stream may not be assessed upon all the lands within its watershed which would, of course, be drained by the improved river. No lands within such watershed can be deemed to be "benefited" by improvement of the river channel, since the service of the river channel in carrying off the surface water from the lands within its watershed is an easement appertaining to all of said lands. Therefore, a much stricter rule must be enforced in determining benefited lands for the purpose of assessing the cost of straightening, widening or deepening a living stream than could be employed in proceedings for the location and construction of a county ditch.

I am not prepared to say what the practical result of the adoption of such a rule as that insisted upon in the two cases cited would be in a given case. It is possible that it would deprive the commissioners of the power to assess any considerable area of land for the purpose of raising funds to be expended in making the improvement. However, it is clear that a living stream may not be called a ditch, and a petition for a ditch to run along the channel of a living stream may not be entertained by the commissioners. If, however, the petition is for the improvement of a channel of a living stream, the commissioners may proceed upon the same, but they may not assess all lands drained by the river for the cost of the improvement upon the theory that they are benefited thereby; they are permitted to assess only such lands, if any, as actually have received a benefit apart from the easement which they have always enjoyed.

The power of a joint board of county commissioners to proceed under section 4488 is substantially identical in this respect with the power of a single board to proceed under sections 4447 et seq.

I therefore conclude that the commissioners of any two counties may join in a proposed improvement of the channel of a living stream provided the petition is for such an improvement, and does not attempt to call for the conversion of the stream into a county ditch; and that in case such an improvement is undertaken the cost thereof may be assessed only upon such lands within the watershed of the river as improved which receives, from the improvement, some benefit in addition to the natural easement of drainage.

Very truly yours,

U. G. DENMAN,
Attorney General.

TURNPIKE ROAD LAW UNCONSTITUTIONAL—NO ACTION UNDER SAME MAY BE TAKEN.

December 17, 1909.

HON. JAMES A. DOUGLAS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> The county commissioners of Pike county, acting as turnpike directors, have contracts outstanding and owe bills for work completed at the time the turnpike director law was held to be unconstitutional by the supreme court. Can these contracts now be completed and bills paid as provided under the turnpike director law?

In reply I beg to say that since the time the supreme court decided the turnpike director law to be unconstitutional, the county commissioners are without authority to take any action under said law.

It is my judgment, therefore, that the contracts mentioned in your communication may not be completed by the county commissioners acting as turnpike directors, but such commissioners will have to carry on the repair of the improved roads under the provisions of section 4919-1 Revised Statutes, as amended 99 O. L. 360.

Yours very truly,

U. G. DENMAN,
Attorney General.

NOTE REQUIRING CERTAIN AMOUNT PAID ANNUALLY LONG AS PAYEE LIVES SHOULD BE TAXED AS ANNUITY.

December 22, 1909.

HON. HUGH R. GILMORE, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Your communication is received in which you submit to this department for an opinion thereon the following inquiry:

> "What value should be placed on notes being listed for taxation when the notes contain a promise to pay in the aggregate the sum of fourteen hundred dollars annually so long as the payee thereof should

live, and when said notes are given in consideration of the payment of twenty-eight thousand dollars to an institution, and when the consideration for said notes is to go to the institution at the death of the payee in the note?"

Your inquiry presents the question as to whether or not the fourteen hundred dollars received annually from these notes is an annuity and, therefore, taxable as such.

Section 2739 Revised Statutes, provides that:

"In listing personal property which has been valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be * * * and annuities, or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

It is my opinion that within the meaning of this section of the Revised Statutes this annual income of fourteen hundred dollars is in the nature of an annuity, and should be listed for taxation at a value equal in amount to that which would be the worth of an annuity of fourteen hundred dollars for the life of the holder of the notes.

Very truly yours,

U. G. DENMAN,
Attorney General.

CRIMINAL PROCEDURE—BONDS IN CRIMINAL CASES—SECTIONS 7160*a* AND 7362 CONSTRUED.

December 23, 1909.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Your communication is received in which you request an interpretation of section 7160*a* R. S. (99 O. L., 356), as to whether or not the provisions therein contained relative to bonds in criminal cases are in conflict with the provisons of section 7362 R. S.

In reply I beg to say that section 7160*a* provides that in all cases in which indictments or presentments are returned into the court of common pleas, that said court shall require the accused to enter into a bond in such an amount as the court may fix, and further provides that when such bond is given it shall not be necessary to renew the same at the end of the term or at any other time, except upon motion made to the court or by the court upon its own motion. This section also provides that it shall not be necessary for the defendant to give any other bond pending any prosecution in error. The same power, however, is given to the higher court to increase or decrease the bond as is given to the common pleas court.

Section 7362 provides that in proceedings in error when sentence has been suspended, the judge who presided on the trial of the case may, in his discretion, admit the defendant to bail. This section, however, contains no provision that an additional bond shall be given and, in my judgment, the bond provided in section 7160*a* is all that is required. Of course the court may, as is provided in said section 7160*a*, increase or decrease the amount of the bond.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNTY COMMISSIONERS—AUTHORITY TO EMPLOY ATTORNEY TO ASSIST PROSECUTOR.

December 28, 1909.

HON. JAY S. PAISLEY, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> Have the county commissioners power to employ and pay an assistant to the prosecuting attorney in a civil suit against the commissioners, auditor and treasurer?

In reply I beg to say section 1274 Revised Statutes, provides that:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers. * * * He shall also perform all duties and services 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; 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 * * * shall be fixed."

The county commissioners may, therefore, under the above quoted provisions of said section, employ an attorney to assist the prosecuting attorney in the suit suggested by you, provided that the proper order is entered upon the journal fixing the compensation as is provided in said section.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—AUTHORITY TO PROVIDE AGAINST USE OF ACETYLENE LIGHT PLANT.

If acetylene light plant is dangerous per se council can provide against use by ordinance. but if not per se dangerous council can only regulate so as to avoid danger.

December 29, 1909.

HON. THOMAS MULCAHY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of December 18th, in which you submit the following for my opinion:

> An acetylene light plant in a hotel at Liberty Center recenty exploded, causing considerable damage to public and private property. Council of that village wish to pass an ordinance prohibiting the use of acetylene for illuminating purposes, and you desire the opinion of this department as to whether such an ordinance may be passed.

Section 7 of the Municipal Code, as amended in 99 O. L. 4, provides that every municipal corporation shall have general power "to prevent injury or annoyance from anything dangerous, offensive or unwholesome; to cause any nuisance to be abated, etc."

It is clear that the general assembly has thus authorized municipalities to exercise certain police powers, and that in determining the extent of the power and the validity of a proposed exercise thereof, recourse must be had to the principles of construction applicable to statutes pertaining to the police power. It is well established that the general assembly itself cannot authorize a municipal corporation, through its legislative department, to determine arbitrarily what things may be dangerous, offensive or unwholesome, or what may constitute, per se, a nuisance. The extent of the police power of the state thus delegated, for local purposes to the municipality, is limited by the requirements *of the public.* It is the public health, morals and safety to preserve and protect which the statute must be designed with reasonable appropriateness.

Still another limitation implicity attaches to the language of section 7*c*. Whether or not there is any distinction between injury and annoyance from things dangerous, offensive and unwholesome on the one hand, and the term "nuisance" as legally defined, it is clear to me that with respect to both of these subjects of regulation two classes are to be distinguished, viz:

1. Things which, in a municipality, constitute public annoyances, per se, and therefore, continually threaten injury and annoyance of a dangerous, offensive or unwholesome nature, and

2. Those pursuits and commodities which, while they in themselves and under all circumstances within a municipality, are not dangerous, offensive or unwholesome, and do not constitute public annoyances, yet when carried on or maintained in a certain way or in certain localities, may take upon themselves the characteristics which subject them to a lawful exercise of the power in question.

As to public annoyances, per se, I have no doubt but that council may prohibit them entirely. But a thing may be dangerous, offensive and unwholesome and threaten injury or annoyance because of its character when located and maintained within a municipal corporation, although the converse would be true with respect to the same thing when located or maintained outside of the limits thereof.

With respect to pursuits and commodities not, per se, public annoyances, an absolute and unqualified prohibition thereof, by ordinance under this section, would probably be condemned by the court as being unreasonable; that is, neither necessary nor appropriate for the protection of public safety. The line, in a word, is to be drawn between prohibition and regulation, and I think it may safely be said that, as to things not in themselves dangerous but which become dangerous only when handled or maintained in certain localities within a municipal corporation, the power of council, under this section, is limited to *regulation.*

I am not sufficiently conversant with the process by which acetylene light is produced to determine to which of the two classes above set out it belongs. I can only suggest the foregoing tests, by the application of which it may be determined whether council, in the prevention of accidents such as that described by you, may lawfully go to the length of prohibiting the use of acetylene gas for illuminating purposes, or whether the power of council is limited to prescribing such conditions and safeguards with respect to its use as shall prevent it from becoming a public menace.

Very truly yours,

U. G. DENMAN,

Attorney General.

QUADRENNIAL APPRAISEMENT ACT—CITY BOARD OF REAL ESTATE ASSESSORS, DUTIES OF—APPOINTMENT OF CLERK AND RENTING ROOM.

December 29, 1909.

HON. HARRY P. BLACK, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 14th, submitting the following questions with respect to the powers and duties of the city board of real estate assessors under the quadrennial appraisement law, 100 O. L. 81:

> "Have they the authority to appoint a clerk of the board, and fix his compensation to be paid by the county commissioners?
>
> "If so, can they appoint one of their number, and is he entitled to additional compensation?
>
> "What authority have they to rent room for their purposes, and require county to pay for same?"

Section 7 of the law in question provides in part as follows:

> "Any board of real estate assessors in any city * * * shall have power to employ a chief clerk and appoint such expert assistants, as such board may deem necessary, and fix their compensation, which shall be paid out of the county treasury upon the order of said board of assessors, and the warrant of the county auditor, and such incidental expenses as such board shall deem necessary shall be paid out of the county treasury in like manner; provided, however, that the total cost * * * in any city shall not exceed the sum of one-twentieth of one per cent. of the total tax duplicate of said city for the year in which said quadrennial appraisement is made."

In my opinion the phrase "and fix their compensation" refers to the compensation of the chief clerk as well as the expert assistants. Even if this were not the case the power to *employ* a chief clerk would, in the absence of other limitations, include the power to fix the compensation of the employe. The manner of the payment of such compensation so fixed will appear clearly from an examination of the foregoing provision.

I do not believe that a city board of assessors may lawfully employ one of their own number as clerk. Such an employment, if not rendered criminal by section 6976 R. S., is clearly contrary to the public policy which prohibits a member of an administrative board from being elected to a salaried position thereunder. I deem it unnecessary to cite authority on this point.

The authority to rent a room for the purposes of the board of assessors, is found in that portion of the above quoted section which authorizes them to incur "such incidental expenses as such board shall deem necessary."

Very truly yours,

U. G. DENMAN,
Attorney General.

INCORPORATED VILLAGE LOCATED WITHIN TOWNSHIP ENTITLED TO PARTICIPATE IN TOWNSHIP ELECTION.

December 30, 1909.

HON. CARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you request an opinion as to whether or not residents of an incorporated village may vote for township officers, and whether or not township officers may be chosen from the residents of an incorporated village.

In reply I beg to say section 1442 of the Revised Statutes is as follows:

> "Township officers shall be chosen for a term of two years and justices of the peace for a term of four years, *by the electors of each township*, on the first Tuesday after the first Monday in November in the odd numbered years, and their terms of office shall commence on the first day of January next after their election."

This section provides that township officers shall be chosen "by the electors of each township." Therefore, the question presented by your inquiry is whether or not the electors of a municipality, which municipality is located within the boundaries of a township are also electors of the township.

This question was decided by the supreme court of Ohio in the case of State ex rel. Halsey, et al., v. Ward, et al., 17 O. S. 543. In this case the court held that:

> "On the organization of a city of the second class divided into wards, the boundaries of which the city are not coterminous with those of any township, the territory within such city does not cease to be a part of the township or townships within the limits of which it is situated."

And that the electors and taxpayers of the municipality are entitled to vote in the choice of township trustees, clerk, treasurer, justices of the peace and constables.

Following this decision, the electors of an incorporated village located within a township, are entitled to participate in the election of township officers, and such officers may or may not be residents of the municipality.

Yours very truly,

U. G. DENMAN,
Attorney General.

SEARCH AND SEIZURE LAW—MANNER OF PAYING COSTS WHEN NO GOODS FOUND.

November 29, 1909.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your communication dated November 23d is received in which you submit the following inquiry:

> "When an affidavit is filed before the common pleas judge of the county for a search and seizure warrant under the search and seizure

law of this state, and an officer of the village is designated as the party to make the search, and the warrant is returned "no goods found," what provision of the statute is made for paying the cost of the search?"

In reply I beg to say the search and seizure law, 98 O. L. page 12, provides no compensation for the officer executing a search and seizure warrant, and inasmuch as lost costs in misdemeanor cases can only be allowed by county commissioners in cases where the defendant is insolvent, it is my judgment that the statutes contain no provision whereby the officer can be compensated in the instance cited in your inquiry.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To Various Municipal Officers)

PROSECUTIONS UNDER STATUTES IN MAYOR'S COURT—COSTS TO BE PAID BY COMMISSIONERS.

March 26th, 1909.

MR. ARTHUR BRYANT, *Attorney-at-Law, Franklin, Ohio.*

DEAR SIR:—I have your letter of March 23rd, inquiring whether the village of Franklin is authorized to pay the costs in a case where a prosecution is conducted before the mayor for a violation of the Rose county local option law. You state that the accused was convicted, sentenced to pay a fine and in default thereof to be sent to the workhouse at Xenia, but the fine was not paid and he was accordingly sent to that workhouse. That the mayor sent his bill of costs to the commissioners of Warren county, who refused to pay the same for the reason that the village would have received the fine if paid.

The payment of costs in such cases is regulated by section 6801*a* of the Revised Statutes, and provides that in prosecutions under the statutes, that is in state cases, the costs must be paid by the county commissioners, and in prosecutions under municipal ordinances the costs must be paid by the village.

I am, therefore, of the opinion that the county commissioners of Warren county, in which the village of Franklin is located, must pay these costs. This, of course, is upon the assumption that the village of Franklin has an agreement with the county commissioners of Greene county to receive in the workhouse at Xenia persons convicted of offenses in Warren county.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF PUBLIC SERVICE—PREPARATION OF PLANS, ETC.

City council must cause plans, specifications, etc., for municipal improvements to be made by board of public service.

January 18th, 1909.

HON. H. L. DELL, *City Solicitor, Middletown, Ohio.*

DEAR SIR:—I have your letter of January 12th, in which you ask whether the board of public service in cities has any legal right in the preparation of the plans, specifications, profiles and estimates for sewers and street paving, before the same are filed in their office and approved by council?

In my opinion it is the duty of the city council to direct the board of public service, through its engineers, that is, the engineer of the board of public service, to prepare plans, specifications, profiles and estimates for this work, the council indicating to the board the contents or data for these matters. This should be done before the council passes the resolution declaring the improvement necessary, because it is in this resolution that the council must approve the plans, specifications, etc. When the board of public service receives such direction from the council it is the duty of that board to comply therewith by preparing such plans, specifications, profiles and estimates and filing the same in the office of the board of public service.

Of course this preliminary work on the part of the council in directing the preparation of these plans, specifications, etc., will, most likely, be done through the proper committee of council having such matters in charge, and this committee should examine the same before they are submitted to council, along with the resolution declaring the improvement necessary, and approving the plans, specifications, etc. In other words, the city council has no authority to employ an outside engineer to prepare these matters. The spirit of the code clearly is that such matters shall be prepared by the board of public service under the supervision of its chief engineer, and all pursuant to a request by council that the same be done.

Very truly yours,

U. G. DENMAN,
Attorney General.

CITY SOLICITOR—EXTRA COMPENSATION FOR RECODIFYING CITY ORDINANCES.

March 11th, 1909.

HON. R. L. DERAN, *City Solicitor, Tiffin, Ohio.*

DEAR SIR:—I have your letter of March 9th, in which you ask my opinion as to whether you may receive, and your city council may pay you, compensation for recodifying your city ordinances outside of the regular salary fixed by ordinance for performing your duties as city solicitor.

It is not a part of your duty, under the law, to recodify the city ordinances and I am clearly of the opinion that you may make a contract with the city and the city may pay you, pursuant thereto, whatever may be agreed upon to do this extra work, so long as you do it at a time and in a manner which will not interfere with the faithful performance of your lawful duties as city solicitor.

Very truly yours,

U. G. DENMAN,
Attorney General.

BONDS—SPECIAL ASSESSMENT FOR STREET IMPROVEMENT.

Bonds issued and refunded in anticipation of collection of special assessment for street improvements do not come within statutes limiting amount for which municipalities may sell bonds.

March 11th, 1909.

HON. ALVAH B. FLOOD, *Village Solicitor, Byesville, Ohio.*

DEAR SIR:—I have your letter of March 2nd, in which you ask my opinion on the following facts:

> The village of Byesville last year paved a part of two streets, and while this work was in progress issued notes in the sum of $20,000 pursuant to section 85*a* of the Municipal Code in anticipation of collection of special assessments. After the assessments were made certain

property owners paid their respective assessments in cash, and after all such cash payments were made there was still $14,600 to be paid on the installment plan, and for which you desired to issue notes or bonds. The village now desires to issue bonds to redeem or refund these notes and possibly to get a longer time in which to pay them, and perhaps a lower rate of interest. Your question is, whether this may be done by the village and whether, if it is done, the bonds so issued, refunding these notes, would become a part of the general bonded indebtedness of of the town, included within the 8 per cent. limit of the Longworth act?

It is especially provided by statute, and it has been decided by our supreme court, and other courts on different occasions, that bonds which are issued in anticipation of the collection of special assessments providing for public street improvements, do not come within the statutes limiting the amount for which municipalities may sell their bonds. This, I think, is the law with respect to notes issued under section 95*a* of the municipal code to realize money in anticipation of the collection of such special assessments. And I am further of the opinion that when such notes or special assessment bonds are refunded that the debt is still the same debt; that is, it is a debt incurred in anticipation of the collection of special assessments, and that so long as it does not include any debt for any other purpose than to pay special assessments levied upon the abutting property, from which assessments the money will come back into the treasury to meet the notes or bonds, or refunding notes or refunding bonds, the debt as originally evidenced, or as evidenced by refunding paper, is still outside the Longworth act.

