But for payment of fees for services other than those in connection with conveying prisoners to the workhouse out of the public treasury, recourse must be had, in my opinion, to section 3019, G. C., which permits the allowance to justices of the peace, police judges or justices, mayors, marshals, chiefs of police and constables, of the fees earned and lost by them in misdemeanor cases by reason of the insolvency of the defendant, not exceeding in the aggregate one hundred dollars ($100.00) in any one year for any one officer."

I am of the opinion, therefore, that the fees of a constable in connection with the transportation of an insolvent person, convicted of a misdemeanor, to a workhouse cannot be paid by the county commissioners under section 3019, General Code, but can only be paid out of the treasury of the township where the sentence was imposed under the provisions of section 4132, General Code, and that where an insolvent defendant has served his costs in jail an allowance to the officers, in place of fees other than transportation, may be made by the county commissioners under the provisions of section 3019, General Code, subject, however, to restrictions contained in that section and in sections 3020 and 3021, General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4049.

BOARD OF ELECTIONS—DISCRETIONARY WHETHER OR NOT TO ALLOW CHALLENGERS AND WITNESSES—UNAUTHORIZED TO ALLOW FOR ONE CANDIDATE AND NOT FOR ANOTHER—WHERE TIE VOTE BY BOARD, SECRETARY OF STATE DECIDES QUESTION.

SYLLABUS:

1. *Under authority of the case of State, ex rel. vs. Bernon, et al., decided by the Court of Appeals of Cuyahoga County, January* 12, 1932, *the board of elections of Cuyahoga County may, in its discretion, refuse challengers and witnesses to both candidates for mayor appearing on the ballot at the non-partisan election to be held February* 16, 1932, *or allow challengers and witnesses to either of the two candidates when so requested, but the board may not allow challengers and witnesses to one of the candidates and refuse challengers and witnesses as to the other candidate.*

2. *In the event of a tie vote by the board of elections of Cuyahoga County upon whether or not a request for challengers and witnesses at the election to be held in Cleveland February* 16, 1932, *shall be allowed or refused, it is the duty of the Secretary of State, as Chief Election Officer, to summarily decide the question when submitted to him by the clerk of such board.*

COLUMBUS, OHIO, February 10, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"The following question has arisen upon which I would like your

official Opinion as Attorney General, at the earliest possible moment.

At the November election of 1931 the electorate of the city of Cleveland voted to amend the Charter of such city so as to change from the City Manager form of government to the Mayoralty plan. The Charter amendment further provided that a special primary election should be held on January 12th to nominate, from a group of non-partisan candidates, two candidates for Mayor to be voted upon at an election on February 16th whereat one of such candidates would be elected; and further providing that the two candidates whose names appeared upon the ballot at the election on February 16th should not carry any party designation.

Just before the primary election a demand was made by certain of the non-partisan candidates for the right to be represented by challengers and witnesses at the primary election of January 12th. The Board of Elections refused to grant the right of having such challengers and witnesses, whereupon one of the candidates brought a suit against the Board of Elections in the Court of Appeals to require the Board to permit the naming of such challengers and witnesses.

The Court of Appeals ruled in their decision that the Board of Elections was invested with discretion to allow witnesses and challengers for any one of the five candidates for Mayor when so requested, and that the Board also may, in its discretion, refuse challengers and witnesses to all the candidates for Mayor appearing upon the primary election ballot at the election to be held January 12th. A copy of such decision is herewith attached.

Section 4785-120 of the General Code provides:

'At any primary, special or general election any political party, supporting candidates to be voted upon at such election, *****, may appoint to each or any of the polling places in the county or city, as the case may be, one person, a qualified elector, who shall serve as challenger for such party, ******.'

It so happens that as a result of the primary election, the two individuals nominated to be voted upon at the February 16th election are affiliated with opposite political parties in State and National politics, although their names appear upon a non-partisan ballot at the February 16th election.

One of the party committees has filed a request with the Board of Elections for the right to name challengers and witnesses for the election February 16th, making the assertion that the party committee is sponsoring the candidacy of one of the two candidates to be voted upon.

The Board, in passing upon the request, voted two and two and have submitted the same to the Secretary of State for his vote as a fifth member of the Board.

The question, therefore, arises as to whether or not, under the provisions of Section 4785-120, a party committee is entitled to challengers and witnesses at a purely non-partisan election, in which none of the candidates whose names appear upon the ballot are designated as party candidates in any manner whatsoever, so far as the records of the Board of Elections may show?

If such party committees are entitled to such challengers and wit-

nesses, is it mandatory upon the Board to permit their use, or is the Board invested with the discretion to either acquiesce to, or refuse, the request?"

Section 4785-120, General Code, a portion of which you have quoted, is pertinent to your inquiry. This section reads in so far as pertinent as follows:

> "At any primary, special or general election any political party, supporting candidates to be voted upon at such election and any group of five or more candidates, may appoint to each or any of the polling places in the county or city as the case may be, one person, a qualified elector, who shall serve as challenger for such party or such candidates during the casting of the ballots, and one person a qualified elector, who shall serve as witness during the counting of the ballots; provided, however, that one such person may be appointed to serve as both challenger and witness. * * * * *
>
> No person other than the judges and clerks of elections, the witnesses and a police officer, or other persons who may be detailed to any precinct on request of the board of elections, or the secretary of state or his legal representative, shall be admitted to the polling place after the closing of the polls until the counting, certifying and signing of the final returns of each election have been completed.
>
> * * * * * * * * * * * *."