I return you herewith all papers sent to me, except your letter.

Very truly yours,

U. G. DENMAN,
Attorney General.

OFFICERS — BOARD OF PUBLIC SAFETY MAY REMOVE — CONSENT OF COUNCIL AND MAYOR AS ABUTTING PROPERTY OWNERS — BOARD OF PUBLIC SERVICE EXPENDING MUNICIPAL LIGHT PLANT INCOME.

March 11th, 1909.

HON. H. R. HILL, *City Solicitor, Ashtabula, Ohio.*

DEAR SIR:—I have your letter of March 4th, submitting, for my opinion, the following questions:

1. The ordinance under which our present police department was organized provides for the appointment of not to exceed two court officers, not included in the classified list. One such was appointed, and the board of safety now seek to remove him. Do they have that power, or does that power belong to the chief of police?

2. Has the council the right to give consent for the city, as an abutting property owner, to the construction of a street railway along a street upon which the city owns real estate?

3. Has the board of service the right to use the income from the municipal light plant without the same having been appropriated by council?

In answer to your first question, section 149 of the Municipal Code provides that the directors of public safety shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks and employes as shall have been provided by ordinance or resolution of council, and the words here, "other officers," mean officers aside from those in the classified service. I think there is no doubt, therefore, that the directors of public safety in your city have the power to remove the officer of which you speak in your first question.

In answer to your second question, I am of the opinion that the city, through its legislative powers, concurred in by the mayor, may give its consent as an abutting property owner, to the construction of the street railway upon the street on which the city owns real estate.

Your third question must be answered in the negative, because no public municipal officer is authorized to spend any money from any source until an appropriation has first been made therefor by the city council.

Very truly yours,

U. G. DENMAN,
Attorney General.

CITIES—BONDED INDEBTEDNESS.

Cities' bonded indebtedness may not exceed 1 per cent. in any one year and may not issue at any time such amount of bonds as added to amount already issued would exceed 4 per cent. of valuation of property listed and assessed for taxation without vote of people.

February 27th, 1909.

HON. O. E. IRISH, *City Solicitor, Ironton, Ohio.*

DEAR SIR:—I have your letter of February 23rd, in which you submit the following facts:

> The bonded indebtedness of the city of Ironton, issued under the Longworth act (section 2835 of the Revised Statutes), as amended in the year 1902, is $179,800. The total value of all property in your city, as listed and assessed for taxation in the year 1908, is $5,425,783. One per cent. of this valuation is $54,257 and four per cent. of such valuation is $217,929. Your city has not issued in any one year from 1902 to 1908, both inclusive, more than one per cent. of the tax valuation of the respective years in which bonds were issued. Were your city council this year to issue $37,229 in bonds under the Longworth act, you would then have outstanding four per cent. of your 1908 tax valuation. You ask my opinion as to whether your city council can now issue either $37,229 or $54,257 without submitting the question to a vote of the people under the Longworth act.

This act (section 2835 R. S.), as it now stands, after stating the purposes for which bonds may be issued by municipalities, provides that the bonds authorized by the act may be issued for any or all purposes enumerated therein, but that the total bonded indebtedness hereafter created in any one fiscal year, under the authority of the act, shall not exceed one per cent. of the total value of all property in the municipal corporation, as listed and assessed for taxation,

except as otherwise provided in the act. This one per cent. for one year may be issued by action of the council and it is otherwise provided in the act that if council desires to issue in any one year more than such one per cent., then the question as to whether such one per cent. shall be exceeded in that year must be submitted to a vote of the people under section 2837 R. S.

The act then further provides that the total indebtedness incurred by any municipal corporation, under this statute as amended April 29th, 1902, for the purposes enumerated therein shall never exceed four per cent. of the total value of all property in the municipal corporation as listed and assessed for taxation unless an excess of such amount is authorized by an election under section 2817 R. S.

Here, then, are two limitations: First, the city may not exceed one per cent. in any one year without a vote of the people. Second, there cannot be issued at any time, without a vote of the people, such an amount of bonds as, added to the amount already issued, would exceed four per cent. of the valuation of the property then listed and assessed for taxation. Had your city issued no bonds up to this year you could now, without a vote of the people, issue bonds in the sum of $54,257, one per cent. of your valuation; but you have heretofore issued bonds in the sum of $179,800. You are not permitted to issue such an amount this year as that, when added to $179,800, the total would exceed $217,029 without a vote of the people.

I am, therefore, of the opinion that your city can, this year, issue only $37,229 unless by a general or a special election the people authorize you to issue more than that.

Very truly yours,

U. G. DENMAN,
Attorney General.

VILLAGE COUNCIL—COMPENSATION OF MEMBERS MUST BE PROVIDED FOR BY ORDINANCE.

January 18th, 1909.

HON. M. J. LACER, *Mayor, Edon, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter, in which you inquire whether or not members of a village council are entitled to compensation, as members, without the passage of an ordinance?

In reply thereto permit me to say that the act of April 20th, 1904, being section 197 of the Municipal Code, provides:

> "Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided in this act. 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; provided that 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, and they shall have such other powers as are conferred upon councils of villages by section 1678 of the Revised Statutes of Ohio."

It is my opinion that under the provisions of the above section it is necessary for council to pass an ordinance fixing the compensation before the members are entitled to draw the same.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY COUNCIL—MEMBER APPOINTED TO POLICE FORCE.

Member of council who has resigned may be appointed to position on police force before expiration of one year. Such services do not come within section 6976 R. S.

March 30th, 1909.

HON. FRANK L. OESCH, *City Solicitor, Youngstown, Ohio.*

DEAR SIR:—I have your letter of March 27th, in which you request my opinion as to whether a duly elected and acting councilman may resign the office of councilman and be thereupon appointed to a position in the police force of the city, and you call my attention to section 6976 R. S.

There is no constitutional or statutory prohibition against such appointment, unless section 6976 R. S., to which you refer, forbids such an appointment. That statute provides as follows:

> "An officer or member of council of any municipal corporation * * who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation * *, or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation * * 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 fifty dollars, or imprisoned not more than six months or less than thirty days, or both, and shall forfeit his office."

The words "contract, job, work or services for the corporation" each and all refer to some contractual relation into which the municipal corporation in its proprietary capacity has entered, or may enter, with some person, firm, association or persons, or a corporation; and this proprietary capacity of a municipal corporation is to be distinguished from its governmental capacity.

A member of council is a public officer and the statute provides, in effect, that neither a member of council nor any other public officer of a municipal corporation shall be interested directly or indirectly in the profits which may arise from any relation into which the municipal corporation has entered in its proprietary capacity. A municipal corporation cannot do any work looking to improvements or repairs of any kind except through some sort of contract. If a municipality seeks to make a repair in a street which would require the services of only one man for a half hour, the services of that man are secured by contract into which the municipality enters in its proprietary capacity, as distinguished from its governmental capacity.

In my opinion this statute means that no public officer, while he is such public officer, or for one year thereafter, can be interested directly or indirectly in the profits which may arise from any contract relation and fined above, into which the municipality has or may enter in its proprietary capacity.

The work of a policeman, of course, is "service" of a certain kind, but it is

not such service as is contemplated by the word "service" in this section 6976 R. S. There is no contract relation between a municipality and a police officer. It has long been settled that the relation existing between a municipality, or any other political division, and an officer thereof, is not a contract relation and that no right of contract is violated when a public official is deprived of his office.

Now the purpose of this statute seems to be to prevent a public official, while he occupies that relation, or for one year thereafter, from having any interest in any private contractural relation into which the municipality has or may enter within the limitations of time prescribed in the statute.

The statute does not provide that a public officer in a municipal corporation may not hold some other public office within a year after his first service expires. If this construction were placed upon this statute, then a city solicitor could not be elected mayor of the city, nor could any officer be elected or appointed to any other public office of the municipality until after one year should elapse from the end of his first service. To prevent such conditions seems to be no part of the purpose of this statute, and, in my opinion, therefore, there is nothing in the statute prohibiting such an appointment as is contemplated in your question.

Very truly yours,

U. G. DENMAN,
Attorney General.

COLLINWOOD SCHOOL SITE—PURCHASE OF BY STATE.

March 11th, 1909.

HON. CHARLES L. STOCKER, *City Solicitor, Collinwood, Ohio.*

DEAR SIR:—I have your letter of March 9th, asking my opinion as to how the state of Ohio may acquire the premises formerly occupied by the Collinwood school, which was burned, and which is owned by the board of education of Collinwood.

This difficulty was anticipated when the legislation was drawn providing for the memorial park, but we do not see how the legislature could adopt a law conferring such power upon the board of education of Collinwood to sell that particular piece of property, and it did not seem advisable to change the general law, section 3971, to read differently from what it does. There is no statute providing that the state may appropriate public property, and this school property is public property, and, as you know, it has been settled in this state, that when property has once been taken or acquired for public purposes it cannot again be appropriated for another public purpose.

I do not see, without further investigation, how the matter may be consummated except it be done through the regular advertising under section 3971, with reliance that the general sentiment of the public may deter anybody from bidding against the governor.

I have a somewhat indefinite notion of a plan which I will go over with Senator Matthews, from your county, and ask him to communicate with you when he returns to Cleveland, the latter part of this week.

Very truly yours,

U. G. DENMAN,
Attorney General.

MAYOR—VILLAGE—MANNER OF FILLING VACANCY IN OFFICE OF.

President pro tem. of village council succeeds to office of mayor upon latter's resignation.

January 18th, 1909.

HON. C. F. WEHR, *Calais, Ohio.*

DEAR SIR:—I have your letter of January 15th, stating that Calais is an incorporated village, that your mayor has resigned, and asking what proceeding must be taken by council to provide his successor. Section 200 of the municipal code (vol. 96, O. L. p. 83), provides as follows:

> "In case of the death, resignation or removal of the mayor, the president pro tem. of council shall become the mayor and serve for the unexpired term, and until the successor is elected and qualified; and the vacancy thus created in council shall be filled as other vacancies therein, and council shall elect another president pro tem. from their own number, who shall have the same rights, powers and duties as his predecessor."

Section 196, page 82, of this same volume, makes section 120, found on page 59 of the same volume, apply to vacancies in the office of council.

Under these sections, upon the resignation of your mayor, you, as president pro tem. become, by that resignation alone, under the statute, the mayor of the village of Calais, and you shall serve for the unexpired term and until the successor is elected and qualified. This successor will be elected at the November election of this year.

You, having been the president pro tem. of your council, and now mayor, because of the resignation of your former mayor, a vacancy now exists in your village council. This vacancy in your council must be filled by an election by the remaining members of your council of some one to serve for the unexpired term. And if your council fails for thirty days to take this action, and fill the vacancy, then you must fill the same by appointment.

After the vacancy in council has been filled, in one or the other of the ways stated above, the council must then elect from among its own number, a new president pro tem., who shall have the same rights, powers and duties as you had before you became mayor.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—ISSUE OF BONDS TO ENLARGE SCHOOLHOUSE—PLACE WHERE ELECTORS VOTE.

School boards must submit question of issuing bonds to electors when amount of bonds issued in one year equals aggregate of tax rate of two mills for year next preceding such issue.

Electors living in territory outside of village, but in village school district, may vote at regular voting place on question of issuing bonds.

March 17th, 1909.

HON. P. L. WILKINS, *City Solicitor, Fredericktown, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter, in which you submit the following questions:

1. "With a tax valuation of $450,000 the board of education desires to issue bonds in the sum of $5,000.00 to build an extension to the present public school building, or, in other words, to enlarge the same. Now, is it necessary to submit the question of issuing bonds to the electors of the district under section 3991 R. S., Ohio, or can the board issue bonds by its own resolution under section 3994, R. S. Ohio?"

2. "Where may electors, living in territory outside of the village, but in the village school district, vote? That is, can they vote at the precinct in the village, or are they compelled to vote in the precincts of their own territory, as at general elections?"

In reply to your first inquiry I beg to say that section 3994 of the Revised Statutes, is in part 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, may, from time to time, as occasion requires, issue and sell bonds, under the restrictions and bearing a rate of interest specified in section thirty-nine hundred and ninety-two and shall pay such bonds and the interest thereon when due, but shall provide that no greater amount of such bonds shall be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue, etc."

Section 3991 is in part as follows:

"When the board of education of any school district determines that it is necessary for the proper accommodation of the schools of such district to purchase a site or sites to erect a schoolhouse or houses, to complete a partially built schoolhouse, to enlarge, repair or furnish a schoolhouse, or to do any or all of said things, and that the funds at the disposal of said board or that can be raised under the provisions of section 3994 of the Revised Statutes of Ohio, are not sufficient to accomplish said purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, shall submit to the electors of the district the question of the issuing of bonds for the amount so estimated, etc."

Since your inquiry states that it is proposed to issue $4,000 in bonds with a tax valuation of $450,000, I am of the opinion that this cannot be done under the provisions of section 3994, and that it is necessary to submit the question of issuing bonds to the electors of the school district as provided by section 3991, Revised Statutes.

In reply to your second inquiry I desire to say that section 3910 provides in part as follows:

"Electors residing in territory attached to a village school district for school purposes shall be entitled to vote for school officers and on all school questions at the regular voting place in the village to which such territory is attached, etc."

I am of the opinion that under the provisions of the above section said electors are entitled to vote at the regular voting place in the village upon the question of issuing bonds for school purposes.

Yours very truly,

U. G. DENMAN,

Attorney General.

BOARD OF EDUCATION—CONTRACT FOR FURNISHING BOOKS—COMPENSATION TO BE PAID.

A board of education may contract with merchants for sale of school books to pupils at cost price paid publisher; board may pay seller ten per cent. of cost price as compensation for selling same.

April 6, 1909.

MR. S. H. WILLIAMS, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I have your letter of April 1st, in which you submit and ask my opinion on the following:

> The contract of the board of education of the city of Lorain for the sale of school books to the pupils of the school district will shortly expire, and the board is desirous of entering into a similar contract. The terms of the contract will depend upon the construction placed upon section 6594, section 5 Laning and 4020-14 Bates, a part of which reads as follows:
>
> > "Each board of education shall have power to, and shall make all necessary provision and arrangements to place the books so purchased within the easy reach of and accessible to all the pupils in their district and for that purpose may make such contracts and take such security as they may deem necessary, for the custody, care and sale of such books and accounting for the proceeds; but not to exceed 10 per cent. of the cost price shall be paid therefor, and said books shall be sold to the pupils of school age in the district at the price paid the publisher and not to exceed 10 per cent. thereof added, and the proceeds of such sale shall be paid into the contingent fund of such district"
>
> It has been the custom of our board of education to enter into contract with certain merchants for the sale of school books to the pupils of the district at cost price paid the publishers, which proceeds are all turned over to the board of education and the board pays to the seller 10 per cent. of the cost price. The question is whether or not the words "but not to exceed 10 per cent. of the cost price shall be paid therefor," authorizes the board to pay such amount as compensation to the book sellers.

The statute quoted provides that the board of education shall make all necessary provision and arrangements to place the books purchased within the easy reach of and accessible to all the pupils in their district, and in order to do this the board may make such contracts and take such security as they may deem necessary for the custody, care and sale of such books, and accounting for the proceeds. That is, the board shall make some arrangements whereby these books shall be placed in the custody and care of and on sale with some person or persons in such a place or places as will be accessible to the pupils of the district; and in order to make this arrangement the board may expend not to exceed 10 per cent. of the cost price of the books as purchased from the publishers.

The person or persons who have the custody, care or sale of the books to the pupils may add to the cost price paid the publishers, 10 per cent. of such cost price. The proceeds of such sales to the pupils must be paid into the contingent fund of the district.

In my opinion, the board is authorized to pay some compensation to the person who has the custody, care and sale of the books to the pupils, but the cost

of this compensation and any other expense which the board may be to in making the arrangements for the custody, care and sale must not altogether exceed 10 per cent. of the cost of the books as paid to the publishers for the same.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—COMPENSATION OF MEMBERS—MANNER OF PROVIDING FOR.

April 15, 1909.

MR. A. W. GEISSINGER, *Columbus, Ohio.*

DEAR SIR:—I have your letter of April 13th, asking whether the salary of a village council, provided for by section 197 of the Municipal Code, may be legally drawn under a resolution passed by the council if such resolution is advertised.

I am of the opinion that under section 122 council may fix the compensation of its members by either a resolution or an ordinance. This action of council, however, is one of a general nature; that is, it is a matter of affecting every taxpayer in the village, and under the law providing for publication of ordinances and resolutions the resolution fixing this compensation should be advertised, and the same formalities taken in adopting it as is prescribed by the code for adopting an ordinance of a general nature under section 1695 R. S. That statute provides that an ordinance of a general nature shall be published in some newspaper of general circulation in the corporation; if a daily twice, and if a weekly once. If no paper is published in the corporation the resolution may then, under section 1697 R. S., be posted up in five conspicuous places in the village.

Very truly yours,

U. G. DENMAN,
Attorney General.

NOMINATION—PETITIONS FOR—HOW TO BE CIRCULATED.

April 21, 1909.

HON. DAVID G. JENKINS, *Assistant City Solicitor, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your favor of April 19th, in which you state that the board of deputy state supervisors of elections for Mahoning county has ruled that petitions for nominations on the ballots to be used at the primaries preceding the municipal election to be held this fall must be circulated independently in the several precincts in your city. You desire my view as to the correctness of this ruling. Complying with your request, I beg to state that I have examined the several sections of the primary election law of 1908, 99 O. L. 214, relating to the nominations for places on the primary ballot and find therein nothing requiring the petitions for such nominations to be circulated independently in precincts or in wards, and nothing authorizing the board of deputy state supervisors of elections to require such petitions to be so circulated. On the contrary, I am satisfied that the manifest intent of the several sections relating to this subject is that such petitions shall be circulated generally within the subdivision for which the election is to be held.

Yours very truly,

U. G. DENMAN,
Attorney General.

FLUSHING OF STREETS—ASSESSMENT OF PART OF COST AGAINST ABUTTING PROPERTY.

April 29, 1909.

HON. HARRY D. SMITH, *City Solicitor, Xenia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of April 27th in which you inquire whether the city of Xenia may assess a part of the cost of flushing streets against abutting property. You invoke my considerations of sections 50, 66 and 67 of the Municipal Code, wherein authority is conferred upon municipalities to sprinkle with water, to sweep and to clean streets and alleys, and call my attention to the question arising under said sections as to whether flushing the streets with water constitutes "cleaning" within the meaning of these sections.

In my opinion, the process of flushing which you describe is a means of cleaning the streets within the meaning of the sections cited. While the sections are to be construed strictly, no departure from the primary meaning of the verb "clean" as defined in the dictionaries is involved in regarding it as inclusive of the process in question.

Yours very truly,

U. G. DENMAN,
Attorney General.

SALE OF BOND ISSUE IN ANTICIPATION OF SPECIAL ASSESSMENTS.

May 7, 1909.

HON. W. S. FURMAN, *City Solicitor, Sidney, Ohio.*

DEAR SIR:—Pursuant to your request for my opinion upon the validity of the legislation and proceedings of your city council, and other officers, under which you propose to sell a bond issue in the sum of twenty-two thousand dollars ($22,000.00) to pay the city's portion of the improvement by paving of certain parts of several streets in the city of Sidney, and a further issue of twenty thousand dollars ($20,000.00) of bonds in anticipation of the collection of special assessments to be levied upon the abutting property on this improvement,

I beg to advise that, in my opinion, these proceedings as they have been taken are fully authorized under the law and are legal, and that the whole transaction is for one general improvement.

Yours very truly,

U. G. DENMAN,
Attorney General.

INTOXICATING LIQUORS—SALE BY DRUGGIST TO PHYSICIAN AND VETERINARY—ORDER OF PHYSICIAN BY TELEPHONE.

A druggist in dry territory may sell whisky or alcohol directly to physician or registered veterinary, but may not sell to veterinary who is not registered.

Where physician telephones to druggist for intoxicating liquors the same may not be delivered to patient.

May 13, 1909.

HON. J. J. BROWN, *City Solicitor, Alliance, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 8th, in which you request my opinion with regard to certain questions arising under the several local option laws.

1. Can a druggist, in dry territory, sell whisky or alcohol directly to a physician?

2. Can a druggist sell liquor to a registered veterinary?

3. Can a druggist fill a prescription written by a veterinary?

4. If a physician is visiting a patient and telephones a druggist to deliver to the patient a quantity of liquor, can the druggist legally do so?

I assume that all of these questions relate to the local option laws and not to the "Dow-Aikin law." I assume also as to your first and second questions that they relate to liquor sold for medicinal purposes, and that you intend to make no question regarding sales for mechanical and scientific purposes.

1. The township local option law, sec. 4364-25 R. S., permits a legally registered druggist to sell liquor "for exclusively known medicinal * * * purposes."

The municipal local option law, sec. 4364-20c R. S., contains an exception in favor of the sale of intoxicating liquors at retail by a legally registered druggist "for exclusively known medicinal * * * purposes; and when sold for medicinal purposes it shall be sold only in good faith upon written prescription issued, signed and dated in good faith by a reputable physician in active practice and the prescription used but once."

The same law, section 4364-20b contains an exception in favor of the sale of intoxicating liquors by manufacturers in wholesale quantities to "bona fide retail dealers trafficking in intoxicating liquors," but this exception as to wholesale transactions is limited to the cases specified.

The residence district local option law, section 4364-30g excepts from the remaining provisions thereof the sale of liquors at retail by a regular druggist for "exclusively known medicinal * * purposes; and when sold for medicinal purposes shall be sold only in good faith upon a written prescription, etc.," and manufacturers and wholesale dealers selling in wholesale quantities.

The county local option law, 99 O. L. 35, section 3 provides: "Nothing in this act shall be construed to prevent the sale of intoxicating liquors at retail by a regular druggist for exclusively known medicinal * * purposes and when sold for medicinal purposes it shall be sold only in good faith upon a written prescription signed and dated in good faith by a reputable physician in active practice, etc."

The "search and seizure law" so called, section 4364-30zb, and section 4364-30zc, provides as to all local option districts that retail druggists making sales of intoxicating liquors therein shall keep records thereof and that "when the sale is for medicinal purposes the book shall also contain the name of the physician issuing the prescription, and the prescription shall be canceled by writing on it the word 'canceled' and the date on which it was presented and filled;" and that "every prescription for intoxicating liquor shall contain the name and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written and the direction for the use of the liquor so prescribed."

All the local option laws, of course, prohibit the sale of intoxicating liquors by any person in dry territory with the above exceptions. Upon consideration of all of the foregoing provisions I am of the opinion that a druggist in "dry" territory may not sell intoxicating liquor directly to a physician without a prescription. All the local option laws, with the exception of the township local option law, seem to me clearly to prohibit such sale. As to the township local option law its provisions are seemingly supplemented by those of the "search and seizure law" in such manner as to make a prescription necessary in every sale for medicinal purposes. Neither the physician nor the druggist may avail

himself of the provisions with regard to sales in wholesale quantities. A physician may, of course, prescribe for himself, but intoxicating liquor for the use of his patients may be furnished by the druggist only on his prescription.

There is some question as to whether alcohol is an intoxicating liquor within the meaning of the local option laws. Your letter does not seem to request my opinion on this point specifically and I do not pass upon it.

2. The principles and statutory provisions above set forth apply to the second question stated by you, and I am accordingly of the opinion that without a prescription a druggist may not sell intoxicating liquor to a veterinary surgeon for medicinal purposes.

3. In my opinion a druggist may not fill a prescription written by a veterinary surgeon or by anyone other than a registered physician in active practice. The provisions of the various laws above cited do not authorize a veterinary surgeon to write a prescription for intoxicating liquors.

4. Upon the principles above stated, I am of the opinion that a druggist may not comply with the order of a physician by telephone to deliver to a patient a quantity of intoxicating liquor. The various local option laws all require the prescription to be written, while such telephonic communication cannot be regarded as a prescription in any sense of the word.

Yours very truly,

U. G. DENMAN,
Attorney General.

LOCAL OPTION LAW—DISPOSITION OF COSTS IN PROSECUTION.

May 13, 1909.

HON. M. R. SMITH, *City Solicitor, Conneaut, Ohio.*

DEAR SIR:—Replying to your letter of May 8th, wherein you inquire as to the disposition of costs in prosecutions under the local option laws I beg to state that section 7 of the county local option law makes no special provision for such disposition. While I assume that your question relates to the county local option law, it may be said that other similar laws are identical with it in this respect. No exception being made by the liquor laws the costs are to be distributed in such prosecutions in the same manner in which costs in other state cases are distributed.

Yours very truly,

U. G. DENMAN,
Attorney General.

VILLAGE MARSHAL—FEES FOR VIOLATION OF MUNICIPAL ORDINANCE.

In absence of ordinance, village marshal is not entitled to receive fees for violation of municipal ordinance, if village fails.

May 14, 1909.

HON. ARTHUR BRYANT, *Village Solicitor, Franklin, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 7th, in which you inquire whether a village council may, by ordinance, provide that the marshal shall not receive his costs in criminal cases under ordinances of the village, if the prosecution fails.

You call my attention to certain provisions of section 1536-863 R. S. (old section No. 1850), viz:

> "He (the marshal) shall have in the discharge of his proper duties, like powers * * * and shall receive the same fees as sheriffs and constables in similar cases * * * and such additional compensation as the council may prescribe."

This section clearly applies primarily to the fees of the marshal in state cases. It is questionable in my mind whether village cases are "similar" to any in which sheriffs and constables are authorized to receive fees. Should the answer to the question suggested be in the negative, the marshal would be entitled to no fees at all, unless council had specifically legislated on the subject.

In the view I take of the case presented by you, this inquiry is immaterial, and I do not desire to hold that section 1536-863 does not fix the fees receivable by marshals in municipal cases. Should the prosecution fail in a village case at any stage of the proceedings, the fees of municipal officers which might be taxed as costs therein could be paid only from the village treasury. In no manner could remuneration be received from any other source. The general statutory provision authorizing magistrates to require complainants to give security for costs does not apply to this class of cases, and in the absence of legislation on the part of council, such complainant may not be held for the costs.

On the other hand, should the marshal be allowed his costs he would not be permitted to retain them, but would be obliged to pay them into the village treasury.

Smallwood v. City, 75 O. S. 339; section 126 M. C.

My conclusion is, therefore, that even in the absence of an ordinance such as that described by you a village marshal is not entitled to receive his fees in prosecutions for violation of municipal ordinances if the village fails; council would have to legislate positively in order to authorize him to have his fees in such cases, and the money to pay them would have to be appropriated by council. Accordingly, while the necessity of an ordinance prohibiting the marshal from drawing such fees may be questioned, its validity cannot be disputed.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—COMPENSATION OF MEMBERS—VILLAGE SOLICITOR.

May 19, 1909.

HON THOMAS EUBANKS, *Village Solicitor, New Madison, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 15th, submitting for my opinion the following questions:

> "1. The council of the village passed an ordinance fixing compensation of councilmen at $2.00 per meeting, but not to exceed 24 meetings each year, and are drawing said salary themselves. Prior to that council served without compensation, no ordinance ever passed before in regard to that. Are they entitled to it?
>
> "2. The village has a population of about 650, and an assessment

valuation of property of about $300,000. Is not the ordinance unconstitutional by reason of being excessive for services rendered and for being oppressive to taxpayers?

"3. No ordinance ever passed establishing the office of village solicitor, but council has employed me as such for one year. Have I the same right to commence an injunction proceeding against them as though I had been elected?"

The ordinance of council fixing the compensation of members at $2.00 for each meeting, not to exceed 24 meetings in any one year, is valid. (Section 197 Municipal Code.) It is effective as to present members of council, no compensation having been previously provided.

Your second question as well as the first is sufficiently answered by the foregoing. I know of no constitutional provision regarding excessive compensation.

With regard to your third question, insofar as it has not been answered by the foregoing, I beg to state that, in my judgment, it is not necessary for council to create the office of village solicitor. Your employment as such solicitor is sufficient to enable you to exercise the powers and duties of legal counsel for the village.

Yours very truly,

U. G. DENMAN,
Attorney General.

ORDINANCES AND RESOLUTIONS—APPROVAL OF MAYOR—APPROVAL BY PRESIDENT OF COUNCIL IN ABSENCE OF MAYOR.

May 19, 1909.

HON. J. B. CONNAUGHTON, *Village Solicitor, Hamilton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 14th, in which you inquire whether a resolution designating two newspapers of opposite politics and of general circulation as advertising mediums for the city, must be submitted to the mayor for his approval.

In my opinion, section 125 M. C., which provides that "every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval," includes every enactment of council, regardless of the nature of the ordinance or resolution. Accordingly, it is immaterial whether or not such a resolution as that referred to is of a general or permanent nature; it must be submitted to the mayor.

You inquire also whether the president of council is authorized, during the temporary absence of the mayor, to approve or veto ordinances and resolutions passed by council.

Section 132 M. C., provides that the president of council, "when the mayor is absent from the city or is unable for any cause to perform his duties * * * shall be the acting mayor." In my opinion the temporary absence of the mayor of such duration as to prevent compliance with section 125 M. C., authorizes the president of council to approve or veto ordinances required to be submitted to the mayor during the period of the mayor's absence.

Yours very truly,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—CONTRACT FOR SCHOOL BUILDINGS—PLANS APPROVED BY INSPECTOR OF WORKSHOPS AND FACTORIES.

Board of education may award contract for school building before plans are approved by inspector of workshops and factories, subject to said approval.

June 8, 1909.

HON. HARRY GARN, *City Solicitor, Fremont, Ohio.*

DEAR SIR:—I have your letter of June 4th, in which you submit the following statement of facts and questions for my opinion thereon:

> "I wish to ask your opinion of and concerning section 5 of an act passed in Vol. 99, page 232, to enlarge the powers of the chief inspector of workshops, etc. What I wish to ask is, when the plans therein provided for must be approved by the chief inspector of workshops, Mr. Morgan? Must it be done before the board of education can advertise and receive bids, or must it be done before they enter into a contract, or after an award has been made? The case we have in mind is the plan for the heating and ventilating of a high school building in this city, of which the general plans have heretofore been approved, except the heating and ventilating plans.
>
> "Has the board of education the right to call for bids, to be accompanied with plans, and consider such bids and plans, when the plans accompanying such bids have not been approved by the state department, Mr. Morgan, as provided by law, and award the work to a bidder, whose plans had not been approved, or must the board re-advertise and consider only bids accompanied with plans that have been approved by the state department, or may the board defer to enter into a contract until the bidder has secured the approval of the state department after the award has been made to him, on the unapproved plan? Is the approval of such plans jurisdictional and must they be approved before the board has any right to receive bids and make an award?"

The act above referred to in your questions and appearing in 99 O. L., pages 232 to 234, inclusive, is the act giving the chief inspector of workshops and factories the right to inspect and order alterations or repairs in school houses, colleges and other buildings used for the assemblage of people, and requiring that the plans for any structures to be erected after the passage of the act be approved by such chief inspector of workshops and factories.

Section 5 of that act provides as follows:

> "The plans for every such structure aforesaid which may be hereafter erected in the state of Ohio and the plans for any alterations in or additions to any such structure aforesaid that is now erected shall be approved by the chief inspector of workshops and factories except that in municipalities having regularly organized building inspection departments the plans shall be approved by said municipal departments."

This section just quoted does not fix the time at which the plans and specifications of the public buildings proposed to be erected shall be submitted to the chief inspector of workshops and factories, and, while this act is supplemental to the act found in 86 O. L. 381, sections 4238-1 to 4238-4, inclusive, Bates' Revised Statutes, I do not find that the time is anywhere fixed in any of these

statutes, nor elsewhere, for a submission of such plans to the inspector. From a careful reading of this act and from the sections of the Revised Statutes above referred to, it seems clear to me that the general assembly in passing them did not consider it necessary to require that such plans should be approved before the receiving of bids. Had the legislature intended that such proceeding should be taken, it undoubtedly would have prescribed that plans should be prepared and submitted to the inspector of workshops and factories for his approval, and that if he should approve the same, then bids might be received on the same. There is, however, no such provision nor anything to that effect in the law.

Section 6 of the act is a prohibition against the *construction* of such a building except upon such approved plans, and I am, therefore, of the opinion that the provisions of this act will be fully complied with if the inspector of workshops and factories approved the plans at any time before a contract is signed for the work; that is, in the case you specify, as to the heating and ventilating apparatus for your high school building, it seems to me that the board may receive bids from persons who do such work, such persons submitting their plans approved or unapproved at that time by the inspector; that if the plans have not yet been approved when the bids were opened, they may then after such opening of bids, and after the awarding of the contract, be submitted to the inspector of workshops and factories for his approval. Of course, the award would have to be conditional upon the approval by the inspector of the plans, but, if on their presentation to the inspector, he approves them, a contract may then be signed between the parties and it will be valid and binding.

Since receiving your letter I have spoken to the chief inspector, Mr. Morgan, and he informs me that it is a rule of his office not to approve heating plans for such work until after bids are opened, and that this rule is maintained for the reason that it would be impossible for him to take care of all the work that would be imposed upon him if he were to attempt to go over all the plans which would be presented indiscriminately, and without any reference as to whether or not any probability existed for an award upon any of the plans so presented.

Very truly yours,

U. G. DENMAN,
Attorney General.

MEMBER OF COUNCIL—BOARD OF COUNTY HOSPITAL TRUSTEES—COUNTY COMMISSIONERS.

The act in 99 *O. L.* 486 *is unconstitutional insofar as it attempts to confer upon county commissioners power to appoint members of the board of county hospital trustees.*

Member of council may not hold a county office, but mere attempt to accept one is not sufficient to create a vacancy in council.

June 9, 1909.

HON. W. B. ROGERS, *City Solicitor, Washington C. H., Ohio.*

DEAR SIR:—I have your letter of the fore part of May, in which you request my opinion upon the following statement of facts:

A member of council of your city, after his election and qualification as such, was appointed a member of the board of county hospital trustees under section 5 of the act found in 99 O. L. 48, and has accepted said appointment. You inquire specifically as to the effect of the acceptance of the subsequent appointment upon the right of the appointee to continue to serve as a member of council.

I regret having so long delayed answer to your inquiry, but the question involves a construction of the act passed by the general assembly in 1908 (99 O. L. 486), providing for the erection and maintenance of county hospitals, and it necessarily goes to the validity of that law under the constitution. As a general rule this office, upon such questions as the above or similar ones, has avoided consideration of the constitutionality of acts passed by the general assembly, and this is because it rarely occurs to us that any immediate difficulty might arise because of our refusal to give an opinion upon the constitutionality of a statute involved. The act in question here, however, attempts to authorize the expenditure of money by counties in the erection of county hospitals, and the information has come to this office that such expenditures are contemplated in several of the counties of the state under this act. The law has been given a careful consideration, and in doing that we have come to the conclusion that at least insofar as it attempts to confer upon the county commissioners the power to appoint trustees, it is unconstitutional, and this, of course, has a direct bearing upon the question which you submit as to whether the member of council of your city, who has accepted an appointment as trustee under this act, has forfeited his right to continue to serve as a member of that council.

Section 120 M. C. provides in part that:

> "Every member of council * * shall not hold any other public office or employment * * except that of notary public or member of the state militia. Any member who shall cease to possess any of the qualifications herein required * * * shall forthwith forfeit his office. Whenever the office of councilman becomes vacant the same shall be filled by election by council for the unexpired term, and in case council fail to fill such vacancy, the mayor shall fill the same by appointment."

In my opinion, a county office is one of those prohibited by the above quoted language. The exception of the offices of notary public and member of the state militia clearly indicates that offices other than municipal offices were intended to be included within the general language of the section.

To the question whether a councilman may accept another office and thus forfeit his membership in council, my predecessor has returned an affirmative answer, holding that such acceptance creates a vacancy in council which may be filled as provided by section 120 M. C. To that opinion I adhere, and advise that if the councilman whom you mention has accepted another office, his office as member of council is now vacant. I do not believe, however that membership in the board of trustees of a county hospital organized under 99 O. L. 486 constitutes a *de jure* office. By this act the general assembly attempted to create a board, the duties of which as prescribed therein are clearly official, and the members of which are certainly public officers. The constitution of this state, however, provides that "the general assembly shall provide by law for the *election* of such county and township officers as may be necessary." (Article X, Sec. 1.) I deem it unnecessary to quote extensively from the act in question. Suffice it to say that the duties of the board sought to be created thereby differ in no essential respect from those of the board of infirmary directors. I am unable to escape the conviction that the members of the board of hospital trustees are county officers within the meaning of section 1, article X of the constitution. (State ex rel v. Brennan, 49 O. S. 33.)