Attached to your communication is a copy of the journal entry in the case of *State, ex rel. Peter Witt, Plaintiff,* vs. *Maurice Bernon, et al., Defendants,* being the case to which you refer in your communication, No. 12411, decided by the Court of Appeals of Cuyahoga County January 12, 1932. The journal entry reads as follows:

> "This cause came to be heard upon the pleadings and evidence and arguments of counsel.
>
> The Court finds that the members of the Board of Elections are invested with discretion to allow challengers and witnesses to any one of the five candidates for Mayor when so requested.
>
> The Court also finds that the Board of Elections may, in its discretion, refuse challengers and witnesses to *all* the candidates for Mayor appearing on the primary election ballot at the election to be held January 12th, 1932.
>
> The Court also finds that the Board of Elections has no legal right to accord this privilege of having challengers and witnesses at each polling booth to any one or more candidates for Mayor and to refuse it as to other candidates.
>
> It is, therefore, ordered that if the members of the Board of Elections in the exercise of their discretion allow witnesses and challengers to any one of the candidates, that the same right shall be accorded by them to any other one or more of the candidates for mayor who so request, including the relator."

In the opinion, after quoting the portion of Section 4785-120, supra, relating to who may be admitted to the polling place, the court said:

"We are of the opinion that the language above cited is broad enough to lodge discretion in the members of the Board of Elections to allow challengers and witnesses in each precinct, if in their discretion it is right and proper so to do. We are also of the opinion that when five candidates for the office of Mayor of the City of Cleveland appear on the primary ballot that to allow challengers and witnesses to any one candidate and at the same time disallow it as to other candidates would constitute a gross abuse of discretion and would be violative of the equal protection clauses of the Federal Constitution and the State Constitution."

Your inquiry resolves itself into a determination of whether or not the foregoing case is applicable to the election to be held on February 16, as well as to the primary election which was held on January 12. There is no difference between these two elections in so far as the non-partisan element is concerned. Both are obviously non-partisan elections. Neither is there any difference in so far as the fact that the persons who are candidates at the ensuing election each, in fact, have party affiliations. It should be noted that at the primary election one of the political parties supporting one of the candidates had received authority from the board of elections to have challengers and witnesses at the polling places. The Court of Appeals for the reasons set forth in the opinion has placed political parties in the same category with individuals in so far as this right to have challengers at a Cleveland non-partisan primary election is concerned.

It remains to be determined whether or not the provisions of Section 4785-120, General Code, may be subject to a different construction in the case of a non-partisan election than given by the Court of Appeals in the case of a non-partisan primary election. The language of the statute is, in my judgment, dispositive of this matter, since it applies to "any primary, special or general election".

It is my opinion, therefore, that under authority of the case of *State, ex rel.* vs. *Bernon, et al.,* decided by the Court of Appeals of Cuyahoga County, January 12, 1932, the board of elections of Cuyahoga County may, in its discretion, refuse challengers and witnesses to both candidates for mayor appearing on the ballot at the non-partisan election to be held February 16, 1932, or allow challengers and witnesses to either of the two candidates when so requested, but that the board may not allow challengers and witnesses to one of the candidates and refuse challengers and witnesses as to the other candidates.

In your communication, you state that the Board of Elections has cast a tie vote on the question of whether or not the request of one of the parties for challengers shall be allowed or refused. Under these circumstances, upon submission of the matter to you as Chief Election Officer, it is your duty to summarily decide the question. Section 4785-13, General Code, after setting forth the duties of the Boards of Elections, provides as follows:

"In all cases of a tie vote or a disagreement in the board, if no decision can be arrived at, the clerk shall submit the matter in controversy to the secretary of state, who shall summarily decide the question and his decision shall be final."

It is, therefore, my opinion that in the event of a tie vote by the Board of Elections of Cuyahoga County upon whether or not a request for challengers and witnesses at the election to be held in Cleveland February 16, 1932, shall be allowed or refused, it is the duty of the Secretary of State, as Chief Election

Officer, to summarily decide the question when submitted to him by the clerk of such board.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4050.

APPROVAL, NOTES OF NORTON TOWNSHIP RURAL SCHOOL DISTRICT SUMMIT COUNTY, OHIO—$7,000.00

COLUMBUS, OHIO, February 10, 1932.

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

4051.

APPROVAL, BONDS OF CITY OF NILES, TRUMBULL COUNTY, OHIO—$12,720.00.

COLUMBUS, OHIO, February 10, 1932.

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

4052.

APPROVAL, ABSTRACT OF TITLE TO LAND IN MIDDLETOWN, OHIO.

COLUMBUS, OHIO, February 11, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication, submitting for my examination and approval an abstract of title, warranty deed, encumbrance record No. 1379 and a certificate of approval of the Board of Control, relating to the proposed purchase by the State of Ohio, of a tract of land situated at Middletown, Ohio, and being more particularly described as follows:

> "Beginning at a point at the intersection of the east line of Section 18, Town 2, Range 4, Lemon Township, and the survey line established by the Board of Public Works of the Miami & Erie Canal; thence south 62° 15′ west, a distance of 388.1′; thence south 69° 09′ west, a distance of 1500′; thence south 62° 17′ west, a distance of 200′; thence south 57° 57′ west, a distance of 1562′ to a point at station 10531+62 is said survey line; thence north 32° 03′ west, a distance of 31.77′ to a point in the west line of State property; thence along said west line of State property, south 57° 25′ west, a distance of 271.5′ to a point at the northeast corner of the Grantors' property; said point being the place of beginning of tract conveyed; thence continuing along the west line of State property,