From the contents of your letter and from information which has come to me aside from that, I understand that the member of council referred to has not abandoned the office of councilman, but has continued to serve and is still serving in that capacity, and it cannot, therefore, be said that he has abandoned

the office of councilman or the duties there to be performed. If, upon accepting the alleged office as hospital trustee, he had tendered his resignation as a member of council or had abandoned the same by a discontinuance of attendance upon the meetings of council and thereby failing or refusing to perform the duties of that office, then there would have been a vacancy in the office regardless of the validity of the hospital act. However, as stated above, this has not been done, but he has continued in the office of city council, performing the duties of the same and has not abandoned the office by resignation or otherwise.

If the conclusion that the hospital act is unconstitutional in the respect above stated is correct, then there is no *de jure* office of county hospital trustee, and the member of council cannot, as a matter of law, be considered as having accepted some office which did not exist.

Concluding, therefore, that the act in question is unconstitutional insofar as it attempts to confer upon the board of county commissioners the power to appoint hospital trustees, who under the act would be county officers, and who under the constitution should be elected by the electors of the county, and the fact existing that the member of council has not actually abandoned the office of councilman, but is still performing the duties of the same, I am of the opinion that he has not forfeited his office as councilman by the mere fact that he attempted to accept an office which does not exist, viz: the office of county hospital trustee.

We are not aware as to what counties of the state have proceeded, or are contemplating proceeding, under this act in the erection of county hospitals therein provided for, but entertaining the views we do with respect to the validity of the law in the particular set forth in this opinion, we feel that further proceedings by counties should not be taken under the provisions of this law until the question herein raised as to its validity is determined by a court of competent jurisdiction.

Yours very truly,

U. G. DENMAN,
Attorney General.

NEWSPAPER—POLITICAL ALLEGIANCE—ANNOUNCEMENT OF.

June 18, 1909.

HON. C. J. HOWARD, *Village Solicitor, Barnesville, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 16th, enclosing clipping from the "Saturday Whetstone," a newspaper published in the village of Barnesville, which contains an announcement, subscribed by the publisher, to the effect that from the date of that issue the publication would be a Democratic newspaper. You request my opinion as to whether such an announcement characterizes the newspaper as partisan within the meaning of the statutes authorizing and requiring publication of legal notices and advertisements in two newspapers of opposite politics.

Complying with your request I beg to state that the principle sanctioned by the courts as applicable to questions of this sort is as follows:

The politics of a newspaper, and the question as to whether or not a newspaper is of a given political party are to be determined by the profession of allegiance and reputation of the paper and not by its adherence to so-called party principles. (Ohio State Journal v. Brown, 19 Circuit Court, 325.)

It is not clear whether a single profession without acquired reputation is sufficient, but it is very clear that reputation without open profession is insufficient. Another possible test is that of support of the partisan ticket at state and

national elections. In the case you submit, however, this test cannot be applied because there has been no election since the date of the announcement.

Upon the authority of the case cited I am of the opinion that an announcement of political allegiance, such as that made in the clipping enclosed by you, is sufficient in itself at the time to impress upon a newspaper the character of a partisan publication.

Yours very truly,

U. G. DENMAN,
Attorney General.

MUNICIPAL CORPORATIONS—ANNEXATION OF—OFFICERS OF WHAT CORPORATION HAVE JURISDICTION.

June 23, 1909.

HON. B. BALDWIN, *Village Solicitor, Dennison, Ohio.*

DEAR SIR:—Your letter of June 19th, receipt of which is acknowledged, requests my opinion on the following question:

> "The municipal corporations of Dennison and Uhrichsville, Tuscarawas county, Ohio, are contemplating uniting under the name of Dennison, Ohio, under the provisions of section 1536-49 to 1536-57, inclusive, of the Revised Statutes of the state of Ohio. There is a controversy as to who would be the officers of the united corporations, some claiming that the officers elected for the village of Dennison at the coming November election would be the officers for the united villages, while others claim that it would be the duty of the three commissioners appointed by each corporation to determine who would be the officers of the united corporations."

The sections cited by you do not provide a method of consolidation of two municipal corporations. No such procedure is known to our law. The statutes under which the two villages in question desire to proceed provide for the annexation of one municipal corporation to another. (Sec. 1536-49, old number sec. 1606). The question you suggest, therefore, would have to be decided before the question to be submitted to the electors of the two corporations under sec. (1536-50), old number sec. 1607, was formulated. Thus, the question would have to be either "shall the village of Dennison be annexed to the village of Uhrichsville" or "shall the village of Uhrichsville be annexed to the village of Dennison," and not "shall the villages of Uhrichsville and Dennison consoldiate."

I infer from your statement with regard to the name of the proposed consolidated villages, that the intention is to annex the village of Uhrichsville to the village of Dennison. If this is the case the officers elected for the village of Dennison at the coming election would, should the proposal to effect the annexation carry at the same election in both municipalities and the other steps contemplated by the related sections be properly taken, have power and jurisdiction over the territory embraced within the limits of the new corporation. In any event it does not lie within the powers of the commissioners appointed under authority of sec. (1536-53), old number section 1610, to decide this question, as the same is not one of the "terms and conditions" referred to therein.

Yours very truly,

U. G. DENMAN,
Attorney General.

COLLINWOOD SCHOOL, MEMORIAL—TRUSTEES—DUTIES PRESCRIBED BY 100 O. L. 24.

July 27, 1909.

HON. CHARLES L. STOCKER, *Solicitor, Collinwood, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you ask for an opinion of this department as to the duties of the trustee appointed under the provision of an act "to provide for the purchase of a certain school site in the village of Collinwood, Cuyahoga county, Ohio, for the purpose of establishing and maintaining thereon a memorial building and park. 100 O. L. 24.

Sections 3 and 5 of said act provide for the appointment and authority of the trustee therein to be named, as follows:

> "Section 3. The governor is hereby authorized to appoint a trustee to represent the state of Ohio and act with the council of the village of Collinwood and negotiate for the purchase of the plot, on which said burned school building stood, with the board of education of the village of Collinwood.
>
> "Section 5. On the certificate of such trustee that all proceedings have been complied with according to law, and the deed of such property has been deposited with said trustee for delivery to said council, and upon the approval of the governor the state auditor shall issue a warrant for such expenditure to be paid out of the appropriation herein provided."

From a consideration of the sections of this act and particularly said sections 3 and 5, I am of the opinion that the trustee shall act as simply an agent insofar as the negotiation of the sale and purchase of said park are concerned, and when that is consummated the deed should be made from the board of education direct to the state of Ohio and deposited with the trustee to be held in trust until approved by the governor and until the state auditor shall issue a warrant for such expenditure to be paid out of the appropriation herein provided, whereupon said trustee is to deliver the deed to the council or the village of Collinwood.

I do not construe the act as warranting the trustee in becoming the grantee in the deed and in turn to become the grantor to the village of Collinwood. The word "trustee" was evidently used by the legislature as a choice of terms and because the person to be appointed to have charge of the transaction was to hold the deed in trust for a period of time. In my opinion, it does not authorize the trustee to become a party to the record of transfer.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

STREET IMPROVEMENT—ACCEPTANCE OF BID IN EXCESS OF ENGINEERS' ESTIMATE.

July 8, 1909.

HON. B. F. LONG *Village Solicitor, Shelby, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 7th, in which you ask to be advised if a bid for a street improvement exceeding the estimate of the engineer of the municipality may be accepted by the council.

I beg to advise that I am unable to find anything in the municipal code

which requires bids for street improvements to be within the estimate of the engineer of the municipality. The object of the engineer's estimate is to advise the council what would be a reasonable price to pay for such improvement and not for the purpose of restraining the council's discretion in letting a contract to that of the engineer's estimate.

I am, therefore, of the opinion that the council may accept a bid which exceeds the estimate of the engineer of the municipality.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION—SECTION 1536-667 DOES NOT AUTHORIZE SOLICITOR TO ENJOIN.

July 14, 1909.

HON. HARRY GARN, *City Solicitor, Fremont, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 12th, in which you ask to be advised if section 1777 (1536-667) Revised Statutes confers power upon you to bring and maintain an action for an injunction to restrain the misapplication by the school board of its funds or the execution or performance of any contract made in behalf of the board of education in contravention of the laws of the state.

I beg to advise that section 1777 of the Revised Statutes gives the city solicitor authority to apply in the name of the corporation to a court of competent jurisdiction for an injunction to restrain the misapplication of funds of the *corporation*, and also to restrain the execution or the performance of any contract made in behalf of the corporation in contravention of law or ordinance governing the same. This statute only applies to the funds of the city and not to the funds of the school board and to contracts made in behalf of the city and not to contracts made on behalf of the board of education. In this connection I call your attention to the case of Youmans v. Board of Education, 13 C. C. 207 and to Ellis' Municipal Code, page 344.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

STREET ASSESSMENT—FOOT FRONTAGE RULE.

Where front of lot abutting on street is owned by one person and rear of lot by another, and lot divided into more than two parts, street assessment by foot frontage must embrace entire lot as numbered and recorded.

July 29, 1909.

HON. J. J. BROWN, *City Solicitor, Alliance, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication in which you make inquiry as to how to apply the front foot rule of an assessment for the improvement of streets under the following conditions, to-wit:

> "Three lots have been regularly platted, numbered and recorded, front on Milner street in this city; the owner in selling them has subdivided said three original lots by conveying one-third of each original

lot to the purchaser thereof, so that each purchaser has the same amount of ground as was in one of the original lots; the street in front of the lots as originally laid out, is improved. The improvement ordinances provide for the cost of the improvement to be levied on lots and lands abutting and abounding on the improvement by the front foot rule."

You also inquire if the rule as applied to this situation will apply in like manner to the improvement of the alley in the rear of said lots for sewer.

Your improvement ordinances evidently provide that the assessment shall be made under the last of the three methods for assessment as provided in section 50 of the Municipal Code, viz: "By the front footage of the property bounding and abutting upon the improvement." The varied forms in which lands lying within municipal limits are platted and recorded and the subsequent divisions thereof by means of transfer of ownership, make the application of any method of assessment difficult, and your inquiry does not present an exception to this rule of difficulty and doubt, when it is borne in mind that assessments on abutting property for local public improvements are only justifiable on the ground of special benefits.

In the enactment of this section 50 the legislature has sought to establish methods by the application of which municipalities might collect assessments from abutting property owners upon the general principle of justice, equality and uniformity. The question here more directly put is, will the method of assessment adopted by your council apply to the three lots as originally platted and recorded and therefore the assessment be apportioned among the three owners, or will the assessment of said three lots have to be paid by the purchaser who owns the front of each of said lots? If these three lots were now owned and bounded as originally platted, the question of assessment thereon would be easy of determination; but for some reason the owner has sold a third of each of the three lots to each of three other parties, and according to the boundary of the lots so sold the lengthwise thereof is parallel with the street to be improved. Hence, the owner of the third of each of the three lots as originally platted owns all that part of the original three lots directly abutting on the street to be improved. Has the front footage rule of assessment no more stability in its application than the unsettled opinions and desires of successive owners of platted lots abutting streets? Must the application of this rule follow the boundary lines of deeds made subsequent to the platting thereof and changing the size foot frontage and general relationship of the lots to the streets? While this may be true in part, I do not believe it can apply to the lots inquired about. Furthermore, no corner lot is involved herein, and hence the assessment rule as applicable to corner lots is not applicable here.

In the absence of judicial determination of a question similar to that presented here, it is with unavoidable uncertainty that a conclusion is reached herein. Reasoning from judicial opinions in cases somewhat analogous to this, I am inclined to the opinion that the assessment here should apply to these three lots as originally laid out and be apportioned among the said three owners thereof. In other words, where the front of a lot abutting on a street is owned by one person and the rear of the lot as originally platted is owned by another person or persons, if the lot should be divided into more than two parts, the street assessment by the front foot must embrace the entire lot as numbered and recorded, and the assessment must be apportioned between or among the owners in accordance with the part owned by each. This conclusion seems to be sustained by the decisions in Fey v. Findlay, 7 C. C. 311, and Coates v. Norwood, 16 C. C. 196.

You do not specify as to the proposed sewer in the alley at the rear of said lots, but if it is to be a main sewer pipe or trunk sewer, in my opinion, the rule would have the same application to the sewer assessment as to the lots for street assessment as above stated.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

SEMI-ANNUAL MUNICIPAL APPROPRIATION ORDINANCE MUST BE PUBLISHED.

January 14, 1909.

HON. TIMOTHY GLENN, *New Paris, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your communication in which you submit the inquiry as to whether or not an ordinance, making semi-annual appropriations, is required to be published. In reply thereto permit me to say that, in my opinion, the ordinance of which you speak is one of a general and permanent nature, as mentioned in section 1695. Expenditures can only be paid as authorized by such an ordinance, and nothing can be accomplished in the administration of the affairs of the village until after its enactment. It is mandatory upon council to pass the ordinance, and it is of such a nature that it should be published as provided by law. Therefore, in my opinion, it is necessary to publish such ordinance as required by the provisions of section 1695 R. S.

Very truly yours,

U. G. DENMAN,
Attorney General.

STREET COMMISSIONER—FAILURE OF COUNCIL TO CONFIRM MAYOR'S APPOINTMENT—PRESENT COMMISSIONER HOLDS UNTIL SUCCESSOR QUALIFIES.

May 13, 1909.

HON. J. J. BOYLE, *Solicitor for Village of Hubbard, Youngstown, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of July 12th, in which you state that in May or June of 1908, the marshal of the village of Hubbard was appointed street commissioner by the mayor, and confirmed by the council; that the mayor has now appointed a successor to said street commissioner but that council has not yet confirmed such appointment. You desire my opinion as to the effect of confirmation by the council of this appointment, and as to the effect of failure by the council to confirm the same upon the tenure of office of the marshal as street commissioner.

Section 203 M. C., provides in part 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 successor is appointed and qualified * * *. The marshal in any village will be eligible as street commissioner."

In as much as the term of the marshal under his original appointment has now expired, the confirmation of the appointment recently made by the mayor

will terminate the marshal's tenure, and the appointee may at once assume the duties of the office of street commissioner. Should council fail to confirm, however, the marshal may continue to discharge the duties of street commissioner until his successor is appointed, confirmed and qualified, according to law.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BONDS—LIMITATION UNDER LONGWORTH ACT—DEFICIENCIES OF WATERWORKS FUND.

A municipal corporation under Longworth act may not issue bonds over 4% limitation without a vote of people.

Bonds may be issued to include deficiencies arising from failure of municipal waterworks to produce sufficient funds from rental.

June 1, 1909.

HON. HANBY R. JONES, *Village Solicitor for Westerville, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of May 28th, submitting for my opinion the following questions:

"The village of Westerville has outstanding bonds which must be paid from the general revenues of the village as follows:

"Waterworks construction, $25,000, issued March 4, 1902.

"Sewer construction, $20,000, issued March 4, 1902.

"Street construction, $30,000, issued March 4, 1902.

"The above bonds were issued after the question was submitted and carried by a two-thirds vote of the electors voting, and were sold and delivered prior to April 29, the date of the amendment to the Longworth act.

"Electric light construction, $12,000, issued by two-thirds vote of the electors of the village, October 1, 1906.

"Electric light construction, $3,000, issued by vote of council, April 1, 1907.

"Electric light construction, $1,500, issued by vote of council, October 1, 1907.

"Street improvement, $3,500, issued by vote of council, July 1, 1908.

"The total value of all property of the village, as listed and assessed for taxation for the year 1908, was $520,000. For the year 1909 it will probably be $550,000.

"Can the village council, without submitting the question to an election, issue bonds during the present fiscal year for any of the purposes set forth in the Longworth act?

"Second. The village owns an electric light plant and a waterworks plant, which are operated together.

"There is an overdraft in the funds of the two plants of $3,000.00 or more, which was caused partly by operating expenses and partly by repairs and improvements which were necessary to keep the plants operating.

"Has council authority to issue bonds under R. S. 2701 to meet this overdraft and to pay outstanding bills, or must they proceed under section 99 of the code and submit the question of issuing deficiency bonds to the electors?

"Third. Has council authority under the Longworth act to issue bonds to meet this overdraft and pay outstanding bills which are the result of improvements and extensions to the electric light and water plants?"

The answer to your first question must, it seems to me, be in the negative. The Longworth act, section 2835 R. S., in its present form provides that:

"The net indebtedness incurred by any * * * municipal corporation, after the passage of section 2835 R. S., as amended April 29, 1902, for the purposes herein enumerated, shall never exceed four (4) per cent. of the total value of all property in such * * * municipal corporation, as listed and assessed for taxation, unless an excess of such amount is authorized by vote of the qualified electors of such * * *. municipal corporation in the manner hereinafter provided in section 2837 R. S.

"In arriving at the net indebtedness incurred, allowance should be made only for the amount held in the sinking fund for the redemption of bonds theretofore issued * * *."

This provision clearly prohibits the municipal authorities from issuing bonds without a vote of the people, if the particular issue contemplated will cause the total net indebtedness of the municipality to exceed an amount equal to four (4) per cent. of the total value of all property therein as listed and assessed for taxation. Four (4) per cent. of the total value of all property, etc., in the village of Westerville, as represented by you, would be $22,000.00. The outstanding bonds amount in all to $20,000.00, but the greater part of the street improvement bonds is to be deducted from this total under section 2835*b* which provides that:

"Nor shall bonds which are to be paid for by assessments specially levied upon the abutting property * * * be deemed as subject to the provisions and limitations of said section, or be considered in arriving at the limitations therein provided."

This deduction together with that on account of the amount in the sinking fund, which is not stated in your letter, but which I presume is sufficient for the purpose at hand, would render the net bonded indebtedness of the village under the Longworth act somewhat less than four (4) per cent. of the total tax valuation of the property therein, but not sufficiently so, I assume, to permit the issue contemplated. I can find no provision authorizing any other exceptions to or exemptions from the operation of the statutory limit of four (4) per cent. The provision of section 2835*b* that:

"* * * the limitations of * * * four (4) per cent. prescribed in section 2835 R. S., shall not be considered *as affecting* bonds issued under authority of said section 2835 upon the approval of the electors of the corporation * * *."

is not, in my opinion, applicable to this question, although this provision was engrafted upon the Longworth act by section 3 of the act of April 27, 1904, 97

O. L. 520, with the evident intention of adding to the meaning of the principal act. Despite such intention, I am satisfied that nothing is thereby added to the above quoted provisions of section 2835. I believe that said section 2835*b* means that the four (4) per cent. limitation shall not apply when the *proposed* bond issue is authorized by the vote of the people. This construction becomes clear upon a reading of the whole section.

With respect to your second question, it is my opinion that bonds to meet overdrafts and unpaid bills, must be issued under section 99 M. C. The language of that section is clear and unmistakable, and the term "to supply a deficiency in the revenues of the corporation" is sufficiently broad, in my opinion, to include deficiencies arising from failure of municipal water works and electric light plants to produce sufficient funds from rentals to operate such plants, and to make incidental repairs and improvements.

With respect to your third question, I am of the opinion that the second of the general powers enumerated in the Longworth act is applicable to an issue of bonds for improving and extending the electric lighting and waterworks system of the village. If there are outstanding bills incurred in this manner, and the same can be separated from the overdraft caused by operating expenses, bonds could, in my judgment, be issued under the Longworth act to pay said bills. In the case of the village of Westerville, however, it should not be done without submitting such issue to a vote of the people.

Yours very truly,

U. G. DENMAN,
Attorney General.

DIRECTOR OF PUBLIC SERVICE TO BE APPOINTED JANUARY 1, 1910—COUNCIL MAY NOT FIX SALARY OF HEAD OF DEPARTMENT OF SERVICE UNTIL DIRECTOR ESTABLISHES.

August 18, 1909.

HON. WILLIAM L. FIESINGER, *City Solicitor, Sandusky, Ohio.*

DEAR SIR:—I have your letter asking my opinion as to:

> "When the city council should pass the ordinance fixing the salaries of heads of departments in the department of public service, as this department will be under the Paine law, and whether the mayor has the right to appoint those heads of that department between August 1, 1909, and January 1, 1910?"

Answer to your inquiry has been delayed because of my absence from the capital, but I trust this has not given you any inconvenience.

Section 145 of the original code, as amended by the Paine bill, provides as follows:

> "The director of public service may establish such departments as may be necessary, and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers, and other persons as may be necessary for the execution of the work and the performance of the duties of this department."

Section 129 of the code, as amended in the Paine law, provides that:

> "The mayor shall appoint, and have the power to remove, the director of public service, the director of public safety, and the heads of subdepartments of the departments of public service and public safety."

Under the last section of the Paine law, section 3, thereof, the present boards of public service shall serve out the term for which they were elected, namely, to January 1, 1910.

Under this last section there can be no director of public service, as provided for in the Paine bill, until January 1, 1910. When he comes into office, it will be within his power, under section 145, as above quoted, to establish such subdepartments as may be necessary in the department of public service. It being the duty of the director of public service to establish such subdepartments as he may deem necessary, the council cannot pass any ordinance with respect to the heads of such subdepartments until they know what those departments are.

In my opinion, therefore, the council cannot act on the matter of salaries for the heads of the subdepartments in the department of public service until January 1, 1910, and after the director of public service, provided for in the Paine bill, has established such subdepartments. For the same reason the mayor cannot appoint the heads of those subdepartments until January 1, 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW—DIRECTOR OF PUBLIC SAFETY—AUTHORITY TO MAKE CONTRACT PRIOR TO JANUARY 1, 1910.

Before January 1, 1910, *there cannot be a board of control, until then director of public safety may advertise for bids and award contract for five hundred dollars or more, according to original section* 143, *if authorized by council so to do.*

August 18, 1909.

HON. MEEKER TERWILLIGER, *City Solicitor, Circleville, Ohio.*

DEAR SIR:—You submit to me the following statement of facts, and ask my opinion thereon:

> "I am urged by the council of this city to present to you the question of executing contract for $1,500.00 after August for improvement to city prison, for which improvement bonds have been already authorized by ordinance. By the time council passes an ordinance authorizing the board of public safety to advertise for bids and enter into a contract for the said improvement and then for the board of public safety to advertise ten (10) days for bids, it will be in August before the contract can be entered into, which brings the contract within the time in which the Paine law is operating, and the question of whether the board of control or director of public safety lets the contract.
>
> "Is there any way by which any director or board can be authorized to lawfully and with *absolute safety* enter into such a contract. Can

council by ordinance empower the director of public safety to do so? We don't want to proceed if there is any question as to its being strictly within the law, and if you feel that the law is uncertain on this point, we would rather wait until the law is before the supreme court.

"*Will the fact that council by ordinance directs the director of public safety to execute such a contract in the sum of* $1,500, *add anything to his power or remove the uncertainty, if there be any.*

"I realize that you are bothered with questions of this sort, with reference to this Paine law, but the newspapers, or one of them, soon after the last meeting of city solicitors in Columbus, quoted you as saying in your talk to the solicitors that 'if the director of public safety executes a contract in excess of $500, he must do so in pursuance to an ordinance passed by council empowering said director of public safety so to do.' This was intended for after August 1, after the director of public safety displaces the board of public safety.

"I would thank you to give us your ideas with reference to the question, and principally whether or not the contract can in any manner be *safely* let by the director of public safety, after August 1, for $1,500.00."

Answer has been delayed because of my absence from the city, but I hope that you have not been inconvenienced thereby.

Section 146 of the Municipal Code, as amended in the Paine bill, went into full force and effect August 1, 1909, and it appears from your letter that your mayor appointed a director of public safety, who now is in charge of the department of public safety in your city. That action is in accordance with my opinions heretofore rendered on that question and, in my judgment, is clearly in accordance with the law. The board of control is to be constituted of the mayor, director of public service and director of public safety, as provided by the supplemental section 154*a* in the Paine law, but section 3—the last section in that law—provides that all elected officers shall serve out the terms for which they have been elected. This proviso, of course, includes the present board of public service and, therefore, a director of public service cannot be appointed until January 1, 1910. There cannot, therefore, be any board of control until January 1, 1910.

Section 154 of the code, as amended in the Paine bill, provides that the director of public safety shall have power to make such a contract as is mentioned in your inquiry, but it is provided in this section 154 that:

"No obligation involving an expenditure of more than $500.00 shall be created except when first authorized and directed by ordinance of council. In making, altering or modifying such contracts, the director of public safety shall be governed by the provisions of section 143 hereof, except that all bids shall be filed with and bonded by the director of public safety."

Section 143 as just mentioned in the quotation refers to section 143 in the original Municipal Code, 96 Ohio Laws, page 67, which is still in force as originally enacted. It provides that:

"The director of public service may make any contract for any work under the supervision of that department not involving more than five hundred dollars, but if any expenditure within that department, other

than compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council, and when so authorized and directed, the directors of public service shall make a written contract with the lowest and best bidder for advertisement, for not less than two, nor more than four consecutive weeks in a newspaper of general circulation within the city."

It further provides when the bids shall be opened, and what the bids shall contain, etc.

By section 154, as amended in the Paine bill, this section 143 is made to apply to the director of public safety in letting contracts in his department. By the last section—section 3—of the Paine law this amended section 154 is now in full force and effect, and if there could now be appointed a director of public service, the board of control would be in existence under supplemental section 154*a* of the Paine bill. If there were a board of control it would be necessary for such board to approve the contract let by the director of public safety under 154; there being no board of control the contract cannot, of course, be submitted to it, and it seems very clear to me that, under the Paine law, your director of public safety can let a contract under section 154, as amended in the Paine bill, and, according to the terms of original section 143; that is to say, your council should by ordinance authorize and direct the contract, and then your director of public safety should advertise, open the bids, award and execute the contract, according to original section 143.

Yours very truly,

U. G. DENMAN,
Attorney General.

PUBLIC SERVICE—DIRECTOR OF—SALARY MAY BE FIXED BY PRESENT COUNCIL.

September 10, 1909.

HON. GEORGE W. KRATSCH, *City Solicitor, Massillon, Ohio.*

DEAR SIR:—I have your letter of September 8th, asking my opinion as to whether the salary of the director of public service in cities and who will be appointed to begin service on January 1, 1910, can be fixed by the present city council.

Section 227 of the Municipal Code, as amended in the Paine bill, and found on pages 567-568 of 99 O. L., provides as follows:

"Council shall by ordinance or resolution, except as otherwise provided in this act, determine the number of officers, clerks and employes in any 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 any department of the city government, if any be required, and said bonds shall be made by such officer, clerk or employe with surety subject to the approval of the mayor of said city."

This section 227, so amended, took effect and went into full force on August 1, 1909, under section 3, the last section of the Paine bill. By section 227, so amended, it is the duty of the city council to fix by ordinance or resolu-

tion the respective salaries and compensation of each officer in the city government except as otherwise provided in the act. There is no other provision with respect to the fixing of the salary of the director of public service and this matter is therefore controlled by this amended section 227. Since this section as amended took effect on August 1, 1909, it is therefore within the power of the present council to fix the salary of the director of public service.

Yours very truly,

U. G. DENMAN,
Attorney General.

PUBLIC SAFETY DEPARTMENT—CONTROL OF BOARD OF HEALTH.

Paine law does not transfer duties of board of health to safety department.

September 11, 1909.

HON. R. M. NOLL, *City Solicitor, Marietta, Ohio.*

DEAR SIR:—I have your two separate letters of September 4, 1909, in which you ask my opinion as to whether the director of public safety, appointed pursuant to the provisions of the Paine law, will have the management and control of the health department of the city, succeeding the board of health in that respect; and you state that the board of service in your city under an ordinance of the council heretofore passed has for several years been acting as the board of health.

Section 187 of the Municipal Code, as amended 97 O. L. 460, Bates' Annotated Ohio Statutes 6th Ed., section 1536-723, provides in part as follows:

> "The council of each city and village shall establish a board of health; such board shall be composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall constitute a quorum; provided, that whenever the council of any city shall declare by ordinance that it will be for the best interests of said city, then upon the passage of said ordinance the board of public service of said city shall be the duly authorized board of health thereof and shall have all the powers and perform all the duties prescribed by law for boards of health; and the mayor shall be president by virtue of his office."

Section 139 of the Municipal Code, as amended in the Paine law, and found on page 563 of 99 O. L., provides as follows:

> "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 the powers and perform all duties conferred by law upon the director of public service or the board of public service, except as otherwise provided by law."

I take it from your letters that the situation in your city is that pursuant to section 187 of the Municipal Code, as above quoted, your city council did pass an ordinance declaring that it would be for the best interests of said city that the board of public service act as a board of health for the city, and that

since the passage of that ordinance your board of public service has been acting in that capacity, and is the duly authorized board of health of your city having the powers and performing the duties prescribed by law for boards of health.

There is no provision in the Paine bill transferring the powers and duties of the board of health to any officer or officers in the department of public safety. On the contrary, under section 139, as above quoted, the director of public service who will be appointed to take office on January 1, 1910, will have all the powers and perform all the duties conferred by law upon directors of public service or the board of public service except as otherwise provided by law. There is no other provision with respect to the board of health and your new director of public service when he comes into office will succeed your present board of public service and will have all the powers which that present board has with respect to the department of health. Your mayor was right in appointing a director of safety, but such director has no authority to manage or control the department of health. Your present board of public service is your board of health, and when your new director goes in on January 1, 1910, he will supersede your present board in this behalf.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL—INCREASE OF SALARY OF PRESIDENT—CITY FIRE LIMITS.

The one hundred and fifty dollar limitation in 126 *M. C. does not apply to president of council as he is not member of council.*

Cities need not comply with section 2473 *in establishing fire limits.*

October 5, 1909.

HON. S. H. WILLIAMS, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date in which you submit the following for my opinion:

> "1. May the salary of the president of council of a city having a population of 25,000 or less exceed one hundred and fifty dollars per year, or does section 126 of the Municipal Code govern the salary of the president of the council as well as every member of council?
>
> "2. Does section 7*m* of 'an act to provide for the organization of cities and incorporated villages' as amended in 99 Ohio Laws 6, authorize council to establish by ordinance fire districts within its limits without complying with section 2473 Revised Statutes?"

Answering your first question, section 12 of the Municipal Code provides as follows:

> "Council shall fix the salaries of all officers, clerks and employes in the city government, except as otherwise provided in this act, and except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury. The salary of any officer, clerk or employe so fixed shall not be increased or diminished during the term

for which he may have been elected or appointed; provided, that 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 in no event shall exceed one hundred and fifty dollars per year each, in cities having a population according to the last or any succeeding federal census, of twenty-five thousand or less, and for over thirty thousand additional inhabitants determined as aforesaid, said compensation may be, but shall not exceed, an additional one hundred dollars per year each, but the salary shall in no city be greater than twelve hundred dollars per annum; and provided further, that those salaries of members of council shall be paid semi-annually, and a proportionate reduction in said salaries shall be made for the non-attendance of any member upon any regular or special meeting thereof."

You will note that the proviso in the above quoted section that compensation of members of council shall not exceed one hundred and fifty dollars per year, each, in cities having a population of twenty-five thousand or less, applies only to members of council, and to decide whether this limitation in this section would apply to the salary of the president of the council, it is necessary to decide, first, whether the president of the council is a member of council.

Section 116 of the Municipal Code provides that the legislative power of every city shall be vested in and exercised by a council composed of not less than seven members.

Section 128 of the Municipal Code provides that the executive power and authority of cities shall be vested in a mayor, president of council, and other enumerated officers.

You will note that the president of the council is not made a part of the legislative department, but is a part of the executive department of a municipality, and I am, therefore, of the opinion that a president of council is not a member of council. Therefore, the exception in section 126 relative to compensation of members of council does not apply to a president of council.

Answering your second question I beg to call your attention to "An act providing for the organization of cities and incorporated villages" as amended in 99 Ohio Laws, page 4, which enumerates the general powers of municipal corporations, and provides that council may provide by ordinance or resolution for the exercise and enforcement of those enumerated powers.

Section *7m* is in part as follows:

"To regulate the erection of buildings and the sanitary conditions thereof, fences, bill boards, signs, and other structures within the corporation limits."

This section gives council general power over the erection of all buildings, and the answer to the question of whether it is limited by section 2473 Revised Statutes, will be found in section 207 of the Municipal Code, which is in part as follows:

"In the management of the fire department and the prevention of fires, council shall have all the powers conferred by general law in sections 2470, 2471, 2472 and 2473 of the Revised Statutes of Ohio, and the fire chief shall have all the powers conferred upon an engineer in sections 2474 and 2475 of the Revised Statutes of Ohio."

Section 207 of the Municipal Code applies to the organization of villages.

I feel satisfied that the council referred to in the quoted portion of this section is meant the council of a village and not of a city, and as section 2473 of the Revised Statutes is expressly made to remain in effect by this section, and not by any other section or sections, and as this section applies only to the powers of the council of a village, I am of the opinion that section 2473 relative to the power of council to regulate the erection of houses and business structures on the petition of the owners, does not limit the power of a city council but only limits that of a village council.

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNCIL—LOANS IN ANTICIPATION OF GENERAL REVENUES—SAFETY DEPARTMENT.

Council may only make loans for safety department in anticipation of general revenues, to sum not exceeding amount of taxes and revenues estimated to be received at next semi-annual settlement of tax collection for said fund after deducting all balances.

October 23, 1909.

HON. PHILO G. BURNHAM, *City Solicitor, Dayton, Ohio.*

DEAR SIR:—I am in receipt of your favor of the 20th inst., in which you state:

> "Our council from time to time has authorized loans to be made in anticipation of the general revenues for the use and benefit of the department of public safety. At this time loans have been authorized and will be made which will exhaust every dollar anticipated to come into the public safety fund at the next semi-annual distribution of taxes on March 1, 1910, and all other sources of revenue."

You desire to know

> "Whether any authority exists under which further loans may be made, or authorized, for the use of the department of public safety, until the present obligations are met and paid off out of the distribution of taxes for the public safety fund on March 1, 1910."

In reply, I call your attention to section 43 of the municipal code, which is as follows:

> "In all municipal corporations council shall make, at the beginning of each fiscal half year appropriations for each of the several objects for which the corporation has to provide, out of the 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 with and within said appropriations and balances thereof.*"

I also call your attention to section 95 of the municipal code, as follows:

> "All municipal corporations shall have power to borrow money and issue certificates of indebtedness therefor, signed as municipal bonds

are signed, in anticipation of the general revenue fund in any fiscal year, *but no loans shall be made exceeding the amount of taxes and revenues estimated to be received at the next semi-annual settlement of tax collections for said fund, after deducting all advances.* The sums so anticipated shall be deemed as appropriated for the payment of the certificates at maturity."

The language of section 43 is mandatory, and confines council, in the making of appropriations and expenditures for any purpose, out of the general revenue funds, to "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."

The language of section 95, giving council of municipalities authority to make loans in anticipation of general revenues, confines council in the making of such loans to a sum "not exceeding the amount of taxes and revenues estimated to be received at the next semi-annual settlement of tax collection for said fund after deducting all advances."

If, as stated in your letter, your city council has made loans "which will exhaust every dollar anticipated to come into the public safety fund at the next semi-annual distribution of taxes," "and all other sources of revenue," I am of the opinion there is no authority for further loans to be made out of the public safety fund until the next semi-annual distribution of taxes on March 1, 1910.

It is true that section 43 of the code provides a method of transferring funds or money from one fund to another, but "no such transfer shall be made until the object of the fund from which the transfer is to be effected has been accomplished or abandoned." I would also call your attention to the fact that the power to make such transfer does not include authority to expend such money after it is transferred. The power to transfer is one thing and the authority to expend is entirely a different thing. Section 43 deprives council of the right to make expenditures from any general revenue fund in excess of the amount fixed by the semi-annual budget of appropriations for that particular fund.

Section 43 also makes provision for the establishment of a contingent fund, but as your letter makes no reference to any "unforeseen emergency" having arisen to cause a deficiency in the public safety fund of your city, for which reason only payments can be made from the contingent fund, I do not discuss the provisions of the statute relative to such contingent fund.

Very truly yours,

U. G. DENMAN,
Attorney General.

ELECTIONS—BOARD OF DEPUTY STATE SUPERVISORS MAY NOT EMPLOY ADDITIONAL CLERKS TO THAT PROVIDED BY LAW.

October 25, 1909.

HON. S. H. WILLIAMS, *City Solicitor, Lorain, Ohio.*

DEAR SIR:—I have yours of the 20th inst., requesting an answer to the question:

"May the board of deputy state supervisors of elections appoint additional clerks at this time, to assist at the election to be held November 2, 1909; and may the county commissioners defray the expenses?"

While your question does not so state, the remainder of your letter makes it clear that by the words "additional clerks," you mean one or more additional clerks of election, to be stationed in the voting booths and assist the two clerks of election provided for each voting precinct by sections 2966-6 section 6, and 2926e of the Revised Statutes.

I have noted the statement in your letter that owing to the number of voters in certain precincts, and the many different candidates to be voted for, "unless there is some assistance legally obtainable many voters will be unable to be recorded as well as many voters deprived of the right to vote," and I have searched the statutes and decisions carefully in the hope that I might be able to suggest some way out of the difficulty you name.

Section 2926e Revised Statutes of Ohio, provides for the appointment of four judges and two clerks of election, who shall be the precinct election officers in cities where registration is required, and section 2966-6, section 6, provides for the appointment of four judges and two clerks of elections in each precinct where the voters are not registered, who shall constitute the election officers of such precinct. The wording of these two sections, particularly that portion of them covering the appointment of such clerks and the designation of substitutes therefor, if for any reason the duly appointed clerks are unable to serve, makes it clear that only two clerks are contemplated and authorized for each election precinct. There are other sections, as for example section 2926c, which authorizes the employment of a deputy clerk and assistant clerk or clerks to assist the clerk of the board of deputy state supervisors, but these sections, I do not believe, can be so construed as to authorize the employment of more than two clerks of election in each voting booth.

It seems to me the remedy for the condition stated in your letter, for those precincts outside the city of Lorain where registration is not required, is provided by section 2966-15, section 3, of the Statutes, by the provisions of which section voting precincts can be rearranged by the board of deputy state supervisors "so as to limit the number of voters in each ward or precinct to 200, as near as may be practicable."

As for the city of Lorain, where registration is required, section 2926 applies and provides practically the same remedy as 2966-15, section 3. I regret that November 2d is so near at hand that these remedies cannot be made use of for this election.

Very truly yours,

U. G. DENMAN,
Attorney General.

BOARD OF EDUCATION—ISSUE OF BONDS—"ANY YEAR" DEFINED.

Any year as used in section 3994 is meant school year as used in section 4016, and begins on September 1 and closes on August 31 of the succeeding year.

November 8, 1909.

HON. L. C. BARKER, *City Solicitor, Galion, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 21, submitting for my opinion the following question:

> "Section 3994 Revised Statutes, provides that: 'The board of education of any school district * * * in anticipation of income from

taxes * * * levied or to be levied, may * * * as occasion requires, issue and sell bonds * * * but shall provide that no greater amount of such bonds shall be issued *in any year* than would equal the aggregate of a tax at the rate of two mills *for the year* next preceding such issue * * *.' What is the meaning or meanings of the word 'year' as used in the above quoted section?"

The following are the possible meanings:

1. The calendar year. This is the primary meaning of the word, and in the absence of apparent inconsistency, or the presence of a context clearly showing that some other meaning is intended, this meaning will be given to the word.

U. S. v. Dixon, 15 Peters, 162.
Glasgow v. Rouse, 43 Mo., 479.
Thornton v. Boyd, 25 Miss., 598.

The context of the section now under consideration appears to relate to the general subject of taxation. The section itself provides a means of securing funds, and it is in *pari materia* with all the sections relating to the raising and expenditure of revenue for school purposes. It seems to me, therefore, that in spite of the lack of statutory definition of the term "year" as used in the section under discussion, and notwithstanding the presumption heretofore alluded to, that the calendar year, as such, is not contemplated by section 3994.

2. The year defined by the date at which the state's lien for taxes become effective, viz: The day preceding the second Monday in April (sections 2736 and 2838 Revised Statutes).

3. The fiscal year of the board of education. Each board is required to fix the rate of taxation necessary to be levied for all school purposes, including the retirement of bonds, by the first Monday in June (section 3958 R. S.), and if any board fails to do so, the county commissioners are required to fix the levy for the contingent fund (section 3969). The amount of the levy so fixed must be certified to the county auditor by the board of education by the first Monday in June, and by the county commissioners, if made by them, by the first Monday in August. (Section 3960 R. S.)

The county auditor is required to prepare his tax list on the basis of all the levies certified to him by the controlling authorities of the several taxing districts of the state and county by the first of October, and on that day he must deliver a duplicate of said list to the county treasurer. (Section 1042 R. S.) The county treasurer is required to collect the amounts charged on the duplicate so presented to him by the county auditor in equal installments during the months of December and June next following his receipt of the duplicate. (Section 1091 R. S.) For the money so collected by the county treasurer, he must settle with the county auditor on the 15th day of February, and the 10th day of August next following the times of collection of taxes. (Section 1115 R. S.) And immediately after each such semi-annual settlement he must pay over to the treasurer of the school district the amount belonging to such district (sections 1122 and 3964 R. S.), unless advance payments have been allowed under authority of section 1123 R. S.

Now the amount so levied and collected is fixed by estimating the expenses of the school district *for the ensuing school year*, not the school year just closing on the first Monday in June.

The theory of the taxation laws of this state, and especially those relating to school funds, is that the expenses for the ensuing year are to be estimated

in advance, and paid out of the returns from taxation. That is to say, should a new district be organized in time for the opening of schools therein, there would be no funds (without some special saving statute) to pay teachers and running expenses until the date of the first settlement between the county treasurer and the district treasurer, and funds received by the district treasurer at the time of such settlement would be applied to the expenses incurred during the school year, a portion of which would have already elapsed. From this the conclusion follows that the levy made in June of any year is to defray the expenses incurred in conducting schools during the school year beginning on the first of September following the date of said levy.

The school year is defined in section 4016 as beginning "on the first day of September of each year," and closing "on the thirty-first day of August of the succeeding year." This provision relates primarily to the sessions of the schools, and their administration on the purely educational side. However, it is apparent from an examination of sections 4044, 4052, 4056 and 4057 Revised Statutes, that the fiscal year of the board of education corresponds with this school year, as defined in section 4016. The accounts of the board are supposed to be closed and re-commenced on the first day of each September, and the sums raised by taxation are to be estimated and expended as of the year commencing and ending on that date.

It follows from the foregoing that the language "a tax * * * for the year next preceding such issue" refers to the tax levied for the purpose of defraying the estimated expenses of the year ending on August 31st next preceding the date of the proposed issue of bonds. It is true that in one sense the tax year may for all purposes be said to begin on the second Monday in April, but that tax year is the one which is defined, so to speak, from the view point of the *tax payer*. Section 3994, on the other hand, relates to the *expenditure* of funds to be raised by taxation and is in *pari materia* with other sections of the same kind. It is the year *for* which taxes are raised, and not the year *in* which the lien of a particular tax attaches, or that during which the owner of property is subject to tax, that seems to be meant by the statute.

To disregard the year measured by the date when the state's lien for taxes attaches to property avoids a great deal of confusion in that it nowhere clearly appears whether the day preceding the second Monday in April is the last day of the preceding year, or the first day of the ensuing year, nor that there is any such thing as a "tax year" for all purposes—either a year beginning on the day preceding the second Monday in April, or that beginning on the first of January, or any other year defined by the taking of any of the steps required to be taken by different officers in the collection and distribution of taxes.

I conclude from all the foregoing that the "preceding year" referred to in section 3994 R. S., is the year ending on the thirty-first day of August next preceding the date of the contemplated issue of bonds. For similar reasons the year in which boards of education are prohibited from issuing bonds exceeding in amount a tax of two mills, etc., is the year beginning on September 1st, the day following the expiration of the year for which the tax, upon which the two mills is to be estimated, was levied. The duplicate which is to be employed in estimating the two mills is that certified to the county treasurer in the October preceding the thirty-first of August above referred to. Speaking concretely, if a board of education desires on *August* 1, 1909, to issue bonds in anticipation of tax under section 3994 for the purpose of constructing or improving a schoolhouse, it must ascertain:

First. Whether like bonds have been issued since September 1, 1908;

Second. Whether the contemplated issue, together with such other issues as may have been made during that time, will exceed in amount two mills on the total tax valuation of the school district as shown on the duplicate delivered to the county treasurer in October, 1908.

In the case you present the proposed issue is to take place, of course, *after* September 1, 1909. The duplicate upon which the two mills is to be estimated is, therefore, that delivered by the auditor to the treasurer in October, 1908, and the "year" during which the two mills limitation as so ascertained must be observed, began on September 1st of this year and will expire on August 31, 1910.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW—APPOINTMENT OF FIREMEN AND POLICEMEN—EMPLOYES IN GAS, ELECTRIC LIGHT AND WATERWORKS PLANTS.

Director of public service fixes number of employes in gas, electric light and waterworks companies. Compensation to be fixed by council.
Director of public safety shall appoint firemen and policemen.

November 16, 1909.

HON. EDWARD K. CAMPBELL, *City Solicitor, Bellefontaine, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of a letter under date of November 13th, signed by yourself and Hon. Lewis E. Pettit, mayor-elect of Bellefontaine, submitting for my opinion thereon the following questions:

"Under the new Paine law, what officers of the city shall make appointment of firemen and policemen? What section gives such authority?

"In the city of Bellefontaine, Ohio, the gas plant, electric light plant and waterworks are owned by the city. Does council fix the number of employes and their salaries, or does the director of public service have this authority?

Section 129 M. C., as amended by the Paine law, 99 O. L. 562, provides in part as follows:

"* * * the directors and officers provided for in this act shall have the exclusive right, subject to the limitations herein prescribed to appoint all officers, clerks and employes in their several respective departments or offices * * *."

Section 147 M. C., as amended, provides in part that:

"The director of public safety shall be the chief administrative authority of the fire (and) police * * * departments, and shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments, except as otherwise provided by law * * *."

Section 153 of the act provides in part that:

"The director of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein * * *."

Section 160 of the act provides in part that:

"Appointments (in the classified service) shall be made as follows: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify * * * the three candidates graded highest in the respective lists * * * such board or officer shall thereupon appoint one of the three so certified."

Section 161 of the act provides in part as follows:

"It shall be the duty of each appointing officer of a city to report to the civil service commission forthwith upon such appointment or employment, the name of such appointee or employe, etc. * * *."

The foregoing sections all bear upon the matter of the appointment of the firemen and policemen. It appears therefrom that the director of public safety shall make such appointments subject to the requirements of the civil service regulations of the act.

Respecting your second question I beg to make the following quotations from the act:

Section 141:

"The director of public service shall manage all municipal, water, lighting, heating * * * and other undertakings of the city * * *

Section 145:

"The director of public service may establish such subdepartments as may be necessary, and determine the number of superintendents, deputies, inspectors, engineers, * * * clerks, laborers, and other persons as may be necessary for the execution of the work and the performance of the duties of this department."

Section 227:

"Council shall by ordinance or resolution, *except as otherwise provided in this act*, determine the number of officers, clerks and employes in any department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation * * *."

From these three related sections it appears that the number of persons to be employed in and about the gas plant, the electric light plant, and the waterworks owned by the city, must be fixed by the director of public service, but that the salaries payable to such employes must be fixed by council.

Yours very truly,

U. G. DENMAN,
Attorney General.

SEWAGE DISPOSAL PLANT—STEPS TO BE TAKEN BY COUNCIL AND BOARD OF PUBLIC SERVICE RELATIVE TO CONSTRUCTION.

November 17, 1909.

HON. L. E. KERLIN, *City Solicitor, Greenville, Ohio.*

DEAR SIR:—I have your letter calling attention to the following ordinance passed by the council of the city of Greenville, May 17, 1909:

> "An ordinance to provide for the furnishing of plans and specifications for sanitary sewer disposal works of the city of Greenville, Ohio, and to appropriate money necessary for such purpose.
>
> "In compliance with the order of the state board of health, and in accordance with an agreement heretofore entered into by and between the council of said city and one Charles S. Slade, by the acceptance made by the council of the written proposal submitted by Charles S. Slade for drafting the plans and specifications of said sewer disposal plant and for his acting as consulting engineer on the constructing of said plant; that Charles S. Slade be, and he is hereby authorized, empowered and instructed so to draft the necessary plans, specifications and profiles of said plant and to make all necessary and proper surveys therefor, and to make an estimate of the probable cost of said plant, and to report the same to council in order that they may determine the amount of bonds to be issued for the construction of said plant, all of which work is to be done under the direction of council, and that said Charles S. Slade be known and designated as 'the special civil engineer for the construction of the sanitary sewer disposal plant,' which office is hereby created under and by virtue of section 1782 of the Ohio Revised Statutes, and that the compensation for said special civil engineer as above defined shall be as follows, to-wit:
>
> "For making the necessary and proper surveys, drafting, plans, specifications and estimates, and advising the city council and other officers in the matter of receiving bids for the construction of said work, the sum of $475.00; and all other services rendered as consulting engineer during the progress of said work, said special civil engineer shall receive as compensation four per cent. of the entire cost of the construction of said plant."

Most of your inquiries as to the legality of the ordinance were answered by an opinion of this department rendered to the state board of health May 17, 1909, which opinion I am informed was read to you over the 'phone by Mr. Bauman of the state board of health on May 17th, before the passage of such ordinance by your city council. This opinion, a copy of which I herewith enclose, held that the directors of public service as "the administrative authority" of the city authorized by law to "have the management of all municipal * * * sewage disposal plants," was the proper board to have charge of the furnishing of plans and specifications for such sanitary sewage disposal works, and the proper board to construct such works; that the power of council, under the Municipal Code, is "legislative only, and it shall perform no administrative duties whatever;" that council could neither appoint nor confirm any person by name for preparing plans and specifications for such sewage disposal plant or for constructing the same; and that when council authorizes the preparation of plans for or the constructing of such sewage disposal plant and appropriates the money for the same, its power is exhausted and the contracts for

such work and the execution of the same shall be "entered into and conducted to performance by the board or officers having charge of the matters to which they relate;" and that, therefore, the employment of an engineer and the making of plans for said plant, being properly included in the construction thereof, is by statute made the duty of the board of public service.

Your inquiries are further answered by an opinion of this department rendered November 12, 1909, to the bureau of inspection and supervision of public offices, a copy of which is herewith enclosed. In this opinion it is held that such ordinance of May 17, 1909, in attempting to create the position of "the special civil engineer for the construction of the sanitary sewer disposal plant" is illegal for the reason that such a position cannot be created under authority of section 1782 R. S.; that even if such a position could be created under section 1782, the attempt of council by such ordinance to appoint Mr. Slade to the position is illegal for the reason that, under section 223 of the Municipal Code, the mayor is designated as the officer who shall make appointments of officers under section 1782, no power being given to council to make such appointments, and for the further reason that, under section 123 of the Municipal Code, council can "neither appoint nor confirm any officer or employe," without specific authority, which has not been granted council in cases arising under section 1782. This opinion further held that such ordinance was invalid for the reason that by it council attempted to perform administrative duties, to enter into a contract, to make an appointment of an individual and to perform work which, under the Municipal Code, should be performed by and under the direction of the board of public service.

It is the whole spirit of the Municipal Code that the engineering work of the city should be done under the supervision of the department of public service and the statutes specifically give the board of public service the power to appoint necessary engineers. This prevents conflict of authority and places the responsibility for honest and efficient administration upon one department.

The above ordinance is, therefore, illegal and void under any consideration and every part of it must be disregarded.

You ask what steps should be taken by council, or the board of public service, to rectify errors in the proceedings for construction of a sewage disposal plant as ordered by the state board of health.

In my opinion the city should take up this entire matter anew, disregarding wholly the ordinance of May 17, 1909, and everything done in pursuance thereof. The city council should pass an ordinance authorizing and instructing the board of public service to prepare plans and specifications for a municipal sewage disposal plant, as ordered by the state board of health, appropriating the amount of money necessary for the preparation of such plans and specifications. It will then be the duty of the board of public service to take such action and employ such persons as they deem best to complete such work.

Since section 9 of the act of May 9, 1908 (99 O. L. 192), provides that:

> "no city * * * shall provide or install for public use, a * * * sewerage system or purification works for the water supply or sewage, of a municipal corporation * * *, until the plans therefor have been submitted to and approved by the state board of health."

the plans adopted by the city of Greenville must then be submitted to and be approved by the state board of health. To facilitate matters the ordinance of council should authorize the board of public service to submit its plans and

specifications, when approved by it, directly to the state board of health. Such a provision in the ordinance would make unnecessary the submission of the plans adopted by the board of public service to the city council prior to the submission of such plans to the state board of health.

Upon the approval of the plans and specifications of the city of Greenville by the state board of health, the city council should then pass an ordinance providing for the construction of such sewage disposal plant and appropriating the amount of money necessary for such purpose. It will then be the duty of the board of public service to construct and complete such plant in accordance with the plans and specifications approved by the state board of health.

Yours very truly,

U. G. DENMAN.
Attorney General.

LIBRARY TRUSTEES ELECTED BY VIRTUE OF SECTION 3998—POWERS AND DUTIES.

November 18, 1909.

HON. J. F. KUHNS, *City Solicitor, New Philadelphia, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 12th, requesting my opinion upon the following questions:

> "1. Whether a board of library trustees, elected under and by virtue of section 3998-2 Revised Statutes as amended March 15, 1909 (vol. 100, O. L. 16), are required, in making up its organization to provide for and elect a treasurer to hold and disburse the library fund, or whether the board of trustees of the library draws its warrant direct on the city treasurer?
>
> "2. In case the board of trustees are not required to elect a treasurer, must the money collected in behalf of the library by way of fines and money collected for library privileges to persons outside of the library district be paid by the board into the hands of the city treasurer, or can such money be used by the board of trustees to meet current expenses without so paying the same to the city treasurer?
>
> "3. In case the board of trustees has authority to use for current expenses the money collected by it by way of fines and library privileges without first paying the same into the hands of the city treasurer, is it then necessary for the board to elect a treasurer to have control of such moneys, or could they be held and expended by some other officer of the board, or a committee duly appointed and authorized by the board to so hold such moneys and disburse the same for current expenses?"

The amendment to section 3998-2 as set forth in 100 O. L. 16 merely adds to the original section a provision authorizing school library trustees to condemn real property, and in no way affects the relation of that section to its context, sections 3998-1, 3998-3 et seq. The following are all the provisions of the entire act in its present form applicable to the control and expenditure of funds by the trustees:

3998-2:

> "The board of education may provide for the management and con-

trol of such library by a board of trustees to be elected by said board of education * * *.

"Such library board in its own name shall hold the title to and have the custody, management and control of all libraries * * *, and to all library property * * * and the expenditure of all moneys collected or received from any source for library purposes for such district."

3998-4:

"Such board of library trustees shall annually * * * certify to the board of education the amount of money that will be needed for increasing, maintaining and operating said library during the ensuing year in addition to the funds available therefor from other sources; and such board of education shall annually levy * * * such assessment * * * as shall be necessary to realize the sum so certified * * *

"The proceeds of the said tax shall constitute a fund to be known and designated as a library fund; payments therefrom shall only be made upon the warrant of the board of trustees of the library, signed by the president and secretary thereof."

There is no express provision authorizing the election or appointment of a treasurer. The provision vesting in the board the sole authority to expend the sums of money receivable by it, does not of itself confer upon the board the right to the possession and control of unexpended money. While section 3998-4 above quoted is applicable in terms only to the proceeds of taxation, I am of the opinion that under the scheme of fiscal administration evidenced in the act establishing the bureau of inspection and supervision of public offices, R. S., section 181-*a*-1 et seq., the moneys received by the board from whatever source should be paid by the secretary into the treasury of the school district —in your case the city treasury—from which it may be expended for all library purposes upon warrant of the board of trustees, signed by the president and secretary thereof.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW DOES NOT APPLY TO VILLAGES—TRUSTEES OF PUBLIC AFFAIRS—TERM OF OFFICE.

November 18, 1909.

HON. ROBERIC JONES, *Village Solicitor of Granville, Newark, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 17th, requesting my opinion on the following statement of facts:

"On August 1, 1909, the mayor of Granville, an incorporated village, appointed John B. Smith as director of public service of the village, attempting to act in making such appointment under the so-called Paine law, 99 O. L. 562. Upon the assumption that said act applies to villages no election for members of the board of trustees of public affairs thereof was held at the time of holding municipal elections. Was the appoint-

ment of Smith valid, and if not, should the present members of the board of trustees of public affairs continue to serve until their successors are elected and qualified?"

The Paine law, so called, applies only to cities.

The present members of the board of trustees of public affairs will continue to hold office until their successors are elected and qualified (section S R. S.), except that their incumbency may not extend beyond the period of four years, article 17 section 2 of the Constitution, State ex rel. v. Brewster, 44 O. S. 249.

Yours very truly,

U. G. DENMAN,
Attorney General.

CITY AUDITOR AND CLERK OF WATERWORKS DEPARTMENT—INCOMPATIBLE OFFICES.

November 18, 1909.

HON. W. R. MACDONALD, *City Solictor, Wellsville, Ohio.*

DEAR SIR:—In your letter of November 15th, receipt whereof is here acknowledged, you request my opinion as to whether the offices of city auditor and clerk of the waterworks department may be held by the same person.

Section 133 M. C. provides that:

"The auditor shall keep the books of the city * * *. At the end of each fiscal year or oftener if required by council, he shall examine and audit the accounts of all officers and departments * * * upon the death, resignation, removal, or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council, and to the solicitor, and the latter shall proceed forthwith to collect the same. He 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 * * *. Whenever any claim is presented to him he shall have power to 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."

Under the above quoted section the city auditor is clearly vested with powers involving judgment and discretion, and in the exercise thereof he acts as a check upon all the departments of the city government having control and expenditure of funds.

After the Paine law, so-called, 99 O. L. 562, shall have become fully effective, to-wit: after January 1, 1910, the position of clerk of the waterworks department will be entirely dependent upon the will of the director of public service, who, under section 145 M. C., as amended in said act, "may determine the number of * * * clerks * * * and other persons as may be necessary for the execution of the work, and the performance of the duties of this department," which department, under section 145 M. C., as amended, in-

cludes the subdepartment of waterworks. The position of clerk of the waterworks department, if created by the action of the director of public service, would come within the classified service of the city as defined by section 158. In other words, the office would be subject to civil service rules.

From the foregoing it seems obvious to me that the offices of city auditor and clerk of the waterworks department are incompatible as measured by the common law tests, and that they may not be held by the same person.

Yours very truly,

U. G. DENMAN,
Attorney General.

STREET ASSESSMENT MAY BE ASSESSED AGAINST STATE.

November 30, 1909.

HON. HARRY E. GARN, *City Solicitor, Fremont, Ohio.*

DEAR SIR:—I have your letter of November 26th, in which you submit for opinion the following questions:

> "Does section 50 of the code or any other provision of law that you are aware of confer the power upon municipalities to assess upon abutting, adjacent, contiguous or other especially benefited lots or land any part of the cost and expense connected with the improvement of any street (pavement), etc., by grading and paving the same, etc., where title to such abutting, adjacent, contiguous or especially benefited lots and lands is in the state of Ohio? Can such property be legally charged with an assessment for such an improvement by a municipality?"

All lands belonging to the state are, of course, exempt from taxation. Section 2732 R. S.

Exemption from taxation, however, is not exemption from assessment for local improvements. Lima v. Cemetery Ass'n., 42 O. S. 128.

In the latter case the point was made that the cemetery association lands which were held liable for municipal assessment could not be forced to pay the same by any statutory process. This point was discussed by the court on page 133, but was held not to have any bearing upon the main question involved in the case.

It is my opinion upon the question you submit, that state property may be assessed for municipal improvements in proper cases, but that the collection of such assessments will have to be made through the general assembly upon the conscience of which, in the last analysis, the obligation to pay rests.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PAINE LAW—CLERK OF BOARD OF CONTROL—CITY AUDITOR MAY NOT ACT AS—PRESENT COUNCIL FIXES SALARIES.

Board of control appoints its clerk and present council has authority to fix salary. City auditor may not act as clerk.

December 1, 1909.

HON. W. S. FURMAN, *City Solicitor, Sidney, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 30th, in which you request my opinion on the following questions:

> "1. In cities, does the mayor, board of control or council appoint the clerk of such board of control, and who fixes his salary?
>
> "2. Can the city auditor act as the clerk of the board of control?
>
> "3. Has the present council authority to provide by ordinance for the salary of all elective and appointive officers, or is this power alone vested in the council-elect?"

In answer to your first question I beg to state that the Paine law, so called, 99 O. L. 562, in providing for a board of control, does not provide for any clerk thereof. Inasmuch as section 154*a* of the code, as amended by this act, provides that the board of control shall keep a record of its proceedings, I am of the opinion that it would be proper for council, under section 227 as amended, to create the position of clerk of the board of control. There being no specific provision of the act respecting the appointment of such clerk, I am of the opinion that the second paragraph of section 129, as amended by the Paine law, will govern. The provision in question is as follows:

> "The directors and officers provided for in this act shall have the exclusive right * * * to appoint all officers, clerks and employes in their several respective departments or offices."

Under this section the power to appoint the clerk of the board of control would be vested in the board itself. The salary of the clerk would, of course, be fixed by council.

Without citation of the sections involved, I beg to state in reply to your second question that, in my judgment, no person connected with any of the departments of the city government, including the board of control, should serve as city auditor. The duties of the city auditor constitute checks upon the exercise of the powers of all the administrative officers and it would be against public policy for the same person to serve as city auditor and in connection with any of the administrative authorities of the municipal governments.

The Paine law is silent, so far as express provisions are concerned, upon the point involved in your third question. However, section 3 of the act provides that:

> "This act shall take effect and be in full force on and after August 1, 1909."

Section 227 as amended, of the act, provides simply that:

> "Council * * * shall fix by ordinance or resolution the respective salaries and compensation and the amount of bond to be given for

each officer, clerk, or employe, in any department of the city government, if any be required."

In view of the fact that the power of council to provide by ordinance or resolution for the salaries of all officers is now effective by virtue of section 3 above quoted, and in view of the settled policy of this state as particularly evinced in section 126 M. C., left undisturbed by the Paine law, viz:

"The salary of any officer, clerk, or employe so fixed (by council) shall not be increased or diminished during the term for which he may have been elected or appointed."

I am of the opinion that the law contemplates that the salaries of officers in the municipal administration which is about to take office in January next, should be fixed by the present council.

Yours very truly,

U. G. DENMAN,
Attorney General.

SCHOOLS—CERTIFICATE OF EMPLOYMENT—SUPERINTENDENT HAS DISCRETION IN ISSUING.

December 8, 1909.

HON. E. M. BELL, *City Solicitor, Piqua, Ohio.*

DEAR SIR:—Replying to your letter of recent date relative to the construction of section 4022-1, etc., Revised Statutes, I beg to state that I have carefully examined these sections and have come to the conclusion that under section 4022-2 the superintendent of schools, or the person authorized by him in the premises, has the sole discretionary authority to issue the age and schooling certificate prescribed in the section. In case of abuse of this discretion, of course the superintendent or his agent might be compelled by appropriate proceedings to issue the certificate, but in the absence of the certificate, I am of the opinion that the parents and employers of the children failing to attend school would be liable to the penalties under the several sections cited.

Yours very truly,

U. G. DENMAN,
Attorney General.

CLERK OF BOARD OF PUBLIC SERVICE AND COUNCIL DO NOT HOLD OVER UNDER CIVIL SERVICE RULES.

December 10, 1909.

HON. W. R. WHITE, JR., *City Solicitor, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of December 8, 1909, in which you ask my opinion on the following question:

"Do the clerk of the board of public service and the clerk of the city council hold over under the civil service provision of the Paine law? In other words can the present clerks be removed by the new administration January 1, 1910?"

Section 162 of the code as amended in the Paine bill, 99 O. L. 567, answers your question, with reference to the clerk of the board of public service, in the negative in the following language:

> "Nothing in this act shall prevent the dismissal or discharge of any apopintee by the removing board or officer."

The new director of public service will not be compelled to retain the present clerk of the board of public service. The clerk of the council is an employe of the council, and under section 158, as amended in the Paine bill, he is not in the classified service. The new council going into office January 1, 1910, will not be compelled to retain the present clerk.

Yours very truly,

U. G. DENMAN,
Attorney General.

PAINE LAW—DIRECTOR OF PUBLIC SERVICE TO DETERMINE NUMBER OF EMPLOYES—COUNCIL FIXES SALARIES.

December 29, 1909.

HON. W. A. O'GRADY, *City Solicitor Elect, Wellsville, Ohio.*

DEAR SIR:—I have your letter of December 27th, in which you ask my opinion on the following facts:

> "The Paine law repeals sections 145 and 227 of the Municipal Code, wherein it states that the service board has power to fix salaries and determine the amount of bond required to be furnished, by the heads and employes of each department. Corresponding sections of the Paine law, enumerating the powers of the director of public service, do not state whether the director has the power to fix bonds or salaries of his employes. It is my contention that council is the proper body to fix salaries and to designate the amount of bond required by ordinance. If I am right in my contention please state whether council will be required to fix the salary of engineer of the municipal water plant, and whether the same would apply to the employment of common laborers on streets, sewers, etc."

Section 145 of the Municipal Code, as amended in the Paine law, provides that:

> "The director of public service may establish such subdepartments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons as may be necessary for the execution of the work, and the performance of the duties of this department."

Section 227 of the code, as amended in the Paine law, provides that:

> "Council shall, by ordinance or resolution. except as otherwise provided in this act, determine the number of officers, clerks and employes

in any department of city government, and shall fix, by ordinance or resolution, their respective salaries and compensation, and the amount of bonds to be given for each officer, clerk or employe, etc."

These two sections just quoted control in answering your question over the original sections 145 and 227. Under these amended sections the director of public service will determine the number of the various employes, but the council must fix the salaries, compensation and bond, and this applies to the engineer of the municipal water plant, and it will also apply to the employment of common laborers on streets, sewers, etc.

Very truly yours,

U. G. DENMAN,
Attorney General.

PAINE LAW—CIVIL SERVICE COMMISSIONERS—WHO APPOINTS.

The president of council, president board of sinking fund trustees of city, and president board of education of city school district in which city is located, will on January 1, 1910, *have power to appoint civil service commissioners.*

December 31, 1909.

HON. PHILO G. BURNHAM, *City Solicitor, Dayton, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 30th, in which you submit for my opinion the following question:

"When and by what officers, as between present incumbents and officers elected at the late municipal election, is the civil service commission provided for by section 157 M. C., as amended by the Paine law, 99 O. L. 562-565, to be appointed in the first instance?"

Section 157 M. C., as amended, provides:

"In all cities, the president of the board of education of the city school district in which the city is located, the president of the board of sinking fund commissioners, and the president of council shall constitute a commission which shall appoint three resident electors of the city to be known as civil service commissioners. They shall be appointed for terms of three years and shall hold office until their successors are appointed and qualified * * *."

Section 3 of the Paine law, 99 O. L. 568, provides that:

"The provisions of sections 157, 158, etc., * * * shall be in full force and effect from and after January 1, 1910."

The power and duty to appoint the civil service commission devolves upon those persons who shall occupy the three offices named in section 157 on January 1, 1910, and the terms of office of the civil service commissioners will begin on the date of appointment.

The terms of office of the present members of the board of education will not expire until the day preceding the first Monday in January, which in the year 1910 will be Sunday, January 2d. (Section 3970-13 R. S.)

The present organization of the board will, of course, continue until supplanted by the new organization on Monday, January 3d. Accordingly the president of the board of education, who will be a member of the appointing board in question, is the president of the present board. Another member of the appointing board is named in the language above quoted from section 157 of the Municipal Code, as amended in the Paine law, in the following language, viz: "the president of the board of sinking fund commissioners." Under this language the question for determination is, what officers were intended by the general assembly when it used the words "sinking fund *commissioners?*"

The officers who, under section 102 of the Municipal Code (96 O. L. p. 54), manage and control the sinking fund of the city are designated "*trustees* of the sinking fund," etc. Under section 3970-1 of the Revised Statutes, as amended in 97 O. L., pages 352 and 353, provision is made for a board of officers to manage and control the sinking fund for boards of education and these officers are designated as the "board of *commissioners* of the sinking fund" of ———— (inserting the name of the district), etc. In section 157 of the code, as amended in the Paine bill, the word "*commissioners*" is used and not the word "*trustees.*" Did the general assembly mean the sinking fund commissioners for the board of education or did they mean the trustees of the sinking fund for the city?

Some time ago I issued a general statement explaining practically all of the various provisions of the Paine bill, and in that statement discussed some questions arising under the bill which at that time seemed to be of considerable doubt, and this question was at that time placed under the heading "Some doubtful questions." Without having gone into the matter thoroughly at the time, and without intending to definitely decide the question, I stated that I did not then feel at liberty to depart from the literal wording of this section 157, as amended in the Paine law. That is, I did not feel at that time, without further investigation, that the word "*commissioners,*" as used in the section would have to be read "*trustees.*" Since then, however, after going into all the related sections of the original Municipal Code, and the various sections thereof as amended in the Paine law, I have reached the conclusion that the general assembly intended that the president of the board of sinking fund trustees of the city shall be one of the members of the appointing board provided for in section 157, as amended in the Paine law.

Section 3790-1 of the Revised Statutes does not definitely, and under any and all circumstances, establish a board of sinking fund commissioners, nor does it make any mention of or provide for a president of such board where one must exist under the requirements of this section of the Revised Statutes. It is provided in this section in effect that a board of commissioners of the sinking fund shall be appointed, if the board of education of the district shall have a bonded indebtedness, but there are, or may be, many boards of education which have no such indebtedness. If there is no such indebtedness, then there would be no reason for the appointment of such board, and in case the board of education of any city district should have no such board then of course there could be no president of such board to act as a member of this appointing board provided for under section 157, as amended in the Paine law. In any case, therefore, in which the board of education of the city district should have no bonded indebtedness this provision in section 157, amended as aforesaid, would fail for lack of a third member of the appointing board provided for in section 157 as amended.

Sections 46, 102 and 104, however, of the original Municipal Code, seem to definitely create or provide for a continuous board of sinking fund trustees, and section 104, just mentioned, provides for this board to elect one of their number

as president of the board, and this must be done in every city in the state. If we adhere to the literal reading of the language providing for the board created by section 157, as amended in the Paine law, and therefore hold that that board must have as one of its members the president of the school board sinking fund commissioners, then section 157, in the case of some cities, must fail; but if we read the word "commissioners" to include and mean "trustees," then section 157 will stand and be effective in each and all of the cities of the state at all times. It is a well known rule of statutory construction that the literal reading may be disregarded if adherence to that meaning will defeat the law, and the rule is also well established in such cases that such meaning may be ascribed to the general assembly as will render the law effective unless some other provision in the statute should absolutely prohibit such departure from the literal reading. I think there is no such prohibitory provision in this statute, but that on the contrary the intention of the general assembly, as gathered from the original Municipal Code, and the amendments thereto in the Paine bill was, and is that the president of the board of sinking fund *trustees* of the city should be one of the members of the appointing board provided for in section 157, as amended, to appoint the three civil service commissioners. Whoever may occupy that position in any city on January 1, 1910, will be a member of that appointing board and will so remain such member until his successor is elected by the board to which he belongs. Section 157, as quoted above, provides that the third member shall be the president of the council, and whoever is occupying the office of president of council on January 1, 1910, will constitute one of the appointing board created by said section 157 as amended.

These three officers, therefore, president of the council, president of the board of sinking fund trustees of the city and the president of the board of education for the city school district in which the city is located will, on January 1, 1910, have the power to appoint on that day or any subsequent day before they or any of them retire from office three resident electors of the city to be known as civil service commissioners. If these officers so in office on January 1, 1910, do not appoint such civil service commissioners on that day, nor at any time thereafter before they or any of them retire from office, if any of them do so retire, then it will be the duty of their successors in office to make such appointments. That is, these three civil service commissioners may be appointed at any time by the three men whoever they may be, who at the time occupy the three offices as above mentioned respectively.

Yours very truly,

U. G. DENMAN,
Attorney General.

COUNCIL MEMBER RETIRED APPOINTED DIRECTOR OF PUBLIC SAFETY.

Section 6976 does not prohibit member of council accepting at expiration of term appointment as director of public safety of city.

December 29, 1909.

HON. T. J. SUMMERS, *City Solicitor-Elect, Marietta, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of December 28th, in which you request my opinion as to the eligibility of a member of the present council of the city of Marietta to become director of public safety of that city in view of the provisions of section 6976 R. S.

That section provides in part as follows:

> "An officer or member of the council of any municipal corporation * * * who is interested directly or indirectly in the profits of any contract, job, work or services for the corporation * * * or acts as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation * * * during the term for which he was elected or appointed, or for one year thereafter, shall be fined, etc."

You call my attention also to the case of State ex. rel. v. Wichgar, 27 C. C. 743, in which it is held, construing this section, that a member of the board of health of a municipal corporation may not receive an appointment as district physician by said board within a year after his term as member of the board of health has expired. I have, in connection with this section, examined, not only this case, but several other cases decided in the courts of this and other states under this and similar statutes. Upon such investigation I am satisfied that accepting an appointment as director of public safety is not equivalent to being "interested in the profits of any services for the corporation," as prohibited by the section under consideration, for the following reasons, viz:

First. The word "services," occurring as it does in the context with the words "contract, job and work," is to be defined by the application of the rule *ejusiem generia.* That is to say, the first of the series of words indicates the sense in which the succeeding words, if each capable of more than one meaning, are to be taken. So, the word "services," which might possibly be construed to mean services rendered to the corporation as an officer thereof, is limited by this rule to services rendered under employment as distinguished from appointment, and in pursuance of *contract.*

Second. If the intention of the general assembly had been to include within the meaning of the word "services," such services as may be rendered as an officer of the corporation, that intention would have been better expressed by the use of the word "office." The failure of the general assembly to use that word indicates that it was intended to exclude its meaning from the possible meanings of the word "services." This inference is strengthened by reason of the enumeration of certain words "commissioner, architect, superintendent or engineer," some of which might be regarded as referring to officers of the corporation. On the principle, *expressio unius exclusio alterius est,* this enumeration would serve to exclude all other classes of officers as distinguished from employes from the possible significance of the word "services."

Concluding, then, it is my judgment that, with the exception of the offices specifically enumerated in section 6976, appointment to municipal office is not prohibited thereby, but that the inhibition of the section is directed against services of a contractual nature and against undertaking employments as distinguished from accepting offices.

That the position of director of public safety is an office and not an employment, seems to me so clear under the provisions of the Paine law, by which the position is created, that I shall not submit any authority thereon. It follows, then, that section 6976 R. S., does not prohibit a member of council of a municipal corporation from accepting, at the expiration of his term as such member, an appointment as director of public safety of the city.

Yours very truly,

U. G. DENMAN,
Attorney General.

AUTOMOBILE LICENSE LAW REPEALS PROVISION OF M. C. AUTHORIZING CITIES TO REGULATE.

December 7, 1909.

HON. CHARLES L. STOCKER, *Village Solicitor, Collinwood, Ohio.*

DEAR SIR:—Replying to your letter of December 6th, I beg to state that in my judgment section 23 of the state automobile license law, so called, 99 O. L. 538-543, repeals by necessary implication the provisions of the Municipal Code which authorized cities and villages to regulate the speed of vehicles upon public streets, so far as that power relates to the regulation of motor vehicles. The section is as follows:

> "No local authority shall have any power to make any ordinance, by-law or resolution regulating the speed of motor (vehicles), provided, however, that local authorities may set aside for a given time a specific public highway for speed tests and races."

The section seems clear, and its effect upon previously enacted laws is unquestionable.

Yours very truly,

U. G. DENMAN,
Attorney General.

(Miscellaneous)

STATE LIBRARY—EXPENDITURE OF APPROPRIATION FOR LIBRARY ORGANIZATION.

January 14th, 1909.

HON. C. B. GALBREATH, *State Librarian, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following statement of facts relative to the department of library organization, with a request for an opinion thereon:

The general assembly in 1906 enacted a law authorizing the board of library commissioners to appoint a "library organizer with office in the state library." At the last session of the general assembly an appropriation was made for the "department of library organization." With the crowded condition of the state library it is impossible to carry on successfully the work of this department without additional room. Query: May a portion of the appropriation above referred to be expended to pay rent for an additional room for said department of library organization?

In reply I beg to say the act above referred to, which authorizes the board of library commissioners to appoint a library organizer, provides that the library organizer shall have his office in the state library. I am, therefore, of the opinion that the library commissioners are without authority to expend any of said appropriation for office rent for the library organizer. The appropriation for "department of library organization" is, however, available to pay all expenses necessary to the proper conduct of the department, and if additional room is required for storage and other purposes incidental to the work of the library organizer, it is my judgment that such expenses may properly be paid out of said appropriation.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

INCOMPATIBILITY OF OFFICES.

Supreme court reporter may serve and receive compensation as secretary of Archaeological and Historical Society.

January 5th, 1909.

HON. E. O. RANDALL,, *Supreme Court Reporter, Columbus, Ohio.*

DEAR SIR:—Your communication is received in which you inquire whether or not there is any legal restriction under section 2 of the act of April 2, 1906, or any other law, preventing you, while holding the office of supreme court reporter, from receiving compensation as secretary of the Ohio State Archæological and Historical Society from the funds appropriated by the general assembly in behalf of said society.

In reply I beg to say that 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 for which is made from the state treasury."

It will be observed that this section forbids any additional remuneration to any officer whose salary is fixed by this act for services rendered under any other title than the title by which such officer was elected or duly appointed. This restriction is intended to prevent officers, whose salaries are fixed by the act, from receiving any fees or other compensation for the performance of official duties enjoined upon them by law. It does not, in my judgment, prevent any officer whose salary is fixed by the act, from receiving compensation out of the public treasury for services rendered in another and different capacity from the office he holds. The right of an officer, however, to assume the performance of other duties than those enjoined upon him by law as such officer will be governed by the rule of compatibility and double compensation. That is, no officer may assume other duties not required of him as such officer if the performance of the same are incompatible with the duties enjoined upon him as such officer. Neither may he consume any of the time required by him in the performance of his official duties in the performance of other duties and receive compensation therefor from the public treasury.

My understanding is that the performance of your services as secretary of said society in no way conflicts with the discharge of your duties as supreme court reporter and that you consume none of the time required of you in the performance of your duties as supreme court reporter in the service of said society.

My opinion is, based upon these facts, that you are entitled to perform the services of secretary to the Ohio State Archæological and Historical Society and receive compensation therefor out of the public treasury, notwithstanding the fact that you are the duly appointed and acting supreme court reporter.

Yours very truly,

U. G. DENMAN,
Attorney General.

CORPORATIONS—CAPITAL STOCK MAY NOT BE INCREASED UNTIL ORIGINAL STOCK IS FULLY SUBSCRIBED.

February 2nd, 1909.

MR. JEROME D. CREED, *Attorney-at-Law, Cincinnati, Ohio.*

DEAR SIR:—Your communication is received in which you submit, in substance, the following inquiry:

I represent a corporation for profit which is capitalized at $150,000. Of this sum $120,000 of common stock has been actually subscribed and paid for in cash, leaving still the sum of $30,000 of stock in the treasury of said company. The company now desires to increase its capital to $250,000, a part of which it desires to issue in preferred stock. Do sections 3262 and 3263 of the Revised Statutes permit such increase, and in such manner?

In reply I beg to say that section 3262 R. S. provides in part as follows:

> "A corporation for profit, after its original stock is *fully subscribed for*, and an installment of 10 per cent. on *each share of stock* has been paid thereon * * * may increase its capital stock, etc."

This being a specific requirement it would seem that a strict compliance therewith must be adhered to before an increase of common stock is legal.

Section 3263 provides that "the corporation may, to increase its capital stock, issue and dispose of *preferred stock* as is authorized in section 3235*a* R. S."

It would, therefore, seem that these two sections would preclude a corporation from issuing stock as you propose, and I so hold.

Yours very truly,

U. G. DENMAN,
Attorney General.

YEARS OF APPRAISEMENT—SECTION 1076 R. S. CONSTRUED.

April 15, 1909.

HON. S. A. STILWELL, *County Auditor, Lebanon, Ohio.*

DEAR SIR:—I have your favor in which you inquire if section 4 of Senate Bill No. 9, passed March 12, 1909, repeals section 2789 of the Revised Statutes. You also inquire if the years of appraisement as set forth in section 1076 Revised Statutes mean the present tax year beginning with the second Monday of April?

I have written an official opinion to Hon. A. O. Dickey, prosecuting attorney, Gallipolis, Ohio, in reply to an inquiry similar to your first, a copy of which I am pleased to enclose herewith to you.

As to your second inquiry, I am of the opinion that the language of section 1076, to-wit, "25% of the annual allowance made in the preceding sections *in the years* when the real property is required by law to be re-appraised" is to be construed as meaning the year 1910, and under the Rathburn quadrennial appraisement bill it would again apply in 1914 and each fourth year thereafter.

I believe this fully answers your inquiries, but should there be other matters in connection therewith in which I can assist you I shall be pleased to do so.

Yours very truly,

U. G. DENMAN,
Attorney General.

DEPUTY PROBATE JUDGE—MAY NOT ACT AS EXECUTOR.

May 28, 1909.

HON. WILLIAM H. LUEDERS, *Probate Judge, Hamilton County, Cincinnati, Ohio.*

DEAR SIR:—Your communication is received in which you submit the following inquiry:

> One of the deputies in my office is named as executor in a will probated in this office. Query: Can such deputy be legally appointed as such executor?

In reply, I beg to say that while there is no statutory provision expressly prohibiting a deputy or other employe in the office of a probate judge from acting as executor, administrator, etc., yet in my opinion the duties of an executor of a will, the execution of which is to be directed and approved by the probate court, are incompatible with the duties of a deputy employed in said court.

Yours very truly,

U. G. DENMAN,
Attorney General.

JUSTICE OF PEACE—TERM OF OFFICE—ELECTION IN 1907 WHEN TERM DOES NOT EXPIRE UNTIL APRIL, 1908.

A justice of peace whose term does not expire until April, 1908, *by being candidate in* 1907 *for re-election may not hold for four years from January* 1, 1908. *The mere being a candidate will not create vacancy, so that if elected he may take office on January* 1, 1908, *as required by law.*

June 4, 1909.

HON. F. H. HENNESSEY, *Justice of the Peace, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 31st, in which you submit the following for my opinion:

> At the November election of 1904 you were elected to the office of justice of the peace, qualified and took office on April 15, 1905. You were again elected to the same office in 1907, and took office under your new commission on January 1, 1908, and *waived* the remainder of your term under the first election, and you desire to know whether having been elected and waived the part of your term after January 1, 1908, you will hold office under your second commission for the term of four years from January 1, 1908, or, if it be necessary for you to be a candidate for re-election this year.

I beg to call your attention to section 567 R. S., which is in part as follows:

> "When a vacancy occurs in the office of justice of the peace in any township, either by death, removal, absence at any time for the space of six months, resignation, refusal to serve, or otherwise, the trustees, having notice therefore, shall, within ten days from and after such notice, fill any such vacancy by appointing a suitable and qualified resident of the township, who shall serve as justice until the next regular election for justice of the peace, and until his successor is elected and qualified;"

This section prescribes the only method by which a vacancy can occur in the office of the justice of the peace, and as the important point to be decided in your case is whether there was a vacancy by reason of your waiver of the office of justice of the peace prior to the November election in 1907.

I am of the opinion the mere fact of your being a candidate for re-election is not sufficient to create a vacancy within the meaning of the statute, so, therefore, your term of office would not expire until April 15, 1908.

The supreme court held in the case of the State ex rel James E. Votava v. John Brown, affirming the decision of the circuit court, which is reported in the 11 C. C.—N. S. 107, that elections for justices of the peace in November, 1907,

purported to be for a term of four years, beginning January, 1908, and in cases where no such term could begin in January, 1908, such elections were void. In your case it would have been impossible for you to have taken office under your second commission on January 1, 1908, as you still held office under your first commission until April 15, 1908, and there should not have been an election for the office of the justice of the peace in 1907, and the election that was held is void.

I am, therefore, of the opinion that you will not hold office under your second commission for the term of four years from January 1, 1908, and that it will be necessary for you to be a candidate for re-election this year.

Yours very truly,

U. G. DENMAN,
Attorney General.

BONDS OF THE WELLSTON IRON AND STEEL COMPANY ARE TAXABLE.

June 23, 1909.

MR. P. H. DOOLEY, *President Board of Review, Wellston, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 22nd in which you ask to be advised whether or not the bonds of the Wellston Iron & Steel Company are taxable.

I beg to call your attention to section 2731 of the Revised Statutes of Ohio, which is in part as follows:

> "All property, whether real or personal, in this state, and whether belonging to individuals or corporations; and all moneys, credits, *investments in bonds*, stocks, or otherwise, of persons residing in this state, shall be subject to taxation except only such as may be expressly exempted therefrom;"

Section 2730 defines "investment in bonds" as follows:

> "Investments in bonds, shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, * * * held by persons residing in this state, whether for themselves or others;"

Section 2 of article 12 of the constitution of Ohio exempts the following bonds:

> "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."

I am of the opinion that the bonds of the Wellston Iron & Steel Company do not come within the class of bonds which are exempt from taxation, and are, therefore, subject to taxation.

Yours very truly,

U. G. DENMAN,
Attorney General.

REQUEST FOR QUO WARRANTO HEARING.

IN THE MATTER OF THE COMPLAINT OF JOSEPH J. KLEIN versus THE CLEVELAND TRUST COMPANY, A CORPORATION.

On the —— day of April, 1909, Joseph J. Klein filed in this office a complaint against the Cleveland Trust Company, a corporation, organized as a bank and trust company under the laws of the state of Ohio, and doing business as such in the city of Cleveland, alleging that said trust company is, without authority of law, exercising the rights, powers and duties of an assignee for the benefit of creditors, to-wit: As assignee of the Euclid Avenue Trust Company in the court of insolvency of Cuyahoga county; as executor of the estate of Julia K. Powers in the probate court of Cuyahoga county; as executor and trustee of the estate of Oren S. Wentz in the probate court of Cuyahoga county, and that it is acting as trustee, receiver and guardian in other instances, and other cases, which said complainant cannot now enumerate, contrary to and in excess of the rights, privileges and powers granted to and vested in it by its charter and by the laws of the state of Ohio.

Upon the filing of said complaint notice of the same was given the Cleveland Trust Company, and a day set for a hearing thereon. Said hearing was had upon April 14th. Messrs. Klein & Harris represented the complainant, and Messrs. S. H. Tolls and H. H. McKeehan represented the Cleveland Trust Company. At the conclusion of said hearing briefs were filed by all the parties in interest.

It is admitted that the Cleveland Trust Company is now acting as assignee of the Euclid Avenue Trust Company, as executor of the estate of Julia K. Powers, and as executor and trustee of the estate of Oren S. Wentz. The questions, therefore, to be determined are:

1. Is said trust company, in so acting as assignee and executor exceeding its rights and powers under its charter?

2. If so, should the attorney general proceed by quo warranto to oust said trust company from exercising such illegal rights and powers?

The case of Schumacher v. McCallup, 69 O. S. page 500, is cited in the complainant brief in support of his contention that said trust company is without authority to act as assignee, executor or administrator. The court held in this case at page 510 that the provisions of section 3821c, 3821d and 3821e relating to the power of the probate judge to appoint a trust company to act as executor, administrator, assignee, guardian, receiver or trustee to be unconstitutional, for the reason that the subject-matter of the same was of a general nature and that the law was not of uniform operation. The court further say on page 512: "An analysis of all the legislation upon the subject leads to two conclusions, either of them fatal to the claim that the trust company has capacity to administer:

"1. The legislature has never attempted to clothe corporations with capacity to act as administrators in Franklin county.

"2. It has not, by a *valid act*, authorized them to act in that capacity anywhere."

Clearly holding that trust companies are without express statutory authority to exercise these powers, this case, I believe, to be decisive of the first question.

Now as to the second question, complainant contends in his brief if it be shown to the satisfaction of the attorney general that said trust company is ex-

ceeding its corporate rights and powers in acting as assignee or executor, that it is then mandatory upon him to at once institute proceedings in quo warranto. It is true that in certain instances it is mandatory upon the attorney general to institute proceedings in quo warranto, but unless the request is made by the governor, the general assembly, or the supreme court, the propriety and wisdom of bringing any such suit rests in the sound discretion of the attorney general. In this case, the request is not made by the governor, the general assembly or the supreme court, but it comes from a private citizen, one who, insofar as the evidence discloses, has no rights or interest in the property involved. Even though the trust company is exercising powers which are ultra vires, yet no claim is made that any injury results to either the parties in interest or to the public at large. On the contrary, serious injury to the parties in interest might result from an interference on the part of the attorney general by bringing ouster proceedings, and thereby delaying the administration of the estates involved.

If the complaint was from a party in interest and alleged that his property rights were being injured by the acts of the trust company, and that the court having original jurisdiction, refused to grant an order of removal, then a different question would be presented.

It is contended that unless the attorney general proceeds in quo warranto, the complainant is without a remedy. This perhaps is true as effecting the *removal* of an executor or administrator, the courts having held that an order of removal of an executor or administrator under section 6017 R. S. is not reviewable. This rule, however, has no application to the appointment of administrators, executors, etc.

The Schumacher case above referred to came into the suprme court, upon review as to the action of the probate court in refusing to appoint Mrs. McCallup administrator, and the supreme court upheld the judgment of the common pleas court in which it reversed the judgment of the probate court.

It follows, therefore, that any citizen who has the right to intervene may object to the appointment by a probate court of a trust company to administer an estate and such citizen will have the protection of all the courts. The same complaint lodged with the attorney general to oust a trust company would, if lodged with the probate court at the time of the application for appointment, prevent the appointment, and, as a consequence, there would be no occasion to request the attorney general to institute quo warranto proceedings against the administrator of a private estate. If the Schumacher case is the law, and trust companies are without authority to act as administrators and executors, then the various probate courts of the state viclate the law when they appoint them.

The proper remedy is by objection to the appointment in the court of original jurisdiction, and not proceedings in ouster after appointment is made.

In view of the above reasons I am of the opinion that I would not be warranted in bringing the action in quo warranto as requested.

U. G. DENMAN,
Attorney General.